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76.4

HOUSE SPECIAL COMMITTEE ON THE EXXON
VALDEZ OIL SPILL CLAIMS SETTLEMENT

SET OF ALL DOCUMENTS SUBMITTED
TO COMMITTEE

ORIGINALS

HOUSE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

DOCUMENTS DISTRIBUTED TO COMMITTEE

<u>Date</u>	<u>Documents</u>
3/19	Consent Decree
3/19	Memorandum of Agreement (MOA)
3/19	Plea Agreement
3/19	Overview: Consent Decree
3/19	Overview: Criminal Case
3/19	Overview: MOA
3/19	Overview: State Case
3/19	HR 4 - creating the Committee
3/19	Permanent Fund Corporation: 4/18 Present Value memo
3/19	Congressional Research Service: Net Present Value
3/20	Sectional Analysis: Consent Decree thru Paragraph 12
3/20	List of Identified Issues
3/20	Rep. Barnes 3-18-91 Memorandum
3/21	HCR 19: Request for delay on Plea Agreement
3/21	Pamela Finley 3/20 Memo re Telephone Conversation with Attorney General Cole
3/21	Draft Restoration Work Plan by Oil Spill Restoration Planning Office
3/21	Sectional Analysis: Consent Decree, Paragraph 13 to end
3/25	Sectional Analysis: MOA
3/25	Sectional Analysis: Plea Agreement
3/27	Preliminary Master List of Issues by Andy Hemenway
4/2	Master List of Issues (rev. 3/29) by Andy Hemenway Oil Spill Litigation Chronology (April 2, 1991)
4/3	Draft committee letter to Judge Holland requesting re delay on Plea Agreement until April 11
4/3	Draft committee letter to Charles DeMonaco (Department of Justice) requesting testimony of federal officials
4/3	Congressmen Studds and Hertel 3/26 letter to Dick Thornburgh
4/3	Attorney General 4/2 Legal Opinion re Authority to enter into Exxon settlement agreement
4/5	Estimated Allowed Costs, furnished by Attorney General
4/5	Erickson & Associates 4/5 Memorandum re Economic Issues
4/5	Becky Penrose 3/28 Memo to Rep. Parnell re Exxon

4/9 Pamela Finley 4/8 Memo re State Constitutional Issues

4/10 Government's Summary of Damage to Natural Resources

4/10 Congressman Studds Statement to Subcommittee on Fisheries and Wildlife Conservation and the Environment

4/10 Legislative Legal Services 4/9 Opinion re Disclosure of Scientific Data

4/10 Congressman Miller 4/8 letter to Judges Holland and Sporkin

4/12 Public Comment letters (kept in separate binder)

4/13 Public Comment letters (kept in separate binder)

4/14 Public Comment letters (kept in separate binder)

4/15 Public Comment letters (kept in separate binder)

4/16 Questions for Federal Representatives

4/16 Charles Cole 3/12 letter to Lee Raymond, Exxon, re agreement not to bring criminal charges against Exxon or Alyeska

4/16 Douglas Bailey 6/21/89 letter to Charles DiMonaco re state no longer pursuing criminal investigation against Alyeska

4/17 Other oil spill cases: Ohio, Massachusetts, Puerto Rico

4/17 Joint Sentencing Memorandum of Exxon Corporation and Exxon Shipping Company

4/17 Government's Memorandum in Aid of Sentencing

4/18 Written questions directed to Douglas Bailey

4/18 Legislative Audit 4/18 memorandum re Expenditures

4/18 Comments on Settlement: Alaska Center for the Environment, and 8 other environmental groups; April 18, 1991

4/18 Davis Wright Tremaine, Law Offices 4/13 letter

4/18 Congressman Miller 4/17 letter to Judge Holland

4/18 Draft House Resolution regarding Plea Agreement

4/18 Packet of correspondence concerning Regional Aquaculture Salmon Enhancement Tax

4/19 Draft committee Resolution (7-LS1256/A)

4/19 Excerpt from 4/16 testimony of Richard Stewart

4/22 Draft letter to Judge Holland re deferring action on Plea Agreement until May 3

4/22 Alternatives to Acceptance or Rejection: 4/21 memorandum by Andy Hemenway

4/22 Memorandum on Exxon Valuation Issues, 4/21 memorandum by Gregg Erickson

4/24 Draft committee letter to Attorney General, Department of Justice and Exxon re withdrawing from settlement

4/24 House Minority Report: 4/23 letter to Judge Holland

4/25 Charles Cole 4/25 letter - state not withdrawing

4/25 Exxon Corporation 4/25 letter - Exxon will inform
if they decide to withdraw

4/25 Senate Exxon Committee resolutions and report

4/25 Judge Holland's Order rejecting Plea Agreement

4/25 Tentative Committee Recommendations, prepared by
Andy Hemenway

4/25 Cliff Davidson 4/23 memo re Disapproval of Settlement
Unless Modified

4/25 Charles Cole 4/25 letter re Governor Hickel will terminate
settlement if not approved by legislature

4/25 Pie Chart by Rep. Kay Brown - Estimated Costs

4/30 Johnny Ellis 4/26 Comments on the Exxon Settlement

4/30 Tentative Committee Recommendations - Rev. 4/29

5/1 Draft Resolutions - HCR 29 and 30
Proposed Committee Report

NOTE: This list is not all inclusive. In addition to this material, the members received copies of newspaper articles, news releases, miscellaneous letters, and other informational items, which are not attached to the minutes, but can be found in separate committee files.

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING
COMPANY, and EXXON PIPELINE COMPANY,
in personam, and the T/V
EXXON VALDEZ, in rem.

Defendants.

Civil Action No.

The STATE OF ALASKA,
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING
COMPANY, and EXXON PIPELINE COMPANY,
in personam, and the T/V
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

AGREEMENT AND
CONSENT DECREE

This Agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V EXXON VALDEZ, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

Introduction

On the night of March 23-24, 1989, the T/V EXXON VALDEZ, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as State of Alaska v. Exxon Corporation, et al., Civil No. JAN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On or before the lodging of this Agreement with the Court, the United States and the State will each have filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted or will assert counterclaims against the United States and the State in their responses to the Federal Court Complaints.

Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command-Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities, 28 U.S.C. §§ 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f). This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V EXXON VALDEZ, Official Number 692966 (now the T/V EXXON MEDITERRANEAN).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) "Alyeska" means Alyeska Pipeline Service Company, a Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) The "TAPL Fund" means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.), and/or the State.

(d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Government in their capacity as trustees of Natural Resources for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. §§ 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, et seq., or any federal or state statute or maritime or common law relating to the environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or

permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) "Party" or "Parties" means Exxon, Exxon Pipeline, the United States, and the State, or any of them.

(f) "Trustees" means the Secretaries of the U.S. Departments of Agriculture and Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Alaska Attorney General

(g) The "Oil Spill" means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) "Effective Date" shall mean the earliest date on which all Parties have signed this Agreement.

(i) "Final Approval" shall mean the earliest date on which all of the following have occurred: (1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired; (3) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the

time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where

"X" equals Exxon's expenditures for work done from January 1, 1991 to the Effective Date, in preparation for and conduct of clean-up of the Oil Spill in accordance with directions of the Federal On-Scene Coordinator, up to a maximum of \$4,000,000, plus Expenditures made by Exxon for clean-up work

after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993	\$100,000,000
September 1, 1994	\$ 70,000,000
September 1, 1995	\$ 70,000,000
September 1, 1996	\$ 70,000,000
September 1, 1997	\$ 70,000,000
September 1, 1998	\$ 70,000,000
September 1, 1999	\$ 70,000,000
September 1, 2000	\$ 70,000,000
September 1, 2001	\$ 70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent)". The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions

as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) the United States or the State

withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or

services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed

by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for offices and

warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraphs 37 or 38 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) if total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both --

(1) that based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) that a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above; or

(b) if total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against which Exxon is seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided,

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

(a) claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) the rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages;

(c) the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

(d) claims by the State for tax revenues which would have been or would be collected under existing AS 43.75 (Fisheries Business Tax) but for the Oil Spill, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility

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for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or

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arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the State, in the State Court Action will be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this paragraph.

Reopener For Unknown Injury

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

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- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Releases and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based

or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline by the TAPL Fund, Exxon agrees to indemnify and hold the Governments harmless from any liability that they have to the TAPL Fund based on such claims. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Alyeska by the TAPL Fund, Exxon agrees to indemnify the Governments for 20.34% of any such liability that either Government has to the TAPL Fund based on such claims.

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Provisions Pertaining to Alyeska

22. Effective upon Final Approval, the Governments release and covenant not to sue Alyeska with respect to all claims for Natural Resource Damages and with respect to all other claims for damages for injury to Natural Resources, whether asserted or not, that either may have against Alyeska relating to or arising from the Oil Spill. If Alyeska asserts claims against the Governments, or either of them, that are based upon third party contribution or subrogation rights, or any other theory of recovery over against the Governments, or either of them, arising from any liability of or settlement payment by Alyeska to Exxon or Exxon Pipeline for any claims, including without limitation Natural Resource Damages and cleanup costs, relating to or arising from the Oil Spill, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to Alyeska based on such claims.

23. In order to resolve as completely as practicable all civil claims of the Governments arising from the Oil Spill against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take

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other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

Third Party Litigation

26. If any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the

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Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party. However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense and take any other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or thereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the Governments for interest on the

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overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. § 3717(a)(1) & (2). Interest on an overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated

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December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attn. DOJ #90-5-1-1-3343

Chief, Admiralty and Aviation Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

General Counsel
National Oceanic and Atmospheric Administration
Department of Commerce
14th & Constitution Avenue, N.W.
Washington, D.C. 20230

As to the State of Alaska:

Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

Supervising Attorney
Oil Spill Litigation Section
Department of Law
1031 W. Fourth Street, Suite 200
Anchorage, Alaska 99501

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As to Exxon:

Office of the Secretary
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

General Counsel
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

Mr. A. Elmer, President
Exxon Shipping Company
P.O. Box 1512
Houston, Texas 77251-1512

As to Exxon Pipeline:

Mr. D. G. Warner
President
Exxon Pipeline Company
P.O. Box 2220
Houston, Texas 77252-2220

Process for Entry of Agreement

37. Notice of this Agreement shall be published in the Federal Register, and the Agreement shall be subject to public comment for a period of thirty (30) days after such publication. Each Government reserves the right to withdraw its consent to the Agreement, within fifteen (15) days following the close of the public comment period, if comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate or if, before the end of that 15 day period, the Alaska State Legislature has not approved the Agreement as written. If the United States or the State withdraws its consent to the Agreement in accordance with this Paragraph, the Agreement shall be deemed terminated as of the date of the notice of withdrawal of consent.

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38. Any Party may elect to terminate this Agreement if:

(1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in United States v. Exxon Shipping Co., No. A90-015 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile, or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph and Paragraph 37, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

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Retention of Jurisdiction

39. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

Miscellaneous

40. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

41. Each undersigned representative of the Parties to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

THE FOREGOING Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby APPROVED AND ENTERED THIS ____ DAY OF _____, 1991.

Honorable H. Russel Holland
United States District Judge
District of Alaska

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

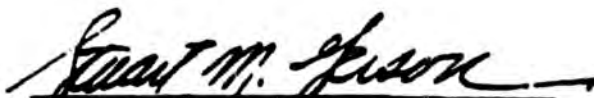
FOR THE UNITED STATES OF AMERICA

Date: 3.12.91



RICHARD B. STEWART
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Date: March 12, 1991



STUART M. GERSON
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

Date: 3.12.91

Tom Sansonetti
THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: 12 March 91

Alan Charles Raul
ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date: March 12, 1991

Samuel K. Skinner
SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: March 12, 1991

John A. Knauss
JOHN A. KNAUSS, Undersecretary for
Oceans and Administrator,
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date: _____

William K. Reilly
WILLIAM K. REILLY, Administrator
U.S. Environmental Protection
Agency

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

Date:

3.12.91

Tom Sansonetti
THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date:

ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date:

March 12, 1991

Samuel K. Skinner
SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date:

JOHN A. KNAUSS, UnderSecretary for
Oceans and Administrator,
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date:

March 12, 1991

William K. Reilly
WILLIAM K. REILLY, Administrator
U.S. Environmental Protection
Agency

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR THE STATE OF ALASKA

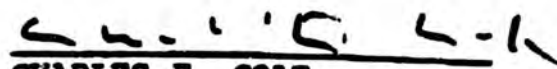
Date:

3-12-91


WALTER J. HICKEL
Governor
State of Alaska

Date:

3-12-91


CHARLES E. COLE
Attorney General and Lead State
Trustee
State of Alaska
Pouch K
Juneau, Alaska 99811

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR EXXON CORPORATION

Date: Mar. 12, 1991


L. G. RAWL, Chairman
Exxon Corporation

FOR EXXON PIPELINE COMPANY

Date: Mar 12, 1991


D. G. WARNER, President
Exxon Pipeline Company

FOR EXXON SHIPPING COMPANY and T/V EXXON VALDEZ

Date: Mar 12, 1991


A. EMER, President
Exxon Shipping Company

RICHARD B. STEWART
Assistant Attorney General
Environment & Natural Resources
Division

STUART M. GERSON
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Attorneys for Plaintiff United States of America

CHARLES E. COLE
Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

Attorney for Plaintiff State of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING
COMPANY, and EXXON PIPELINE COMPANY,
in personam, and the T/V
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

The STATE OF ALASKA,
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING
COMPANY, and EXXON PIPELINE COMPANY,
in personam, and the T/V
EXXON VALDEZ, in rem,

Defendants.

Civil Action No.

AGREEMENT AND
CONSENT DECREE

This Agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V EXXON VALDEZ, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

Introduction

On the night of March 23-24, 1989, the T/V EXXON VALDEZ, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as State of Alaska v. Exxon Corporation, et al., Civil No. JAN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On or before the lodging of this Agreement with the Court, the United States and the State will each have filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted or will assert counterclaims against the United States and the State in their responses to the Federal Court Complaints.

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Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command-Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities, 28 U.S.C. §§ 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f). This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V EXXON VALDEZ, Official Number 692966 (now the T/V EXXON MEDITERRANEAN).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

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Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) "Alyeska" means Alyeska Pipeline Service Company, a Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) The "TAPL Fund" means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.), and/or the State.

(d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. §§ 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, et seq., or any federal or state statute or maritime or common law relating to the environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or

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permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) "Party" or "Parties" means Exxon, Exxon Pipeline, the United States, and the State, or any of them.

(f) "Trustees" means the Secretaries of the U.S. Departments of Agriculture and Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Alaska Attorney General

(g) The "Oil Spill" means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) "Effective Date" shall mean the earliest date on which all Parties have signed this Agreement.

(i) "Final Approval" shall mean the earliest date on which all of the following have occurred: (1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired; (3) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the

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time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where
"X" equals Exxon's expenditures for work done from January 1, 1991 to the Effective Date, in preparation for and conduct of clean-up of the Oil Spill in accordance with directions of the Federal On-Scene Coordinator, up to a maximum of \$4,000,000, plus Expenditures made by Exxon for clean-up work

after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993	\$100,000,000
September 1, 1994	\$ 70,000,000
September 1, 1995	\$ 70,000,000
September 1, 1996	\$ 70,000,000
September 1, 1997	\$ 70,000,000
September 1, 1998	\$ 70,000,000
September 1, 1999	\$ 70,000,000
September 1, 2000	\$ 70,000,000
September 1, 2001	\$ 70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent)". The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instruction

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as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) the United States or the State

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withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or

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services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed

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by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for office and

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warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraphs 37 or 38 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) if total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both --

(1) that based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) that a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above; or

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(b) if total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against which Exxon is seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided,

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

(a) claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) the rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages;

(c) the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

(d) claims by the State for tax revenues which would have been or would be collected under existing AS 43.75 (Fisheries Business Tax) but for the Oil Spill, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility

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for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or

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arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the State, in the State Court Action will be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this paragraph.

Reopener For Unknown Injury

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

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- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Releases and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based

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or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline by the TAPL Fund, Exxon agrees to indemnify and hold the Governments harmless from any liability that they have to the TAPL Fund based on such claims. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Alyeska by the TAPL Fund, Exxon agrees to indemnify the Governments for 20.34% of any such liability that either Government has to the TAPL Fund based on such claims.

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Provisions Pertaining to Alyeska

22. Effective upon Final Approval, the Governments release and covenant not to sue Alyeska with respect to all claims for Natural Resource Damages and with respect to all other claims for damages for injury to Natural Resources, whether asserted or not, that either may have against Alyeska relating to or arising from the Oil Spill. If Alyeska asserts claims against the Governments, or either of them, that are based upon third party contribution or subrogation rights, or any other theory of recovery over against the Governments, or either of them, arising from any liability of or settlement payment by Alyeska to Exxon or Exxon Pipeline for any claims, including without limitation Natural Resource Damages and cleanup costs, relating to or arising from the Oil Spill, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to Alyeska based on such claims.

23. In order to resolve as completely as practicable all civil claims of the Governments arising from the Oil Spill against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take

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other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

Third Party Litigation

26. If any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the

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Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party. However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or thereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the Governments for interest on the

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overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. § 3717(a)(1) & (2). Interest on an overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated

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December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attn. DOJ #90-5-1-1-3343

Chief, Admiralty and Aviation Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

General Counsel
National Oceanic and Atmospheric Administration
Department of Commerce
14th & Constitution Avenue, N.W.
Washington, D.C. 20230

As to the State of Alaska:

Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

Supervising Attorney
Oil Spill Litigation Section
Department of Law
1031 W. Fourth Street, Suite 200
Anchorage, Alaska 99501

As to Exxon:

Office of the Secretary
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

General Counsel
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

Mr. A. Elmer, President
Exxon Shipping Company
P.O. Box 1512
Houston, Texas 77251-1512

As to Exxon Pipeline:

Mr. D. G. Warner
President
Exxon Pipeline Company
P.O. Box 2220
Houston, Texas 77252-2220

Process for Entry of Agreement

37. Notice of this Agreement shall be published in the Federal Register, and the Agreement shall be subject to public comment for a period of thirty (30) days after such publication. Each Government reserves the right to withdraw its consent to the Agreement, within fifteen (15) days following the close of the public comment period, if comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate or if, before the end of that 15 day period, the Alaska State Legislature has not approved the Agreement as written. If the United States or the State withdraws its consent to the Agreement in accordance with this Paragraph, the Agreement shall be deemed terminated as of the date of the notice of withdrawal of consent.

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38. Any Party may elect to terminate this Agreement if:

(1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in United States v. Exxon Shipping Co., No. A90-013 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile, or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph and Paragraph 37, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

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Retention of Jurisdiction

39. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

Miscellaneous

40. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

41. Each undersigned representative of the Parties to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

THE FOREGOING Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby APPROVED AND ENTERED THIS ____ DAY OF _____, 1991.

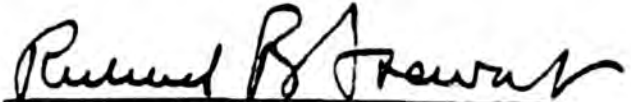
Honorable H. Russel Holland
United States District Judge
District of Alaska

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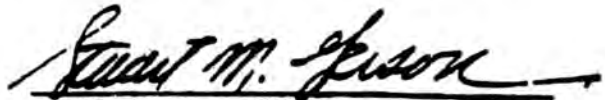
[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR THE UNITED STATES OF AMERICA

Date: 3.12.91


RICHARD B. STEWART
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Date: March 12, 1991


STUART M. GERSON
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

Date: 3.12.91

Tom Sansonetti
THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: 12 March 91

Alan Charles Raul
ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date: March 12, 1991

Samuel K. Skinner
SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: March 12, 1991

John A. Knauss
JOHN A. KNAUSS, Under Secretary for
Oceans and Administrator,
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date: _____

William K. Reilly
WILLIAM K. REILLY, Administrator
U.S. Environmental Protection
Agency

- 30a -

[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

Date: 3.12.91

Tom Sansonetti
THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: _____

ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

Date: March 12, 1991

Samuel K. Skinner
SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: _____

JOHN A. KNAUSS, UnderSecretary for
Oceans and Administrator,
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date: March 12, 1991

William K. Riley
WILLIAM K. RILEY, Administrator
U.S. Environmental Protection
Agency

[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR THE STATE OF ALASKA

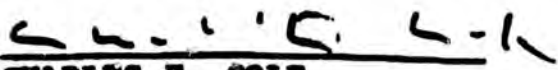
Date:

3-12-91


WALTER J. HICKEL
Governor
State of Alaska

Date:

3-12-91


CHARLES E. COLE
Attorney General and Lead State
Trustee
State of Alaska
Pouch K
Juneau, Alaska 99811

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

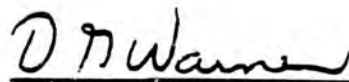
FOR EXXON CORPORATION

Date: Mar. 12, 1991


L. G. RAWL, Chairman
Exxon Corporation

FOR EXXON PIPELINE COMPANY

Date: Mar 12, 1991


D. G. WARNER, President
Exxon Pipeline Company

FOR EXXON SHIPPING COMPANY and T/V EXXON VALDEZ

Date: Mar 12, 1991


A. ELMER, President
Exxon Shipping Company

MAR 13 '91 08:18 U.S. ATTORNEY'S OFC.

P.2/16

CHARLES A. De MONACO
 Assistant Chief
 Environmental Crimes Section
 Environment and Natural Resources
 Division
 U.S. Department of Justice
 P.O. Box 23985
 Washington, D.C. 20026-3985
 (202) 272-9879

FILED

MAR 13 1991

UNITED STATES DISTRICT COURT
 DISTRICT OF ALASKA

By _____ Deputy

Attorney for the United States of America

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

MOTION TO PERMIT FILING
 OF DOCUMENTS TRANSMITTED
 VIA FACSIMILE MACHINE

Comes Now, the United States of America, plaintiff in the above-captioned case, by and through its attorneys, to move this Court to permit the filing of an original Plea Agreement and a Notice of Intent to Change Plea containing faxed signature pages for the reasons set forth in the attached affidavit of counsel.

Respectfully submitted this 13th day of March, 1991, at Anchorage, Alaska.


 CHARLES A. De MONACO
 Assistant Chief
 Environmental Crimes Section
 Department of Justice

MARK B. HARMON
 Trial Attorney
 Environmental Crimes Section

ERIC NAGLE
 Trial Attorney
 Environmental Crimes U.S.
 Section

MARK R. DAVIS
 Special Assistant U.S.
 Attorney

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 23985
Washington, D.C. 20026-3985
(202) 272-9879

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-1CR
	)	No. A90-015-2CR
Plaintiff,	)	
	)	AFFIDAVIT OF MARK R. DAVIS
v.	)	IN SUPPORT OF MOTION TO
	)	PERMIT FILING OF DOCUMENTS
EXXON CORPORATION AND	)	TRANSMITTED VIA FACSIMILE
EXXON SHIPPING COMPANY,	)	MACHINE
	)	
Defendants.	)	

Mark R. Davis, being duly sworn, deposes and states as follows:

1. I am a Special Assistant U.S. Attorney assigned to represent the United States in the above-captioned matter.
2. The United States has agreed to execute a plea agreement with both defendants in the above-captioned case.
3. Counsel for both the government and defendants are located at present in three different cities: Washington, D.C., Tucson, AZ, and Anchorage, AK.
4. To permit all necessary counsel to sign the Notice of Intent to Change Plea and the Plea Agreement, they contain separate signature pages. These signature pages will

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first be executed in Washington, D.C., then will be transmitted by facsimile machine to Tucson and then faxed to Anchorage.

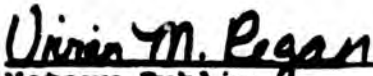
5. Facsimile transmission is the fastest manner available which will permit all counsel to sign the signature page so that the plea agreement can be filed on March 13, 1991.

6. Only the signature pages will be transmitted by facsimile machine. The body of the Notice of Intent to Change Plea and the Plea Agreement are original documents.

Further more, affiant sayeth not.


MARK R. DAVIS

Subscribed and sworn before me on this the 13th day of March, 1991.


Notary Public

My commission expires on 1/21/92.

FILED

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 23985
Washington, D.C. 20026-3985
(202) 272-9879

MAR 13 1991
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Attorney for the United States of America

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. 190-015 CR.

PLEA AGREEMENT

I. INTRODUCTION

This document contains the complete plea agreement between the United States of America, plaintiff in the above-captioned action, and the defendants, EXXON SHIPPING COMPANY ("EXXON SHIPPING") and EXXON CORPORATION ("EXXON").

A. The defendant, EXXON SHIPPING, is charged in Counts One, Two and Three of an indictment filed in the District of Alaska with violations of the Clean Water Act, Title 33, United States Code, Sections 1311(a) and 1319(c)(1)(A); the Refuse

Act, Title 33, United States Code, Sections 407 and 411; and the Migratory Bird Treaty Act, Title 16, United States Code, Sections 703 and 707(a).

B. The defendant, EXXON, is charged in Count Three of an indictment filed in the District of Alaska with a violation of the Migratory Bird Treaty Act, Title 16, United States Code, Sections 703 and 707(a).

C. The defendant, EXXON SHIPPING, agrees to enter a plea of guilty to the Counts in paragraph IA.

D. The defendant EXXON agrees to enter a plea of guilty to the Count in paragraph IB, subject to the factual basis for the plea being that it was oil owned by EXXON, and transported under contract with EXXON SHIPPING, that killed migratory birds, for which EXXON had no permit.

II. DEFENDANTS' AGREEMENT AND UNDERSTANDING

The defendant, EXXON SHIPPING, is represented by James F. Neal, Esq., James F. Sanders, Esq., E. Edward Bruce, Esq., and Robert C. Bundy, Esq. The defendant EXXON, is represented by Patrick Lynch, Esq., Edward J. Lynch, Esq., and John F. Clough, III, Esq. The defendants acknowledge that their attorneys have explained all of the elements of each offense charged against them.

A. If EXXON SHIPPING pled not guilty, the United States would have to prove beyond a reasonable doubt each and every one of the following charges to the unanimous satisfaction of a jury:

1. That on or about March 24, 1989, in the District of Alaska, and elsewhere, the defendant, EXXON SHIPPING, did negligently cause the discharge of pollutants, namely more than ten million gallons of crude oil, 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)(A).

2. That on or about March 24, 1989, in the District of Alaska, and elsewhere, the defendant EXXON SHIPPING 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.

3. That on or about March 24, 1989, in the District of Alaska, and elsewhere, the defendant, EXXON SHIPPING, without being permitted to do so by regulation as required by law, did kill migratory birds in violation of Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

B. If EXXON pled not guilty, the United States would have to prove the following charge to the unanimous satisfaction of a jury beyond a reasonable doubt:

That on or about March 24, 1989, in the District of Alaska, the defendant EXXON, without being permitted to do so by regulation as required by law, did kill migratory birds in violation of Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

C. Legal Basis for the Fines and Restitution Payment

1. The defendants, EXXON SHIPPING and EXXON, agree, solely for the purpose of this plea agreement and for no other purpose, that there is a legal basis with respect to the offenses charged in the indictment for the Court to impose the fines agreed to in paragraph IIIC.

2. The defendants, EXXON SHIPPING and EXXON, agree, solely for the purpose of this plea agreement and for no other purpose, that there is a legal basis for the Court to impose the payment agreed to in paragraph IV as damages recoverable for compensatory and remedial purposes by the State of Alaska.

D. Consequences of the Plea

1. EXXON SHIPPING understands that by pleading guilty to the Counts under paragraph IC, it is admitting the essential elements of the charges in those Counts.

2. EXXON understands that by pleading guilty to the Count under paragraph ID, it is admitting the essential elements of the charge in that Count on the factual basis set forth in paragraph ID.

3. Each defendant understands that by pleading guilty, it gives up the following rights:

- a. The right to be tried by jury;
- b. The right to challenge and object to the composition or procedures of the grand jury; and
- c. The right to confront and cross-examine witnesses.

E. Upon acceptance of the pleas and imposition of sentence by the Court, the United States will immediately move to dismiss Counts 4 and 5 as to EXXON SHIPPING and Counts 1, 2, 4, and 5 as to EXXON.

III. AGREEMENT OF THE PARTIES REGARDING IMPOSITION OF SENTENCE

A. The United States agrees not to seek additional criminal charges or any civil or administrative penalties, except as provided in paragraph IIIB below, against the defendant EXXON, or any of its present or former officers, directors or employees, or any of its wholly-owned subsidiaries, their present or former officers, directors or employees, or 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 documents,

by Alyeska Pipeline Service Company to the federal or state government.

B. The parties agree that nothing in this plea agreement limits the right of any agency of the United States, other than the Department of Justice, to seek and take civil or administrative action against EXXON SHIPPING, EXXON, or any other EXXON subsidiaries, or their employees, or against Alyeska Pipeline Service Company, or any of its shareholders or owner companies or present or former shareholder representatives, including any such action relating to suspension or debarment or listing, but not including the civil or administrative penalties referred to in paragraph IIIA.

C. The parties agree, following the entry of pleas by EXXON SHIPPING and EXXON, and the acceptance by the Court thereof, that the defendants shall be sentenced in accordance with the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., and that under that procedure the appropriate disposition at the time of sentence is the imposition of fines which total \$100 million, as follows:

1. With respect to EXXON SHIPPING, the fine shall be \$75 million.
2. With respect to EXXON, the fine shall be \$25 million.
3. With respect to EXXON SHIPPING, \$37.5 million shall be remitted, and with respect to EXXON, \$12.5 million

shall be remitted. The remission of these amounts is appropriate in view of the following facts:

(a) The defendants recognized their responsibilities with respect to the grounding of the "EXXON VALDEZ" and the resulting oil spill;

(b) The defendants have expended in excess of \$2 billion in response to and clean up of the oil spill in Prince William Sound and its environs;

(c) The defendants have paid in excess of \$300 million to claimants allegedly injured by the oil spill; and

(d) The defendants cooperated in the federal criminal investigation of the grounding of the "EXXON VALDEZ" and the resulting oil spill.

D. The parties agree that the fines described in paragraph IIIC represent the full extent of the criminal sanctions to be imposed upon the defendants pursuant to this agreement, and are in full satisfaction of the criminal charges referred to in the indictment and all criminal charges or claims for civil or administrative penalties referred to in Paragraph IIIA. The payment of \$37.5 million by EXXON SHIPPING and \$12.5 million by EXXON shall fully discharge the criminal sanctions to be imposed pursuant to this agreement.

IV. AGREEMENT OF THE PARTIES REGARDING RESTITUTIONARY PAYMENTS

A. The defendants, EXXON SHIPPING and EXXON, agree to make payments to the State of Alaska which total \$50 million

within 30 days of the acceptance of this plea agreement by the Court. All monies paid by EXXON SHIPPING and EXXON under this paragraph IVA are remedial and compensatory payments. Such monies are to be used by the State of Alaska exclusively for restoration projects relating to the "EXXON VALDEZ" oil spill. Restoration includes restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills.

B. The parties agree that the administration of the monies to be paid under paragraph IVA shall be under the control of the State of Alaska and that upon payment, such monies and any interest which accrues thereon shall be available for use by the State of Alaska for the purposes described in paragraph IVA without objection, challenge, or judicial or administrative review.

C. The parties agree that all payments made under paragraph IVA represent compensation for harm or injury to the State of Alaska. Such payments are intended by the parties to be exclusively remedial, compensatory, and non-punitive and are intended to be separate and distinct from the fines described in paragraph IIIC and from any other criminal, civil, or administrative penalties that could have been imposed upon the defendants.

V. GENERAL PROVISIONS

A. EXXON guarantees payment of the fine imposed on EXXON SHIPPING under this plea agreement. In the event that defendant EXXON SHIPPING fails to make timely payment of the fine, EXXON shall, within thirty (30) days of the date of demand, make payment in EXXON SHIPPING's stead.

B. The defendants, EXXON SHIPPING and EXXON, understand that the Court has discretion to accept or reject this plea agreement, and that if the Court rejects the plea agreement or does not dismiss the charges referred to in paragraph IIE, each defendant will be permitted to withdraw its plea of guilty.

C. The parties agree, subject to the decision of the Court, that there is in the record information sufficient to enable the meaningful exercise of sentencing authority, pursuant to Rule 32(c) F.R. Cr. P., and agree that waiver of a presentence investigation and report would be appropriate.

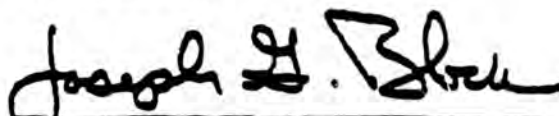
The above-stated terms and conditions comprise the entire plea agreement between the United States of America, defendant EXXON SHIPPING and defendant EXXON, and there are no other terms or conditions, express or implied.

MAR 13 '91 09:17 U.S. ATTORNEY'S OFFICE
03/13/91 11:00 U.S. ATTORNEY, TUCSON

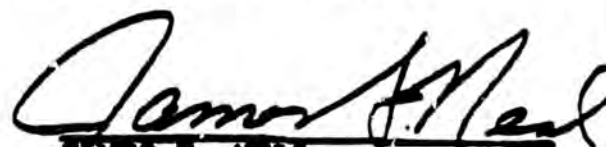
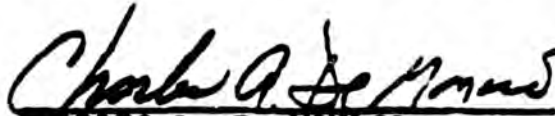
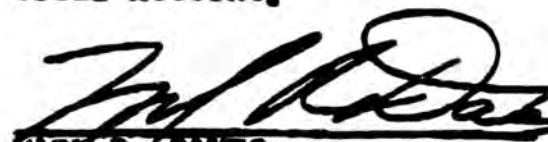
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0413

FOR THE UNITED STATES
OF AMERICA:JOSEPH G. BLOCK
Chief
Environmental Crimes Section
Environment and Natural
Resources Division
U.S. Department of Justice

FOR THE DEFENDANTS:

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Counsel for Exxon ShippingCHARLES A. De MONACO
Assistant ChiefE. EDWARD BRUCE
Counsel for Exxon ShippingERIC W. EAGLE
Trial AttorneyROBERT C. BUNDY
Counsel for Exxon ShippingMARK R. DAVIS
Special Assistant U.S.
AttorneyEDWARD J. LYNCH
Counsel for Exxon
CorporationMARK S. HARRISON
Trial AttorneyJOHN P. CLOUGH III
Counsel for Exxon
CorporationDATED THIS 13th day of March, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIVE VILLAGE OF
CHENEGA BAY, et. al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et. al.,

Defendants.

Civil Action No. 91-483 SS

FILED

MAR 12 1991

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 91-484 SS

CHENEGA CORPORATION, et. al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et. al.,

Defendants.

MEMORANDUM OPINION AND ORDER

These cases are before the Court on a continuation of the hearing commenced on March 7, 1991, on plaintiffs' motions for a temporary restraining order, and on the plaintiffs' motions for a preliminary injunction. The plaintiffs are Native Alaskan villages, the some 5,000 residents of these villages, and Native Village Corporations owned by these villagers. The defendants are officials of the United States Government and of the State of Alaska. Plaintiffs seek to enjoin the defendants from consummating settlement negotiations with Exxon Corporation, Exxon Shipping Co., [collectively, "Exxon"] and Alyeska Pipeline Service Co., relating to the discharge of oil by the M/V EXXON VALDEZ. The Court on March 7, 1991, issued a ten-day temporary restraining order

(N)

restraining a settlement. Plaintiffs now seek issuance of a preliminary injunction. Defendants seek dissolution of the temporary restraining order.

Plaintiffs contend that the defendants plan to enter into an agreement with Exxon and Alyeska settling civil claims against Exxon and Alyeska that the defendants may have as a result of the Valdez oil spill. The plaintiffs' claim, in essence, is that this planned agreement will compromise the plaintiffs' rights to seek relief themselves against Exxon and Alyeska. The plaintiffs' claims for damages against Exxon and Alyeska are currently being prosecuted in federal and state courts in Alaska.

In response to plaintiffs' motions, the defendants have represented to the Court that "resolution of [the United States'] natural resource damages should not impair rights or claims of third parties." Declaration of George W. Van Cleve at ¶ 4. The Court believes this representation to mean that after the settlement agreement has been executed, the plaintiffs will be able to prosecute fully the suits they have initiated against Exxon and Alyeska just as if no settlement agreement existed. The Court will further take the defendants' representation to mean that Exxon and Alyeska may be liable to the plaintiffs for damages to natural resources and/or lands they have an interest in, even if it is claimed the same natural resources and/or lands are covered by the settlement agreement among the defendants and Exxon and Alyeska.

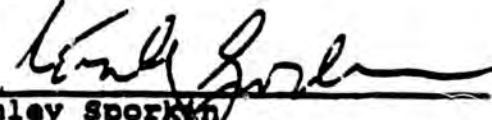
The Court accepts the defendants' good-faith representations. On the basis of these representations, the Court believes that the

plaintiffs' rights are not affected by the planned settlement agreement. Accordingly, it is this 17 day of March 1991 hereby

ORDERED that the temporary restraining order issued by this Court on March 7, 1991, is DISSOLVED; and it is further

ORDERED that plaintiffs' motions for a preliminary injunction are DENIED; and it is further

ORDERED that the Court shall retain jurisdiction over this matter to ensure that the defendants' representations are carried out so that plaintiffs' rights are protected. The Court shall maintain this case on its docket so that the plaintiffs may on motion request such additional relief as they may be entitled to, and so that the defendants may make an appropriate motion to have this case transferred to the United States District Court for the District of Alaska, as the defendants have indicated in court they may desire to do.


Stanley Sporkin
United States District Court

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MEMORANDUM

March 18, 1991

SUBJECT: Overview of Consent Decree and Preliminary Questions related to it

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

OVERVIEW: CONSENT DECREE.

This settles the case between the State and Exxon and the U.S. and Exxon for civil damages against Exxon arising out of the Exxon Valdez oil spill. The case has recently been, or will soon be, filed in federal District Court in Alaska. It is based on the federal Clean Water Act (CWA), 33 U.S.C. 1321(f). The state has the choice of suing in state court under state law, or federal court under the Clean Water Act. In re Allied Towing Corp., 478 F. Supp. 398 (E.D. Va. 1979). If it chooses to pursue its federal remedies (by agreeing to the consent decree), it will give up all but one of its state claims. (The one involves fisheries business taxes.) It will also be bound by certain restrictions in the CWA and related regulations.

Legal Basis. Jurisdiction is based on the federal Clean Water Act (CWA), 33 U.S.C. 1321(f). The state and the federal government each have the right to recover for their own damages under the CWA. In re Allied Towing Corp., *supra*. There does not appear to be any requirement that the damages to the state and the damages to the federal government be combined, although the consent decree does combine them. However, if the state chooses to sue under the CWA, it must abide by the limitations of that Act as to (1) the types of damages that can be recovered, (2) the things for which money recovered can be spent, and (3) the use of a trustee in developing a plan for spending the money recovered. The state's damages under the CWA are recovered through a trustee appointed by the Governor 42 U.S.C. 9607(f)(2)(B).

Types of Damages. Under the CWA, the state can recover for the costs of "replacing or restoring" the damaged natural resources.

Amount to be Paid. The consent decree requires Exxon to pay \$900 million less (1) Exxon's clean up costs from 1/1/91 to the date the consent decree is signed (up to \$4 million), and (2) Exxon's clean up costs from the date the consent decree is signed through the date the consent decree is approved (including any appeals from it). See CD 8(a), p.7 and CD 11, pp. 11-12. The rest is to be paid in installments from 1991 through 2001. CD 8, pp.7-8. There is no interest accruing on the unpaid amounts before they are due, but interest does accrue on overdue payments. CD31, p. 23. The \$900 million (less Exxon's clean up costs from 1/1/91) is the total that is owed to both the state and federal governments. The consent decree does not say how much of this is the federal government's money and how much is the state's money.

To Whom Paid. The trustees (three federal appointed by the President and three state officials appointed by the Governor) tell Exxon to whom the money is to be paid. CD8(d), p. 8.

Restrictions on Use. In the consent decree the U.S. and the State agree that the money will be used as follows:

1. To reimburse the U.S. and the State for response and cleanup costs incurred by them before 1/1/91.
2. To reimburse the U.S. and the State for damage assessments done before the date the consent decree is signed.
3. To reimburse the State for litigation costs incurred before the date the consent decree is signed.
4. To reimburse the U.S. or the State or both for cleanup costs incurred by either of them after 12/31/90 and to plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources or natural resource services injured, lost or destroyed by the oil spill, or to acquire equivalent natural resources or natural resource services.

The amount that can be returned to the state for past response and cleanup costs, past damage assessments, and litigation fees, is limited to \$72 million. The amount that can be returned to the federal government for past response, cleanup, and assessment is \$62 million. The remainder is to be used by the trustees for things in #4.

Who Decides How the Money is Used. The MOA, rather than the consent decree, is the document that primarily deals with the use of the money. However, in the consent decree the governments "represent" that the money will be disbursed in accordance with the MOA. CD10, p.11. Also, the consent decree does contain the restrictions discussed above as to how the money can be used. Moreover, even if there were no MOA, the CWA restricts the use of the money to restoring, rehabilitating, or acquiring the equivalent of the natural resources that were damaged. 33 U.S.C. 1321(f)(5) The regulations under the CWA also require the state trustee

to adopt a plan, and the money to be spent in accordance with that plan. 43 C.F.R. 11.92 and 11.93. However, the "up to \$72 million" that is to be reimbursed to the state for past cleanup, response, assessment, and litigation costs, and any money reimbursed to the state for future clean up should go into the general fund and be available for any use. (The consent decree and MOA are not clear on this, but it would make sense since, with the possible exception of litigation costs, this is "reimbursement" for money already spent for the required uses.)

Other. The consent decree also addresses releases, reopener for damage that could not have been anticipated at the time of the settlement, provisions covering the TAPL fund, Alyeska, and third parties. Note that if the court approves the settlement, the state gives up all its civil claims relating to the oil spill, including those currently pending in state court, except the amount that would have been refunded to local governments under AS 43.75.130 (fisheries business tax). CD 13, pp. 14-15.

The consent decree also allows the State or the U.S. to withdraw from it within 45 days after the publication of the proposed consent decree in the Federal Register if comments received on it show it is inappropriate, improper, or inadequate, or if Alaska's legislature does not approve it by that time. CD 37, p. 26 Any of the parties may withdraw for certain other reasons as well, including failure of the court to accept the plea agreement in the criminal case. See CD 38, p. 27.

PRELIMINARY QUESTIONS RELATED TO THE CONSENT DECREE

1. Art. IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA, must be dedicated. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

2. Alaska's constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's constitution, and if so, does the A.G. have the power to enter into an agreement under the CWA?

3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?

4. Are the amounts Exxon will pay deductible under federal tax laws? Under state tax laws?

5. If the legislature does not approve the settlement, can the state still agree to it? (It appears the answer is yes). Should/can the legislature intervene in the federal case if it does not approve the settlement, but the Governor decides to go ahead with the settlement?

6. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree?

7. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?

8. At the bottom of page 10 and top of page 11, the consent decree refers to "natural resources or natural resource services" that were injured, lost, or destroyed and the acquisition of equivalent "resources or services". What is a "natural resource service"?

PF:lmb
91-081.lmb

DIVISION OF LEGAL SERVICES

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MEMORANDUM

March 18, 1991

SUBJECT: Exxon Settlement; Overview and Preliminary Questions; Federal Criminal Case (Work Order No. (7LS1044))

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

OVERVIEW; CRIMINAL CASE

The U.S. has filed a criminal case against Exxon in federal district court in Alaska (A-90-015-1 Cr. and A-90-015-2 Cr.) There is a proposed plea agreement between the U.S. and Exxon. If it is rejected, Exxon can withdraw from the consent decree.

Legal Basis. The case against Exxon is based on violations of the Clean Water Act, (33 U.S.C. 1311(a) and 1319(c)(1)(A)), the Refuse Act (33 U.S.C. 407 and 411), and the Migratory Bird Treaty Act (16 U.S.C. 703 and 707(a)).

Types of Damages. The Plea Agreement contemplates a fine payable to the U.S. and restitution payable to the state.

Amounts to be Paid. The proposed fine is \$100 million, with \$50 million remitted (not paid). Restitution to the state is in the amount of \$50 million.

To Whom Paid. The fine is to be paid to the U.S. government. The \$50 million in restitution will be paid to the state.

Restrictions on Use. The \$50 million paid in restitution is to be "used by the State of Alaska exclusively for restoration projects relating to the "EXXON VALDEZ" oil spill." Plea Agreement p. 8. Restoration includes replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research projects directed to the prevention, containment, cleanup and amelioration of oil spills. Id.

Representative Max Gruenberg

March 18, 1991

Page 2

Who Decides How Money Used. It appears that the restitution will be paid immediately to the state (general fund) and therefore the Legislature will determine how it is spent, within the restrictions on use listed above.

PRELIMINARY QUESTIONS RELATED TO PLEA AGREEMENT

1. Has the state filed a criminal complaint against Exxon under state law?
Could it? When does the statute of limitations run?

PLF:pl

91-177.plm

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MEMORANDUM

March 18, 1991

SUBJECT: Exxon Settlement; Overview of Memorandum of Agreement and Consent Decree (MOA) and Preliminary Questions Related to It (Work Order No. 7LS1044)

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

OVERVIEW: MOA

The "Memorandum of Agreement and Consent Decree" (MOA) settles a lawsuit that has recently been filed, or will soon be filed, in federal District Court in Alaska. In this lawsuit the federal and state governments are suing each other. The MOA concerns how the money recovered jointly by the U.S. and the State in the Exxon case is to be spent. Exxon is not a party to this lawsuit or the MOA.

Legal Basis. The Clean Water Act (CWA) says that the state is to recover for injuries to natural resources "on behalf of the public as trustee," 33 U.S.C. 1321(f)(5), but does not address the mechanics of the "trust". However, federal regulations adopted under the CWA (or under CERCLA, but applicable to the CWA, 42 U.S.C. 9651(c)), do address the mechanics of spending money recovered under the CWA. The state trustee is appointed by the Governor, 42 U.S.C. 9607(f)(2)(B), and recovers on behalf of the public for damage to state resources. 40 CFR 300.605. The trustee then devises a plan for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. 40 CFR 300.615(c)(4); and 43 CFR 11.93. The money is then to be spent in accordance with this plan. 43 CFR 11.92(c).

Types of Damages. The MOA deals with three types of damages. First there are "allowed expenses". These are the unreimbursed past expenses incurred by the state or federal governments for assessment and restoration (response and cleanup) and the state's litigation expenses. Second there are unreimbursed costs of future response and cleanup incurred by the state or federal government. Finally, there is "natural resource damage recovery," which is intended to compensate for the damage done state and federal natural resources. MOA IIA and G, pp.6-7.

Allowed Expenses. The state can recover up to \$72 million for its "allowed expenses". This money would be paid directly by Exxon to the state treasury "over a period of five years." MOA VB. The MOA does not say what 5 years, or whether the installments are to be equal. Although the MOA is not entirely clear on this point, it appears that this money would have no restrictions on its use since it simply replaces money the state has already spent on items allowed under the CWA. If this is so, the legislature could then appropriate the money for any purpose.

The federal government would also be reimbursed, directly by Exxon, for its past restoration and assessment expenses, up to \$62 million.

Future Response Costs. If the state or federal governments perform response work after December 31, 1990, and the work is certified by the federal on-scene coordinator (FOSC) or the state on-scene coordinator (SOSC), reimbursement for those expenses shall also be paid by Exxon directly to the appropriate government. MOA VB, p.13. It appears that any such reimbursements to the state would go to the state treasury and be available for appropriation without limitation as to any specific purpose.

Natural Resource Damage Recovery. Whatever is left of the \$900 million after Exxon's cleanup costs after December 31, 1990 have been deducted, allowed expenses have been paid to the state (up to \$72 million) and federal (up to \$62 million) governments, and future response costs have been paid, will be deposited in a trust fund in the court registry. Interestingly enough, the federal regulations require that money recovered by the state trustee under the CWA be deposited either in a special account in the state treasury, or in an interest bearing account payable to the state agency acting as trustee. 43 CFR 11.92(a)(2). However, the MOA does not allocate this money between the federal and state governments nor does it appear to require that such an allocation be made in the future. While the regulations encourage trustees to cooperate, they do not explicitly authorize such a joint trust. 40 CFR 300.615.

Under the MOA, six trustees (3 federal officials and 3 state officials) will decide how to spend the money in the trust fund. MOA IVA 1 and 2, pp 9-10. If all six trustees cannot agree as to how the money shall be spent, the federal district court judge will decide; the trustees may also submit a dispute to non-binding mediation or "other means of conflict resolution." MOA IVA 3. The MOA requires the trustees to establish procedures for "meaningful public participation" (including an advisory group) in formulating an injury assessment and restoration plan. MOA IVA 4. Once the plan is established, it appears that the trustees would spend the money to implement it. MOA IVA 1, pp. 9-10. I have found nothing in the MOA that requires the trustees to use federal or state agencies in spending the money, nor anything that would prevent them from doing so. However, if some of the money is

to be used by a state agency, it would probably have to be appropriated. See MOA VD, p. 13.

Other. The MOA terminates 16 years from its effective date. The MOA does not require legislative approval, or even provide for it, but the MOA is referenced in the consent decree.

PRELIMINARY QUESTIONS RELATED TO THE MOA

1. Since some of the natural resource recovery is received in exchange for damages done to state resources, does the money have to be appropriated in order to comply with the state constitution vesting the appropriation power in the legislature? If so, how would that appropriation be accomplished, especially if the money is to be spent (out of the court registry) on something other than activities of a state agency?
2. Is the dedication of funds to a specific purpose contrary to the state constitution prohibiting such dedication. (See question #1 re consent decree.)
3. Would expenditures from the trust be subject to AS 36.30, the state procurement code?
4. Who, if anyone, will perform audits of the trustees' expenditures?
5. What rules apply to deposits in the court registry? Are deposits in the court registry interest bearing? May they be invested?
6. The MOA (as well as the consent decree) refers to "natural resource services" MOA p. 8 (top) and paragraph 13C's last sentence. What are these?
7. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?
8. Will the federal government be able to pay for some of its existing regular staff out of the trust fund on the theory that the federal employees are working on assessment and restoration related to the oil spill? In short, can this money simply be substituted as the funding source for services the federal government would provide anyway out of other federal funding?
9. Is the existence of the trust fund in the court registry and the commingling of state and federal damages allowed under applicable federal regulations?

10. The MOA, paragraph VC on p. 13, states that the money will be spent on restoration of natural resources in Alaska unless the trustees decide that spending funds outside of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources (or services) injured in Alaska. What does this mean? Would it allow the money to be used to establish parks, institutes, centers, etc. in other states?

11. The MOA notes that the A.G. and the commissioners of fish and game and environmental conservation are the state trustees. (The trustees can be changed, MOA IIL, p.8.) Will the commissioners have the time to establish the restoration plan and implement it, in addition to their other duties? Will additional staff be required in the state budget to allow them to do so? Who will pay for administrative expenses of the trust? The trust? Will this eat up the trust?

12. For the purposes of the oil spill litigation and use of money recovered, the federal government will be able to assert that it is a co-trustee over all natural resources injured by the oil spill. The state can assert the same as to federal resources. MOA VII B, p. 14. What are the implications of this paragraph?

13. If the legislature approves the consent decree, will it be prevented from challenging the MOA?

14. Could the legislature, by enacting legislation, retain greater control over the trust proceeds than allowed by the MOA (but still be within the limits of the CWA and applicable regulations)?

15. Will reimbursements for past allowed expenses and future clean up costs go to the general fund without any restrictions on its use?

16. Does the A.G. believe it is bound by 43 CFR 11.92 and 11.93 (the way money must be spent)?

17. If the trustees buy and develop real estate, who will own it? Who will be responsible for it when the MOA terminates?

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MEMORANDUM

March 18, 1991

SUBJECT: Exxon Settlement; Overview and Preliminary Questions; State Case (Work Order No. 7LS1044)

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

OVERVIEW: STATE CASE

On August 15, 1989 the State filed a complaint against Exxon and others (including Alyeska) under state law in state superior court. (89-06852). References in this memo are to pages of the complaint. If the consent decree becomes effective, all but one of the state's claims against Exxon and Exxon Pipeline in the state case will be dismissed. The one exception is for the local governments' share of fisheries business taxes lost due to the oil spill. CD 20 pp. 18-19. The consent decree also provides for the release of claims "for natural resource damages" against Alyeska. It is not clear what will happen to the state claims against other defendants: Exxon Shipping Co.; Amerada Hess Pipeline Corp.; Arco Pipe Line Co.; BP Alaska Pipelines; Mobil Alaska Pipeline Co.; Phillips Alaska Pipeline Corp.; and Unocal Pipeline Co.

Legal Basis. The state's claims are based on state statutory and common law. The claims include: negligent or intentional failure to contain and clean up the spill (p.23); negligence in piloting the Exxon Valdez (p. 25); negligent or intentional misrepresentation as to prevention and cleanup capabilities (p. 27); negligence per se (negligence proved by violation of statutes and regulations)(p. 28); common law strict liability (p.29); maritime tort (p.30); breach of right-of-way lease (p. 31); public nuisance (p.32); private nuisance (p.33); trespass (p. 34); strict liability under AS 46.03.822 (p. 35); liability for restoration under AS 46.03.780 (p. 36); civil damages under AS 46.03.760(e) (p.37); civil penalties under AS 46.03.758(b)(1) and (2) (p.37); civil assessments under AS 46.03.760(a); and infliction of emotional distress.

Types of Damages. The state seeks to recover civil penalties and assessments, response costs, cleanup costs, damage assessment costs, damage to the natural resources of the state, direct and indirect costs of providing governmental services to people adversely affected by the oil spill, losses due to ordinary government services curtailed or impaired as a result of the oil spill, loss of revenue from fish processing tax, salmon enhancement tax, oil and gas production tax, corporate income tax, and oil production royalties. (See pp 6-8 and 22).

Amount Paid. No settlement has been proposed. If the case were taken to trial, damages recovered would depend on the strength of the evidence presented at trial to prove the loss, and the amount that the fact-finder would attach to intangible losses (e.g., the value of natural resources damaged.)

To Whom Paid. If a judgment were recovered, Exxon would either pay the state or the state would execute on its judgment against Exxon's property.

Restrictions on Use. There are no restrictions on the use of damages recovered under state law. AS 46.08.020 encourages the legislature to appropriate recoveries and penalties to the oil and hazardous substance release response fund, but does not require such an appropriation.

Who Decides How Money Used. The legislature decides how the money will be used.

PRELIMINARY QUESTIONS RELATED TO STATE CLAIMS.

1. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska?

2. State law allows recovery of certain damages that the CWA does not, e.g., economic losses, civil penalties. What does the state gain in the consent decree that compensates for the loss of these claims?

PLF:pl

91-178.plm

HOUSE RESOLUTION NO. 4**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE HOUSE RULES COMMITTEE**

Introduced: 3/18/91

Referred: Today's Calendar

A. RESOLUTION**1 Establishing a House Special Committee on the Exxon Valdez Oil Spill Claims Settlement.****2 BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:**

3 WHEREAS justice requires that Alaska be adequately compensated for the damage done to it
4 as a result of the oil spilled from the T/V Exxon Valdez in March of 1989; and

5 WHEREAS the Agreement and Consent Decree in United States v. Exxon, et al., and State of
6 Alaska v. Exxon, et al., signed by the parties on March 12, 1991, allows the United States or the State
7 of Alaska to withdraw its consent to the Agreement if the Alaska State Legislature fails to approve the
8 Agreement within 45 days from the date that notice of the Agreement is published in the Federal
9 Register;

10 BE IT RESOLVED by the House of Representatives that a House Special Committee on the
11 Exxon Valdez Oil Spill Claims Settlement is established to study the proposed Agreement and related
12 documents; and be it

13 FURTHER RESOLVED that the Speaker of the House of Representatives shall determine the
14 number of representatives to be members of the committee, shall appoint the members, and shall
15 designate a member to chair the committee; and be it

16 FURTHER RESOLVED that the House Special Committee on the Exxon Valdez Oil Spill
17 Claims Settlement shall hold, in addition to its own meetings, joint meetings with a like Senate

1 committee for the purpose of receiving public testimony on the proposed Agreement; and be it

2 **FURTHER RESOLVED** that the House Special Committee on the Exxon Valdez Oil Spill

3 Claims Settlement shall report to the House of Representatives by the 35th day after the Agreement is

4 published in the Federal Register the committee's recommendation that the House approve or disapprove

5 the proposed Agreement, and that the committee is terminated on the 46th day after the Agreement is

6 published in the Federal Register.

FISCAL NOTE

No. 1Bill Version: HR 4(H) Publish Date: 3/18/91STATE OF ALASKA
1991 LEGISLATIVE SESSION

Revision Date: _____
 Title: Establishing a House Special Comm.
on the Exxon Valdez Oil Spill claims settlement.
 Sponsor: House Rules
 Requestor: House Rules

Department Affected: Legislative Affairs Agency
 BRU: Legislative Council
Legislative Operating Budget
 Component: Session Expenses
Legislative Operating Budget

COMPONENT SERIAL NO:

782 & 796

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact. Expenditures for this special committee will be absorbed within the existing Session Expenses and House Operating Budget.

Prepared By: Pamela A. Stoops, DirectorDivision: Administrative ServicesPhone: 465-3850Date: 3/15/91Approved By: Warren W. Endicott, Executive DirectorAgency: Legislative Affairs AgencyDate: 3/15/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

COPY

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 19, 1991

SUBJECT: Sectional Analysis of Consent Decree (W.O. 17LS-1044)
TO: Representative Max Gruenberg
FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

**SECTIONAL ANALYSIS OF CONSENT DECREE
THROUGH PARAGRAPH 12**

INTRODUCTION. Pages 2-3. This sets out the background of the federal case. The important points are (1) an assertion that only the trustees are entitled to act on behalf of the public as trustees to recover damages to the natural resources arising from the oil spill; (2) the payments by Exxon are in addition to the \$2 billion that Exxon alleges it has spent for past cleanup and reimbursements to the federal, state, and local governments; and (3) the payments are made in response to "pending or potential civil claims for damages or other civil relief."

Questions.

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so?
2. Does the fact that the money is exchanged for the extinguishment of claims under state law affect the applicability of the CWA and regulations under it?

JURISDICTION. (Page 4). This sets out the basis of the federal district court's jurisdiction---federal question; maritime and admiralty; U.S. as a plaintiff; and the Clean Water Act.

Question.

1. Why did the parties want to have a consent decree as well as an agreement extinguishing claims? (To have a remedy available to enforce agreement? Other?)

PARTIES.(Page 4). This sets out the parties to the agreement. Note that "Exxon" includes the T/V EXXON VALDEZ, but does not include Exxon Pipeline.

DEFINITIONS.(Pages 5-7). This section defines terms used in the consent decree. "Governments" is defined earlier (page 1) to mean the U.S. and the State of Alaska.

Note that "natural resources" includes those belonging to the federal government, the state, or both.

For the purposes of the consent decree, the only state trustee is the attorney general.

^{all parties sign (Mindy Max)}
The "effective date" is the date all parties have signed the agreement, while "final approval" does not occur until 45 days after the agreement has been published in the Federal Register, and the court has approved the agreement and the time for appeal from that decision has elapsed without appeal, or the decision has been upheld on appeal. *when legally binding*

Special attention should be paid to the definition of "natural resource damages." It includes damages to natural resources arising under state as well as federal law. It also includes "economic rent".-->

Questions.

1. Why are the natural resource damages of the state not separated from the natural resource damages of the federal government? *for AG*

potential for co-mingling & confusion

2. If the court signs the consent decree, when does the time for appealing that decision expire?

3. Does the reference to claims under state law mean that this recovery is not entirely under the CWA?

4. What do the terms in the first three lines of page 6 mean? Does "natural resource damage" include economic loss to the state e.g., lost taxes?

5. When was the last date that all parties signed? (My copy does not show Exxon's signature.)

EFFECT OF ENTRY OF DECREE (Page 7). Once the decree is signed and entered by the court, it is a final judgment between the state and federal governments and Exxon and Exxon Pipeline.

PAYMENT TERMS: PARAGRAPH 8 (Pages 7-8). Exxon is to pay, to both governments jointly, a total of \$900 million. The first payment of \$90 million is due

10 days after the effective date. The second payment is due September 1, 1992. The amount of the second payment is \$150 million, less (1) Exxon's cleanup costs from January 1, 1991 to the effective date (up to \$4 million); and (2) Exxon's cleanup costs from the effective date to the date of final approval. On September 1, 1993, Exxon is to pay \$100 million. On September 1 of each year from 1994 through 2001, Exxon is to pay \$70 million. The payments shall be made as directed jointly in writing by the state attorney general and the federal assistant attorney general in charge of environment and natural resources.

Questions.

1. What is the present value of the amounts to be paid by Exxon?
2. Has Exxon paid the first \$90 million?
3. What guarantee is there that Exxon will pay the required amounts? Is this a debt dischargeable in bankruptcy?
4. Are the amounts Exxon will pay deductible under federal tax law? Under state tax laws?

ESCROW; PARAGRAPH 9 (Pages 8-10). If final approval of the consent decree has not occurred when a payment is due (which will almost certainly be the case with the first payment), Exxon is to deposit the payment in an escrow account and notify the state and federal governments. The escrow agent must submit to the court's jurisdiction. After final approval, and 5 days after notification by the state and federal attorneys general, the money shall be paid to the "governments", plus interest. The interest is based on the average daily yield on three-month treasury bills. If the amount in the escrow account is not sufficient to pay that amount of interest and the escrow expenses, Exxon must make up the difference. If either government withdraws its consent under paragraph 37, or any party terminates the agreement under paragraph 38, the money in the escrow account shall be returned to Exxon.

USE OF MONEY; PARAGRAPH 10 (Pages 10-11). In this paragraph the governments agree between themselves how the money is to be spent. The consent decree states that neither Exxon, Exxon Pipeline, Alyeska, nor anyone except the governments obtains a right or obligation as a result of this paragraph.

The U.S. and the State "agree" that the money will be spent only as follows:

- (1) to reimburse the state and federal governments for response and cleanup costs incurred before January 1, 1991;

(2) to reimburse the state and federal governments for damage assessment costs incurred before the effective date;

(3) to reimburse the state for litigation costs incurred before the effective date;

(4) to reimburse the state and federal governments for cleanup and response costs incurred by either of them after December 31, 1990; and

(5) to assess injury and plan, implement, and monitor the restoration, rehabilitation, or replacement of natural resources (or natural resource services) injured, lost, or destroyed as a result of the oil spill, or acquire the equivalent of those resources or services.

The maximum amount that the state can receive as reimbursement for past response, cleanup, assessment, and litigation expenses is \$72 million. The maximum amount that the federal government can receive as reimbursement for past response, cleanup, and assessment is \$62 million. The federal and state governments also "represent" that the amount recovered from Exxon will be spent in accordance with the MOA.

Questions.

1. Art. IX, sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. chose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply?

2. Alaska's constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's constitution, and if so, does the attorney general have the power to enter into an agreement under the CWA?

3. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree?

4. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?

5. This paragraph refers to "natural resource services." What is a "natural resource service"?

6. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true?

7. Despite the statement to the contrary, will a private party have a right to enforce the restrictions in use set forth in this paragraph?

EXXON'S CONTINUED CLEANUP; PARAGRAPH 11 (Page 11). Paragraph 11(a) requires Exxon to continue cleanup work after the effective date, as directed by the federal on-scene coordinator (FOSC), subject to prior approval of costs by the FOSC. In addition Exxon shall perform cleanup work as directed by the state on-scene coordinator, to the extent it does not conflict with the directions of the FOSC or federal law, subject to prior approval of costs. This paragraph also states that "Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC for the State OSC." Under paragraph 11(b), Exxon's obligation for cleanup ends upon final approval of the settlement "except as set forth in this Agreement". In addition, Exxon gets a credit for its expenditures for cleanup under this paragraph. "Expenditures" includes salaries, wages, benefits, expenses for Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

Questions.

1. If the State OSC or the FOSC disagree with Exxon's proposed costs, does Exxon still have to do the work? (What does "subject to prior approval" mean?) In the event of a dispute about the costs, who makes the final decision?

2. The first sentence of 11(b) provides that Exxon has no cleanup obligations after final approval of the consent decree "except as set forth in this Agreement." Does another paragraph of the agreement impose cleanup obligations after final approval?

3. What does the last sentence of 11(a)---concerning immunity of Exxon from liability "by reason of undertaking clean-up work" in accordance with directions of the FOSC or State OSC--- mean? Is it intended to immunize Exxon from liability for acts connected with cleanup work Exxon does under direction of the FOSC or State OSC? Can it be read as an agreement by the state and federal governments to indemnify Exxon if a third party recovers against Exxon based on acts related to this cleanup? Does it apply to past work? Does it apply to workers compensation? Contract claims?

Representative Max Gruenberg
March 19, 1991
Page 6

EXXON'S CONTINUED CLEANUP: PARAGRAPH 12 (Pages 13-14). If the agreement is terminated, or the court does not approve it, Exxon can setoff expenditures made by Exxon under paragraph 11 against any liability Exxon may have to either government as follows:

(1) If the post-effective date expenditures are \$35 million or less, the setoff does not apply unless Exxon shows both

(a) that based on information available to the FOSC or State OSC the anticipated cost was grossly disproportionate to the net environmental benefits anticipated, or the work could not reasonably have been expected to result in a net environmental benefit; and

(b) that Exxon submitted a written objection to the work a reasonable time before beginning it, explaining its objections.

(2) If the post-effective date expenditures are above \$35 million, Exxon gets the setoff unless the government or governments show that based on the information available to the FOSC or State OSC, the work was reasonably expected to result in a net environmental benefit and the anticipated cost was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Question.

1. Can Exxon setoff amounts approved by the FOSC against amounts the State? Can Exxon setoff amounts approved by the State OSC against amounts owed the federal government?

PF:lmb:pl
91-085.LMB

EXXON VALDEZ OIL SPILL SETTLEMENT CLAIM
IDENTIFIED ISSUES

1. Is there a formal mechanism or should the Legislature intervene so the court cannot approve the settlement without Legislature?
2. Should the Federal government be notified of the House Special Committee's meetings? Which is the lead agency? Should Attorney General's Office also be notified?
3. Federal government testimony must be obtained. Attorney General should attend.
4. What are bankruptcy implications? What are the net costs to the state, in terms of taxes?
5. What is the present value of the settlement monies?
6. What are the implications to settling with Alyeska Pipeline Service?
7. Why isn't the rest of the settlement "restitution as part of the fine?" Is restitution, as part of the fine, deductible?
8. Why not enforced settlement by state superior court?
9. Is this issue a "lock-up" of state lands?
10. Can we disapprove one of the two agreements?
11. What if trustees don't agree? Will that spawn an increase of litigation?
 - o district bound to grant 45 days waiting period?
 - o Should Legislature intervene to protect interest?
 - o Why is there no guilty plea to felony charges?
 - o Is misdemeanor and felony punishable?
14. Why not charge Exxon to state law? When is statute of limitation of state law? Are we precluded or prohibited from pursuing state law?
15. Should we publish statute of limitation for third parties?
16. Estoppel and subpcena Attorney General
17. How will third party lawsuit against State be funded? How will costs of defense be paid in the third party suits

18. Constitution: power of appropriation of state revenues
19. Confidentiality of scientific and economic data. Is it a conflict of state law?
20. How will lawsuits against the state be funded (should the state lose its case)? How much to defend the state against these claims?
21. Effect on affected communities
22. Value of settlement
23. Are there other mechanisms that can accept the settlement?
24. Are these state assets?
25. What are other realistic options? Analysis of options.
26. Legislature's power to appoint trustees. Can the trustees act completely independently without state or federal approval?
27. Can Legislature agree to agreement with stipulations?
28. How is liability exclusion related to state law?
29. How much has state already spent in litigation costs?
30. Timeline required by court and this committee
31. How to identify state and federal monies?

HOUSE CONCURRENT RESOLUTION NO. 19
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE

Introduced: 3/21/91

Referred: Today's Calendar

A RESOLUTION

1 Relating to the United States v. Exxon plea agreement.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS the T/V Exxon Valdez oil spill of March 1989 and the actions taken by the United
4 States, the State of Alaska, and Exxon Corporation as a result of that spill have had a tremendous effect
5 on the people, land, and natural resources of Alaska; and

6 WHEREAS certain agreements relating to the T/V Exxon Valdez oil spill have been entered into
7 by or between the United States, the State of Alaska, and Exxon Corporation and certain of its
8 subsidiaries; and

9 WHEREAS these agreements provide for the settlement of various civil claims and criminal
10 charges brought by the United States and the State of Alaska against Exxon Corporation and certain of
11 its subsidiaries; and

12 WHEREAS the Alaska State Legislature is presently reviewing these agreements in order to
13 determine, among other things, whether the agreements are in the best interest of Alaska; and

14 WHEREAS the review being conducted by the Alaska State Legislature is not expected to be
15 completed until May 3, 1991; and

16 WHEREAS one of the agreements under review by the Alaska State Legislature is the plea
17 agreement entered into by the parties in United States of America v. Exxon Corporation and Exxon

1 Shipping Company, No. A90-015 CR; and

2 **WHEREAS** a hearing on that plea agreement is scheduled for Friday, March 22, 1991, before
3 the United States District Court for the District of Alaska; and

4 **WHEREAS** the Alaska State Legislature is concerned that approval of the plea agreement by
5 the United States District Court prior to the time the Legislature completes its review of all the
6 settlement agreements will not be in the best interest of Alaska;

7 **BE IT RESOLVED** that the Alaska State Legislature respectfully requests the parties to the plea
8 agreement in United States of America v. Exxon Corporation and Exxon Shipping Company to request
9 the United States District Court to take no final action on the plea agreement prior to May 3, 1991; and
10 be it

11 **FURTHER RESOLVED** that if the parties refuse to accede to this request, the Alaska State
12 Legislature respectfully requests the United States District Court for the District of Alaska to take
13 judicial notice of this official act of the Alaska State Legislature and on its own motion delay final
14 approval of the plea agreement in United States of America v. Exxon Corporation and Exxon Shipping
15 Company until May 3, 1991.

16 **COPIES** of this resolution shall be sent to Joseph G. Block, Chief, Environmental Crimes
17 Section, Environment and Natural Resources Division, United States Department of Justice; Charles A.
18 De Monaco, Assistant Chief, Environmental Crimes Section, Environment and Natural Resources
19 Division, United States Department of Justice; Eric W. Nagle, Trial Attorney, United States Department
20 of Justice; Mark R. Davis, Special Assistant United States Attorney; Mark B. Harmon, Trial Attorney,
21 United States Department of Justice; James F. Neal, Counsel for Exxon Shipping; E. Edward Bruce,
22 Counsel for Exxon Shipping; Robert C. Bundy, Counsel for Exxon Shipping; Edward J. Lynch, Counsel
23 for Exxon Corporation; John F. Clough III, Counsel for Exxon Corporation; and to the Honorable H.
24 Russel Holland, Chief Judge, United States District Court for the District of Alaska.

STATE OF ALASKA
1991 LEGISLATIVE SESSION

No. 1

Bill Version HCR 19

(H) Publish Date: 3/21/91

Revision Date: _____

Department Affected: _____

Title: Exxon Valdez Oil Spill

BRU: _____

Litigation

Component: _____

Sponsor: House Rules Committee

Requestor: _____

COMPONENT SERIAL NO.

--	--	--	--

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Rep. Johnny Ellis, Chair

Phone: _____

Division: House Rules Committee

Date: 3/21/91

Approved by Commissioner: _____

Agency: _____ Date: _____

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 20, 1991

SUBJECT: Telephone Conversation with Attorney General Cole re Exxon Valdez Settlement; March 20, 1991

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

On March 20, 1991 I talked on the telephone to Attorney General Cole, who was very cordial and cooperative. I asked him three questions and received the following answers.

1. Question: Can the "up to \$72 million" to be given to the state for reimbursement of past expenses be appropriated for any purpose once it is deposited in the state treasury?

Answer: Mr. Cole believed that it could. He also stated that "up to \$72 million" really meant "\$72 million".

2. Question: If the six trustees decide to spend money from the trust fund for work to be done by state employees, will that money flow into the state treasury (with restrictions on its use set by the trustees) and be subject to appropriation for the specified purposes?

Answer: Mr. Cole said that this issue had not been considered in the negotiations. He said he suspects that the money would not need to be appropriated, but would be like a gift to the affected agency. I pointed out that if these were state employees, they would expect to be paid by the state. I think he could see my point and we left this as an unresolved question that would need more thought.

3. Question: I asked him generally about the immunity of Exxon that appears at the end of paragraph 11(a) in the middle of page 12 of the consent decree.

Representative Max Gruenberg
March 20, 1991
Page 2

Answer: He stated that this was intended to immunize Exxon from liability for undertaking the cleanup, but not for its negligence in performing the cleanup.

PLF:pl
91-195.plm

cc: Charles Cole, Attorney General
Senator Dick Eliason



OIL SPILL RESTORATION PLANNING OFFICE

437 E Street, Suite 301 Anchorage, Alaska 99501
(907) 271-2461 FAX: (907) 271-2467

March 7, 1991

RECEIVED
MAR 18 1991

Dear Concerned Citizen:

Based on your past interest in the planning of restoration following the Exxon Valdez Oil Spill, we are enclosing, for your information, a copy of this recent notice announcing a draft 1991 Restoration Work Plan. The Restoration Planning Work Group is interested in your continued input in this process and look forward to receiving your comments. On behalf of the Work Group, we appreciate your interest.

Sincerely,

Stanley E. Senner
Alaska Department of Fish & Game

Linda R. Comercl
U.S. Environmental Protection Agency



federal register

**Friday
March 1, 1991**

Part VII

Environmental Protection Agency

**Prince William Sound and Gulf of Alaska;
Draft 1991 Restoration Work Plan; Notice**

to response actions), to return an injured resource to its baseline condition as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided. This definition of restoration from the NRDA regulations is provided here for informational purposes. The NRDA regulations are not mandatory but do provide a model for restoration planning.

The Trustees have determined that restoration after the Exxon Valdez oil spill should be subject to continuing review as information is developed about injuries and possible restoration opportunities. The Trustees expect that each year's work will build on the last, and that all information pertinent to the Exxon Valdez oil spill will be examined in the course of the restoration process.

1. Steps in the Planning Process

The restoration planning process is a dynamic and evolving process that will generally include the following steps:

a. Determining the Need for Restoration. The need for restoration depends on the nature and extent of natural resources injured, lost, or destroyed and the adequacy of natural recovery. The primary information sources regarding resource injury, loss, or destruction are the studies conducted by State and Federal agencies as part of the natural resource damage assessment. These studies are described in the 1989 and 1990 Exxon Valdez damage assessment plans (see the documents referenced at the end of this notice). Other sources of information include public comments, data gathered as part of the oil spill response, and other studies conducted by government agencies outside of the damage assessment process.

b. Identifying Potential Restoration Activities. For any injury, there are three possible types of restoration which may be used singularly or in any combination:

Direct restoration refers to measures in addition to response actions, usually taken on site, to directly restore or rehabilitate an injured, lost, or destroyed resource or otherwise to promote or enhance the recovery of such resources;

Replacement refers to substituting one resource for an injured, lost, or destroyed resource of the same or similar type; and

Acquisition of equivalent resources means to compensate for an injured, lost, or destroyed resource by substituting another resource that provides the same or substantially similar services as the injured resource.

Determining the adequacy of natural recovery is fundamental to the choice of a restoration activity. In some cases the Trustees may determine that it is most appropriate to allow natural recovery to proceed without further intervention by man (i.e., no action alternative). The definition of direct restoration includes any administrative actions that may be taken by the Federal or State agencies, such as limiting certain activities in the affected areas, to promote recovery of injured resources.

c. Evaluating Potential Restoration Alternatives. Evaluation of potential restoration alternatives will consider such factors as:

- Nature and extent of injury;
- Adequacy of natural recovery;
- Technical feasibility;
- Net environmental benefit (including indirect impacts);
- Cost effectiveness;
- Reasonableness of cost of the restoration project in light of the value or ecological significance of the resource; and
- Results of actual or planned response actions.

Some restoration proposals may be readily evaluated. In other cases additional information, for example, biological, ecological, or resource assessment data, will be gathered to support the evaluation process. The goal of the Trustees and EPA is to conduct restoration planning for the recovery of the injured environment as a whole. In general, priority will be given to alternatives which benefit multiple rather than single species or resources. By necessity, however, individual elements of the restoration program may be species- or resource-specific.

d. Recommending and Implementing Restoration Activities on a Continuing Basis. As information about injuries, resources recovery, restoration methods or costs becomes available, certain activities may be recommended and carried out in advance of the receipt of funds for restoration from the parties responsible for the oil spill (see Section III, below).

e. Presenting a Damage Claim to Parties Responsible for the Oil Spill and Receiving Funds for Restoration. The damage assessment process initiated by the Trustees is designed to identify and quantify specific resource injuries and determine restoration costs and other corresponding monetary values. The Federal and State governments will present their claims for these amounts to the parties responsible for the oil spill as required by Federal and State law.

f. Preparing and Implementing a Final Restoration Plan. When the full amount

of restoration funds that will be recovered has been resolved, final determinations will be made concerning the nature and scope of the remaining phases of restoration.

g. Evaluating the Effectiveness of Restoration Measures, and Recommending Additional Actions. Implementation of restoration activities and the success of resource recovery will be monitored and evaluated based on standards appropriate to individual projects and resources to verify that restoration goals have been met. Long-term monitoring activities also may be implemented to verify that the affected area is recovering.

Restoration planning, as outlined above, is underway; the overall pace of restoration is dependent on the availability of information to determine injury and the resolution of a claim for damages. Implementation of restoration and monitoring activities may take a number of years. The Trustees and EPA intend to follow the restoration planning process as outlined above in order to accelerate the restoration of the Prince William Sound-Gulf of Alaska ecosystem and the affected natural resources and services.

2. Public Participation

The Trustees and EPA intend to encourage, provide for, and be responsive to public participation and review during the restoration planning process. Carrying out this intent, however, is complicated by the need for confidentiality with respect to damage assessment information due to pending or possible future litigation with the parties responsible for the Exxon Valdez oil spill. Notwithstanding these considerations, the Trustees intend to provide an opportunity for meaningful public review and comment on all restoration implementation activities.

In September of 1990, the Oil Spill Public Information Center was opened in Anchorage to provide the public with scientific data and other information related to the 1989 Exxon Valdez oil spill. The Trustees will continue to place information in the center as it becomes available.

3. Restoration Planning Activities in 1990

The Trustees and EPA began to solicit public opinion in March 1990 with a symposium on restoration in Anchorage, Alaska. In April and May of 1990, eight public scoping meetings were held throughout southcentral Alaska to ascertain the public's priorities for the restoration program. For a detailed description of these meetings, see the

Habitats and Recreation Sites, is under consideration.

C. 1990 Technical Support Projects

1. Peer Reviewer Process for Restoration Feasibility Studies

Agencies: Alaska Department of Fish and Game, Alaska Department of Environmental Conservation, Alaska Department of Natural Resources, U.S. Department of the Interior, U.S. Department of Agriculture, National Oceanic and Atmospheric Administration, U.S. Environmental Protection Agency.

This project provided funds to ensure that scientists with expertise on natural resource restoration were available to provide peer review of restoration feasibility projects and other restoration planning studies and activities.

2. Assessment of Beach Segment Survey Data

Agencies: Alaska Department of Natural Resources, Alaska Department of Environmental Conservation, Alaska Department of Fish and Game, U.S. Forest Service, U.S. Park Service, U.S. Environmental Protection Agency.

The objective of this project is to review and summarize beach survey information (obtained through oil spill response activities) to assist in planning for and implementing site-specific restoration activities, particularly in the area of direct restoration. This study was initiated late in 1990 and continues to date.

A master database is being created from that portion of the beach surveys relevant to restoration. The primary sources of this information are the Alaska Departments of Natural Resources and Environmental Conservation. Data from local and regional governments as well as non-governmental sources will also be reviewed and integrated into the system as appropriate. This preliminary project will be completed in Spring 1991.

3. Development of Potential Feasibility Studies for 1991 Agencies: Alaska Department of Fish and Game, U.S. Environmental Protection Agency, Alaska Department of Natural Resources, Alaska Department of Environmental Conservation, U.S. Forest Service, U.S. Department of Fish and Game, U.S. National Park Service, U.S. National Oceanic and Atmospheric Administration.

This project provided for the orderly development of additional feasibility studies including: (a) Monitoring "natural" recoveries; (b) pink salmon stock identification; (c) herring stock identification/spawning site inventory;

(d) artificial reefs for fish and shellfish; (e) alternative recreation sites and facilities; (f) historic sites and artifacts; and (g) availability of forage fish. Currently feasibility study proposals are under consideration for all of the above themes.

III. 1991 Restoration Work Plan

The Trustees are currently developing and evaluating restoration planning and implementation activities, which will be described in the 1991 Restoration Work Plan to be published in the *Federal Register* later in the Spring. Planning activities will include feasibility studies, technical support studies, and natural recovery monitoring which will be made available to the public for review and comment. Implementation activities that are now under consideration are presented in this section. The Trustees and EPA are asking, through this notice, for public comment on and additional suggestions for restoration planning and implementation activities for 1991. As noted previously, the Trustees and EPA anticipate publishing later this Spring a notice of the restoration projects identified for implementation in 1991. More detailed descriptions for 1991 restoration projects will be made available to the public for comment.

A. 1991 Restoration Planning Activities

The fundamental purpose of restoration planning is to identify and evaluate potential restoration implementation activities, in consultation with technical experts and the public. The integration of results from the damage assessment and other information into restoration planning is critical to the success of the oil spill program. As damage assessment results are reviewed and evaluated, the Trustees will identify potential restoration implementation activities and related feasibility and technical support projects. This process involves ongoing consultation with principal investigators for damage assessment studies, agency experts, and outside peer reviewers to review the nature and extent of oil spill injuries in relation to the biology and ecology of injured species, habitats, and ecosystems. A key goal is to identify life history requirements, limiting factors, and environmental processes that are especially sensitive or that may be enhanced.

Section II describes five feasibility studies carried out in 1990, some of which may continue in 1991. The Trustees and EPA are considering additional feasibility and technical support projects in 1991 and, following additional review, intend to discuss

them in the Spring 1991 *Federal Register* Notice. Studies now being considered concern a variety of resources, including pink salmon, tidal marshes, Pacific herring, bald eagles, recreation, and sea otters. Feasibility and technical support studies will be implemented as damage assessment data and funding become available.

The scientific literature and experience from oil spills other than the *Exxon Valdez* will provide background on restoration and information from other oil spills. In 1991, the Restoration Planning Work Group expects to review and evaluate previously identified literature on restoration (see Appendix B, August 1990 Progress Report) and to continue review and evaluation of literature on species and ecosystem recoveries following anthropogenic and natural environmental disturbances.

Information on the adequacy of natural recovery is central to determining whether to implement restoration actions or to allow injured resources to recover on their own. Direct measures of recovery, such as species distribution, abundance, diversity, growth, reproductive success, or other physiological and biochemical properties, may be appropriate monitoring objectives. In some cases, it is appropriate to indirectly determine the degree of recovery by measuring exposure (presence of oil residuals and/or metabolites) and by applying knowledge or toxicological effects derived from the oil spill literature. For these reasons, the recovery of injured resources can best be followed by implementing a balanced program of monitoring. The duration of recovery monitoring will depend on the time necessary to establish a trend for recovery, and this in turn will necessarily depend on the severity and duration of effects resulting from the oil spill.

Some recovery monitoring studies will be considered for implementation in 1991. As with feasibility and technical support projects, these will be discussed in the March 1991 *Federal Register* document.

Public participation will continue to be an important component of restoration planning in 1991. The Restoration Planning Work Group is interested in and will try to accommodate requests for meetings with individuals or groups. In addition, the Trustees will consider whether and what additional actions, such as publications and workshops, are appropriate and possible in 1991. Requests and suggestions from the public are invited.

Need and Objectives:

The marine and intertidal habitats where most oil spill injuries occurred are ecologically linked to adjacent uplands. The water quality in streams and estuaries where salmon spawn depends on the adjacent uplands. Eagles nest and roost in large trees along the coasts and streams, and marbled murrelets nest in association with forested uplands. Harlequin ducks nest in riparian habitats and feed in the streams as well as in nearby intertidal and estuarine areas. Common and thick-billed murres and other seabirds nest on off-shore islands.

Tourism and recreation activities, such as sport fishing and camping, also depend on the quality and accessibility of shorelines and uplands. The diversity, productivity, and uses of intertidal and estuarine habitats, and of freshwater streams along the coast depend on the ecological integrity of the adjacent uplands. Continued productivity in the undamaged parts of the regional ecosystem, including strategic marine, intertidal, and estuarine habitats and adjacent uplands, may be necessary for the recovery of biological communities that were injured.

During the public scoping process the governments received many restoration suggestions that involved the protection and prime fish and wildlife habitats, recreation sites, and adjacent uplands. Suggested approaches to this protection included land acquisition and changes in management practices.

Land-use activities may occur in the oil spill area in 1991 or 1992. These activities may impact important habitats and recreation sites or slow the recovery of spill-injured resources.

The objective of this project is to identify and protect strategic wildlife and fisheries habitats and recreation sites and to prevent further potential environmental damages to resources injured by the *Exxon Valdez* oil spill. This project will be preceded by a technical support project to identify and evaluate potential properties which if publicly owned will contribute to this objective. Where acquisition of property

rights is determined to be appropriate, they will be acquired on a willing buyer/willing seller basis. Primary considerations in deciding which properties should be acquired during this project will include (1) the nature and immediacy of changes in use that may further affect resources injured by the oil spill and (2) the prospect that failure to act will foreclose restoration opportunities.

The Trustees have developed the following preliminary sequence of steps for use in identifying and protecting strategic fish and wildlife habitats and recreation sites:

1. Identification of key upland habitats that are linked to the recovery of injured resources or services by scientific data or other relevant information.

2. Characterization and evaluation of potential impacts from changed land use in relation to their effects on recovery of the ecosystem and its components; comparative evaluation of recovery strategies not involving acquisition of property rights (e.g., redesignation of land use classification), including an assessment of protection afforded by existing law, regulations, and other alternatives.

3. Evaluation of cost-effective strategies to achieve restoration objectives for key upland habitats, identified through steps one and two above. This would include evaluation of other restoration alternatives for these resource injuries.

4. Willing seller/buyer negotiations with private landowners for property rights.

5. Incorporation of acquired property rights into public management.

Habitat and recreation site acquisition proposals that meet the appropriate evaluation factors for restoration (see section 2) will be identified and assigned by priority for implementation in accordance with this preliminary five-step process and applicable State and Federal laws and regulations.

The geographic scope of the 1991 project will be the oil spill area. Subsequent to this initial effort, the

Trustees will continue to survey potential acquisitions, including acquisitions outside the spill area. Estimated Cost: To be determined

C. Funding for the 1991 Restoration Work Plan

Although it is expected that the responsible parties will pay for the costs of the damage assessment and restoration program, there is no certainty about the final amount and when such funds will be forthcoming. It is possible, therefore, that funds to carry out the 1991 Restoration Work Plan, including the proposed planning and implementation activities, will have to be advanced by the State and Federal governments. To date, those funds have not been committed or secured by either government.

D. References

The documents listed below provide additional information on damage assessment and restoration. They are available from the Oil Spill Public Information Center, The Simpson Building, 645 G Street, Anchorage, Alaska, 99501.

1. "The 1990 State/Federal Natural Resource Damage Assessment and Restoration Plan for the *Exxon Valdez* Oil Spill, Volume I Assessment and Restoration Plan Appendices A, B, C."

2. "State/Federal Natural Resource Damage Assessment Plan for the *Exxon Valdez* Oil Spill," August 1990.

3. "Restoration Planning following the *Exxon Valdez* Oil Spill: August 1990 Progress Report."

4. "Restoration following the *Exxon Valdez* Oil Spill: Proceedings of the Public Symposium," July 1990.

Dated: February 26, 1991.

LaJuana S. Wulcher,

Assistant Administrator, Office of Water, U.S. Environmental Protection Agency.

Dated: February 25, 1991.

Charles E. Cole,

Attorney General, State of Alaska.

[FR Doc. 91-5014 Filed 2-28-91; 8:45 am]

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MEMORANDUM

March 21, 1991

SUBJECT: Sectional Analysis of Consent Decree - Paragraph 13 to end.
(Work Order 17LS-1044)

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

**SECTIONAL ANALYSIS OF CONSENT DECREE
PARAGRAPH 13 TO END.**

RELEASE OF CLAIMS BY GOVERNMENTS; PARAGRAPH 13 (Pages 14-15).
The state and federal governments give up all civil and administrative claims they have against Exxon arising out of the oil spill. This includes all the claims the State has made in state court under state law, except for #4 below. This paragraph explicitly states that the consent decree does not impair:

(1) the right of the state or federal government to enforce the consent decree, including the reopener clause;

(2) the rights of Alaska Native villages to act as trustees for the purposes of asserting or compromising their claims for damage to natural resources belonging to, managed by, controlled by, or appertaining to the villages;

(3) the rights of other parties who own or have an interest in property affected by the oil spill; or

(4) claims by the State for tax revenues that would have been, or would be collected under existing AS 43.75.

However, if the state recovers a judgment for lost AS 43.75 taxes, the state agrees to enforce that judgment only to the amount that would have been refunded to local governments. (See AS 43.75.130). In other words, the state can go ahead and sue for the full amount of lost taxes under AS 43.75, but if Exxon decides not to pay the full

amount, the state can only force payment of the amount (roughly one-half) that is given to local governments.

Questions.

1. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue, and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful?

2. Number 2 of the exceptions refers to Alaska Native "villages". Are there any other Native groups (corporations?) whose claims would be affected by this settlement?

3. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims?

RELEASE OF CLAIMS BY GOVERNMENTS; PARAGRAPHS 14-15 (Pages 15-17). In paragraph 14, the governments give up civil and administrative claims against Exxon Pipeline (except to the extent that Exxon Pipeline is liable because of its interest in Alyeska) to the same extent they gave up claims against Exxon in paragraph 13.

In paragraph 15, the governments agree not to make civil claims against Exxon's or Exxon Pipeline's employees, directors, and officers that relate to the oil spill. However, this provision is void if the employee, director, or officer brings an action against the governments, or either of them, relating to the oil spill.

If the state or federal government obtains a judgment against an officer, employee, or director of Exxon or Exxon Pipeline for liability relating to the oil spill, the government will collect on the judgment only to the extent the judgment is covered by insurance policies purchased by the individuals.

Question.

1. From the way paragraph 15 is structured, it appears that there may be a civil case pending against an employee, director, or officer of Exxon or Exxon Pipeline. Is this true?

REOPENER FOR UNKNOWN INJURY (Pages 17-18). In addition to other payments required by the consent decree, Exxon shall pay amounts, up to \$100 million, needed for restoration projects to restore one or more populations, habitats, or species which, as a result of the oil spill, have suffered a substantial loss or substantial decline in the oil spill areas if

(1) the cost of the restoration project is not grossly disproportionate to the magnitude of the benefits; and

(2) the injury to the population, habitat, or species could not reasonably have been known, nor could it have been anticipated by any trustee from any information in the possession of or reasonably available to any trustee on the effective date.

Ninety days before demanding payment, the governments must file plans for the projects, statement of claimed costs, and information relied upon in preparing the plan and cost estimate.

Question.

1. How likely is it that the state or federal government will be able to take advantage of this provision, given the requirement that the injury can not have been anticipated by any trustee?

RELEASES AND COVENANTS NOT TO SUE BY EXXON AND EXXON PIPELINE (Pages 18-19). Exxon and Exxon Pipeline give up all civil and administrative claims they may have against the state and federal governments, and their employees, relating to the oil spill. Exxon and Exxon Pipeline reserve the right to enforce the consent decree. This does not affect any claims Alyeska may have against the governments.

Question.

1. What claims have Exxon or Exxon Pipeline asserted against the state or federal government?

TRANS-ALASKA PIPELINE LIABILITY FUND. The TAPL Fund is established by 43 U.S.C. 1653 (c), and consists of a nickel-per-barrel fee on the shipment of oil through the Valdez facility. The fee is not paid once the fund balance reaches \$100 million, and is imposed when the balance falls below that amount. The owner or operator of a vessel and the fund are strictly liable, jointly and severally, for damages sustained as a result of discharges of oil from the vessel if the oil was transported through the trans-Alaska pipeline and placed aboard the vessel at the Valdez loading facility. Strict liability of the fund may not exceed \$100 million per incident and the owner or operator of the vessel is responsible for the first \$14 million, and the fund

is liable for the rest up to \$100 million. The fund may proceed against the owner and operator of the vessel and third parties if the negligence of any of these caused the damage.

The consent decree provides that Exxon's release of the governments does not bar a claim Exxon may have against the TAPL fund. It also provides that if the TAPL fund asserts claims against the governments based on money the fund pays to Exxon or Exxon Pipeline, Exxon will repay the governments for any liability they may have to the TAPL fund. Also, if the TAPL fund asserts claims against the governments based on money the fund pays to Alyeska, Exxon will repay 20.34% of the government's liability. (Exxon Pipeline owns 20.34% interest in Alyeska.)

Questions.

1. Has the TAPL fund paid any money to Exxon or Exxon Pipeline? Is it likely to do so?
2. Has the TAPL fund paid any money to Alyeska, or is it likely to do so?
3. How likely is it that the TAPL fund will assert claims against the state for money (if any) the fund pays to Alyeska?

PROVISIONS PERTAINING TO ALYESKA (Pages 20-21). In paragraph 22, the governments give up all claims they may have against Alyeska related to the oil spill for "Natural Resource Damages" and "damages for injury to Natural Resources." In addition, if Alyeska pays Exxon for claims relating to the oil spill, and Alyeska then recovers from the state or federal governments all or part of what Alyeska paid Exxon, Exxon will repay the governments that amount.

In paragraph 23, the governments agree that if either recovers any amount from Alyeska related to the oil spill, it will instruct Alyeska to pay 20.34% of that amount to Exxon.

In paragraph 24 Exxon and Exxon Pipeline agree to repay the governments 20.34% of any amount Alyeska recovers from the governments related to the oil spill (except for recoveries described in paragraphs 22 or 25).

Paragraph 25 covers situations where Alyeska sues the state or federal governments for its own damages related to the oil spill, or because of Alyeska's liability to third parties (other than Exxon) related to the oil spill. In this situation, Exxon will pay the governments the amounts the governments paid Alyeska, if the government asserts in good faith all defenses it has and doesn't refuse a good faith proposal for settlement with Alyeska.

Questions.

1. Are any lawsuits of the types described in paragraphs 22-25 currently pending, or likely?
2. The consent decree releases Alyeska from liability to the state for "damages for injury to Natural Resources." Are we reserving any other types of civil claims against Alyeska (e.g., economic loss)?

THIRD PARTY LITIGATION (Pages 21-23). Paragraph 26 governs cases where a third party sues Exxon or Exxon Pipeline and one or both of the governments for damages related to the oil spill. In this case, each party is to pay the amount allocated to it in the judgment recovered by the third party, and will not try to recover against the other sued party. If necessary to obtain an allocation of the liability, the sued parties may assert claims against each other, but will not enforce a judgment against each other.

Under paragraph 27, if Exxon or Exxon Pipeline is sued by a third party for damages related to the oil spill, but neither government is a party, then Exxon will not seek to hold the governments liable for any amount it has to pay. If one or both of the governments is sued for damages related to the oil spill, but neither Exxon nor Exxon Pipeline is a party, the governments will not seek to hold Exxon liable for any amount the government has to pay (except for indemnification under paragraphs 21, 22 and 25).

Paragraph 28 provides that any amount Exxon has to pay a third party will not reduce the payments required by paragraph 8 (\$900 million) or paragraph 17 (\$100 million reopener).

Paragraph 29 provides that the parties will not tender each other as defendants under Rule 14(c) of the Federal Rules of Civil Procedure. Essentially this means that the parties will not pull each other in as a defendant in a maritime or admiralty case started by a third party. Note that this paragraph is not explicitly limited to lawsuits related to the oil spill.

Paragraph 30 covers situations where a third party settles with Exxon and sues one or both of the governments. In such cases, the governments have to try to apportion fault without joining Exxon as a defendant. If the court does not allow that, the governments may join Exxon for the purpose of allocation of fault, but may not enforce any action against Exxon as a result of that allocation. Here again, this paragraph is not explicitly limited to lawsuits related to the oil spill.

Questions.

1. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.)

2. Are there third party suits against the state, or are there likely to be such, in which Exxon or Exxon Pipeline is not a defendant? (Under paragraph 27, the state could not recover against Exxon for its losses in such cases.)

3. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. I suspect this was an oversight. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits?

4. Can the state and federal governments recover against each other for judgments they have to pay to third parties?

INTEREST FOR LATE PAYMENTS (Pages 23-24). If Exxon fails to make a payment when due under paragraph 8 ((\$900 million) or paragraph 9 (the escrow account), Exxon must pay interest on the overdue amount. The interest rate is the amount the federal government charges on amounts owed it. It is tied to the investment rate for the Treasury tax and loan accounts. 31 U.S.C. 3717 (a)(1) and (2).

RESERVATION OF RIGHTS (Pages 24-25). Paragraphs 32-35 contain fairly standard provisions. Paragraph 32 states that the agreement does not constitute an admission of fact, law, or liability. Paragraph 33 states that the agreement does not create any rights in a person who is not a party to it. Paragraph 34 states that the agreement does not prevent the governments from providing assistance or funding to those who are not a party to the agreement. Paragraph 35 states that the agreement does not impair an existing contract between Exxon or Exxon Pipeline and any entity of either Government, including a bioremediation studies agreement between Exxon and the EPA.

NOTICES AND SUBMITTALS (Pages 25-26). This section gives the addresses of the parties for the purposes of any written notices required by the agreement.

ENTRY OF AGREEMENT; WITHDRAWAL OF CONSENT (Page 26). Notice of the consent decree is to be published in the Federal Register, and public comments received for 30 days. At the end of the 30-day period, either the state or the federal government can withdraw from the agreement if comments show that it is inappropriate, improper, or inadequate, or if, before the end of the 15-day period the state legislature has not approved the agreement "as written". If either

government withdraws, the agreement terminates as of the date of notice of withdrawal.

Question.

1. It appears that the governments could keep the agreement in effect even if the state legislature does not approve it. If the legislature does not approve it and the state or federal government does not withdraw, could the legislature intervene in the federal case to prevent approval by the court? Could it intervene in the state court to prevent dismissal of claims?

TERMINATION OF AGREEMENT. Any party, including Exxon and Exxon Pipeline, can terminate the agreement if

(1) a court of competent jurisdiction disapproves or overturns a plea agreement in the federal criminal case against Exxon;

(2) a court of competent jurisdiction makes a final decision that the agreement will not be approved and entered by the court without modification; or

(3) a court of competent jurisdiction modifies the agreement in a manner materially adverse to any party, or interprets a material provision in a manner inconsistent with the parties' intentions, before or at the time of approving the agreement.

To terminate the agreement, the party must give written notice to the other parties within 10 days after the event occurs that justifies termination. If one party terminates, the agreement terminates as to all parties. The provisions for termination do not appear to involve approval of the termination by the court, although the court may get involved if the parties disagree about whether a modification was "material".

After termination under this paragraph (or termination after withdrawal under the previous paragraph), the agreement ceases to be valid, except that (1) Exxon may recover its money from the escrow account, and (2) the provisions of paragraphs 11 and 12, relating to cleanup, continue notwithstanding the termination.

Paragraph 12 gives Exxon a setoff under certain circumstances (the circumstances being different depending on whether the setoff amount exceeds \$35 million or not) for its future cleanup work against any amount that it may owe either government for the oil spill. It appears that this setoff is now cast in stone, whether the agreement is terminated or not.

Paragraph 11's relationship to termination is a bit more complex because it states that Exxon has no further obligations with respect to cleanup (except as set forth in

the agreement) after "final approval". Given the definition of "final approval" on pages 6-7, the agreement will not extinguish Exxon's cleanup duty if either of the governments withdraws from it, or if any of the parties terminates it for any reason except the rejection of the plea agreement in the criminal case. The difficulty would arise if the governments do not withdraw, the court approves the agreement without changing it or indicating that it interprets it differently from the parties, the court's decision becomes final without an appeal (at which point "final approval" occurs and Exxon's cleanup duty ends under paragraph 11) and thereafter, a court rejects the plea agreement, thereby allowing Exxon to terminate the agreement, but still arguably to claim the benefit of paragraph 11(b). This may not be very likely, but it is theoretically possible.

Questions.

1. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated?
2. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC?

RETENTION OF JURISDICTION (Page 28). The court retains jurisdiction to enforce the consent decree.

MODIFICATION AND ASSERTION OF AUTHORITY (Page 28). Any modifications of the agreement can be made only with the written consent of all the parties and the approval of the court.

Also, the representatives of the parties certify that they have authority to enter into the agreement and legally bind the parties to the agreement.

Question.

1. Does the assertion by the Governor and the A.G. that they have authority to enter into the agreement and bind the state, prevent the legislature or a private party from challenging the agreement as beyond the power of the executive (e.g., if one of its provisions violates the state constitution)?

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MEMORANDUM

March 22, 1991

SUBJECT: Exxon Settlement; Sectional Analysis of Memorandum of Agreement (MOA) (Work Order No. 7LS1044)

TO: Representative Max Gruenberg

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

SECTIONAL ANALYSIS OF MOA.

INTRODUCTION (Pages 2-5). This contains background and certain information. The Clean Water Act (CWA) is referenced. The current federal trustees are identified as the secretaries of the interior and agriculture and the administrator of NOAA, and the state trustees are identified as the commissioners of fish and game and environmental conservation and the state Attorney General. The U.S. Coast Guard is identified as the federal on-scene coordinator (FOSC) and the state DEC is identified as the state on-scene coordinator (SOSC). "Exxon" in the MOA includes Exxon Corp., Exxon Shipping Co., and Exxon Pipeline Co.

The introduction also identifies laws on which the parties rely in setting up the joint trusteeship, i.e., 42 U.S.C. 9607 (that section of CERCLA authorizing the regulations at 43 CFR 11), 40 CFR 300.615(a), and 43 CFR 11.32(a)(1)(ii). The committee should note that while 40 CFR 300.615(a) encourages cooperation among trustees, it does not specifically authorize a co-trusteeship nor the commingling of funds. 43 CFR 11.32(a)(1)(ii) concerns damage assessments, not disposition of recovered funds. 43 CFR 11.92 and 11.93, which do concern disposition of recovered funds are not referenced. The introduction also states that the state and federal entities have determined that the procedures in the MOA "will best enable them to fulfill their duties as trustees...."

JURISDICTION (Page 5). The jurisdiction of the court is the same here as it is in the consent decree, including jurisdiction under the CWA.

DEFINITIONS (Pages 6-8). The definitions should be read, but certain points can be summarized here.

First, "allowed expenses" are the past unreimbursed expenses of the state and federal government for response, assessment, and cleanup, as well as the past litigation expenses of the state. These parallel the provisions in the consent decree.

"Natural resource damage recovery" is the amount to be paid under the consent decree, less the "allowed expenses" and less unreimbursed cleanup and response costs of the state or federal government incurred after December 31, 1990; the "natural resource damage recovery" is the amount to be managed by the six trustees. In this memo, I will refer to this as "the trust fund money."

The "trustees" under this agreement are the current trustees, or any replacements designated by the President or the Governor hereafter.

"Restore" or "restoration" are important terms because the definition is about the only limit on what the trustees may use the trust fund money for. It means any action which endeavors to restore a natural resource (or services provided by that resource) that was injured, lost, or destroyed by the oil spill to its pre-spill condition. It also includes actions which replace or substitute something for those resources or services. It also includes acquisition of "equivalent resources and services." It is a very broadly defined term, especially when it includes "services provided by the resource." This is discussed more fully under paragraph V below.

CO-TRUSTEESHIP (Pages 8-9). This states that the trustees shall act as co-trustees in collecting and using the natural resource damage recoveries from Exxon. To avoid the claim that this "co-trusteeship" gives one government ownership of or authority over natural resources of the other government, the parties state that nothing in the MOA shall be deemed an admission of law or fact by either government concerning that ownership or authority. Neither government may use the MOA against the other except in matters concerning the enforcement of the MOA or the settlement of the oil spill litigation. This section also states that the MOA does not affect rights or obligations of third parties (including Alaska Native villages and persons with an interest in property injured by the oil spill) or the rights and obligations of the U.S. or the State to the Native villages or private parties.

ORGANIZATION; Paragraph IVA (Pages 9-11). First, all decisions relating to the use of the trust fund money shall be made by unanimous agreement of the six trustees. In addition, the federal trustees must consult with the EPA. If the trustees cannot agree, either government may resort to federal district court in Alaska to settle the dispute. The trustees may also submit the matter to non-binding mediation or "other means of conflict resolution."

The trustees agree to cooperate in establishing a joint trust fund in the registry of the federal district court in Alaska, or as otherwise determined by agreement of the governments and order of the court.

The trustees agree to establish procedures for meaningful public participation, which may include a public advisory group.

The trustees shall agree to an organizational structure for decisionmaking under the MOA within 90 days after the consent decree (in the U.S. and State v. Exxon case) has been approved and entered as a judgment of the court.

Questions.

1. Why did the state and federal governments not separate the money recovered by the federal government from the money recovered by the state government?

2. Is the establishment of a joint trust fund contrary to 33 U.S.C. 1321(k), also known as "the 311(k) fund," which requires funds received by the United States under 33 U.S.C. 1321 to be deposited in a revolving fund in the federal Treasury?

3. Is the establishment of a joint trust fund contrary to 43 CFR 11.92(a)(1), which also requires the federal trustee to retain federal damage recoveries under the CWA in a separate account in the treasury? Is it contrary to 43 CFR 11.92(a)(2), which requires the state trustee to put the state's recovery in a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee? Do 11.92 and 11.93 apply (see below)?

4. Is the commingling of trust assets a violation of the trustees' common law trust responsibilities?

5. Will a trust fund in the court registry bear interest?

6. What standards would a court use in deciding disputes among the trustees?

7. Could the trustees agree to binding arbitration, so that an arbitrator would decide the use of the money?

RETENTION OF RIGHTS RE INJURY ASSESSMENT AND RESTORATION;
PARAGRAPHS IVB and C (Pages 11-12). This states that the MOA does not prevent either government from undertaking injury assessment or restoration activity in addition to that paid for by the trust fund.

It also allows each government to change the trustees, without objection by the other, so long as neither government designates more than three trustees. (It appears that a government could designate fewer than three trustees if it wanted to.)

It also acknowledges that the President has given the EPA the task of coordinating, on behalf of the federal government, the restoration of the injured natural resources.

Finally, it provides that the MOA does not constitute an election on the part of either government to be bound by the Natural Resource Damage Assessment Regulations codified at 43 CFR 11. This is an interesting provision, especially given the parties' reference of 43 CFR 11.32 in the introduction. Although Part 11 is entitled "Natural Resource Damage Assessments," and the vast majority of 43 CFR 11 deals with methods of damage assessments, 43 CFR 11.92 and 11.93 address the establishment of a restoration account and a restoration plan. 43 CFR 11.10 states that the "assessment procedures set forth in this part are not mandatory," but 43 CFR 11.14(aa) defines "assessment" to mean the process of determining damages for injuries to natural resources. Therefore it is not clear whether the parties to the MOA are saying that they are not bound by any part of 43 CFR 11, or whether they are saying they are not bound by that part of 43 CFR 11 that relates to damage assessments.

Question.

1. Do 43 CFR 11.92 and 11.93 apply to all recoveries under the CWA, or are they optional? Did the parties believe those regulations apply.

USE OF NATURAL RESOURCE DAMAGE RECOVERIES; PARAGRAPH VA (Page 12). The trustees jointly use the trust fund money to restore, replace, enhance, rehabilitate or otherwise acquire the equivalent of natural resources injured as a result of the oil spill and the reduced or lost services provided by such resources. The CWA, 33 U.S.C. 1321(a)(8) defines "removal" to include actions necessary to minimize or mitigate damage, but does not otherwise provide guidance as to the meaning of these terms. It is likely, although not certain, that the trustees will use the definitions at 43 CFR 11.14. 43 CFR 11.14(a) defines "acquisition of the equivalent" or "replacement" to mean the substitution for an injured resource with a resource that provides the same or substantially similar services (this is in addition to substitutions as part of response actions). "Services" under 43 CFR 11.14(nn) means the physical and biological functions performed by the resource, including the human uses of those functions; I interpret it as including use of natural resources for food or water, and perhaps such things as recreation. "Restoration" or "rehabilitation" means actions undertaken to return the injured resource to its baseline condition. 43 CFR 11.14(ll).

Under this paragraph the governments are also to establish standards and procedures for administering the trust fund money.

Finally, this paragraph requires that all natural resource damage recoveries be placed in the joint trust fund.

Questions.

1. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much should be spent on damage to federal resources?
2. Can this money be substituted as the funding source for services the federal government would provide in any event out of other federal funds?
3. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?)
4. Will the trust pay its own administrative expenses?
5. Who, if anyone, will perform audits of the trustees' expenditures?
6. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed?

REIMBURSEMENT TO GOVERNMENTS; PARAGRAPH VB. (Pages 12-13).
Up to \$72 million shall be available to the state for reimbursement of its past expenses. Up to \$62 million shall be available to the federal government to reimburse its past expenses. This reimbursement money shall be paid directly to the governments by Exxon over five years. The agreement does not state which five years, or whether the installments must be equal.

Also, all of the governments' unreimbursed response and cleanup costs incurred after December 31, 1990, and certified by either the FOSC or the SOSC, shall be reimbursed to the appropriate government. (The trust fund will get whatever is left when these items are deducted from the settlement proceeds.)

For questions relevant to this paragraph, see the sectional of the consent decree.

OUT-OF-STATE EXPENDITURES; PARAGRAPH VC. (Page 13). "Except as otherwise provided" in the MOA, the trustees agree that the trust money will be expended on the restoration of natural resources in Alaska unless the trustees agree that "spending funds outside of Alaska is necessary for the effective restoration, replacement, or acquisition of equivalent natural resources injured in Alaska and services provided by such resources."

Questions.

1. Is there some other provision that allows the trustees to spend the money on projects outside Alaska? (Why is the "except as otherwise provided" language there?)

2. Could the trustees create a recreational site in another state to compensate for the loss of a recreational site in Alaska? Could fish hatcheries be built in Washington and paid for out of the trust funds under this provision? Could scientific studies be done out of state and paid for with trust fund money?

NO STATE OBLIGATION TO SPEND MONEY; PARAGRAPH VD (Page 13).
The MOA states that it does not obligate the governments to expend money except to the extent funds are appropriated or are otherwise lawfully available.

Question.

1. Is this an indication that trust money that the trustees decide to use to pay for work of state agencies will have to be appropriated by the legislature? Or it is just a "safety" clause to assure the state that it does not have to pay money under the MOA?

SCIENCE STUDIES (Page 13). The state and federal governments are to continue to cooperate in appropriate scientific studies relating to the oil spill, including those approved for the 1991 field season.

COVENANTS NOT TO SUE; PARAGRAPHS VIIA A,E, and F (Pages 14-16).
The governments agree not to sue each other with respect to:

(1) the authority of either government to enter into and comply with the MOA;

(2) the right of either government to engage in cleanup, damage assessment, or restoration activities under the MOA;

(3) all civil claims one government may have against another arising out of acts or omissions that occurred before the execution of the MOA and related to the oil spill.

In "E" on page 15, the governments agree that if they are both sued by a third party for a claim arising out of the oil spill, the governments will cooperate in their defense and not assert claims against each other. In "F" the parties agree that they will cooperate in each other's defense if one, but not the other, is sued by a third party for a claim relating to the oil spill. In both cases, the governments agree to pay their liability as determined in final judgment, and not to assert claims against each other.

Questions.

1. If the trustees disagree, can the state trustees take the issue to court if the issue is whether a federal agency should be involved in a particular project, or does #2 above preclude that?

2. Does this put the state in the position of cooperating with the federal government against an Alaskan resident who asserts an oil spill claim against the federal government?

CO-TRUSTEESHIP AS TO NATURAL RESOURCES; PARAGRAPHS VIJB AND C (Pages 14-15). For the purposes of oil spill litigation related to Exxon and other proceedings relating to the determination, recovery, or use of natural resource damages resulting from the oil spill, each government is entitled to assert that it is a co-trustee of all of the natural resources injured, lost, or destroyed as a result of the oil spill.

Each government also agrees not to sue the other one to determine the share of either government's ownership or rights or management authority over natural resources injured, lost, or destroyed as a result of the oil spill.

Question.

1. Does the last clause preclude, at least for the next 16 years, the U.S. and the State from suing each other to determine ownership of resources, or rights to control resources, if those resources were hurt by the oil spill? Would this affect disputes that had nothing to do with the MOA or the oil spill?

EFFECTIVENESS OF MOA; PARAGRAPH VIID (Page 15). If the governments become adverse to each other in the oil spill litigation (with Exxon), the MOA shall remain in effect.

Question.

1. How does this provision interact with the termination provision on page 17 that says the MOA terminates if the consent decree terminates, unless otherwise agreed by the parties?

ENFORCEMENT, VENUE, AND INVALIDITY (Page 16). The MOA is enforceable in federal district court in Alaska, which retains jurisdiction.

If the MOA is determined to be invalid, the use of the remaining money will be determined by further agreement of the governments or by an allocation of the recoveries by the federal district court in Alaska, subject to appellate review.

Question.

1. The heading of this paragraph includes "governing law," but the text doesn't mention it. Did the agreement have a governing law provision at one time?

EFFECTIVE DATE (Page 17). The MOA is effective on the date the consent decree is signed and entered by the court, except for the provision covering continuation of joint science studies, which is effective on the date all parties sign the MOA.

INTEGRATION AND MERGER (Page 17). The MOA and the consent decree constitute the entire agreement between the state and federal governments as to matters mentioned in them. The parties note that the agreement reached among the trustees as to disbursements of the \$15 million paid by Exxon in April 1989 remains in effect.

Question.

1. What was the agreement of April, 1989?

TERMINATION (Page 17). The MOA terminates 16 years from the effective date, or upon termination of the consent decree, unless otherwise agreed by the parties.

Question.

1. How does this relate to paragraph VIID on p.15?

JUDICIAL REVIEW (Page 18). The MOA creates no rights in a person who is not a party to it. It is not subject to judicial review except as provided in article VII.

Question.

1. Since this is a court decree, do the parties have the power to prevent judicial review?

2. What does the reference to article VII refer to?

3. Does this prevent a third party from challenging a decision of the trustees on the grounds that the decision is inconsistent with the MOA or applicable law?

MODIFICATION AND REPRESENTATION (Page 18). This MOA can only be modified with the written consent of the parties and the approval of the court. The representatives certify that they are authorized to enter into the MOA and bind the governments.

DIVISION OF LEGAL SERVICES

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MEMORANDUM

March 25, 1991

SUBJECT: Exxon Settlement; Sectional Analysis of Plea Agreement
(Work Order No. 7LS-1044)

TO: Representative Max F. Gruenberg, Jr.

FROM: Pamela Firley *Pam Firley*
Assistant Revisor of Statutes

SECTIONAL ANALYSIS OF PLEA AGREEMENT

I. INTRODUCTION. This section sets out the crimes in the indictment against Exxon and Exxon Shipping that Exxon and Exxon Shipping will be pleading guilty to.

Exxon Shipping is pleading guilty to

- (1) negligent discharge of pollutants (oil) into Prince William Sound without a permit (a violation of the Clean Water Act, carrying a fine of \$2500-\$25,000 per day);
- (2) discharge of refuse (oil) into Prince William Sound (a violation of the Refuse Act carrying a fine of \$500-2500), and
- (3) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.)

Exxon is pleading guilty to

- (1) killing migratory birds (a violation of the Migratory Bird Act, carrying a fine of \$500.) The basis for Exxon's liability is that Exxon owned the oil that Exxon Shipping discharged that killed migratory birds.

II. DEFENDANTS' AGREEMENT AND UNDERSTANDING. This lists the attorneys representing the defendants and sets forth the facts that the government would have to prove for conviction of the counts to which the defendants are pleading guilty. It also sets forth the defendant's agreements that there is a legal basis for the fines and restitution. This statement is made for the purpose of the plea

agreement only. The defendants also recognize that by pleading guilty they are admitting the essential elements of the charges in the counts (i.e., the essential facts.)

Finally, the U.S. agrees to ask the court to dismiss (once the court has accepted the plea agreement) other counts against Exxon Shipping and Exxon, namely the ones to which they are not pleading guilty.

Question.

1. What counts will be dismissed?

III. AGREEMENTS REGARDING IMPOSITION OF SENTENCE. First, the U.S. agrees not to make additional criminal charges or seek civil or administrative penalties for various acts relating to the oil spill against

- (1) Exxon, its present or former officers, directors, or employees;
- (2) any of Exxon's wholly-owned subsidiaries or their present or former officers, directors or employees; or
- (3) Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives.

The government reserves the right to take civil or administrative action (other than for penalties or under criminal laws) against the above persons and entities. (This reserves the federal government's rights to take action relating to suspension, debarment, or listing.)

This section also lists the fines. Exxon Shipping is to pay \$75 million, half of which is remitted (not paid). Exxon agrees to pay \$25 million, half of which is remitted (not paid). The remission is based on the defendants' recognizing their responsibility, cooperating with the federal government, and making past payments for cleanup (\$2 billion) and for injuries to claimants (in excess of \$300 million.)

Question.

1. Who are Exxon's wholly owned subsidiaries?
2. Why is Alyeska Pipeline Service Company included in the entities against whom criminal charges will not be brought and from whom civil or administrative penalties will not be sought?

IV. AGREEMENTS REGARDING RESTITUTION. Exxon and Exxon Shipping agree to pay the State of Alaska \$50 million in restitution within 30 days after the

Representative Max F. Gruenberg, Jr.

March 25, 1991

Page 3

court accepts the plea agreement. The payments are to be used by the State exclusively for restoration projects relating to the oil spill. The state is to control the use of the money, and upon payment the money shall be available for use by the state for restoration projects without objection, challenge, or judicial or administrative review.

Restoration (for which the money may be spent), includes (1) restoration, replacement, and enhancement of resources affected by the oil spill; (2) acquisition of equivalent resources and services; and (3) long-term environmental monitoring and research programs directed to prevention, containment, cleanup, and amelioration of oil spills.

V. GENERAL PROVISIONS. Exxon guarantees the payments Exxon Shipping is to make.

If the court rejects the plea agreement or does not dismiss the charges the U.S. has said it will move to dismiss, each defendant will be permitted to withdraw its guilty plea.

PF:gc:mi
91-166.glc

PRELIMINARY

3/27

MASTER LIST OF ISSUES

CONSENT DECREE

[I] Introduction (pages 2-3)

1. Could the state still sue Exxon for violation of state criminal laws? Does it intend to do so? [PF]
2. Does the fact that the money is exchanged for the extinguishment of claims under state law affect the applicability of the CWA and regulations under it? [PF]

[II] Jurisdiction (paragraph 1; page 4)

3. Why did the parties want to have a consent decree as well as an agreement extinguishing claims? (To have a remedy available to enforce the agreement? Other?) [PF]

[III] Parties (paragraphs 2-5; page 4)

[IV] Definitions (paragraph 6 [a-i]; pages 5-7)

4. Why are the natural resources damages of the state not separated from the natural resource damages of the federal government? [PF]
5. If the court signs the consent decree, when does the time for appealing that decision expire? [PF]
6. Does the reference to claims under state law mean that this recovery is not entirely under the CWA? [PF]
7. What do the terms in the first three lines of page 6 mean? Does "natural resource damage" include economic loss to the state, e.g. lost taxes [PF]

8. When was the last date that all parties signed? [PF]

[V]
Effect of Entry of Decree by Court
(paragraph 7, page 7)

[VI]
Payment Terms
(paragraphs 8 [a-d], 9-10; pages 9-11)

Payment Schedule (paragraph 8)

9. What is the present value of the amounts to be paid by Exxon? [PF]
10. Has Exxon paid the first \$90 million? [PF]
11. What guarantee is there that Exxon will pay the required amount? Is this a debt dischargeable in bankruptcy? [PF]
12. Are the amounts Exxon will pay deductible under federal tax law? Under state tax law? [PF]

Escrow (paragraph 9)

Use of Money (paragraph 10)

13. Art. IX, Sec. 7 of Alaska's Constitution prohibits dedicated funds. Money recovered under the CWA must be dedicated, as this paragraph reflects. Can the A.G. choose to settle a case under a law that requires a dedicated fund, especially when the state could recover under state law, which does not require dedication? Is recovery under the CWA participation in a "federal program" such that the prohibition against dedicated funds would not apply? [PF; Rep. Barnes, 3/19]
14. Does any state statute require that money received in this settlement be deposited in the General Fund?
15. Is legislative authorization needed to accept funding from the trustees? [Rep. Ulmer, 3/21, p. 10]
16. Alaska's Constitution vests the appropriation power in the legislature alone. Federal laws and regulations applicable to the CWA require the Governor to appoint a trustee who will decide how money recovered under the CWA is to be spent. Is the scheme under the CWA contrary to Alaska's Constitution, and if so, does the A.G. have the power to enter into an agreement under the CWA? [PF]

17. How much has the state spent for response, cleanup, damage assessment, and litigation costs? (This question includes supplementals tied to the oil spill and regular department budgets related to it.) How much has Exxon reimbursed for these activities to date? How does the remainder owing compare to the \$72 million maximum that the state could get back as reimbursement under the consent decree? [PF]

18. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA? [PF]

19. This paragraph refers to "natural resource services." What is a "natural resource service?" [PF]

NB: This term is also used, and undefined, in the MOA (page 8 [paragraph IIIA]).

20. It appears that the reimbursements to the state (up to \$72 million) are not restricted as to use. Is this true? [PF]

21. Despite the statement to the contrary, will a private party have a right to enforce the restrictions in use set forth in this paragraph? [PF]

22. Does the settlement provide for federal or state funding for continued damage assessment studies?

23. By "representing" to the court that money will be spent pursuant to the MOA, are the governments barred from changing the MOA without court approval? [3/19, p. 6]

24. Could the trustee's, or the court if breaking an impasse, act through a private party (e.g. the Nature Conservancy or a Native corporation) to preserve or utilize natural resources under the settlement? [Rep. Phillips, 3/19, p.11]

25. Does the Alaska Constitution bar the state from bypassing the appropriation process in disposing of state assets, i.e., the litigation proceeds? [Rep. Barnes, 3/19, p. 11]

[VII]

Commitment by Exxon to Continue Cleanup
(paragraphs 11[a-b], 12[a-b]; pages 11-14)

Cleanup Duties (paragraph 11)

26. If the SOSC or the FOSC disagree with Exxon's proposed costs, does Exxon still have to do the work? (What does "subject to prior approval" mean?) In the event of a dispute about the costs, who makes the final decision? [PF]

27. The first sentence of 11(b) provides that Exxon has no cleanup obligations after final approval of the consent decree "except as set forth in this Agreement." Does another paragraph of the agreement impose cleanup obligations after final approval? [PF]

28. What does the last sentence of 11(a) -- concerning immunity of Exxon from liability "by reason of undertaking clean-up work" in accordance with directions of the FOSC or SOSC -- mean? Is it intended to immunize Exxon from liability for acts connected with cleanup work Exxon does under the direction of the FOSC or SOSC? Can it be read as an agreement by the state and federal governments to indemnify Exxon if a third party recovers against Exxon based on acts related to this cleanup? Does it apply to past work? Does it apply to workers compensation? Contract claims? [PF; Rep. Navarre, 3/19, p.16]

29. To what extent is Exxon's current liability for cleanup limited by the settlement?

Set Off for Cleanup Expenses (paragraph 12)

30. Can Exxon setoff amounts approved by the FOSC against amounts owed the state? Can Exxon setoff amounts approved by the SOSC against amounts owed the federal government? [PF]

[IX]

Releases and Covenants Not to Sue by the Governments
(paragraphs 13 [a-d], 14-16; pages 14-17)

Release of Exxon (paragraph 13; pages 14-15)

31. In the state case, the state asserted claims for lost revenue from the salmon enhancement tax, loss of oil and gas production tax revenue, loss of corporate income tax revenue, and loss of oil production royalties. These claims will be given up as to Exxon. Would the state have been able to prove this claimed loss of revenue, and if so, how much did the state believe it could prove? Does the state intend to continue litigating against other defendants in the state case, and if so, does it expect to be successful? What has it gained in the consent decree to compensate for the loss of those claims? [PF]

32. If the state settles under the consent decree, what happens to the state claims against the remaining defendants? Are there any state claims remaining against Alyeska?
[PF/State Claims]

33. Number 2 of the exceptions refers to Alaska Native "villages". Are there any other Native groups (corporations?) whose claims would be affected by this settlement? [PF]

34. Do political subdivisions of the state retain their claims against Exxon under this settlement? [Rep. Kubina 3/19; Rep. Leman 3/21, p.2]

35. Although the consent decree states that it does not affect third party claims related to the oil spill, will settlement between the state and Exxon have any practical effect on the ability of third parties to litigate their claims (e.g. is there any effect on confidentiality of scientific and economic data)? [PF]

Release of Exxon Pipeline (paragraph 14; pages 15-16)

Release of Claims Against Employees, etc.
(paragraph 15; pages 16-17)

36. From the way paragraph 15 is structured, it appears that there may be a civil case pending against an employee, director, or officer of Exxon Pipeline or Exxon. Is this true? [PF]

Dismissal of Actions (paragraph 16; page 17)

[IX]
Reopener for Unknown Injury
(paragraphs 17-19; pages 17-18)

Qualified Restoration Projects (paragraph 17;
pages 17-18)

37. How likely is it that the state or federal government will be able to take advantage of this provision, given the requirement that the injury can not have been anticipated by any trustee? [PF; Reps. Leman, Davidson, 3/21, p.3]

38. How will "benefits" be quantified under this clause? [Reps. Gruenberg, Leman, 3/21, p.3]

\$100 Million Limitation (paragraph 18; page 18)

Filing of Plans (paragraph 19; page 18)

[X]

5

Releases and Covenants Not to Sue by Exxon and Exxon Pipeline
(paragraph 20; pages 18-19)

39. What claims have Exxon or Exxon Pipeline asserted against the state or federal government? [PF]

[XI]
Trans-Alaska Pipeline Liability Fund
(paragraph 21; page 19)

40. Has the TAPL fund paid any money to Exxon or Exxon Pipeline? Is it likely to do so? [PF]

41. Has the TAPL fund paid any money to Alyeska, or is it likely to do so? [PF]

42. How likely is it that the TAPL fund will assert claims against the state for money (if any) the fund pays to Alyeska? [PF]

[XII]
Provisions Pertaining to Alyeska
(paragraphs 22-25; pages 20-21)

Release of Alyeska (paragraph 22; page 20)

43. Are any lawsuits of the types described in paragraphs 22-25 currently pending, or likely? What is their value? [PF]

44. The consent decree releases Alyeska from liability to the state for "damages for injury to Natural Resources." Are we reserving any other types of civil claims against Alyeska e.g., economic loss)? [PF]

Partial Payment to Exxon (paragraph 23; page 20)

Partial Payment to Governments (paragraph 24; page 21)

Indemnification of Governments by Exxon (paragraph 25; page 21)

Third Party Litigation
(paragraphs 26-30; pages 21-23)

No Contribution or Indemnity; Allocation of Liability
(paragraph 26; page 21)

45. Are there third party suits against Exxon and the state, or are there likely to be? (Under paragraph 26, the state could not recover against Exxon for its losses in such cases.) [PF] What will the cost of litigating third party suits be to the state? [Rep. Barnes, 3/19]

46. Should the state adopt a statute of limitations on third party claims?

Suits Against Exxon or A Government Only (paragraph 27; page 22)

47. Are there third party suits against the state, or are there likely to be such, in which Exxon is not a defendant? (Under paragraph 27 the state could not recover against Exxon for its losses in such cases.) [PF] What value do the claims have? What portion of the claim could we collect from Exxon? What will the litigation cost? [Rep. Navarre, 3/19]

No Reduction in Payments (paragraph 28; page 23)

No Tender as Defendants (paragraph 29; page 23)

48. Paragraphs 29 and 30 are not limited to lawsuits related to the oil spill. I suspect this was an oversight. How likely is a court to interpret these paragraphs as applying only to spill-related lawsuits? [PF]

Settlement With Exxon and Suit Against A Government
(paragraph 30; page 23)

49. Can the state and federal governments recover against each other for judgments they have to pay to third parties? [PF]

[XIV]
Interest for Late Payments
(paragraph 31; pages 23-24)

[XV]
Reservation of Rights
(paragraphs 32-35; pages 24-25)

No Admission (paragraph 32)

No Claims Created (paragraph 33)

Government Programs Not Impaired (paragraph 34)

Existing Contracts Not Impaired (paragraph 35)

[XVI]

Notices and Submittals
(paragraph 36; pages 25-26)

[XVII]

Process for Entry of Agreement
(paragraphs 37-38; pages 26-27)

Notice, Legislative Approval, Withdrawl (paragraph 37)

50. It appears that the governments could keep the agreement in effect even if the state legislature does not approve it. If the legislature does not approve it and the state or federal government does not withdraw, could the legislature intervene in the federal case to prevent approval by the court? Could it intervene in the state court to prevent a dismissal of claims? [PF]

51. To what extent would the legislature's approval of the consent decree constitute an approval of the MOA?
[PF/Overview; Rep. Barnes, 3/19, p.6]

52. Can the legislature disapprove of one of the two agreements?

53. Is the federal court bound to wait the full 45 days before ruling?

54. Can the legislature approve the settlement conditionally, with stipulations? [Rep. Hudson, 3/19, p.12]

Termination of Agreement (paragraph 38)

55. What did the state receive in exchange for the setoff in paragraph 12, assuming the agreement is terminated? [PF]

56. Can the setoff be applied against amounts owed the state if the work was approved by the FOSC, but not the SOSC? [PF]

57. If the court rejects the Plea Agreement, can the U.S. or Alaska terminate the settlement?

58. Does legislative approval of the settlement estop the state or third parties from making constitutional challenges to the authority of the administration to enter into it, or to the funding mechanisms? [Rep. Barnes, 3/19, p.12]

[XVIII]

Retention of Jurisdiction
(paragraph 39; page 28)

59. Who drafted which parts of the documents, and will they be interpreted against the drafter? [Rep. Gruenberg, 3/21, p.4]

60. Is the Consent Decree to be interpreted under federal law, or under Alaska law? [Rep. Gruenberg, 3/21, p.6]

61. Is the agreement in violation of the law of any other jurisdiction? [Rep. Gruenberg, 3/21, p.6]

[XIX]

Miscellaneous
(paragraphs 40-41; page 28)

Modification (paragraph 40)

Assertion of Authority (paragraph 41)

62. Does this Article estop the legislature or a third party from litigating the issue of authority? [PF, 3/21 p.9]

MEMORANDUM OF AGREEMENT

Introduction

I

Jurisdiction
(page 5)

II
Definitions
(pages 6-8)

III
Co-Trusteeship
(pages 8-9; paragraphs A-C)

IV
Organization
(pages 9-12; sections A[1-5], B[1-3] and C)

A. General Provisions

1. Why did the state and federal governments not separate the money recovered by the federal government from the money recovered by the state government? [PF]
2. Is the establishment of a joint trust fund contrary to 33 U.S.C. 1321(k), also known as the "311(k) fund", which requires funds received by the United States under 33 U.S.C. 1321 to be deposited in a revolving fund in the U.S. Treasury? [PF]
3. Is the establishment of a joint trust fund contrary to 43 CFR 11.92(a)(1), which also requires the federal trustee to retain federal damage recoveries under the CWA in a separate account in the treasury? Is it contrary to 43 CFR 11.92(a)(2), which requires the state trustee to put the state's recovery in a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee? Do 11.92 and 11.93 apply? [PF]
4. Is the commingling of trust assets a violation of the trustees' common law trust responsibilities? [PF]
5. Will a trust fund in the court registry bear interest? [PF]
6. What standards would a court use in deciding disputes among the trustees? [PF]
7. Could the trustees agree to binding arbitration, so that an arbitrator would decide the use of the money? [PF]
8. If an appropriation is necessary in order for expenditures to comply with the Alaska Constitution, how could this be done? [PF/Overview]

8a. Would expenditures from the trust be subject to AS 36.30, the state Procurement Code? [PF/Overview]

8b. Who, if anyone, will perform audits of the trustees' expenditures? [PF/Overview]

8c. Could the legislature, by enacting legislation, retain greater control over the trust proceeds that allowed by the MOA (but still be within the limits of the CWA and applicable regulations)? [PF/Overview]

NB: This Article raises the same issues under the Alaska Constitution raised in connection with the Consent Decree, regarding the appropriation requirement and the prohibition against dedicated funds.

B. Injury Assessment and Restoration Process (pages 11-12)

8. Do 43 CFR 11.92 and 11.93 apply to all recoveries under the CWA, or are they optional? Did the parties believe those regulations apply? [PF]

C. Role of the Environmental Protection Agency (page 12)

[V]
Distribution of Settlement Monies
(paragraphs aA-D; pages 12-13)

A. Joint Use of Natural Resource Damage Recoveries
(paragraph A; page 12)

9. How will the trustees know how much of the trust fund should be spent on damage to state resources and how much on damage to federal resources? [PF]

10. Can this money be substituted as the funding source for services the federal government would provide in any event out of other federal funds? [PF]

11. What are the limits on the acquisition of "equivalent resources" in practical terms? (To compensate for lost beachcombing opportunities, could the trustees build camping sites? Ski lodges? Roads to ski lodges?) [PF]

12. Will the trust pay its own administrative expenses? [PF]
If state staff are used in support of the state trustees' activities, will the state budget bear the cost? Will

additional state staff be needed to carry out trustee duties and oversee the trust's activities? [PF/Overview]

13. If the trustees buy land, who will own it? If they develop land, who will administer whatever facility is developed? [PF]

B. Reimbursement of Allowed Expenses and Response Costs
(paragraphs B-D; pages 12-13)

B. Federal and State Limitations (page 12)

13a. Will reimbursements for past allowed expenses and future cleanup costs go to the general fund without any restrictions on its use? [PF/Overview]

C. Out of State Expenditures (page 13)

14. Is there some other provision that allows the trustees to spend the money on projects outside Alaska? (Why is the "except as otherwise provided" language there?)

14a. Is there any limitation on the use of funds for projects outside the state? Could the money be used to establish parks, institutes, etc. in other states? [PF/Overview]

D. No Obligation To Spend Except As Authorized
(page 13)

15. Is this an indication that trust money that the trustees decide to use to pay for the work of state agencies will have to be appropriated by the legislature? Or is it just a "safety" clause to assure the state that it does not have to pay money under the MOA? [PF]

VI
Science Studies
(page 13)

VII
Covenants Not to Sue
(paragraphs A[1-3], B-F; pages 14-16)

A. Suits by Government Against Government

16. If the trustees disagree whether a federal agency should be involved in a particular project, can the state trustees take the issue to court? [PF]

B. Assertions of Co-Trusteeship

17. Does the last clause preclude, at least for the next 16 years, the U.S. and the state from suing each other to determine ownership of resources, or rights to control resources, if those resources were hurt by the oil spill? Would this affect disputes that had nothing to do with the MOA or the oil spill? [PF] In general, what are the implications of this paragraph? [PF/Overview]

C. Intervention in Third Party Suits

D. MOA Effective Notwithstanding Adversarial Status

18. How does this provision interact with the termination provision on page 17 that says the MOA terminates in the Consent Decree terminates, unless otherwise agreed by the parties? [PF]

E. Third Party Suits Against Both Governments

F. Third Party Suits Against One Government

19. Does this put the state in the position of cooperating with the federal government against an Alaskan resident who asserts an oil spill claim against the federal government? [PF]

VIII

Enforcement of Agreement
and Governing Law and Venue
(paragraphs A-B; page 16)

A. Enforcement by Alaska Federal Court

20. The heading of this provision includes "governing law", but the text doesn't mention it. Did the agreement have a governing law provision at one time? [PF]

B. Disposition if MOA Found Invalid

IX
Multiple Copies and Effective Date
(page 17)

X
Integration and Merger
(page 17)

21. What was the agreement of April, 1989? [PF]

XI
Termination
(page 17)

22. How does this relate to paragraph VII (D) on page 15 (providing that the MOA remains in effect if the Governments are adverse in litigation)? [PF]

XII
Judicial Review
(page 18)

23. Since this is a consent decree, do the parties have the power to prevent judicial review? [PF]

24. To what in Article VII does this refer? [PF]

25. Does this prevent a third party from challenging a decision of the trustees on the ground that the decision is inconsistent with the MOA or applicable law? [PF]

XIII
Miscellaneous
(paragraphs A-B; page 18)

A. Modification

B. Authorization

OIL SPILL LITIGATION CHRONOLOGY
(April 2, 1991)

March 13, 1991

State, federal and Exxon representatives sign "Agreement and Consent Decree" and "Memorandum of Agreement and Consent Decree" in civil litigation; federal and Exxon representatives sign "Plea Agreement" in federal criminal case.

March 19, 1991

Settlement documents published in the federal register.

March 24, 1991

Statute of limitations expires on common law tort claims under state law.

April 8-9, 1991

Hearings scheduled before US House Interior subcommittee.

April 11, 1991

Deadline established by Judge Holland for public comments on the Plea Agreement.

April 18, 1991

Deadline for comments to federal and state government on Consent Decree and MOA.

April 24, 1991

Judge Holland has scheduled a hearing at 8:30 a.m. to announce his decision on the Plea Agreement.

May 3, 1991

Last day on which federal or state government may withdraw from the settlement if: (1) legislature has not approved the Consent Decree; or (2) comments show Consent Decree is inappropriate, improper or inadequate.

May 4, 1991

Last day on which any Party may terminate the Consent Decree if Judge Holland rejects the Plea Agreement on April 24 (Parties may terminate within 10 days of rejection).

10 Days After (1) Final Judicial Rejection of Consent Decree or (2) Final Judicial Approval With (a) Misinterpretation or (b) Materially Adverse Modification

Last day on which any Party may terminate the Consent Decree. This period would apparently expire at the end of the time for appealing from Judge Holland's decision, or when an appeal has been finally decided.

MEMORANDUM

State of Alaska

Department of Law

TO Sen. Richard I. Eliason, Chair
Senate Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

DATE April 2, 1991

FILE NO

TEL NO 465-3600

Rep. Max F. Gruenberg, Jr., Chair
House Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

SUBJECT Authority of the Governor
and Attorney General to
Enter into the EXXON VALDEZ
Settlement Agreement

FROM Charles E. Cole
Attorney General

As you know, the Agreement and Consent Decree (hereinafter "Settlement Agreement") in the EXXON VALDEZ litigation was reached between Exxon, the State and the Federal governments after several weeks of discussion about the pending and potential litigation between them. The terms of the Settlement Agreement reflect many hours of hard bargaining among the parties, an effort to resolve on mutually acceptable terms their respective claims related to the EXXON VALDEZ oil spill ("Oil Spill") without additional expensive, potentially interminable, and uncertain litigation.

This memorandum will discuss the reasons why the Governor and the Attorney General have the authority to negotiate and agree to the Settlement Agreement on behalf of the State of Alaska.

I. THE ECONOMIC TERMS OF THE SETTLEMENT AGREEMENT

The basic economic terms related to the Settlement Agreement are the provisions pertinent to this memorandum's discussion and, therefore, merit summary at the outset.

A. The Federal Criminal Plea Agreement

The State played no role in the negotiations between Exxon and the Federal government with respect to the Plea Agreement in the Federal government's criminal case against Exxon (Case No. A-90-015 CR., United States District Court for the District of Alaska). However, under that Plea Agreement, the State is to receive half of the fine to be paid by Exxon.

1/ The Exxon entities involved in the Settlement Agreement are Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, the supertanker that caused the Prince William Sound oil spill. Those entities will be referred to in this memorandum collectively as "Exxon."

The second type governs the balance of the \$900 million to be paid, after deductions are made for the State reimbursement payments, for the similar federal reimbursement payments of up to \$62 million, and for expenditures made by Exxon with respect to continuing Oil Spill clean-up, as defined in paragraph 11 of the Settlement Agreement. In addition, the related Memorandum of Agreement ("MOA") provides for reimbursements to the State and Federal government for "all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990," as certified by their spill response coordinators, "shall be paid directly to the Governments by Exxon over a period of 5 years." MOA ¶V(B). These reimbursements will thus be paid to the State and subject to the Legislature's appropriations power, like the \$72 million in reimbursements to the State for pre-1991 costs and the \$50 million in restitution to be received under the Plea Agreement.

The remaining balance of Exxon's settlement payments will be held in and administered through a joint trust fund ("Trust Fund"). Those monies must be used by the Trust Fund's trustees "to assess injury resulting from the Oil Spill, and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the oil spill, or the acquisition of equivalent resources or services." The Settlement Agreement provides that the Trust Fund monies are to "be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska." ¶10.

Pursuant to the MOA, the Trust Fund will be administered by the State and Federal governments as "co-trustees." MOA ¶III(A). A group of six Trustees designated by the President and the Governor, three each from the State and Federal governments, are to act as co-trustees: the Administrator Of the National Oceanic and Atmospheric Administration, the Secretaries of the Departments of the Interior and Agriculture; the Commissioner of the Alaska Department of Fish and Game, the Commissioner of the Alaska Department of Environmental Conservation, and the State Attorney General. The MOA requires that the Trustees act jointly in the collection and use of all damage recoveries. Decisions on use of the monies in the Trust Fund for restoration are to be made by unanimous agreement of the Trustees, though provisions are made in the MOA for methods to resolve any disputes. MOA ¶IV(A)(3). The MOA provides that the Trustees "shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group" MOA ¶IV(A)(3). The funds are to be held subject to this co-trusteeship in a joint Trust Fund under the supervision of the United States District Court for the District of Alaska. MOA ¶IV(A)(2).

MEMORANDUM

State of Alaska

Department of Law

TO: Sen. Richard I. Eliason, Chair
Senate Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

DATE: April 2, 1991

FILE NO:

TEL NO: 465-3600

FROM: Rep. Max F. Gruenberg, Jr., Chair
House Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

SUBJECT: Authority of the Governor
and Attorney General to
Enter into the EXXON VALDEZ
Settlement Agreement

Charles E. Cole
Attorney General

As you know, the Agreement and Consent Decree (hereinafter "Settlement Agreement") in the EXXON VALDEZ litigation was reached between Exxon,^{1/} the State and the Federal governments after several weeks of discussion about the pending and potential litigation between them. The terms of the Settlement Agreement reflect many hours of hard bargaining among the parties, an effort to resolve on mutually acceptable terms their respective claims related to the EXXON VALDEZ oil spill ("Oil Spill") without additional expensive, potentially interminable, and uncertain litigation.

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^{1/} The Exxon entities involved in the Settlement Agreement are Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, the supertanker that caused the Prince William Sound oil spill. Those entities will be referred to in this memorandum collectively as "Exxon."

Under the Plea Agreement, Exxon Shipping pleads guilty to violations of the Clean Water Act, 33 U.S.C. §§1311(a) and 1319(c)(1)(A), the Refuse Act, 33 U.S.C. §§407 and 411, and the Migratory Bird Treaty Act, 16 U.S.C. §§703 and 707(a); Exxon Corporation pleads guilty to Migratory Bird Treaty Act violations, 16 U.S.C. §§703 and 707(a). Exxon will pay \$100 million as a criminal fine under the Plea Agreement.

The Plea Agreement provides that \$50 million of that fine is to be paid as restitution to the State of Alaska within 30 days of the Court's acceptance of the Plea Agreement. It further provides that those monies "are to be used by the State of Alaska exclusively for restoration projects" relating to the Oil Spill. Restoration is defined to include "restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills." Plea Agreement ¶4(A). Those monies will be entirely under the control of the State and will thus be subject to the legislative appropriations process, though with that restriction on their use. Plea Agreement ¶4(B).

B. The Agreement And Consent Decree

The Settlement Agreement requires Exxon to make a total of \$900 million in payments.^{2/} After the first installment of \$90 million is paid within ten days after the effective date of the Settlement Agreement, payments are to be made annually on September 1st, over a ten year period beginning in 1992, in amounts set out in the payment schedule in paragraphs 9(b) and (c) of the Settlement Agreement.

The Settlement Agreement includes two basic types of recoveries from Exxon related to the settlement of the State's civil claims. The first type, in a amount of up to \$72 million, is in settlement to reimburse the State 1) for response and clean-up costs incurred prior to January 1, 1991, 2) for its natural resource damages assessment costs, and 3) for its litigation costs, including attorneys' fees, experts' fees and other costs. Settlement Agreement ¶10.

^{2/} The Settlement Agreement also includes a "reopener" provision that provides for Exxon to pay up to \$100 million dollars for additional restoration projects in areas affected by the Oil Spill, if the projects meet a cost/benefit criterion and the injury being redressed was not reasonably known or anticipated based on information available at the time of the Settlement Agreement's effective date. Settlement Agreement ¶¶17-19.

The second type governs the balance of the \$900 million to be paid, after deductions are made for the State reimbursement payments, for the similar federal reimbursement payments of up to \$62 million, and for expenditures made by Exxon with respect to continuing Oil Spill clean-up, as defined in paragraph 11 of the Settlement Agreement. In addition, the related Memorandum of Agreement ("MOA") provides for reimbursements to the State and Federal government for "all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990," as certified by their spill response coordinators, "shall be paid directly to the Governments by Exxon over a period of 5 years." MOA ¶V(B). These reimbursements will thus be paid to the State and subject to the Legislature's appropriations power, like the \$72 million in reimbursements to the State for pre-1991 costs and the \$50 million in restitution to be received under the Plea Agreement.

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II. DEFINING THE REAL ISSUE

The only real issue presented by the joint Trust Fund aspect of the settlement is whether the executive branch of the State government has authority to negotiate and agree to such a settlement mechanism.

In framing that issue, it is critical to understand that the Trust Fund monies are not monies to be received by or belong to either the State or the Federal governments. While the State's position is that it owns and is the trustee for most of the resources impacted by the Oil Spill, the Federal government contends otherwise. As a compromise of both governments' claims to exclusive control of monies recovered, the governments agreed that the monies would instead be placed in the joint Trust Fund established by Consent Decree under the Clean Water Act.

Thus, under the Settlement Agreement, those monies comprise a trust res, as to which neither government has sole ownership or control, held jointly for the benefit of certain damaged natural resources.^{3/} Consistent with well-established trust law, the governments, as co-trustees, have joint ownership control over the Trust Fund monies and must exercise that control jointly and consistently with the terms of the Settlement Agreement. See generally Restatement (Second) of Trusts §§2, 34, 185, 194 (1959) (two or more co-trustees hold trust property as joint tenants; unless terms of trust provide otherwise, co-trustees share duties and powers, which can properly be exercised only by all trustees).^{4/}

^{3/} The rights and obligations of the governments with respect to the Trust Fund are governed by the terms of the Settlement Agreement, construed in light of common law trust principles. See Restatement (Second) of Trusts §4 (1959) (terms of trust are defined by instrument creating trust). See also State v. Weiss, 706 P.2d 681, 683-83 & n.3 (Alaska 1985) (applying common law trust principles to State's obligations with respect to public lands; state legislature had no power to alter status of Mental Health Lands granted by United States, because doing so effectively terminated trust in violation of the State's duties as trustee); State v. University of Alaska, 624 P.2d 807, 814 (Alaska 1981) (private trust law principles applied to evaluation of State's obligation with respect to University lands).

^{4/} See also Mitchell v. Mitchell, 655 P.2d 748, 752 (Alaska 1982) (person seeking recovery as representative for surviving family members is "a nominal party only and holds the recovery in trust"); Thomson v. Wheeler Construction Company, 385 P.2d 111, 114 (Alaska 1963) ("A trust is a fiduciary relationship with respect to
(continued...)

A. The Trust Fund Does Not Violate
The Legislature's Appropriations Authority

While there has been concern expressed about whether the Trust Fund violates the Legislature's appropriation power, that power simply does not extend to monies that are not public revenues or assets of the State and can not be placed in the State Treasury.^{5/}

The Alaska Supreme Court has discussed the definition of "appropriations" in delineating the scope of the governor's line item veto power:

'An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'

For our purpose, the operative phrase "public revenue" is critical since it is the basis of the general fund and special funds from which the legislature may allocate money. Thus, any time the legislature allocates monies from the general fund or special funds, the governor's line item veto would be appropriate. However, the sale of general obligation bonds is the commitment of the state to a debtor relationship with those who purchase the bonds, and is therefore distinguishable from such allocations.

Thomas v. Rosen, 569 P.2d 793, 796-97 (Alaska 1977) (citations omitted) (governor lacks constitutional power to line item veto general obligation bonds authorizations, since they "do not qualify as appropriations").

^{4/}(...continued)

property, subjecting the person who holds ... the property to equitable duties to deal with it for the benefit of another person.") Cf., In re Cornelius, 520 P.2d 76, 85 (Alaska 1974) (one who receives money on behalf of another is a fiduciary; "the funds are impressed with a trust and conversion by the [person to his or her own uses] is a breach of that trust").

^{5/} The provision of the Alaska Constitution concerning appropriations provides, in relevant part:

No money shall be withdrawn from the Treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.

Alaska Const., Art. IX, §13 (emphasis added).

Most broadly interpreted, the Legislature's appropriations power extends both to "public revenues" and to all "state assets," all property owned by the State. Thomas v. Bailey, 595 P.2d 1, 4-9 (Alaska 1979) (Beirne initiative to transfer State lands to private persons based on residency violated constitutional prohibition against making "appropriations" by initiative). As the Supreme Court later explained, invalidating initiative provisions requiring the University of Alaska to transfer real and personal property to Community College System:

The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

McAlpine v. University of Alaska, 762 P.2d 81, 87-88 (Alaska 1988) (emphasis added). See also Alaska Conservative Political Action Committee v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (initiative seeking to require sale of municipally owned utility to private, nonprofit cooperative for \$1 would unconstitutionally make "appropriation," where utility had \$32.7 million in equity; "prohibition against appropriations by initiative applies to all state and municipal assets") (emphasis added).

However, that power obviously does not extend to monies that are not assets belonging to the State, but are instead assets of a joint Trust Fund not subject to sole State ownership or control.^{6/}

^{6/} Courts in other jurisdictions have ruled that funds received by a state for specific purposes are trust funds and are not subject to the legislative appropriations power, even where they are received and held solely by the state and not in a joint trust fund subject to co-trusteeship obligations. The Massachusetts Supreme Court well stated the rationale for that conclusion:

(continued...)

⁶/(...continued)

If Federal funds are received by State officers or agencies subject to the condition that they be used only for objects specified by Federal statutes or regulations, the money is impressed with a trust and is not subject to appropriation by the Legislature. The recipient of such funds has no choice but to comply with the requirements imposed by Federal law.

Moreover, legislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and be expended only on appropriation by the legislative branch, would result in the Legislature's interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws.

Opinion of the Justices to the Senate, 378 N.E.2d 433, 436 (Mass. 1978) (citations omitted). See, e.g., Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987) (expenditure of federal block grant funds, not subject to state matching requirement or other legislative decisionmaking, was within governor's executive power to make resource allocation decisions, since funds were essentially custodial in nature); Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985) (oil company's payment to state pursuant to consent order resolving administrative proceeding alleging that company violated regulations in marketing petroleum and natural gas products was not subject to General Assembly's appropriation power, and governor's exercise of authority over fund was not an impermissible invasion of Assembly's right to appropriate public funds); Opinion of the Justices to the House of Representatives, 471 N.E.2d 1266 (Mass. 1984) (even if revenues received pursuant to bill establishing Development Bank constituted "money received on account of the Commonwealth" within meaning of State Constitution's article establishing process by which revenues are to be received and disbursed, revenues would not be subject to those requirements, since funds were impressed with a trust established to secure debt obligations of Bank, which could disburse those funds pursuant to specific conditions and limitations). See also Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Arizona 1974); MacManus v. Love, 499 P.2d 609, 610 (Colo. 1972); State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974); Application of State ex. rel. Dept. of Transportation, 646 P.2d 605, 609-10 (Okla. 1982). Contra, Shapp v. Sloan, 391 A.2d 595, 604-07 (Pa. 1978), appeal dismissed sub nom., Thornburgh v. Casey, 440 U.S. 942 (1979) (custodial Federal funds must be appropriated by the legislature or returned to the Federal government).

(continued...)

B. The Trust Fund Does Not Violate The Constitution's
Prohibition Against Dedicated Funds

For similar reasons, the Alaska Constitution's prohibition concerning dedicated funds is not violated by the Trust Fund. The relevant sentence in the Constitution states:

Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 [the Constitution's Permanent Fund provisions] of this article or when required by the federal government for state participation in federal programs. ...

Alaska Const. Art. IX, §7.

The Supreme Court has interpreted that prohibition against dedicating "proceeds of a state tax or license" to extend to all similar "source[s] of revenue" received by the State. State v. Alex, 646 P.2d 203 (Alaska 1983). In Alex, the legislature had passed a statute authorizing private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, in a way that "dedicate[d] the proceeds of the assessments to the associations." The Court rejected "a distinction between 'general revenue taxes' and 'special assessments' for services," and held the dedication of assessments unconstitutional. Id. at 208-210. As discussed previously with respect to the appropriations issue, however, the Trust Fund monies are simply not "revenues" of the State.^{6/}

^{6/} (...continued)

The Alaska Supreme Court has not decided the issue whether the Legislature can or must exercise its appropriations power in order to authorize the State to expend trust monies or custodial funds held by the State, though a Superior Court decision has ruled (without elaboration) that the governor could not expend custodial funds without a legislative appropriation. Kelly v. Hammond, Case No. 77-4 Civ. (Juneau, 4/19/78).

^{7/} There is obviously a strong link between the Alaska Constitution's appropriations language and the dedicated funds prohibition. That prohibition is aimed at restraining the Legislature's creation of dedicated funds from certain State revenues through its appropriations power. See Alaska Constitutional Convention Proceedings 2364 (dedications of funds had the undesirable effect of preventing the "legislature" from "decid[ing] each case on its merits," causing it to "lose[] [the] control that it should have over the workings over state government"; appropriations should be made only after legislature (continued...)

Furthermore, even if the Trust Fund monies were State revenues, the limitations on the use of those monies to those allowed under the Clean Water Act would not violate the dedicated funds prohibition for two additional reasons: 1) the monies would be received by the State subject to co-trusteeship obligations; and 2) the monies would be received by the State subject to a federal statutory requirement as to their use.^{8/}

^{7/}(...continued)

"decide[s] each case on its merits"); id. at 2367-70 ("eventually you get so many funds earmarked that the legislature just does not have the money to work with for current operating expenses").

^{8/} In a thorough analysis of the dedicated funds prohibition after the Alex decision, the Attorney General concluded that even under the strictest conceivable interpretation, monies received in trust would not be subject to that prohibition. 1982 Op. Att'y Gen. No. 13, File No. 366-649-80 (Nov. 30, 1982) ("[E]ven under the strict view, there would be some kinds of monies received by the state which it could not, for independent legal reasons, deposit into the general fund. These monies would include trust funds, restricted gifts, and funds subject to restrictions by contract"). That opinion also concluded that the fact that some State revenue was subject to federal statutory requirements that it be spent in a particular way did not violate the prohibition. Id. ("The dedication of proceeds of fishing and hunting licenses to the operation of a Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by Article IX, section 7. See 16 U.S.C. §669."). See also Op. Att'y Gen., File No. 366-403-85 (Aug. 13, 1985) (trust obligation exists with respect to public school fund; dedication of revenues to public school fund would not violate dedicated fund prohibition because "the legislature has removed the lands from a federally-created trust and substituted a monetary fund. We believe the exceptions to the prohibition on dedicated funds contained in article IX, section 7, of the Alaska Constitution--i.e., for dedicated funds 'required by the federal government' or 'existing upon the date of ratification of this section by the people of Alaska'--authorize the dedication of revenues to the public school fund, since the dedication of revenues is an alternate form to the pre-statehood federal dedication of lands."); Op. Att'y Gen., File No. 388-140-82 (June 22, 1982) (federal statute specifying use to which State could put its share of receipts from oil and gas leasing in National Petroleum Reserve; "federal legislation directing payment of the money to the state attaches conditions to the state's receipt of that money" and thus "impose[s] a requirement which is exempt from the dedicated fund prohibition").

(continued...)

C. The Real Issue

The Trust Fund monies are not "State assets" or "public revenues," subject to the Legislature's appropriations power or the constitutional prohibition against dedicated funds.

The issue then, purely and simply, is whether the Governor and the Attorney General of the State of Alaska have the power and authority to agree to a settlement of the Exxon litigation in which a portion of Exxon's settlement payments are made into a Trust Fund, supervised by the United States District Court and administered by the State and Federal governments as co-trustees, or whether they are legally constrained to settle the Exxon litigation only on terms that require all monies to be paid directly to the State.

III. THE SEPARATION OF POWERS DOCTRINE IN ALASKA

As the legislature well knows, the principle of separation of powers is a central construct of American constitutional government and of Alaska's Constitution.^{9/}

^{8/} (...continued)

A common sense reading of the exemption where a dedication of funds is "required by the federal government for state participation in federal programs" would allow funds to be taken under the restrictions embodied in the Settlement Agreement, even were those funds considered "public revenues." The purpose of this exemption is to ensure that the State may receive monies available under federal law subject to restrictions. Though recoveries under the Clean Water Act might not be received literally from a federal "program," it is likely that the dedicated funds prohibition would be interpreted by the courts to allow the State to benefit from such recoveries with the statutory restrictions as to their use.

^{9/} The historical and intellectual origins of the separation of powers doctrine have been extensively reviewed and analyzed by scholars. See, e.g., W. Gwyn, *The Meaning of the Separation of Powers* (1965); M. Vile, *Constitutionalism and the Separation of Powers* (1967); Sharp, "The Classical American Doctrine of 'the Separation of Powers'," 2 U.Chi.L.Rev. 385 (1935). The doctrine is generally considered to have been derived primarily from the writings of John Locke concerning the delineation of functions in the English government, and the writings of Montesquieu, who strongly "argued that any combination of the judicial, legislative or executive powers would create a system with an inherent tendency towards tyrannical actions." The doctrine was incorporated into the state constitutions that predated the American Constitution and has been embodied in subsequent state constitutions. J. Nowak, R. (continued...)

The Alaska Supreme Court has long and consistently recognized that although "the Alaska Constitution does not expressly address itself to the doctrine of separation of powers," that principle is clearly "implied" from the Constitution's separate articles creating the executive, legislative and judicial branches of the Alaska government. Rust v. State, 582 P.2d 134, 138, n.11 (Alaska 1978).^{10/} "Under the structure envisaged by Alaska's fundamental charter, the legislative power of the state is vested in the legislature, the executive power in the governor, and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature." Bradner v. Hammond, 553 P.2d 1, 5 (Alaska 1976) (footnotes omitted).

There is no doubt that the countervailing principle of "checks and balances" allows each branch of the State government to directly and indirectly affect the other.^{11/} Thus, the legislature may enact laws that are to be executed by the executive and interpreted by the judiciary in accordance with legislative intent;^{12/} the executive may enforce those laws in accordance with its discretionary view of the public interest and governmental priorities; and the judiciary may review the actions of both the

^{9/} (...continued)

Rotunda, and J. Young, Constitutional Law (1983), citing, J. Locke, Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government); Montesquieu, The Spirit of Laws (Nugent trans. 1949)

^{10/} See also Alaska State-Operated School System v. Mueller, 536 P.2d 99, 103 (Alaska 1975) ("Those who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial.").

^{11/} See, e.g., Bradner v. Hammond, 553 P.2d at 5:

A problem inherent in applying the doctrine of 'separation of powers' stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers.

^{12/} For purposes of the analysis presented below in this memorandum, it is important to bear firmly in mind that the legislature can restrict the executive's constitutional discretion to execute the law only by means of a lawfully enacted statute. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

other branches in light of applicable constitutional and other legal constraints.^{13/}

However, the Alaska Supreme Court has embraced a strict view of the autonomy of the State's governmental branches, which precludes each branch from improperly interfering with the autonomy and discretion of the others with respect to their core constitutional powers. See, e.g., Bradner v. Hammond, 553 P.2d at 6-8 ("the separation of powers doctrine requires that the blending of governmental powers [between the branches] will not be inferred in the absence of an express constitutional provision").

IV. THE GOVERNOR'S CONSTITUTIONAL AUTHORITY
TO EXECUTE AND ENFORCE THE LAWS

"There is no dispute that our constitution was designed with a strong executive in mind." Bradner v. Hammond, 553 P.2d 1, 3 n.3 (Alaska 1976). See Alaska Constitutional Convention Proceedings 1102, 1741, 1986-88, 2038, 3103. Article III, Section 1 of the Constitution provides that "[t]he executive power of the State is vested in the governor."

Principal among the governor's express constitutional powers is his or her responsibility for executing and enforcing the laws. The constitutional provision concerning that power makes clear the governor's plenary authority to initiate and control litigation brought for that purpose:

Governor's Authority. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. ...

^{13/} See also, e.g., State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d 622 (Kan. 1984) (doctrine of separation of powers avoids dangerous concentration of power through checks and balances each branch of government has against other by assigning each branch powers and functions appropriate to it; generally, "legislative power" is power to make, amend or repeal laws, whereas "executive power" is power to enforce laws, and "judicial power" is power to interpret and apply laws in actual controversies).

Alaska Const., Art. III, §16.^{14/}

The Constitutional Convention considered the discretion of the executive branch to enforce the law to be an essential element of the strong executive intended under the Alaska Constitution:

In order to enforce the strong executive and to bulwark his power we have given him power by appropriate actions or proceedings in the court, brought in the name of the state, to enforce compliance with any constitution [sic] or legislative mandate. That is specifically written into the constitution because we want to have a broad interpretation of the powers of the strong executive.

Alaska Constitutional Convention Proceedings 1986. Thus, the governor has the constitutional mandate to use his or her judgment in enforcing the law to best protect the public's interest. See State v. Lewis, 559 P.2d 630, 635 (Alaska), cert. denied, 432 U.S. 901 (1977).

V. THE ATTORNEY GENERAL'S SETTLEMENT AUTHORITY

The Attorney General is the State officer charged with implementing the executive branch's policies with respect to execution of the law.^{15/} In that respect, the Attorney General

^{14/} See, e.g., Alexander v. State By and Through Allain, 441 So.2d 1329 (Miss. 1983) ("Executive power" is the power to administer and enforce the laws; "execution" is at the core of executive power).

^{15/} The Alaska Constitutional Convention strongly rejected proposals offered by a minority of its Judiciary Committee members either to create an elected Attorney General's position in the Constitution (defeated by a 40-12 vote) or to have the Governor appoint the Attorney General, by a process similar to that adopted for judicial appointments, from candidates determined to be qualified by the Judicial Council (defeated by a 36-18 vote). In doing so, the Convention expressly reaffirmed the Constitution's intention to have a "strong executive" and made it clear that the Governor should have full authority to appoint his or her Attorney General, in order to assure that the Attorney General could work effectively in the executive department and would be compatible with the Governor and the Governor's programs. Alaska Constitutional Convention Proceedings 2193-2202, 2215-23 (Delegate McLaughlin stating that an elected Attorney General would put "a diverse and possibly a discordant element into the executive (continued...)

has broad common law powers and responsibilities. For the historically inclined, the common law roots of the attorney general's powers were recently, tersely summarized by the Alabama Supreme Court:

The office of attorney general had its nascence in the *attornatus regis* of the thirteenth and fourteenth century England. The *attornatus regis* served as the sovereign's primary legal representative, with considerable power subject to limitation only by the King. The office was carried over to colonial America, where it eventually became the office of attorney general. All fifty states have an office of attorney general created either by constitution or statute. ...

The most far-reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, 'the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest.... [H]e may abandon, discontinue, dismiss or compromise it.' In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a

¹⁵/(...continued)

branch" undercutting the Attorney General's "attorney-client relationship" with the Governor, which "has to be based on faith and personal selection"; instead, Attorney General should be an "executive appointee" and "an attorney largely for the executive department"; Delegate Stewart stating that rather than giving independent advice to both the executive and the legislature, "the attorney general [should be] purely and simply the adviser for the executive"; Delegate Rivers, a territorial attorney general, agreeing that the Attorney General should not be expected to counsel both the governor and the legislature, and that an elected attorney general would undercut the constitutional intention to have a strong executive, because an elected attorney general might be of an "opposite political faith," otherwise not "see eye-to-eye" with the governor, or be "inadequate or hostile to [the governor]"; Delegate Buckalew opposing the Judicial Council proposal as inconsistent with the commitment to a strong executive). See also *id.* 2284 (Delegate Taylor explaining that by not making the attorney general a constitutional office, the Convention was recognizing that "it was a legal department of the executive branch and ... the governor would have the right ... to appoint the attorney general who sets up the legal department of the executive department").

suit when he determines that continued litigation would be adverse to the public interest.

Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 677 (Ala. 1990) (footnotes omitted) (attorney general had authority to dismiss state insurance department's proceedings in appeals court despite objection of commissioner of insurance).^{16/}

Alaska takes a similarly expansive view of the Attorney General's common law powers. Because the nature and extent of those powers is fundamental to the issue addressed in this memorandum, the Alaska Supreme Court's seminal discussion of the subject deserves extended quotation:

Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020 indicates that the office of the Attorney General is to function with those powers and duties normally ascribed to it at common law:

(b) The attorney general shall . . .

(7) perform all other duties required by law or which usually pertain to the office of the attorney general in a state.

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.

When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers. Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. The state constitution is divided into a number of separate articles. Since Article III concerns the executive

^{16/} See also 6 W. Holdsworth, A History of English Law 467-68 (1924); National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 9-17 (1980); Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 Am.J. of Legal History 304 (1958).

branch, it can fairly be implied that this state does recognize the separation of powers doctrine.

Both federal and state courts have consistently and carefully observed the line which divides their branch of government from that of the executive. They have held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding.

"In that field, the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state."

The order to prosecute by the Superior Court overstepped this line and was an infringement upon the discretionary powers residing in the executive branch. Such an order is not within the province of the court.

We conclude that, although we have jurisdiction to entertain this case and to find, as we have, the existence of legal authority, we do not have power to control the exercise of the Attorney General's discretion as to whether he will take action in any particular cases of contempt for non-support.

Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975) (footnotes and citations omitted) (emphasis added).^{17/}

It is thus entirely clear that, as an incident of both common law and statutory powers, the Attorney General has the discretionary authority to settle the State's litigation.^{18/}

^{17/} In addition to AS 44.23.020, which codifies certain of the Attorney General's inherent powers and provides other duties for him or her, other statutes, far too numerous for citation, expressly provide for the Attorney General to initiate or defend administrative and judicial proceedings. However, "[t]he duties of the office are so numerous and varied that it has not been the policy of state legislatures to attempt specifically to enumerate them." State ex rel. Olsen v. Public Service Commission, 283 P.2d 594, 598-99 (Mont. 1955).

^{18/} See also State of Oklahoma ex. rel. Wilson v. Blankenship, 308 F. Supp. 870, 875 (W.D. Ok. 1969), rev'd. on jurisdictional grounds, 447 F.2d 687 (10th Cir. 1971), cert. denied, 405 U.S. 918 (1972) ("Ordinarily, the Attorney General both under the common law (continued...)

A. The Attorney General Has The Authority To Agree To
A Settlement That Includes A Joint Trust Fund

The Trust Fund settlement device agreed to by the Attorney General in the Exxon litigation is appropriate under both common law and state and federal statutes.

First, as part of the Attorney General's common law authority to initiate, participate in and settle litigation, the Attorney General may seek any available legal or equitable remedy, even if a particular remedy is not expressly provided by statute.^{18/}

^{18/} (...continued)

and by statutes, may control and manage all litigations in behalf of the state and is empowered to make any disposition of the state's litigation, which he deems for its best interest"); Island-Gentry Joint Venture v. State Through State Board of Land and Natural Resources, 554 P.2d 761 (Haw. 1976) (attorney general has exclusive authority to control and manage for state all phases of civil litigation in which state has an interest, and such authority necessarily includes control of settlement of actions); Sarkeys v. Independent School District, 592 P.2d 529, 536 (Okla. 1979) ("The authority of the Attorney General to settle or compromise the litigation in question, in the absence of fraud or collusion is exclusive."); State ex rel. Derryberry v. Kerr-McGee, 516 P.2d 813 (Okla. 1973) (attorney general had authority to settle and compromise asphalt price-fixing case; absent "fraud or collusion," court will presume that case settled for valid reasons, based on Attorney General's judgment as to the state's best interests); State v. Jones, 41 So.2d 280 (Ala. 1949) (attorney general had power to enter into good faith settlement, despite constitutional provision forbidding compromise or release of obligations owed the state).

^{19/} Attorneys general have been recognized to have numerous common law litigation powers, including: to institute and intervene in civil suits to protect the public interest, in their discretion; to challenge the constitutionality of legislative or administrative actions; to bring suits under federal law to protect members of the public; to intervene in regulatory rate cases; to litigate parens patriae (for the benefit of the state's citizens) in cases involving a wide range of matters; to bring proceedings against public officers; to sue for abatement of nuisances; to enforce charitable trusts; to intervene in will contests; to seek revocation of corporate charters; to represent state agencies; and to initiate criminal prosecutions, even where local prosecutors have not done so. See National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 36-71 (1980).

Thus, in State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982), the Alaska Supreme Court held that the State's Consumer Protection Act did not regulate real property sales and that the State's Uniform Land Sales Practices Act would not apply retroactively to certain land purchases. However, the Court held that neither statute restricted "the court's traditional equity powers" to award restitution "at the instance of the State," as a remedy to benefit defrauded land purchasers. 660 P.2d at 416.^{20/}

Furthermore, the Court held that the Attorney General, on behalf of the State, had the authority to pursue the common law fraud claims of land purchasers and to seek restitution for them based on those claims. Quoting and reaffirming its recognition of the Attorney General's broad common law powers in the Public Defender case, discussed previously, the Court concluded:

We believe that the above language [from the Public Defender decision] forecloses any argument that the State is without authority to bring suit in the absence of express statutory authority. This view finds ample support in the decisions of other jurisdictions where the attorney general's common law powers are recognized. ... This authority has been held to confer standing on the attorney general to seek redress for common law fraud.

We therefore hold that the State has the authority to bring suit in the public interest on the basis of common law fraud to obtain restitution for defrauded land purchasers. ... [I]t is not the court's function to pass upon the Attorney General's determination of what is or is not in the "public interest"

660 P.2d at 420-21.

^{20/} In reaching this conclusion, the Court found "persuasive" the California Supreme Court's reasoning in a case involving a substantially similar issue. In that case, People v. Superior Court, 507 P.2d 1400 (Cal. 1973), the Court ruled that while a California statute only expressly authorized the California Attorney General to sue to enjoin misleading advertizing, that statute "did not restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference'" Therefore, the California Court held that courts retained their "inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the consumers found to have been defrauded." 507 P.2d at 1402 (citations omitted and emphasis added). The Alaska Supreme Court's First National Bank opinion noted that "a number of analogous federal cases ... had reached the same conclusion." 660 P.2d at 416.

The trust, used as the vehicle for the Exxon settlement, is an ancient equitable creature. Litigants have long asked courts to infer or create trusts as a way to remedy legal or equitable wrongs. See, e.g., Klondike Industries Corp. v. Gibson, 741 P.2d 1161, 1171 (Alaska 1987) (court may impose constructive trust where it concludes that holders of legal title to property should be considered to have duty to act consistently with the equitable interests of other persons in property); Ayers v. Jackson Township, 525 A.2d 287, 314 (N.J. 1987) (citing authorities in support of creation of equitable fund so that 1) damages from toxic discharge would not have to be estimated in advance; 2) recovery could be used for medical monitoring; and 3) trustees could make decisions on disbursements on equitable grounds). See also Milliken v. Bradley, 433 U.S. 267, 281 (1976) (courts have "broad" "equitable powers to remedy past wrongs").^{21/}

For almost 40 years, environmental trusts have been created, by settlements and court orders, as a method to use monies paid by a polluter to benefit the resource damaged by the polluter's activities. See For Land's Sake 1 (New Jersey Conservation Foundation, Morristown, N.J., 1990). Such trusts have been established with both private plaintiffs and governmental trustees making the decisions about expenditures of trust monies.^{22/}

^{21/} The creation of common or trust funds for recoveries in class action litigation is one notable and well-established example of the courts' willingness to create such funds as a remedy. See generally 2 H. Newberg, Newberg on Class Actions §§10.01 et seq., 11.15 - .21, 12.01 et seq. (2d ed. 1985) (classwide damage awards and lump sum fund settlements).

^{22/} Some examples gleaned from research done by the National Wildlife Federation as a result of the Exxon litigation:

The Chesapeake Bay Foundation and Natural Resources Defense Council sued Bethlehem Steel for polluting the Chesapeake Bay in violation of its clean water permit. The resulting consent decree gave them extensive oversight powers in administering a \$1.1 million trust fund, with monies to be spent on projects which "further the goals of the Clean Water Act by contributing to the restoration and protection of the Chesapeake Bay and its resources," consistent with the "mitigation project criteria" set forth in the EPA's Clean Water Act settlement policies. Chesapeake Bay Foundation v. Bethlehem Steel Corp., Civ. No. Y-84-1620 (D.Md., July 14, 1987).

The Hudson River Foundation was the result of a protracted case brought by environmental organizations and Hudson River fishermen opposed to the construction of the Storm King power plant. The settlement established a \$12 million endowment for scientific research on the ecology of the Hudson River.

(continued...)

²²/ (...continued)

Representatives from the state and federal government, from the different plaintiff groups, and from New York utilities sit on a panel which recommends projects for a trustee panel. Final authority for administration of funds rests with the trustee panel, comprised of ten distinguished persons independent of government. See generally R. Sandler and D. Schoenbrod, The Hudson River Plant Settlement (New York University, 1981).

The Virginia Environmental Endowment began with a \$13.2 million deposit from Allied Chemical Corporation which had been found guilty of polluting the James River with the toxic chemical kepone. The presiding federal judge approved Allied's suggestion that instead of paying a fine, it would create an environmental trust. The judge appointed independent, prominent citizens to administer the Endowment. Projects undertaken range from educating citizens to tackling pollution problems in the Virginia area. See Virginia Environmental Endowment, Annual Report (1987).

The Ohio Fund was established pursuant to a consent decree between the EPA and parties responsible for the administration of the Hamilton County municipal sewer system, the Metropolitan Sewer District of Greater Cincinnati, which failed to comply with its NPDES permit. The purpose of the trust is to fund "environmentally beneficial project(s)" for enumerated purposes in accordance with certain criteria. The project(s) are required 1) to further the statutory goals of the Clean Water Act, 2) to address the kinds of environmental problems caused by the defendants' noncompliance, 3) to supplement any existing legal requirements, and 4) to benefit the general public rather than any of the defendants or any governmental unit. U.S. v. Bd. of County Commissioners of Hamilton County, Ohio, et al., C-1-89-0693 (S.D. Ohio, March 11, 1985).

The Whooping Crane Trust is a \$7.5 million "trust in perpetuity" created in a consent decree between an electric power company and plaintiffs, the State of Nebraska and the National Wildlife Federation. Each of the three parties to the agreement (the power company, the governor of Nebraska, and the National Wildlife Federation), appoint one trustee who may be replaced at the pleasure of the party who appointed him. The purpose of the trust is "to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska;" the trustees may choose to fund "programs, activities, and acquisitions ... formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life support system for the whooping crane and other migratory species which utilize it." Platte River Whooping Crane Maintenance Trust, Trust Declaration. See also U.S. v. Metropolitan District Commission, No. 85-0489-MA (D.Mass. 1988) (establishing Boston Harbor Massachusetts Bay
(continued...)

Trust funds have often been created by consent decrees entered in Clean Water Act actions for injunctive relief and other remedies.^{23/} See, e.g., PIRG v. Powell Duffryn, 913 F.2d 64, 82 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991) ("in a Clean Water Act case, a court may fashion injunctive relief requiring a defendant to pay monies into a remedial fund, if there is a nexus between the harm and the remedy"; district court can create trust fund as part of equitable relief, but civil penalties must be paid into U.S. Treasury).

The environmental trust fund most analogous to that created under the Exxon Settlement Agreement was established as a result of litigation relating to the Shell Oil Company's discharge of oil from its Martinez, California complex. That discharge affected lands and waters, including wetlands around the Shell Marsh and Peyton Slough, and entered into the Carquinez Strait and Suisun Bay, near San Francisco.

^{22/}(...continued)

Trust). Cf., United States v. Browning-Ferris Industries Chemical Services, Inc., 704 F.Supp. 1355 (M.D. La. 1988) (attorney general had defendant pay a portion of recovery to university to endow environmental research program).

^{23/} The remedies expressly available under the CWA also arguably exist at common law. The courts have long recognized common law "public trust" and "parens patriae" doctrines, under which a government is entitled to seek damages and injunctive relief in order to protect land or water resources in which it has a "public trust" interest. See, e.g., Maine v. M/V Tamano, 357 F.Supp 1097, 1101 (D.Me. 1973) (state can seek both injunctive relief and damages for oil discharge under public trust and parens patriae theories); Aerojet-General Corp. v. San Mateo County Superior Court, 257 Cal.Rptr. 621 (Cal.App. 1989) (State's public trust interest in navigable portions of river was sufficient for standing to claim damages caused by environmental pollution). See generally 1 V. Yannacone, B. Cohen, S. Davison, Environmental Rights and Remedies §2.1 et seq. (1972) (discussing development of trust doctrine). Under common law theory then, the State might seek as an equitable remedy, and a court might order created, a fund to benefit damaged resources. See, e.g., Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 495-96 (1971) (fund sought for restoration of waters polluted by mercury); State v. Levi Strauss & Co., 715 P.2d 564 (Cal. 1986) (settlement fund for class members created in parens patriae consumer action brought by Attorney General). See also 1 W. Rodgers, Environmental Law §2.13D (1986) (range of equitable remedies possible in environmental cases is "virtually unlimited").

The Consent Decree in that case, a copy of which is available to the Legislature, resolved the claims of the United States Government, as well as those of numerous California state and local governmental entities and agencies that were also plaintiffs. U.S., et al. v. Shell Oil Company, Civ. No. C- 89-4220 (N.D. Cal., Nov. 29, 1989). Like the present case, the Consent Decree used a Clean Water Act trust as the mechanism for collectively resolving claims for natural resources and other damages sought under various state and federal statutes, as well as common law theories. See Shell-Martinez Consent Decree ¶¶I(D)-(J), V.

Prominent among its settlement payment provisions, the Consent Decree provides for approximately \$11 million to be placed in a joint trust fund.^{24/} A Memorandum of Agreement incorporated into the Consent Decree provides for decisions concerning disbursement and management of the trust fund to be made by a Committee comprised of representatives of federal, California and local governmental entities. See Shell-Martinez MOA ¶I. While the Shell-Martinez MOA enumerates various uses to which the fund monies may be devoted, the Committee is to "be guided by the primary objectives of restoring, rehabilitating and acquiring the equivalent of the natural resources adversely affected by the Oil Spill." See Shell-Martinez MOA ¶II.

Cooperation with the Federal government and the creation of a joint trust fund is clearly appropriate under the circumstances of the Exxon litigation, as it was in the Shell-Martinez case.

B. The Clean Water Act Trust Remedy

The Clean Water Act ("CWA") provides that the State and Federal governments are to act as "trustees" in seeking recovery for natural resource damages and that all recoveries by the trustees are to be used for restoration and resource acquisition purposes. See 33 U.S.C. §1321(f)(5) ("The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.").

^{24/} Like the Exxon Settlement Agreement, the Shell-Martinez Consent Decree, though dedicating the majority of the recovery to an environmental trust fund, also provided for significant monies to be paid directly to the numerous governmental parties as reimbursement for their costs and clean-up efforts, as well as penalties. See Shell-Martinez Consent Decree ¶IV(A).

Consistent with the trustee status under which the governments may recover natural resource damages, the statute is interpreted to require that such recoveries be held in trust for the damaged resources. See Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 675 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981) (requirement that recoveries be used to benefit damaged resource is "[i]n accordance with the trust analogy"). See also W. Fratcher, Scott on Trusts §§170, 192 (4th ed. 1987) (trustee's duty is to act with respect to trust property in the interests of the trust's beneficiaries).

The regulations promulgated under the CWA concerning such trusts expressly address only the situation where a single sovereign recovers money. "All sums recovered ... by the Federal government acting as trustee shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury." 43 C.F.R. §11.92(a)(1). "All sums ... recovered ... by a State government acting as trustee shall either: (i) be placed in a separate account in the state Treasury; or (ii) be placed by the responsible parties in an interest bearing account payable in trust to the state agency acting as trustee." 43 C.F.R. §11.92(a)(2). These sums must be spent "out of the account ... only for those actions described in the Restoration Plan" 43 C.F.R. §11.92(c). The regulations further provide the State trustee responsible for the Restoration Plan and spending trust proceeds in accordance with that Plan is to be an "agency designated by the governor". 43 C.F.R. §11.14(rr).

However, relevant to the joint Trust Fund created by the Exxon Settlement Agreement, the regulations also provide that the state and federal trustees should cooperate to "[d]evise and carry out a plan" for restoration and resource acquisition where the affected resources are "contiguous," or under joint trusteeship. 40 C.F.R. §§300.615(a), (b)(4).^{25/} The CWA and its accompanying regulations therefore strongly support the conclusion that joint recoveries should be placed in a joint trust fund and administered cooperatively. See also Alaska Const., Art. XII, §2 ("The state ... may cooperate with the United States ... on matters of common interest.").

Based on these statutory and regulatory provisions, a joint trusteeship was considered the appropriate basis for the Consent Decree in the Shell-Martinez oil spill litigation,

^{25/} See also 43 C.F.R. §§11.32(a)(1)(ii), (a)(1)(iii) (trustees encouraged to cooperate in assessing inseparable damages and required to cooperate in pursuing such damages); 40 C.F.R. §§300.73-.74 (requiring trustee coordination and cooperation in fulfilling duties which, under 33 U.S.C. §1321 (f)(5), include pursuing damage claims and implementing restoration plan).

discussed previously in this memorandum. A joint trusteeship will almost certainly be upheld by the courts as an appropriate settlement mechanism, authorized by federal law, in the Exxon case as well.

C. No Statutory Provision Expressly Precludes
The Trust Fund Settlement

The Attorney General's authority to enter into the joint Trust Fund settlement with Exxon and the Federal government is certainly subsumed within the Attorney General's broad, inherent settlement powers. Because of the inherent nature of those powers, "[i]t is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law," the Attorney General retains all his or her common law powers "in the absence of express restrictions" imposed by constitution or statute. Hansen v. Barlow, 456 P.2d 177, 178 (Utah 1969) (emphasis added).^{26/}

No Alaska statutory provision expressly precludes the Attorney General from settling litigation like the EXXON VALDEZ case by means of a settlement which includes a joint Trust Fund.^{27/}

^{26/} Accord, Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 684 (Ala. 1990); Olsen v. Public Service Commission, 283 P.2d 594 (Mont. 1955); Lund ex rel. Wilbur v. Pratt, 308 A.2d 554, 558 (Me. 1973) (attorney general "may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights"); Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987) ("[i]n the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every civil suit instituted by him in his official capacity ..., and his authority extends as well to control of defense of civil suits against the state, its agencies, and officers"); State ex rel. Derryberry v. Kerr-McGee Corporation, 516 P.2d 813 (Okla. 1973). See also National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 24 (1980) ("In states which recognize common law powers, codification does not affect such powers unless the statutes expressly state so.")

^{27/} Given the absence of any such express prohibition, it is unnecessary to speculate concerning the issue whether and to what extent the Legislature might prohibit the Attorney General from so settling the litigation. However, it is clear that the separation
(continued...)

²⁷/ (...continued)

of powers doctrine would restrict any legislative attempt to intrude on the executive branch's discretionary authority to conduct litigation in the State's interest. See Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) (appointment of executive officers clearly an executive function, and legislature could not require legislative confirmation of lesser executive officers in addition to those made subject to confirmation by the Alaska Constitution); In re Mackay, 416 P.2d 823 (Alaska 1965), cert. denied, 382 U.S. 803 (1965) (inherent power of Supreme Court over suspension and disbarment of attorneys cannot be defeated by legislative branch of government). Cf., Granato v. Occhipinti, 602 P.2d 442 (Alaska 1979) (superior court could not constitutionally require State executive agency to perform home-study in private child custody dispute); Rust v. State, 582 P.2d 134 (Alaska 1978) (sentencing court could recommend that defendant be incarcerated in particular facility, but ultimate responsibility for classification and placement of defendant was vested in Division of Corrections, and court lacked authority to order defendant incarcerated in a designated facility); State Carlson, 555 P.2d 269 (Alaska 1976) (separation of powers principles precluded trial court from accepting guilty plea to lesser charge of manslaughter over the opposition of the prosecution). See also Bowsheer v. Synar, 478 U.S. 714 (1986) (powers vested in the Comptroller General under "reporting provisions" of Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws); State Board of Ethics for Elected Officials v. Green, 545 So.2d 1031 (La. 1989) (to extent statute authorized Supervisory Committee on Campaign Finance Disclosure to file civil proceedings to collect penalties for violation of Campaign Finance Disclosure Act, it unconstitutionally violated separation of powers; Committee members were legislatively appointed, and thus could not constitutionally be authorized to enforce the law); In re Opinion of the Justices, 532 A.2d 195 (N.H. 1987) (once legislature has made appropriation for executive branch, requirement of fiscal committee approval of contracts made pursuant thereto is unconstitutional intrusion into executive branch of government); State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) (constitutional provision that duties of state executive "shall be prescribed by law" does not allow the legislature to transfer inherent or core functions of executive officers); General Assembly of State of New Jersey v. Byrne, 448 A.2d 438 (N.J. 1982) (any legislative action which excessively interferes with executive's ability to faithfully execute the laws passed by Legislature violates separation of powers); Aiken County Bd. of Ed. v. Knotts, 262 S.E.2d 14 (S.C. 1980) (legislature may not, consistent with separation of powers, undertake to both pass laws and execute them by its own members); State ex rel. Guste v.
(continued...)

The only statutes that have been suggested to have potential impact on that settlement authority are the Alaska statutes concerned with oil and hazardous substance release remedies. However, those statutes can not be fairly said to preclude expressly the Settlement Agreement or its joint Trust Fund mechanism, for several reasons.

First, AS 46.08.020 and AS 46.08.010 require "[m]oney received by the state" to be "deposited in the general fund and credited to the special account called the 'oil and hazardous substance release account'." As discussed earlier in this memorandum in the context of the appropriations and dedicated fund issues, the joint Trust Fund monies are not monies "received by the state." Therefore, the statutory requirement to deposit such monies in the general fund, as a matter of plain statutory language, simply does not apply.

Furthermore, the most plausible reading of these statutes is that they deal only with monies recovered by the State as reimbursement for costs, as the February 15, 1991, memorandum to Senator Cotten from the Assistant Revisor of Statutes stated at page 4, ¶II(C). AS 46.08.070(a) empowers the Attorney General to seek compensation for State cleanup related expenditures. That section states:

The commissioner shall seek reimbursement promptly under this section, AS 46.03.760(e), or federal law for the cost incurred in the cleanup or containment of oil or a hazardous substance that has been released.

(emphasis added).

AS 46.08.020 similarly makes clear the cost reimbursement nature of the recoveries subject to the statutory chapter, in outlining potential appropriations of these proceeds:

²⁷/(...continued)

Legislative Budget Committee, 347 So.2d 160 (La. 1977) (legislature may not appoint officers to enforce its laws because that would invade the exclusive realm of the executive).

Some courts have held that ~~the~~ legislature may not restrict the attorney general's common law powers. See, e.g., Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority, 456 N.E.2d 50, 55 (Ill. 1983) (Attorney General's duties are prescribed by law and include those powers traditionally held by Attorney General at common law; while legislature may add to his powers, it cannot reduce his common-law authority in directing legal affairs of state); Murphy v. Yates, 348 A.2d 837 (Md. 1975) (legislature may not abrogate common-law powers of Attorney General).

(a) The legislature may appropriate from the following sources to the ["Oil and Hazardous Substance Release Response] fund:

(2) money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific cite [sic]...; [and]

(3) fines, penalties, or damages recovered under this chapter or other law for costs incurred by the state as a result of the release or threatened release of oil or a hazardous substance.

(b) Money received by the state under (a)(2) and (a)(3) of this section shall be deposited in the general fund and credited to the special account called the "oil and hazardous substance release mitigation account."

The relevant sections thus require on their faces that only those damages, penalties or fines recovered for "costs incurred by the State" for "clean up and containment" be placed in the special account in the general fund.^{28/}

Additionally, it is important to recognize that if any Alaska statute were interpreted to preclude the Attorney General from pursuing or agreeing to Clean Water Act trust fund remedies,

^{28/} The Legislature's concern was that the general fund be reimbursed for outlays of money. The legislative Fiscal Note to HB 205, the source of AS 46.04.010 as it presently reads, states, "This procedure is designed to reimburse the general fund and thus hold down overall state cleanup costs. It is intended that about 20% of all cleanup costs can be recovered." 1980 House Journal Supp. No. 43, Apr. 8, 1980. Similarly, in introducing this legislation, Representative Miles stated that "it provides for prompt clean up of oil spills and for prompt reimbursement of those spills." House Floor debates, Apr. 15, 1980.

With respect to AS 46.08, Representative Navarre noted in support of the new fund that "it appeals to me because although it offers the opportunity to charge back to the responsible party, if we can identify them, the cost of cleaning up these areas as we discover them." House Resources Comm., Jan. 29, 1986. Former DEC Commissioner Ross similarly told the House Finance Committee on Feb. 17, 1986, that "we would anticipate operating this fund in exactly the same manner, of looking for liability, and assigning it accordingly when we found it, and reimbursing the state." (emphasis added). See also Statement by Representative Pourchot before House Finance Committee, Mar. 10, 1986; statement by Representative Davis on House Floor, Mar. 19, 1986.

serious federal supremacy and preemption issues would be raised.^{29/} While the State may in many contexts provide remedies more liberal or protective than those provided by federal law,^{30/} the courts might well rule invalid an attempt by the Legislature effectively to eliminate a remedy clearly provided under federal law.

In brief, were a State statute interpreted to preclude the State from participating in trust fund recoveries under the Clean Water Act, that statute would likely be held preempted, because it would frustrate and serve as an obstacle to the Clean Water Act's purposes. See International Paper Company v. Ouellette, 479 U.S. 481, 491 (1987) ("[i]n addition to express or implied preemption, a state law also is invalid to the extent that it 'actually conflicts with a ... federal statute'"; Clean Water Act preempts private water pollution suit based upon the common law of nuisance of the state in which the alleged injury occurred, when the source of the alleged injury is located in another state).

Finally, it would make little sense for the legislature expressly to constrain the Attorney General's discretion by prohibiting him or her from agreeing to a settlement, based on federal laws, that establishes a joint State-federal environmental restoration trust fund, even when that settlement mechanism would provide the best overall outcome for the State. The Legislature clearly, and wisely, has not done so.

VI. THE SETTLEMENT STRUCTURE WAS NEGOTIATED AND AGREED TO REASONABLY AND IN GOOD FAITH

It was thus certainly within the Attorney General's authority and discretion to decide to settle the State's Oil Spill litigation with Exxon, in part by agreeing to the creation of a resource restoration Trust Fund jointly administered by State and federal Trustees. As quoted previously in this memorandum, the

^{29/} The Supremacy Clause provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U. S. Const., Art. VI.

^{30/} See, e.g., Webster v. Bechtel, 621 P.2d 890 (Alaska 1980) (federal Fair Labor Standards Act did not preempt State from providing greater protection and more expansive remedies under the Alaska Wage and Hour Act).

Alaska Supreme Court has strongly declared that where the Attorney General has the "legal authority" to make a particular decisions with respect to the State's litigation, Alaska's courts "do not have power to control the exercise of the Attorney General's discretion" To attempt to do so would be "an infringement upon the discretionary powers residing in the executive branch" "not within the province of the court." Public Defender Agency, 534 P.2d at 951.

Even if the Supreme Court's clear statement in that regard were disregarded, at most an Attorney General's decision concerning the conduct and disposition of State litigation can be legally challenged only if that decision was made in bad faith or, perhaps, for entirely arbitrary and capricious reasons. See Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 677 (Ala. 1990) (courts have either "refused to interfere with the attorney general's use of his discretionary power" or "left undisturbed the use of the power to control litigation as long as the attorney general's actions are not arbitrary, capricious, or in bad faith").^{31/}

The Governor and the Attorney General must be allowed to exercise discretion to settle cases in good faith and on whatever lawful basis they think to be in the State's best interests. They are not required to doggedly pursue in every case all potential State positions and claims. In some cases, they might decide for a variety of reasons, including litigation strategy or problems of proof, simply to abandon potential claims, without seeking any recovery for them. In other cases, they might determine that injunctive relief would provide the best settlement consideration (for instance, an agreement by Exxon itself to undertake certain cleanup or restoration work at the direction of State and federal agencies), rather than seek any monetary recovery under any State or federal law.^{32/}

^{31/} See also Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980) (Supreme Court will not interfere with performance of attorney general's discretionary duties, absent bad faith); Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977) (attorney general's discretionary power not to be used in arbitrary or capricious manner); State ex rel. Carmichael v. Jones, 41 So.2d 280 (Ala. 1949) (consent agreement between attorney general and taxpayer settling unliquidated claim for taxes was lawful because made in good faith and within power of Attorney General); Cooley v. South Carolina Tax Commission, 28 S.E.2d 445 (S.C. 1943) (attorney general acted in good faith in compromising estate tax).

^{32/} See also Rubin v. Board of Environmental Protection, 577 A.2d 1189, 1192 (Me. 1990) ("Attorney General is entitled under the common law to seek injunctive relief against violations" of law).

There is no sense in which the Exxon Settlement Agreement was negotiated and agreed to in bad faith or arbitrarily and capriciously. Instead, for the reasons discussed in this memorandum and which will be discussed further with the Legislature during the public comment and legislative approval process, the conclusion was reached that it was in the best interests of the State of Alaska to settle the Oil Spill litigation in large part through the mechanism of a joint Trust Fund, rather than pursue separately the State's various claims for damages. For present purposes, this memorandum will merely summarize the basic reasons why the joint Trust Fund was a reasonable, even essential, component of a settlement.

As a fundamental matter, it was important for the State and Federal governments to act in concert in seeking a settlement. By acting and settling together with the Federal government, the State was able to achieve a better overall settlement for the people of Alaska, both in terms of receiving reasonable reimbursement damages (as to which the Legislature will have appropriations authority), and obtaining the greatest benefit for Alaska's damaged natural resources.

A joint Trust Fund recovery for natural resource damages and restoration was reasonably necessary to such a joint settlement because of potential disputes concerning which sovereign is trustee for which resources. It was desirable to avoid such disputes for several reasons, including: 1) the expense and considerable time unquestionably required for litigating -- undoubtedly including through the available appeals processes -- the numerous resource trusteeship issues presented; 2) the uncertain outcome, always attendant to litigation even in more clearly charted legal waters, of such disputes because of numerous unsettled questions of law concerning trusteeships of various resources; 3) the arguable prospect that some resources or restoration efforts might ultimately be held by the courts to be subject to joint trusteeship by the State and Federal governments; 4) the practical fact that even with respect to resources that might be identified with some confidence as subject to the trusteeship of a single sovereign (e.g., state tidelands and federal uplands), both the damage to those resources and restoration efforts affecting them are very much intertwined; and, finally, 5) as a tactical matter, resource trusteeship disputes could certainly have been used by Exxon to complicate hugely the litigation by interjecting at various stages issues as to which sovereign could recover and bore the burden of proving damages with respect to which resources, thereby both dividing the State and Federal governments and likely prolonging further Exxon's day of reckoning and payment.

The State believes that it has a stronger claim to many of the fish, wildlife and other natural resources impacted by the spill than does the Federal government and might well have

prevailed to that effect after lengthy and costly litigation. However, in light of the considerations mentioned above, it was more appropriate and in the best interests of the State to agree instead to a settlement that in part employed a joint State-federal resource restoration Trust Fund. Such a Trust Fund was a necessary ingredient of a settlement designed to produce the greatest benefit to the people of Alaska.

CONCLUSION

This memorandum has discussed the clear authority of the Attorney General to agree to the settlement of the EXXON VALDEZ litigation on the terms contained in the Settlement Agreement.

However, despite that authority, the settlement is obviously politically sensitive, not only because of the magnitude of the resource and economic issues addressed by the Settlement Agreement, but also because of the profound impact of the EXXON VALDEZ Oil Spill on both Alaska's political culture and -- very directly -- on the lives of many Alaskans.

Therefore, in recognition of the public's interest in the settlement and the Legislature's perceived desire to review the Settlement Agreement, the Settlement Agreement was made subject both to a public comment period and review by the Alaska Legislature. As paragraph 37 of the Agreement provides, if the Legislature does not approve the Settlement Agreement within a prescribed time period, the Agreement may be terminated by the State merely by giving notice to Exxon and the United States government.

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Memorandum

5 April 1991

To: Max Gruenberg

From: Gregg Erickson *Gregg Erickson*

Subject: Economic Issues in Proposed Exxon Settlement

During the Special Committee's meeting on March 27, you requested that I work with your staff to follow-up on several issues. Some initial comments are given below. An additional memorandum addressing the more general issue of valuing natural resources injuries is in preparation.

Natural Resources Damages

What is meant by "natural resources damages"?

If Mr. A. smashes Mr. B's car, justice requires that Mr. A repair the car to its condition before the crash, or provide an equivalent replacement vehicle, or sufficient money to make Mr. B indifferent to the injury inflicted on his car. The money that Mr. B gets is his "damages," not the injury to his car.

Natural resource damages are, like the money paid to Mr. B, "compensatory and remedial" (see the definition on p. 5 of the consent decree), but from an economist's standpoint they differ from ordinary damages in two ways: (1) the injured property must in some sense be held in common ownership; and (2) the injury must be so broadly inflicted that private parties have an insufficient economic incentive to recover all the damages.

The injured resource need not be a part of nature's endowment; for example, injury to cultured fish in an artificial lake would almost certainly give rise to natural resources damages, provided the lake and fish were public resources. Commercial fishermen who lose income because of an oil spill are usually not thought to have a claim to natural resources

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damages, as long as they have sufficient economic incentive to pursue private litigation.

What are natural resources services?

Natural resource services are a flow, distinct from the natural resources themselves, which are the stock of assets that provide the flow. If Mr. A destroys Mr. B's House, Mr A is not only liable for replacing the house (the stock), but also liable for providing Mr. B a place to live (maintaining the flow of housing services) while the new house is being built. The robins that arrive in Juneau each April are a valuable natural resource stock, providing insect control, bird-song, pleasure to bird-watchers, food to certain predators, and other valuable natural resources services.

Do natural resources damages include economic losses as from lost tax revenue? If not, is the state then giving up these claims?

It is unlikely that lost tax revenue would be considered natural resources damages.

Excepting the municipal portion of the fish taxes, the settlement explicitly extinguishes the state's tax-loss claims. There is no provision in the consent decree for making good the loss to the general fund. This contrasts to the cleanup and damage assessment claims, for which general fund reimbursement is explicitly provided. The state's negotiators may have decided that the tax loss claims had little merit, or that reimbursement was bargained away for things they judged to be of greater importance. The restitution to be paid under the criminal plea agreement may have figured in the negotiator's thinking. The attorney general denies any role in that agreement, however, and in any event, the restitution monies may only be appropriated for specific purposes, and thus do not directly compensate for the unrestricted revenue the lost taxes would have provided.

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Why are the state's natural resources damages being treated as if they are inseparable from those of the federal government?

In principle, "ownership" can be determined for tidelands, submerged lands and a few other resources injured by the oil spill. Most of the natural resources damages, however, arise from injuries to biological resources to which the notion of ownership can be related only with difficulty. Who owns the sea otter, or the salt water she swims in? Who owns the clams she eats or the plankton that feed the clam? And if the sea otter dies because the clams die because the plankton die because of the oil, how is the injury and damages to be divided among the various "owners"? From an economic perspective, the notion of a joint trusteeship, whatever its deficiencies, must be measured against the expenditure of human talent and public funds that efforts by the governments to "divide the baby" would entail.

What limits are there to the "acquisition of equivalent resources"?

The federal Clean Water Act defines "restoration" as including "replacement and acquisition of equivalent resources." The question of how far one can stretch the notion of equivalent resources has been the object of considerable legal and bureaucratic discussion within the trustee agencies and among them and their legal advisers. Good economic arguments have been advanced to support the "equivalence" of a wide range of alternative resource acquisitions. For example, boat launching facilities near Talkeetna might be an economically and cost effective way to compensate sport fishermen for lost opportunities in Prince William Sound. "Equivalent resources" is an elastic concept, but restoration planners were advised that the further they chose to stretch it, the greater the risk of doing something that would be ruled non-reimbursable. Absent a compelling policy reason to push the limits, and anticipating vigorous challenges from Exxon, the attorneys counseled caution.

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The Dept. of Law has addressed restoration questions in a number of contexts, including a 1990 memorandum responding to concerns among staff at the Department of Natural Resources that the purchase of upland habitat scheduled for logging might be going beyond the definition. The committee may wish to request a copy of this and other memoranda addressing the definitions of restoration in federal law.

Restitution

On what sorts of things might the state properly spend the \$50 million that may come to the state as restitution under the criminal plea agreement?

The plea agreement provides that within 30 days of the agreement's acceptance Exxon will pay the state \$50 million in "remedial and compensatory payments...to be used by the State of Alaska exclusively for restoration projects related to the EXXON VALDEZ oil spill." Restoration includes "restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed at the prevention, containment, cleanup and amelioration of oil spills." (emphasis added)

In contrast to the rest of the definition, the italicized words are not found in federal statutes. The statutory language probably allows for a wide range of alternative resource acquisitions and restoration strategies. The addition of "enhancement" and "research programs directed at...oil spills" further widens the range of options available for spending the restitution money. The committee may wish to inquire concerning the origins of this new language.

Re-Opener Clause

The proposed consent decree allows the governments to collect up to \$100 million from Exxon after the year 2002 for additional restoration projects, but only if the governments can prove that "the injury [requiring restoration] could not reasonably have been known nor ... anticipated by any Trustee from any information in the possession of or reasonably

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available to any Trustee on the Effective Date." Is there any basis for determining the likelihood of this condition being met?

Speaking from the damage assessment perspective, it is difficult though probably not impossible standard to meet.

DIVISION OF LEGAL SERVICES

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MEMORANDUM

April 8, 1991

SUBJECT: State Constitutional Issues Related to the Exxon Valdez Settlement

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

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

QUESTION PRESENTED. You have asked if there are any state constitutional issues raised by the Exxon Valdez settlement.

SHORT ANSWER. There are certainly constitutional issues raised by the settlement documents. Unfortunately, there are no cases in Alaska clearly deciding these issues, and therefore I cannot state for certain that the settlement does or does not violate the state constitution. With that warning, what follows is my opinion on the issues raised.

1. The requirement in the consent decree and the MOA that the recovery from Exxon be used for certain purposes may violate against dedication of funds, art. IX, sec. 7, Constitution of the State of Alaska. However, there is a reasonable argument to be made that the dedication is within the "federal program" exception of art. IX, sec. 7.

2. While there is case law from other jurisdictions on both sides of the issue, in my opinion the provision of the MOA under which the three federal and three state trustees are to spend roughly \$700 million without appropriation by the legislature violates art. II, sec. 1, or art. IX, sec. 13.

3. There is a remote possibility that the dedication in the plea agreement would preclude the state from accepting the money, but I believe that the chances of a court making such a decision are extremely slim.

4. The legislature could cure the appropriation problem by a yearly appropriation. A one-time appropriation of the proceeds to be received in the future might violate the dedicated funds provision. While an appropriation for the required purposes would allow the money appropriated to be spent for those purposes, it would not cure any dedication problem in the agreement.

DISCUSSION.

I. The Settlement Documents. There are two documents related to the Exxon Valdez settlement---the consent decree (which settles the case between the state and Exxon and the federal government and Exxon)^{1/} and the memorandum of agreement and consent decree, hereinafter "MOA" (which settles the case between the state and federal governments concerning the proceeds to be received by both governments from Exxon.)^{2/} In addition, the plea agreement in a criminal case brought by the U.S. against Exxon^{3/} requires Exxon to pay money as restitution to the state, and therefore is also discussed here.

A. The Consent Decree. Under paragraph 8 of the consent decree, Exxon is to pay to the governments \$900 million (less certain cleanup costs incurred by Exxon) over a period of eleven years. In paragraph 10 of the consent decree the two governments agree (without participation by Exxon) that the \$900 million (less certain of Exxon's cleanup costs) will be paid as follows:

(1) up to \$72 million will be paid to the state to reimburse it for its past cleanup, response, assessment, and litigation costs;

(2) up to \$62 million will be paid to the U.S. to reimburse it for its past cleanup, response, and assessment costs;

(3) the state and federal governments will be reimbursed for cleanup costs incurred by either of them after December 31, 1990; and

(4) the remainder (referred to herein as "the trust fund money" or "natural resource damage recovery"), which will probably be in the neighborhood of \$700 million depending on future cleanup costs, will be spent for future assessment, rehabilitation, restoration, or replacement of the natural resources or services injured by the oil spill, or the acquisition of equivalent resources or services.

^{1/} This is filed in federal district court in Anchorage, case no. A-91-083 Civ.

^{2/} This is filed in federal district court in Anchorage, case no. A-91-081 Civ.

^{3/} This is filed in federal district court in Anchorage, case no. A-90-015-1 Cr. and A-90-015-2 Cr.

Finally, in paragraph 10, the governments "represent" that the money received under the consent decree will be held, allocated, and spent in accordance with the MOA.

The money that the state will receive under (1) and (3) above does not raise any issues under the state constitution if, as appears to be the case, that money will go to the state treasury and be available for appropriation without any restrictions on its use.^{4/} However, because the money received under (4) above must be spent for certain purposes, that provision may violate the prohibition on dedicated funds found in art. IX, sec. 7 of the state constitution.^{5/} In addition, to the extent that the representation concerning the MOA incorporates the MOA in the consent decree,^{6/} the consent decree may violate those sections of the constitution relating to the legislature's appropriation power, which are discussed below in relation to the MOA.

B. The MOA. Paragraph IVA2 of the MOA requires the two governments to establish a trust fund into which trust fund money will be deposited. The trust fund will be in the court registry unless the parties and the court agree otherwise. The money will be spent by 3 federal trustees (designated by the President) and 3 state trustees (designated by the Governor) acting jointly. It is to be spent for the purposes of restoring, replacing, enhancing, rehabilitating, or otherwise acquiring the equivalent of the natural resources injured as a result of the oil spill, and the lost services provided by those resources. In addition to the dedication of funds problem mentioned above, the MOA raises the question of whether the agreement to let the trustees establish a trust fund and spend the money without requiring an appropriation violates art. II, sec. 1 of the state constitution (vesting the legislative power, including the appropriation power, in the legislature), or art. IX, sec. 13 of the state constitution (requiring an appropriation before money can be withdrawn from the state treasury and requiring authorization for any obligation for the payment of money.)

C. The Plea Agreement. Under the plea agreement entered into by Exxon and the federal government, Exxon is to pay the state \$50 million in restitution. According to the plea agreement this money can be spent only for restoration, replacement, and

^{4/} The attorney general has taken the position that reimbursement money will be unrestricted, and I agree.

^{5/} In addition, AS 46.08.020(a)(2) states that the legislature may appropriate to the oil and hazardous substance release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance." In his April 2, 1991 opinion, at pages 26-27 the Attorney General states that this statute is limited to money reimbursed for cleanup expenses. However, the literal terms of AS 46.08.020(a)(2), unlike those of AS 46.04.010, suggest that all money recovered from a responsible party is to be general fund money subject to appropriation. It is possible therefore that the agreement may violate AS 46.08.020.

^{6/} A "representation" may not necessarily be the same as an agreement.

enhancement of resources affected by the oil spill, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup, and amelioration of oil spills. The requirement also raises the question of whether the legislature can accept the money, with restrictions on its use, given the prohibition on the dedication of funds in art. IX, sec. 7 of the state constitution.

II. The Prohibition Against the Dedication of Funds.

Art. IX, sec. 7, Constitution of the State of Alaska, reads as follows:

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

A. Dedication in the Consent Decree and MOA. Despite the fact that this section appears to restrict the dedication^{2/} of the proceeds of a "state tax or license," Alaska's Supreme Court has held that it applies to "the sources of any public revenues." State v. Alex, 646 P.2d 203, 210 (Alaska 1982). In Alex, the state Supreme Court relied on the history of the state constitutional convention, as discussed in an opinion of the Alaska Attorney General, which opinion concluded that revenues from the lease or sale of state natural resources could not be dedicated. 1975 Alaska Op. Atty. Gen. No. 9 (May 2). It seems highly likely that "revenues" would include money due the state under either a judgment for, or settlement of, the state's claims for damages to its natural resources. A settlement is, after all, very much an exchange of one state asset (the state's legal claims) for another (money). If the state had continued to pursue its state claims in state court, any recovery would certainly be "revenue" of the state. Even under the Clean Water Act, the trustee must be an authorized "representative" of the state. 33 U.S.C. 1321(f)(5). See 42 U.S.C. 9607(f)(2)(B) (state trustee must be "state official.") State recoveries under the Clean Water Act may be deposited in a special account in the state treasury. 43 CFR 11.92(a)(2). It seems likely that money exchanged for the extinguishment of the state's legal claim would be state revenue for the purposes of art IX, sec. 7 of the state constitution. Therefore, the question is whether the recovery from Exxon is subject to an exception to the dedicated funds provision.

^{2/} Although in the normal course of events this section will have the greatest effect on the legislative branch, by its terms it appears to apply to all state officials.

Based on the history of the state constitutional convention, the Attorney General has suggested that there may be certain "implied exceptions" to this provision, i.e., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, certain contributions from local governments, and tax receipts collected by the state on behalf of local governments. 1982 Op. Atty. Gen. No. 13, p. 11 (November 30). None of these include recoveries from a third party for damages to state natural resources. Moreover, to "imply" an exception for dedications that the attorney general establishes in a settlement, would give the attorney general unfettered discretion to circumvent this section of the state constitution by including in any settlement a "trust" requirement that the money be spent for a particular purpose. It may be that the court would imply an exception for money offered to the state as a gift, with conditions imposed by the donor, because in that case (1) no state official has participated in the dedication, and (2) the money is not being exchanged for a state asset. In the Exxon settlement however, the dedication applies (1) because of the Attorney General's decision to sue and settle under the Clean Water Act, and (2) to money exchanged for the state's legal claims against Exxon.

However, section 7 itself has several explicit exceptions, namely the Permanent Fund in art. IX, sec. 15, dedicated funds that existed at the time the sec. 7 was ratified, and those dedications "required by the federal government for participation in federal programs." Only the latter seems relevant.

To qualify under the "federal program" exception, (1) the dedication must be required; and (2) the state must be attempting to "participate in a federal program." The applicable provision of the federal Clean Water Act, 33 U.S.C. 1321(f)(5), requires that any damages received by the state under that section be used "to restore, rehabilitate, or acquire the equivalent of" the injured natural resources. Clearly, a recovery under the applicable provision of the Clean Water Act must be dedicated. However, it is not entirely clear that the full amount that will be dedicated to the trust fund is in fact required to be dedicated under the Clean Water Act. 33 U.S.C. 1321(f)(1)-(3) contain dollars per barrel limitations on recovery, except in cases of willful negligence or willful misconduct, and it is not clear whether the state's recovery under 33 U.S.C. 1321(f)(4) and (5) is similarly limited.^{8/} If it is so limited, and there was no evidence to support willful negligence or willful misconduct then the vast majority of the money that will be deposited in the trust could not be received under the terms of the Clean Water Act because it would exceed those dollar limitations. Therefore, it should not be subject to the dedication requirements of the Clean Water Act, and is not "required" to be dedicated under federal law.

^{8/} At the end of the April 3, 1991 hearing of the House Special Committee on the Exxon Valdez Settlement, the Attorney General indicated that he thought the dollars per barrel limitation would apply to the state's recovery, but that Exxon had waived the limitation.

Assuming that federal law does require the dedication of all of the roughly \$700 million, it is also not clear that suing under the Clean Water Act is "participation in a federal program" within the meaning of the dedicated funds provision. The delegates to the state constitutional convention adopted the "federal program" exception because they realized that without dedication, the state could not receive federal funding for certain programs e.g., fish and wildlife programs. 1975 Op. Atty. Gen. No.9 pp. 3-4 (May 2). If Alaska's Supreme Court were to take a strict view of the "federal program" exception, it could hold that the exception applies only to programs under which a dedication is required in order for the state to receive money from the federal government since that was the type of program envisioned by the drafters of the state constitution.

Even taking a slightly less restrictive view, the state Supreme Court could nevertheless hold that the exception did not apply where the state has the choice of receiving money under federal law with a required dedication of funds or of receiving it under state law without a dedication. The rationale for this interpretation would be that Alaska's Constitution establishes a strong policy against dedicated funds, and exceptions to it should be construed to allow dedication only when it is truly necessary for the state to receive some benefit. This less restrictive view would still bar the attorney general from settling under the Clean Water Act because that Act does not preempt state law, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), and therefore the state could simply pursue the claims under state law that it has already filed in state court. Under either of these two interpretations of the "federal program" exception, the court would essentially be saying that the attorney general could not take advantage of a federal law (that did not preempt state law) if the provisions of that federal law required a violation of the dedicated funds provision of state constitution. See McDowell v. State, 785 P.2d 1, 10 n. 3 (Alaska 1989) (Despite federal law that allowed state to manage federal land only if state recognized rural preference, state could not grant rural preference in violation of state constitution.)^{2/}

However, the Alaska Supreme Court might well interpret the "federal program" exception to include litigation under federal law, even though state remedies were

^{2/} The Attorney General has suggested in his April 2, 1991 opinion, at page 28, that state law that would effectively prohibit the state from suing under the Clean Water Act would be preempted, and therefore unenforceable, because it would serve as an obstacle to the Clean Water Act's purposes. However, since the Clean Water Act does not prevent a state from enacting its own remedies for spills covered by the Clean Water Act, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), this seems unlikely. In addition, the Clean Water Act expressly states that it does not preempt a state from imposing liability for oil spills, and that it does not affect any state law not in conflict with the section. 33 U.S.C. 1321(o)(2) and (3). Since the Clean Water Act contemplates that the state may establish its own remedies, it obviously does not require the state to sue under the Clean Water Act.

available. The rationale would be that the attorney general should not be limited in choosing available remedies because there may be tactical advantages to suing under federal law that are not available under state law. See Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975) (Dicta; the exercise, within constitutional limits, of the Attorney General's discretion in disposing of state litigation is not subject to review.) If the attorney general chooses to litigate under federal law, and federal law requires dedication of recoveries, then the basic purpose of the exception (to allow the state to take advantage of federal law despite a federal dedication requirement) has been met. Given the lack of case law on the "federal program" exception, it is difficult to predict how the state Supreme Court would interpret this provision. Either of the three possible approaches outlined above is plausible and reasonable.

B. Dedication in the Plea Agreement. Generally, the discussion above concerning dedication of funds in the consent decree and MOA would apply to the plea agreement. I am considerably more confident that the state may accept the \$50 million from the plea agreement than I am about the constitutionality of the dedication in the consent decree and MOA. The reason for this is that the money to come to the state in the plea agreement is not being exchanged for the state's claims for civil damages, nor has the state participated in the dedication. Rather the money will come to the state as a result of the federal government's agreement with Exxon.

First, the state Supreme Court may determine that money received by the state as a gift, to which the state has no legal claim, is not "revenue" subject to the dedicated funds provision. This would allow the state to accept gifts given with restrictions on their use. (Note that if the state accepts a gift with restrictions on its use, the state is bound by those restrictions. Patrick v. Blake, 19 N.W.2d 220 (S.D. 1945).) This interpretation would also appear not to violate the policy underlying the dedicated funds provision, since the dedication was not created by any action of a state official, but rather entirely by the donor. Since the dedicated funds provision is a limit on the state's taking action that creates a dedicated fund, it should not be applicable at all where the dedication is imposed by a donor without any action by the state government.

Even if the dedicated funds provision applies, the "federal program" exception appears applicable to the \$50 million, even if it is not applicable to money received in settlement of the state's claims. Assuming the court took a strict view of the "federal program" exception, it is likely that this would be viewed as money received from the federal government (like federal money for fish and wildlife programs or highways.) It is true that Exxon will be paying the money, but only because the federal government required it to do so as part of the plea agreement. At any rate, it is money that the federal government could have kept for itself, as part of a fine,

but chose to have paid to the state in restitution. It is not money that the state is exchanging for its own civil claims.

If the court took the "middle" position concerning the federal program exception, the state should also be allowed to accept the money, with restrictions on its use. The state does not have the opportunity to receive this money without restrictions, because it is available only as part of an agreement between the federal government and Exxon. The state has no right to prosecute Exxon for violations of federal criminal laws.

Therefore, while there is some possibility that the state Supreme Court might hold that the state cannot accept the \$50 million in restitution, because its use is restricted, that possibility is very remote. The dedication in the plea agreement is not created by the choice or agreement of a state official, and the state is not giving up anything of value in exchange for the restitutionary payment.

III. Encroachment on Legislative Power.

A. The Consent Decree. Except for the reference to the MOA in paragraph 10 of the consent decree, the consent decree does not address the mechanism by which the settlement proceeds are to be spent. Therefore its terms (with the possible exception of the reference to the MOA) do not raise the separation of powers problems inherent in the MOA. However, because the consent decree is based on the Clean Water Act, there is a latent question as to whether the Clean Water Act itself requires a spending mechanism that may violate art. II, sec. 1 or art. IX, sec. 13 of Alaska's constitution.

The answer appears to be "no". 33 U.S.C. 1321(f)(5) requires money recovered by the state to be used for certain purposes, but does not establish a mechanism for spending that money. 40 CFR 300.605 requires the state trustee to act on behalf of the public as trustee for state resources, but does not address the mechanism for spending a recovery. 40 CFR 300.615(a) directs the trustees to coordinate their efforts and cooperate, but does not require a joint trusteeship, let alone the spending of money without legislative authorization. 40 CFR 300.615(c)(4) requires the state trustee to devise and implement the restoration plan, but again this procedure does not appear to require that the trustee do so without legislative participation.

Regulations enacted pursuant to 42 U.S.C. § 651(c) also may affect the state trustee's power. These regulations were remanded in Ohio v. U.S., 880 F.2d 432 (D.C. Cir. 1989), so it is possible that they do not apply. However, even if they do apply, they appear to allow for the legislature's appropriation role, and may even mitigate against the joint trusteeship proposed in the MOA. 43 CFR 11.92(a) requires the federal

recovery to be placed in the federal treasury,^{10/} and the state recovery to be placed in either a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee. The state trustee is required to prepare a restoration plan (which may be modified) and the money must be spent for actions described in the restoration plan. 43 CFR 11.92(c) and 11.93. These provisions do not explicitly prevent the legislature from appropriating the money to projects described in the restoration plan, and there seems no practical need to engraft such a restriction on to the regulations. Typically the executive branch devises specific plans (within statutory law) and the legislature appropriates money for them. There seems no reason why the legislature could not participate in the process here by establishing statutory authority necessary for state agencies to participate in the restoration plan if that authority did not already exist, and appropriating the money for the programs proposed by the trustee. Moreover, the fact that 43 CFR 11.92(a)(2) allows the state recovery to be deposited in an account in the state treasury suggests that under the Clean Water Act the legislature is to be allowed to exercise the appropriation power over money that the trustee uses to implement the plan. However, if the Clean Water Act itself, or regulations adopted under it, were to be interpreted to prevent the legislature from appropriating money recovered under that Act, then the same constitutional questions that are discussed under the MOA would apply.

B. The MOA.

The MOA requires the state and federal natural resource damage recovery to be deposited in a joint trust account, either in the court registry or in another account agreed to by the parties and approved by the court. Six trustees, three federal and three state, are then to spend the money. This procedure raises two questions: (1) Does the legislature need to establish the fund into which the recovery is deposited; and (2) Does the power of the six trustees to spend the money violate the state legislature's appropriation power?

1. The Establishment of the Trust Fund. So long as the money remains in the court registry, there may be no constitutional requirement that the legislature authorize the deposit of the proceeds, though it would do no harm to do so. It is standard judicial procedure to deposit funds into the court registry when there are two litigants who claim a right to all or part of those funds, pending the court's decision on ownership. However, it is clear from the MOA that the deposit is not made pending judicial decision, but rather that the money will remain in the fund until it is spent by the trustee. Because of this "wrinkle," it may be necessary for the

^{10/} 33 U.S.C. 1321(k) also requires any money recovered by the federal government under that section to be placed in a fund in the U.S. treasury. Since the federal recovery is being placed in the court registry, there is a question as to whether the MOA complies with 33 U.S.C. 1321(k).

legislature to authorize the creation of the fund and the deposit of money into it. If the parties attempt to set up a separate fund, it becomes somewhat more likely that legislative authorization is needed because the state could no longer shelter under the notion that the fund is a normal deposit into the court registry.

Generally, special funds for state money must be established by law, *i.e.*, by the legislature. Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E. 2d 176 (Mass. 1980). (Trial court ordered fine to be paid for project enhancing natural resources; Supreme Court holds money is subject to appropriation and that it cannot be considered a trust fund because only the legislature can establish a trust fund); State v. West, 145 P. 15 (Wash. 1914). The possible argument against the need for legislative authorization is that the court itself has the power to establish a trust fund. It is not clear, however, that this power can be exercised in derogation of a state's constitutional requirement that money in the fund be appropriated. Moreover, because the fund would be established by the court under the state's attorney general's agreement, it is not really the court's power to establish a trust fund that is at issue, but rather the authority of the executive branch to establish a trust fund by agreement.

2. The Appropriation Power. Article II, sec. 1 of the state constitution vests the legislative power in the legislature. Article IX, sec. 13 of the state constitution reads as follows:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Because the latter section refers to money in the state treasury, one could argue that this section does not apply to money before it reaches the state treasury. However, when dealing with constitutional questions involving public funds, courts have generally held that constitutional provisions apply if the money is subject to deposit in the treasury, even if the actual deposit has not occurred. State v. Nelson, 7 N.W.2d 735 (N.D. 1943)(Money due the state under state law must be deposited in the treasury and be subject to appropriation; it cannot be withheld by a local government to recoup money admittedly owed by the state to the local government); Texas Pharmaceutical Ass'n. v. Dooley, 90 S.W.2d 328,330 (Tex. Ct. Civ. App. 1936)(Money due the state under state law is public money, "whether deposited in the state treasury or not," for the purposes of a constitutional prohibition against gifts to private persons). The real question is whether the trust fund money is subject to appropriation and whether the state trustees have the authority to obligate the expenditure of the trust fund money without legislative authorization.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In Public Employees' Local 71 v. State, 775 P.2d 1062 (Alaska 1989), the court noted that the state's collective bargaining agreements were subject to approval by the legislature because the funding of such an agreement was relegated to the legislature by art. IX, sec. 13 of the state constitution. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation, which could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (Initiative requiring transfer of state land to private persons was attempted appropriation of state asset). Alaska Conservative Political Action Cmtee. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (sale of utility worth over \$32 million in exchange for \$1 is appropriation prohibited by initiative). McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983) (claim for money damages is asset). Superior Court Judge Thomas Stewart has ruled that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., 1st Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978). However, since the state Supreme Court has not decided a case similar to one involving the Exxon settlement, further discussion is needed.

The attorney general appears to take the position that the legislature's power of appropriating money and authorizing expenditures is not implicated because the money never becomes the property of the state; the federal government and members of the executive branch of the state spend the money without ever deciding how much is owned by the state and how much is owned by the federal government. There are several problems with this argument.

First, if a court were to decide that the attorney general could authorize money to be spent (without legislative authorization or appropriation) whenever the money was subject to the competing claim of another person or entity, it would set a rather dangerous precedent. Unfortunately, such a rationale could not be based on the Clean Water Act, because neither the Clean Water Act nor regulations enacted under it require joint use of the natural resource damage recovery from Exxon. On the contrary, 43 CFR 11.92(a) contemplates that the state and federal recoveries will be deposited and administered separately, although of course the state and federal trustees could cooperate in spending their respective recoveries. Therefore, if a court

were to find no violation of the appropriation or authorization requirements on the ground that no part of the Exxon settlement ever became state money, (because the trustees spent it all before deciding what belonged to whom) the same rationale could be applied to any case in which the attorney general agreed with an opposing party that they should jointly spend disputed money. A court may be very reluctant to make such a decision, especially given the decisions in the Fairbanks North Star Borough and McAlpine cases.

Second, if no part of the natural resource damage recovery from Exxon is state money, then elementary logic compels the conclusion that the state got nothing for the damage to its natural resources; the money from Exxon cannot at the same time be a state asset and not be a state asset. Under this rationale, the state has given up one asset (its claim for damages to its natural resources) without receiving anything (money) in exchange. The argument assumes that the attorney general has given away the state's claims against Exxon for immense damage to the state's natural resources and the state has received nothing in return. If this is indeed what the attorney general maintains, then there is a substantial question as to whether the governor, through the attorney general, has faithfully executed the law, as required by art. III, sec. 16, Constitution of the State of Alaska.^{11/}

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA recites that the "state" is a trustee for the damaged natural resources: MOA, p.2. The fact that the recovery is joint does not make it (or at least part of it) any less the recovery of the state. Nor does the state and federal governments' agreement to spend the money without deciding to whom it belongs, obliterate the fact that it is (at least in part) a recovery of the state. Finally, the fact that the trustees intend to use state employees and agencies for their projects, see 56 Fed Reg. No. 41, p. 8898 (1991), is a clear indication that the "trust" is not entirely separate from the state government.

In my opinion, the better view is that the trust fund recovery does include state money, albeit of undetermined amount, and albeit imposed with a trust. However the question still remains as to whether that state money imposed with a trust is subject to appropriation.

^{11/} Interestingly enough, the U. S. Supreme Court has held that a state legislature violates its public trust in disposing of certain public lands in certain circumstances, and that in such cases, the disposal is void. Ill. Central R. Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). While a court is almost certainly not going to prevent an attorney general from dismissing claims as a general matter, it might do so if the harm to the public interest were sufficiently egregious.

Different jurisdictions have taken divergent positions on what money is subject to appropriation. E.g., Kittredge v. Boyd, 18 P.2d 563 (Kan. 1933)(Taxes paid under protest are not subject to appropriation); Oesterle v. Lavik, 52 N.W.2d 297 (N.D. 1952)(Taxes paid under protest are subject to appropriation.) Some states hold that money coming from a non-state source (usually the federal government) that the source designates for a particular purpose, are not subject to the appropriation process. Opinion of the Justices, 378 N.E.2d 433 (Mass 1978)(federal trust fund money); Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Ariz. 1974)(funds from a purely federal source to be disbursed to Indian Tribe and two cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(Federal and private funds given to state university are not subject to appropriation.)

The resolution of this issue in Colorado has changed somewhat over time. In MacManus v. Love, 499 P.2d 609 (Colo. 1972), the court held that federal funds that are not connected to state appropriations are not subject to appropriation. In Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985), the court held that money received by the state from a settlement between a federal agency and a private entity (without participation by the state) was not subject to appropriation. However, in Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987), the court held that federal funds that required state matching money, or that could be transferred among block grants, were subject to appropriation.

At least two states with provisions similar to art. IX, sec. 13 of Alaska's constitution have held that all federal funds must be appropriated before they can be spent. In Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981), the court held that federal funds must be appropriated, even though their use is severely limited by federal law, in order to restrain the executive from overspending, to maintain the balance of power between the executive and legislative branches, and to ensure accountability in government. In Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630 (1979), the court came to the same conclusion. The court noted that the Advisory Commission on Intergovernmental Relations, established by Congress, had urged state legislatures to assume greater control over federal funds coming to state governments.

Given the divergent decisions on this issue in other jurisdictions, it is impossible to state with certainty what Alaska's Supreme Court would decide. However, in my opinion, allowing the trustees to spend money recovered from Exxon without an appropriation would violate art. II, sec. 1, or art. IX, sec. 13, of the state constitution. This conclusion is based on five considerations.

First, the Alaska cases in this area are based on the premise that control over state assets and finances is vested in the legislature and only the legislature. The court was unwilling to "bend" that principle, even in the face of the fiscal emergency in the Fairbanks North Star Borough case. It has also refused, in the McAlpine case, to

limit the appropriation power to cover only money. Finally, it applied the principle in the Public Employees Local 71 case even though that case involved a contract already negotiated by the governor with public employees. Finally, a highly respected Superior Court judge has found that custodial and trust funds are subject to appropriation in Alaska. Kelley v. Hammond, 1st Jud. Dist. at Juneau, case No. 77-4 (May 30, 1978). There seems little reason for the court to depart from the principle when the state is recovering money for damage to natural resources of the state.

Second, the possibility that other parts of the state budget would be affected by spending the money---the consideration behind the shift in the Colorado cases---may well apply here. If trust fund money is to be spent on certain environmental or fish and game programs, that fact may affect other programs of the state departments of environmental conservation and fish and game. If trust fund money is spent on programs that use state employees, that may also affect the state budget. While the attorney general has taken the position that no part of the recovery is "state" money, the restoration plan clearly anticipates that the trustees will use state employees in the trust's projects. See 56 Fed. Reg. No. 41, p. 8898 (1991). The use of these employees, and liability for their acts will certainly affect the state budget. Time taken by the state trustees for their duties in administering the trust may also affect staffing decisions in the state budget. Finally if the trustees acquire land to be owned, or partially owned, by the state, that may also affect the long-term fiscal obligations of the state.

Third, the cases in this area have primarily dealt with funds received from the federal government, and the practice in Alaska has been to appropriate federal funds. AS 37.20.020 states that all federal grants of money are to be deposited in a special account in the general fund (which would then be subject to appropriation.) In addition, AS 46.08.020(a)(2) authorizes the legislature to appropriate to the oil and hazardous release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific site." Since the money will be received from an entity (Exxon) that matches the statutory description, the statute indicates the legislature's intent that such money be deposited in the general fund for appropriation. While these statutes do not settle the constitutional issue, they do reflect the legislature's interpretation of its powers.

Fourth, some of the cases holding that money is not subject to appropriation are based on the fact that the money is being held by the state in trust for another entity authorized to spend it. E.g., Navajo Tribe v. Arizona Dept. of Admin., 528 P.2d 623 (Ariz. 1974)(Tribe and cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(University.) The money received for natural resource damages from Exxon, however, is not being "passed through" to another entity that can spend it. Rather, the state trustees recover the money "on behalf of the public as trustee of the natural resources." 33 U.S.C. 1321(f)(5). The natural resources cannot spend the money,

nor can the public. Therefore the "pass through" rationale underlying these cases does not seem to apply to the money recovered from Exxon. The state is doing more than "holding" the money for another; it is, through its trustees, deciding how to allocate the money, which is primarily a legislative function.

Finally, in all the cases discussed above in which money was held not subject to appropriation, the money was coming to the state as a gift or grant from either the federal government or a third party. (This is true even of the money received from a settlement between the federal government and Chevron in Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo 1985) because it does not appear that the state was a litigant or released any of its claims in the settlement.) No one could seriously maintain that money paid by Exxon under the consent decree is a "gift" from Exxon to the state. As is clearly evident from the terms of the consent decree, Exxon is to pay the money in exchange for the state and federal governments extinguishing their claims for damages. This fact distinguishes this situation from those in which the court viewed money as outside the appropriation process because it was "non-state funds." E.g., State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974). Money received in exchange for a state asset can hardly be "non-state funds."

IV. Effect of Unconstitutionality: Cure; Continuing Appropriations.

A. Effect of Unconstitutionality. In general, of course, the attorney general has absolute discretion in settling lawsuits, including the power to dismiss cases without recovery by the state. Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (1975). But courts have indicated that this discretion is not absolute. Public Defender Agency v. Superior Court, Third Judicial District, supra, 534 P.2d at 950 (discretion only within constitutional bounds; dicta); Smith v. Meese, 821 F. 2d 1484 (11th Cir. 1987) (Dept. of Justice's policy on prosecution of voting rights cases subject to judicial review); NAACP v. Levi, 418 F. Supp. 1109 (D.C. Cir. 1976) (Dept. of Justice's policy of deferring to state investigation of civil rights violations is subject to judicial review); Boyd v. U.S., 345 F. Supp. 790 (E.D.N.Y. 1972) (Prosecutorial discretion does not protect attorney general's conduct from review on charge of bad faith, fraud, or illegality; dicta). As the court stated in Nader v. Saxbe, 497 F.2d 676, 679-80, n. 19 (D.C. Cir 1974):

The Executive's constitutional duty to "take Care that the Laws be faithfully executed," Art. II, sec. 3, applies to all laws, not merely to criminal statutes. (Citations omitted). It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review. (Citations omitted). The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits of that authority. (Citations omitted.) Judicial review

of the latter sort is normally available unless Congress has expressly withdrawn it. (Citations omitted). The decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. (Citations omitted).

If the attorney general has agreed to provisions that violate the state constitution, those provisions are invalid. See White Construction Co., Inc. v. Commonwealth, 418 N.E. 2d 357 (Mass. Ct. App. 1981), aff'd, 432 N.E. 2d 104 (1982) (State officials have authority to bind the state only to the extent allowed by state law.) This true even if those unconstitutional provisions are authorized by the federal Clean Water Act. Federal law does not require the state to sue under the Clean Water Act. Therefore the situation is similar to that in McDowell v. State, 785 P.2d 1, 10, n. 20 (Alaska 1989), wherein the court held that the state could not grant a subsistence preference to rural residents, even though federal law allowed the state to manage federal land only if it granted a rural subsistence preference on federal land. The issue then is whether the Exxon settlement documents do violate the state constitution.

Because several documents and legal issues are raised, I will try to summarize the possibilities:

1. If the dedication required by the Clean Water Act is not allowed under art. IX, sec. 7 of the state constitution, the trust fund provisions in both the consent decree and the MOA are invalid, since they both contain that dedication.

2. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, and the Clean Water Act is interpreted to require that procedure, then both the MOA and the consent decree would be invalid because the attorney general would not be authorized to sue or settle under the Clean Water Act.

3. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, but those provisions are not required under the Clean Water Act (nor incorporated by implication into the consent decree), then the MOA would be invalid, but the consent decree would not violate the appropriations provisions of the state constitution.

4. If the money due the state under the plea agreement violates the dedicated funds provision (which seems unlikely), then the state cannot accept the money.

B. Cure. If the plea agreement, MOA, or consent decree violate the dedicated funds prohibition, then the dedication is invalid. The legislature cannot "cure" a dedication problem because the prohibition on dedicated funds applies to the legislature as well as the executive branch. However, for those years in which the legislature actually

appropriated the money for the required purposes, the money could be spent for those purposes pursuant to the appropriation (not pursuant to the dedication.)

The appropriation problem could be cured in several ways, assuming of course that the Clean Water Act does not require trust money to be spent without appropriation. First, the court or the parties could amend the MOA to require annual appropriation of that portion of Exxon's payment that is a state asset. The court may, in fact, imply an appropriation requirement. Alternately, the legislature could take it upon itself to authorize the trust and the deposit of money into it, and to appropriate each year the state's interest in Exxon's payment to the fund.

It might be possible for the current legislature to appropriate to the trust fund all of the natural resource damage recovery to be received from Exxon under the consent decree over the years. However such a "continuing appropriation" may itself violate the dedication of funds prohibition. A state superior court has held that a continuing appropriation violates the dedicated funds provision. Trustees of Alaska v. State, Super. Ct., 3rd Jud. Dist., at Anchorage, case No. 3-AN-84-12053 (Aug. 30, 1985.) Apparently the theory was that the legislature making the continuing appropriation is attempting to tie the hands of future legislatures who would, in order to negate the continuing appropriation, have to repeal it. The Trustees case was not appealed, so it is not clear whether continuing appropriations do violate the dedicated funds provision. However, in Public Employees' Local 71 v. State, 775 P.2d 1062, 1064 (Alaska 1989), the State Supreme Court did state that the monetary terms of a collective bargaining agreement are subject to independent legislative approval by appropriation "each year" that the contract is in effect. Even if continuing appropriations do violate the dedicated funds provision as a general matter, it still might be possible to defend a continuing appropriation as required for participation in a federal program, although such an argument would be subject to the objections discussed above in connection with the dedication in the MOA and consent decree, and the additional argument that a continuing appropriation was not required by the Clean Water Act, the consent decree, or the MOA. Finally, of course, as a practical matter subsequent legislatures could repeal the continuing appropriation at any time.

V. Summary.

The Attorney General stated in his April 2, 1991 memo at p. 10 that the "real" issue is whether he and the Governor had the power to settle the Exxon Valdez litigation. Unfortunately, I cannot agree. There is no doubt that the Attorney General has the authority to settle the state's litigation in good faith. However, his authority, like the authority of any state official acting in his or her official capacity, is limited by the Constitution of the State of Alaska.

Therefore the first question is whether the Attorney General can release the state's claim in exchange for money that must be used for certain purposes under the Clean

Representative Max Gruenberg
April 8, 1991
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Water Act, 33 U.S.C. 1321(f)(5). If the court were to interpret art. IX, sec. 7, Constitution of the State of Alaska, strictly, the dedication might well be invalid. However, if the court interpreted the "federal program" exception less strictly (which in my view it could reasonably do), and if in fact all the money dedicated to the trust were actually recoverable under the Clean Water Act, then the agreement would not violate art. IX, sec. 7 of the state constitution.

The second question is whether the Attorney General, having recovered money as the authorized representative of the state, has the constitutional authority to allow the state and federal trustees to spend that money without appropriation by the state legislature. (It should be noted that the Clean Water Act and regulations adopted pursuant to it do not expressly prohibit the legislature from appropriating the state's recovery nor require or expressly authorize a joint trust.) Essentially the Attorney General has decided that, rather than litigate with the federal government over who owns how much of the trust money, he will agree that the state and federal trustees may spend the money. However well-intentioned that decision may be, I believe the agreement violates art. II, sec. 1 or art. IX, sec. 13, Constitution of the State of Alaska. The Attorney General certainly has the authority to determine the value of the state's claim by a good faith settlement, but only the state legislature has the power to authorize its expenditure. While it is possible that I am wrong, I doubt that a court will agree with the position that the state never received anything because the trustees spent the money without deciding who owned how much of it.

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FILED

APR 08 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Re _____ Deputy

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Case No. A90-015-CR
	)	
v.	)	
	)	
EXXON SHIPPING COMPANY	)	GOVERNMENT'S SUMMARY OF
and	)	DAMAGE TO NATURAL RESOURCES
EXXON CORPORATION,	)	IN AID OF SENTENCING
	)	
Defendants.	)	

The United States, by its attorneys, submits the attached summary of natural resource damage, arising from the Exxon Valdez spill, in order to aid the Court in determining whether the sentence set forth in the plea agreement is appropriate. This summary is based on extensive damage assessments conducted by government scientists and contractors over the past two years.

This Court has ordered the parties to submit memoranda in aid of sentencing by April 16, 1991. The government will file its memorandum on that date, but is submitting the attached summary in advance of that date in order to give the

court additional time to assess, pursuant to 18 U.S.C. § 3553(a)(2)(A), the seriousness of the offenses to which defendants have entered pleas of guilty and to assist the public in commenting on the proposed plea agreement.

Respectfully submitted this 24 day of April 1991, at Anchorage, Alaska.



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SUMMARY OF EFFECTS OF THE EXXON VALDEZ OIL SPILL
ON NATURAL RESOURCES AND ARCHAEOLOGICAL RESOURCES
March 1991

INTRODUCTION

The T/V Exxon Valdez ran aground on Bligh Reef in Prince William Sound on the night of March 23-24, 1989, spilling approximately 11 million gallons of North Slope crude oil, making this the largest oil spill in United States history. The oil spread through Prince William Sound, the Gulf of Alaska, and lower Cook Inlet. More than 1,200 miles of coastline were oiled, including portions of the Chugach National Forest, Alaska Maritime, Kodiak, and Alaska Peninsula/Becharof National Wildlife Refuges, Kenai Fjords National Park, Katmai National Park and Preserve, and Aniakchak National Monument and Preserve. Oil from the T/V Exxon Valdez impacted shorelines nearly 600 miles from Bligh Reef.

The magnitude of efforts of the state and federal governments, the public, and Exxon to contain and clean up the spill, rescue wildlife, and study the effects of the spill is unprecedented. Among those efforts are the state/federal natural resource damage assessment studies designed to measure injuries to natural resources including birds, mammals, fish and other wildlife, and marine and terrestrial habitats. These studies are intended to provide the information necessary for the Trustee agencies to manage and restore injured resources appropriately and to provide necessary documentation to enable the governments to present a claim for damages to the responsible parties. This summary briefly describes the area affected by the spill, the chronology of the spill, and the process developed to implement and manage the injury assessment studies. It focuses, however, on what has been learned over the past two years about the effects of this oil spill on natural resources.

DESCRIPTION OF THE AREA AFFECTED BY THE SPILL

Prince William Sound lies near the top of the Gulf of Alaska (see map), an 850 mile arc extending from the Aleutian Islands on the west to the islands of southeast Alaska. The gulf coast is remote, rugged, and scenic. Its maritime climate nourishes a lush, green landscape in the summer. The area is snow covered in the winter. Bears, whales, bald eagles, puffins, seals, sea lions, and sea otters are among the abundant wildlife of the area. Storms that cross the Gulf drop as much as 300 inches of rain and snow annually in the high coastal mountains. Glaciers descend from permanent ice fields capping these coastal mountain ranges, continuing to carve intricate fjords and send icebergs floating out to sea. These are the largest glaciers outside Antarctica and Greenland.

Prince William Sound is one of the largest relatively undeveloped marine ecosystems in the United States. It has one of the continent's largest tidal estuary systems. Prince William Sound has rich commercial herring and salmon fisheries. The open water of the Sound is about the size of Chesapeake Bay. Its many islands, bays, and fjords give it

more than 2,000 miles of shoreline. Prince William Sound is surrounded by land, most of which is part of Chugach National Forest.

To the southwest of Prince William Sound is the Kenai Peninsula, home of the Kenai Fjords National Park, various units of the Alaska Maritime National Wildlife Refuge, and, among others, the cities of Homer and Seward. Numerous seabird colonies are located along the coast of the Kenai Peninsula, including those most frequently visited by tourists in Alaska. Both Prince William Sound and the Kenai Peninsula are accessible by air, boat, and on a limited basis, by automobile from nearby Anchorage, Alaska's major population center. State ferries that run among the larger communities and many charter boats make it easy for people to visit the heart of the Gulf coast. In recent years, there has been a steady increase in the number of wilderness seekers, kayakers, cruise ship passengers, and other tourists visiting the area.

The Kenai Peninsula points southwest to Shelikof Strait and Kodiak Island. Shelikof Strait lies between Kodiak Island, on the south and the Alaska Peninsula on the north. Shelikof Strait is the source of a very productive commercial pollock fishery. The Kodiak National Wildlife Refuge is located on the Kodiak Archipelago and Katmai National Park and Preserve, Alaska Peninsula/Bocharof National Wildlife Refuge, and Aniakchak National Monument and Preserve are located along the coast of the Alaska Peninsula. The Alaska Peninsula tapers, then scatters into the islands of the Aleutian chain.

CHRONOLOGY OF THE EXXON VALDEZ OIL SPILL

For the first three days of the spill, the weather was calm and the slick lengthened and widened amoeba-like and generally stayed in the vicinity of the grounded tanker and off the beaches. Even with these seemingly ideal circumstances for oil recovery, the amount of oil in the water completely overwhelmed efforts to contain and recover the oil. A major windstorm on March 27, 1989, pushed the oil in a southwesterly direction and oiled beaches on Little Smith, Naked, and Knight Islands. The oil continued to spread, contaminating islands, beaches, and bays in Prince William Sound. Four days into the spill, oil began to enter the Gulf of Alaska. The leading edge of the slick reached the Chiswell Islands off the coast of the Kenai Peninsula on April 2, 1989, and the major seabird nesting colonies on the Barren Islands on April 11, 1989, nineteen days into the spill. By May 18, 1989, oil had moved some 470 miles and had fouled shorelines of Prince William Sound, the Kenai Peninsula, the Kodiak Archipelago, and the Alaska Peninsula. Oil subsequently reached shorelines on the Alaska Peninsula nearly 600 miles from Bligh Reef.

During 1989, the response to contain and cleanup the spill and rescue oiled wildlife involved a massive effort. Skimmer ships were sent throughout the spill zone to vacuum oil from the water surface. Booms were positioned to keep oil from reaching important commercial salmon hatcheries in Prince William Sound. A fleet of fishing vessels, known as the "Mosquito Fleet," played an important role in protecting these hatcheries, in corralling oil to assist the skimmer ships, and in capturing oiled wildlife and

transporting these animals to rehabilitation centers. After oil contaminated shorelines, a beach cleanup program was activated. Various local committees, with community and government agency participation, provided recommendations to the U.S. Coast Guard about areas that should receive priority for cleanup. An army of workers cleaned shorelines, using techniques ranging from cleaning rocks by hand to high pressure hot water washing. Fertilizers, sometimes in a chemical base, were applied to some oiled shorelines to increase the activity of oil-metabolizing bacteria, in an experimental procedure known as bioremediation. When deteriorating weather brought an end to cleanup work in the fall of 1989, a great amount of oil remained on the shorelines. Although winter storms proved extremely effective in cleaning many beaches, spring shoreline surveys indicated that much work remained to be done in 1990. Crews operating from boats and helicopters cleaned oiled shorelines in Prince William Sound, along the Kenai and Alaska Peninsulas, and on the Kodiak Archipelago. Manual pick up of remaining oil was the principal method used during 1990, but bioremediation and relocation of oiled berms to the active surf zone were also used in some areas.¹ Another shoreline survey will be conducted during May 1991, to determine the need for additional cleanup work.

INJURY ASSESSMENT PROCESS

The Exxon Valdez oil spill occurred just prior to the most biologically active season of the year in southcentral Alaska. During the two month period after the spill, seaward migrations of salmon fry, major migrations of birds, and the primary reproductive period for most species of birds, mammals, fish, and marine invertebrate species took place. The organisms involved in these critical periods of their life cycles encountered the most concentrated, volatile, and potentially damaging forms of the spilled oil. As will be discussed in this summary, the oil affected different species differently. Whereas, for example, it directly killed large numbers of birds and sea otters that encountered oil on the water surface, it did not prohibit in and out migration and spawning of large schools of salmon and herring.

The state and federal Trustee agencies were forced to mobilize field studies rapidly with little time for planning. Through intensive efforts, studies were designed, administrative processes were accelerated, and 58 field studies were carried out. Additionally, technical services programs were organized to provide hydrocarbon analysis, histopathology, and mapping support for the field studies. Initial decisions on the types and scope of studies conducted were made by agency experts familiar with the resources and the environment. Even with the rapid deployment of studies, however, some opportunities to gather injury data were irretrievably lost during the early weeks of the spill.

A legal framework was subsequently established and studies were reviewed and modified according to their likelihood to document resource injury. Expert peer reviewers were retained and study plans used during 1989 underwent scientific review for possible

¹Exxon has represented that it has paid over \$2.0 billion to conduct cleanup activities during 1989 and 1990.

modification in 1990. Some studies were discontinued or modified if they were unable to further document resource injury, and some new studies were initiated to fill identified information needs. Status reports prepared in January 1990, were used to guide the development of plans for the second year of studies. Thirty-nine studies and three technical services programs were continued in 1990. Scientific review was again used to plan for the upcoming 1991 field season, during which 29 studies and two technical services programs will be conducted.

This summary of the effects of the Exxon Valdez oil spill on natural resources is preliminary, as studies are still underway and available data are not fully analyzed and interpreted. However, the injuries to natural resources that have been documented to date are summarized herein. This summary also addresses studies that were discontinued. It should be noted that studies were discontinued for a variety of reasons, such as the determination that field work had been completed, that there was no practicable way to measure injury, or that no injury was documented. Even though some studies failed to identify injury and were discontinued, this does not necessarily mean that the resources were not affected by the spill. Certain injuries (if present), such as possible latent or sublethal effects on reproductive or other systems in animals, might not become fully evident for a number of years after the spill. At present there is no significant indication of long-term injury to resources other than those specifically noted below. Although studies indicate that there are continuing injuries to certain resources, natural recovery may also have begun. As petroleum hydrocarbons are broken down in the ecosystem, plant and animal communities begin to reestablish themselves. This recolonization has already been observed in some of the more lightly oiled areas. In the more heavily oiled areas, this natural recovery process is expected to take longer. As this natural recovery occurs, many of the birds and mammals that feed in these areas are expected to begin recovering.

MARINE MAMMALS

Following the spill, studies of humpback whales, Stellers sea lions, sea otters, harbor seals, and killer whales were started. The humpback whale and Stellers sea lion studies were discontinued following the 1990 field season. Humpback whale investigations were limited to photo identification of whales, estimations of reproductive success, and possible relocations of whales. It was not possible to take tissue samples for petroleum hydrocarbon analysis to document exposure. The study did not show direct oil spill mortalities or reproductive failures.

The sea lion study is being completed following the 1990 pup counts. Some tissue samples were analyzed for petroleum hydrocarbon concentrations, and although there was some indication of exposure to oil, it was difficult to determine what populations were affected because of the sea lions' active seasonal movements. Because of an ongoing pre-spill population decline and premature pupping of sea lions, it was not possible to distinguish post- from pre-spill population effects clearly.

Studies of killer whales, based on observations only (because tissue sampling was not an

option), have indicated that killer whales are missing from at least one and possibly two pods in Prince William Sound. Injuries to harbor seals and sea otters have been clearly indicated and studies of these species are continuing.

Sea Otters: The population of sea otters in Prince William Sound before the spill was estimated to have been as high as 10,000. The total sea otter population of the Gulf of Alaska was estimated to be at least 20,000. Statewide, the sea otter population is estimated at 150,000. Sea otters were particularly vulnerable to the spill. As the oil moved through Prince William Sound and the Gulf of Alaska, it covered areas used by large numbers of otters. When sea otters become contaminated by oil, their fur loses its insulating capabilities, leading to death from hypothermia. Sea otters also died as a result of ingestion of oil and perhaps inhalation of toxic aromatic compounds that evaporated from the slick shortly after the spill. The effects of oil were documented by surveys of wild populations; analysis of tissues for petroleum hydrocarbons and indicators of reduced health; by tracking sea otters outfitted with radio transmitters (including those released from rehabilitation centers); and estimating total mortality from the number of sea otters found on beaches. These studies concentrated on developing an estimate of sea otter mortality in Prince William Sound and along the Kenai Peninsula, the population most affected by the spill. During 1989, a total of 1,011 sea otter carcasses were recovered in the spill area, cataloged, and stored in evidence trailers. Of these, 876 were recovered dead from the field and 135 died in rehabilitation centers or other facilities. The total number of sea otters estimated to have been killed directly by the spill ranges from 3,500 to 5,500 animals throughout the spill area.

Initial results indicate significant differences in hematology and blood chemistry parameters between sea otters in oiled and unoiled areas. Greater variation was observed in DNA content of blood lymphocytes of sea otters from oiled areas, but sperm and testicular cells showed no indication of DNA damage resulting from oil exposure. It cannot yet be determined whether these differences affect sea otter health or survival. There are indications that sea otters continue to be exposed to petroleum hydrocarbons in oiled areas. Analysis of blood and fat samples collected from animals during 1990 found elevated concentrations of certain aromatic compounds in sea otters from heavily oiled areas and elevated concentrations of petroleum hydrocarbons continue to be documented in food items eaten by sea otters in oiled areas. Additionally, other damage assessment studies have documented a decreased abundance of mussels in oiled areas, a key prey species for sea otters.

Studies have documented continuing injury to sea otters. Normally, very few prime age sea otters (animals between 2 and 8 years old) die each year and most mortality occurs among very young and old age classes. The high number of prime age sea otter carcasses found during 1990 indicates that the pattern of sea otter mortality in heavily oiled areas continues to be abnormal. Results of boat surveys indicated continued declines in sea otter abundance within oiled habitats in Prince William Sound. Preliminary results indicate that pupping rates in oiled and unoiled areas are not significantly different. However, the first information available for the spring of 1991 shows higher yearling mortality rates in oiled areas than in unoiled areas. Studies of the survival and reproductive success of sea otters released from rehabilitation

centers indicate a high level of mortality of adult animals and significantly lower pupping rates than the pre-spill mortality and pupping rates in Prince William Sound. Of the 193 sea otters released from rehabilitation centers, 45 were fitted with radio transmitters. Sixteen of these animals are still alive, 13 are known to be dead, and 15 are missing. One radio transmitter is known to have failed.

Harbor Seals: There has been no census of harbor seals in Prince William Sound since the mid-1970s when the population was estimated at 3,000 to 5,000 animals. Since that time, the harbor seal population in Prince William Sound and the Gulf of Alaska has declined substantially. A population census of Prince William Sound is planned for the summer of 1991.

Two hundred harbor seals are estimated to have been killed by the spill. Only 19 seal carcasses were recovered following the spill, since seals sink when they die. Population changes were documented by summer and fall aerial surveys of known haulout areas. Toxicological and histopathological analyses were conducted to assess petroleum hydrocarbon accumulation and persistence and to determine toxic injuries to tissues.

Population surveys, which are reliable indicators of population trends, conducted in 1984 and 1988 indicated that harbor seal populations in Prince William Sound had declined prior to the spill, with similar declines in what were subsequently oiled and unoled areas. From 1988 to 1990, however, the decline at oiled sites (35 percent) was significantly greater than at unoled sites (13 percent).

Severe debilitating lesions were found in the thalamus of the brain of a heavily oiled seal collected in Herring Bay 36 days after the spill. Similar but milder lesions were found in five other seals collected three or more months after the spill. During 1989, oiled harbor seals behaved abnormally, being lethargic or unwary. Petroleum hydrocarbon concentrations in bile were 5 to 6 times higher in seals from oiled areas one year after the spill. This indicates that seals were still encountering oil in the environment, were metabolizing stored fat reserves that had elevated levels of petroleum hydrocarbons, or both.²

Killer Whales: Approximately 182 killer whales forming nine distinct family units or "pods" resided in Prince William Sound before the spill. This count is based on pre-spill documentation. These whales were studied intensively before the spill and their group composition and dynamics are well known. Damage assessment studies of killer whales involved extensive boat-based surveys in Prince William Sound and adjacent waters. Whales were photographed and the photographs were compared to the Alaskan

²Harbor seals are taken in some Alaska villages for subsistence. The State of Alaska conducted a program, separate from the damage assessment program, to test subsistence foods potentially affected by the spill to insure that they were safe for human consumption. The State of Alaska determined that harbor seals in the affected area were safe for people to eat (Oil Spill Health Task Force, July-August 1990 Report and September-October 1990 Report. Alaska Department of Fish and Game, Division of Subsistence).

killer whale photographic database for the years 1977 to 1989 to determine changes in whale abundance, seasonal distribution, pod integrity, and mortality and natality rates.

The AB pod of 36 individual whales was sighted intact in September of 1988. When sighted on March 31, 1989, seven days after the spill, seven individuals were missing. These whales remain absent and six additional whales were missing from the AB pod in 1990. Several of the missing whales are females who left behind calves. It is unprecedented for females to abandon calves, therefore their prolonged absence implies that these adult females are dead. In addition, nine individuals from AT pod were missing in 1990. Explanations for the possible causes of death of these missing whales, including explanations apart from the effects of the spill, are being explored. Killer whale surveys will continue in 1991.

TERRESTRIAL MAMMALS

Studies were conducted on terrestrial mammals that may have been exposed to oil through foraging in intertidal habitats. These species included brown bear, mink, black bear, Sitka black-tailed deer, and river otters.

Brown bears are long-lived animals and forage seasonally in the intertidal and supratidal areas of the Alaska Peninsula and the Kodiak Archipelago. Preliminary analysis of brown bear fecal samples and some tissues show that some brown bears were exposed to petroleum hydrocarbons, but no conclusive injury has been documented. Radio-collared brown bears along the Katmai coast and at a control site on the Alaska Peninsula will continue to be monitored while the transmitters remain active.

Mink and other small mammals that are known to feed and spend part or all of their time in the intertidal zone are difficult to study. They are known to crawl off into burrows or the brush if sick or injured and carcasses are unlikely to be found. Also, information on pre-spill populations of these animals is minimal. Scientists developed a laboratory study to test reproductive effects of oil on ranch-bred mink, in which they were fed food mixed with small, non-lethal amounts of weathered oil. Although changes in reproductive rates or success were not documented, it was found that oil-contaminated food moved through the intestines of the animals at a more rapid rate than did clean food, possibly providing less nutrition to the animals. No field studies were carried out for black bear due to the difficulty of finding, collaring, or otherwise investigating these animals in the dense underbrush in which they reside. However, a literature search confirmed that these animals do forage in the intertidal zone in the spill area.

The deer study found no evidence of injury based on intensive searches of beaches that revealed no mortality attributable to the spill. However, deer taken for purposes of testing for safety for human consumption (not part of the damage assessment process) found slightly elevated petroleum hydrocarbons in some tissues in deer (which feed on kelp in intertidal areas) but it was determined that the deer were safe to eat.

River Otters: A few river otter carcasses were found by cleanup workers. River otters forage in streams and shallow coastal habitats that were contaminated by the spill. Analysis of river otter bile indicated that petroleum hydrocarbons are being accumulated by this species. Studies of radio tagged animals in Prince William Sound showed that home ranges are larger, movements more erratic, and body weights are lower in oiled habitat. Field work is continuing in 1991 to further assess the status of this species, including analysis of blood samples to measure the health of these animals.

BIRDS

Among the most conspicuous effects of the Exxon Valdez oil spill was the injury to birds. Seabirds are particularly vulnerable to oil as they spend much of their time on the sea surface while foraging. Oiled plumage insulates poorly and loses buoyancy and birds die from hypothermia or drowning. Birds surviving initial acute exposure may then ingest oil by preening. Approximately 36,000 dead birds were recovered after the spill; at least 31,000 of these deaths were attributed to the effects of oil. In addition to the large number of murres, sea ducks, and bald eagles, carcasses of loons, cormorants, pigeon guillemots, grebes, murrelets, and other species were also recovered (see attached comprehensive list of bird carcasses logged into evidence trailers by September 25, 1989). Only a small proportion of the total number of birds estimated to have been killed were recovered, as many undoubtedly floated out to sea, sank, were scavenged, were trapped and hidden in masses of oil and were not visible, were buried under sand and gravel by wave actions, decomposed, or simply beached in an area where they were not found. Additionally, it is known that, in a number of cases, carcasses found shortly after the spill were not turned in to receiving stations. Preliminary analyses provided by computer models that account for some of these variables estimate that the total number of birds killed by the spill ranges from 260,000 to 580,000 with the best approximation that between 350,000 and 390,000 birds died. Following peer review, the model will be run again to provide a more refined estimate of total mortality.

Common and Thick-billed Murres: Murres are the third most abundant seabird in Alaska (after tufted puffins and black-legged kittiwakes). A total of approximately 1,400,000 murres reside in the Gulf of Alaska (Unimak Pass to the Canadian border in southeastern Alaska). The total population of murres in Alaska is approximately 12,000,000. The murre colonies on the Chiswell Islands are the most visited by tourists in Alaska. In 1989 and 1990 murres were the most heavily affected bird species. Murre colonies impacted by the spill lost 60 to 70 percent of breeding birds. Oil in Prince William Sound affected major wintering areas of murres and other species. As oil moved out of Prince William Sound and along the Kenai Peninsula and the Alaska Peninsula, it hit major seabird nesting areas such as the Chiswell and Barren Islands, as well as numerous smaller colonies. The oil hit these areas outside Prince William Sound at the same time that adult murres were congregating on the water near colonies in anticipation of the nesting season. Approximately 22,000 murre carcasses were recovered following the spill. Colony surveys indicate that an estimated minimum of 120,000 to 140,000 breeding adult murres in the major colonies that were surveyed were killed by the spill. Extrapolating this information to other known murre colonies hit by

the spill (but not specifically studied), the mortality of breeding adult murres is estimated to have been 172,000 to 198,000. However, area-wide, including wintering and non-breeding birds, the total mortality of murres is estimated to be about 300,000. Murres exhibit strong fidelity to traditional breeding sites and infrequently immigrate to new colonies.

Normally, murres breed in densely packed colonies on cliff faces. Each murre colony initiates egg laying almost simultaneously. This synchronized breeding behavior helps the birds repel predators such as gulls and ravens. In oiled areas, murre colonies have exhibited a much lower populations than before the spill, breeding is later than normal, and breeding synchrony has been disrupted. These structural and behavioral changes in colonies have caused complete reproductive failure during 1989 and 1990, and thus lost production of at least 215,000 chicks. Murre colonies in unoiled areas displayed none of these injuries and had normal productivity. Monitoring of reproductive success of the colonies will continue in 1991.

Bald Eagles: Of the estimated Alaskan bald eagle population of 30,000 birds (20,000 adults and 10,000 fledglings), an estimated 2,200 reside in Prince William Sound. One hundred forty-four (144) dead bald eagles were found following the spill. Although there is considerable uncertainty regarding the total mortality of bald eagles, it is estimated that several times this amount may have been killed by the initial spill. Approximately 90 percent of radio-tagged bald eagles that died during subsequent studies were not found on the beach but in the brush back from the beachfront. This suggests that most of the eagles that died in the spill would not have been found by surveys typically restricted to beach areas. To assess injuries to bald eagles, helicopter and fixed-wing surveys were flown to estimate populations and productivity. Radio transmitters were attached to bald eagles to estimate survival, distribution, and exposure to oiled areas. Bald eagles in Prince William Sound were most intensively studied. Productivity surveys in 1989 indicate a failure rate of approximately 85 percent for nests on moderately or heavily oiled beaches compared to 55 percent on unoiled or lightly oiled beaches. Bald eagles have a delayed sexual maturity and have a relatively long life span under normal circumstances. Consequently, although reproduction apparently rebounded to more normal levels in 1990, population impacts as a result of poor productivity of nestlings and the death of hundreds of adult eagles in 1989 may not be readily apparent for several years. Fewer bald eagles were sighted in 1990 than in 1989, however this change was within the expected error of the survey method. An additional survey will be conducted in 1991 to see if there is a downward population trend.

Sea Ducks: More than 2,000 sea duck carcasses were recovered after the spill, including more than 200 harlequin ducks. Studies concentrated on harlequins, goldeneyes, and scoters, species that use the intertidal and shallow subtidal habitats most heavily affected by the spill. Harlequins were most affected, consistent with the fact that they feed in the shallow water area of the intertidal zone. This is the only species of sea duck studied that both nests in the spill area and feeds in the shallow intertidal zone. All of these species feed on invertebrates such as mussels and are likely to continue to be exposed to petroleum hydrocarbons through their food. About 33 percent of the harlequins collected in the spill area had poor body condition and about 40 percent had

tissues contaminated with petroleum hydrocarbons. Preliminary surveys also indicate harlequins may have failed to reproduce in the spill zone in Prince William Sound during 1990. These injuries will be investigated further during 1991.

Other Birds: Surveys and studies indicate reduced numbers of black oystercatchers, pigeon guillemots, and marbled murrelets in oiled areas. Black oystercatchers and pigeon guillemots use inshore and intertidal areas for feeding and nesting. Reduced breeding success of black oystercatchers was documented in oiled areas, largely as a result of loss of chicks along oiled beaches. It is estimated that between 1,500 and 3,000 pigeon guillemots were killed by the spill, representing as much as 10 percent of the catalogued population in the Gulf of Alaska. This species is susceptible to continued exposure to petroleum hydrocarbons because it uses intertidal rocks and waters within 200 meters of shore. Petroleum hydrocarbons were found in eggs and tissue in 1989.

Marbled and Kittlitz's murrelets represented a high proportion of the dead birds recovered in oiled areas of Prince William Sound. The reduction in the number of murrelets observed in oiled areas during cleanup in 1989 and the return of many of these birds in 1990 suggest disturbance associated with cleanup activities affected these birds. The extent of injury to certain species, including loons, cormorants, and gulls will probably never be known because pre-spill information on numbers of these birds in the spill area are not available. Data on bird distribution and abundance data gathered during aerial and boat surveys remain to be fully analyzed and interpreted. Boat surveys will continue during 1991. Studies did not document injury to certain bird species such as Peale's peregrine falcons or songbirds.

FISH/SHELLFISH

No massive die-offs of adult fish were found following the spill, and adult salmon, for example, were evidently able to migrate to spawning areas after the spill. However, fish are most vulnerable to oil contamination during the early stages of their life cycles. Accordingly, most fish studies initially focused on this phase of fish life history. During 1991, scientists will begin to be able to assess affects on adult fish such as salmon that would have been exposed to oil as eggs or larvae. Species most often affected by the spill were those that inhabit and spawn in the intertidal zone (salmon) or in the shallow areas next to shore (herring and Dolly Varden).³ Less than ten dead rockfish were found during the spill and their deaths were attributed to oil. Several species of coastal and offshore fish (pollock, halibut, sablefish, cod, yellowfin and flathead sole, and rockfish) show evidence over a large geographic area of continuing exposure to petroleum hydrocarbons in areas affected by the spill, but significant injury has not yet been documented. Exposure to petroleum hydrocarbons does not necessarily lead to

³The State of Alaska imposed the highest possible standards for commercial fishery openings and for processing plant inspections to insure that all commercially harvested salmon were free from contamination. Salmon subject to commercial harvest in the spill area were rigorously tested to insure that the catch was safe for human consumption.

injury, since many animals have the capability to physiologically "manage" the exposure with no resulting harm. In particular, salmon and other fish can metabolize petroleum hydrocarbons so that these contaminants are unlikely to be found in edible fish tissues. Indicators of exposure among fish include bile metabolites and mixed function oxidases. Since injuries from chronic exposure to oil may not manifest themselves for a number of years, it is premature to conclude that coastal and offshore species were not injured; therefore certain studies are continuing.

Pink Salmon: The full extent of short term injury to pink salmon cannot be assessed until after the 1991 run returns to spawn in the summer. Although the overall catch of pink salmon in Prince William Sound during 1990 was an all-time record (as predicted before the spill), this was primarily due to strong runs of hatchery-produced salmon. Salmon survival associated with the Armin F. Koernig hatchery, located in the middle of a heavily oiled area of the spill zone, was half that of Ester Hatchery, located outside the area of the spill. Wild production of pink salmon did not mirror the record production of hatchery fish.

Seventy-five percent of wild pink salmon spawn in the intertidal portion of streams in Prince William Sound. Wild stock salmon did not shift spawning habitat following the spill and deposited eggs in intertidal areas of oiled streams. Preliminary analyses indicate a 70 percent greater mortality of pink salmon eggs laid in the summer of 1989 and a 50 percent greater mortality in the summer of 1990 in oiled streams as compared to control streams. Larvae from heavily oiled streams showed gross morphological abnormalities, including club fins and curved spines. The pink salmon that returned to Prince William Sound in the summer of 1990 were exposed to oil as larvae as they swam under the slick, but not as eggs which were more directly exposed to oil than the larvae. Fish returning in 1991 will be the first that were exposed to oil as eggs. Eggs and larvae of wild populations continue to be exposed to oil in intertidal gravel in oiled areas.

Sockeye Salmon: Commercial harvest of sockeye salmon was curtailed in portions of Cook Inlet, Chignik, and Kodiak in 1989 because of the spill, resulting in an unusually high number of adults migrating to spawn in certain lake spawning systems (returning adults that arrive at the spawning areas are referred to as the "escapement"). Overly large spawning escapements may result in poor returns in future years by producing more juvenile salmon than can be supported by the nursery lake's productivity. Preliminary data indicate that overescapement degraded rearing habitat in lakes and that sockeye salmon survival and growth rates are lower than usual. Further study is needed before the extent of these injuries can be determined.

Dolly Varden and Cutthroat Trout: Prince William Sound is the northern extreme of the range of cutthroat trout. Both cutthroat trout and Dolly Varden use nearshore and estuarine habitat for feeding throughout their lives (in contrast to salmon which migrate out to sea). The highest concentrations of bile petroleum hydrocarbon metabolites in all fish sampled were found in Dolly Varden. Tagging studies have demonstrated that the annual mortality of adult Dolly Varden was 32 percent greater in oiled areas than in unoled areas. The larger cutthroat trout showed similar levels of mortality in oiled and unoled areas. Additionally, cutthroat trout growth rates were reduced in oiled areas.

Studies are continuing to measure impacts on populations of these popular sport fish species.

Pacific Herring: Populations of Pacific herring were spawning in shallow eelgrass and algal beds at the time of the spill. The effects of oil on egg survival, hatching success, larval development, and recruitment to the spawning population were studied. Study results show a large increase in the percentage of abnormal embryos and larvae in oiled areas of Prince William Sound during the 1989 reproductive season. Larvae in oiled areas also had a greater incidence of eye tumors. These effects continued but at somewhat lower rates in 1990. Results also showed greater egg mortality in oiled areas as compared to unoiled areas. Whether the adult population has been affected by these larval injuries will not be determined until the 1989 and 1990 cohorts return to spawn in 1992 and 1993.

COASTAL HABITAT

The coastal tidal zone, commonly known as the "intertidal zone," was the most severely contaminated habitat. Intertidal habitats are highly productive and biologically rich. They are particularly vulnerable to the grounding of oil, its persistence, and effects of associated clean-up activities. An interdisciplinary team with expertise in plant and systems ecology, marine biology, and statistical analysis, was established to conduct field studies to assess the effects of oil on intertidal ecosystems.

Supratidal: Results of studies in the Kodiak/Alaska Peninsula area suggest that oil in the supratidal habitat and beach cleanup disturbance decreased the productivity of grasses and other vegetation including beach rye grass, that help stabilize beach berms. In one instance, cleanup activities completely removed the vegetation. Increased production of supratidal vegetation was found in Prince William Sound in 1989. This finding corresponds with information from other oil spills. It is not known whether this increased production was a result of decreased browsing by terrestrial mammals or a fertilizer effect of the oil.

Intertidal: Natural populations of intertidal organisms were significantly reduced along heavily oiled shorelines such as Herring Bay. Densities of intertidal algae (*Fucus*), barnacles, limpets, amphipods, isopods, and marine worms were decreased. Although there were increased densities of mussels in oiled areas, they were significantly smaller than mussels in the unoiled areas and the total biomass of mussels was significantly lower. Intertidal organisms continue to be exposed to hydrocarbons from the more heavily oiled sediments. Petroleum hydrocarbon accumulation in filter feeding mussels experimentally placed in oiled areas indicate that oil remains available for uptake by other organisms. Initial findings also indicate that oiled surfaces retarded settlement by juvenile barnacles when compared to unoiled sites. In addition to direct mortality, the reproductive cycle of mussels at oiled sites in the lower Cook Inlet/Kenai Peninsula and Kodiak/Alaska Peninsula regions was delayed by several months.

Intertidal fishes were less abundant in oiled areas than in unoiled areas. In addition, gill

parasitism and respiration rates were significantly higher in fish from oiled sites compared to unoiled sites.

Fucus, the dominant intertidal plant, was severely affected by the oil and subsequent cleanup activities. The percentage of intertidal areas covered by Fucus was reduced following the spill and opportunistic plant species which characteristically flourish in disturbed areas were increased. The average size of Fucus was reduced, the number of reproductive sized plants greatly decreased, and the remaining plants of reproductive size decreased in reproductive potential due to fewer fertile receptacles per plant. There was also reduced recruitment of Fucus at oiled sites.

SUBTIDAL HABITATS

Spilled oil in some areas has migrated to and contaminated the seafloor at depths of up to 100 meters as contaminated sediments moved off beaches during winter storms and cleanup activities. There is evidence that petroleum hydrocarbons have been taken up by animals feeding on the ocean bottom. Petroleum hydrocarbon metabolites have been found in the bile of yellowfin sole, rock sole, rockfish, and pollock. Concentrations of petroleum hydrocarbon metabolites in the bile of yellowfin sole have not declined from 1989 to 1990. This contrasts with Dolly Varden which feed close to shore and where petroleum hydrocarbon metabolites in bile decreased in the same period. The effects of this exposure are still being studied. Many subtidal and intertidal species, particularly fish, have the capability of metabolizing and eliminating petroleum hydrocarbons from their bodies. Clams metabolize hydrocarbons very slowly and consequently accumulated them in high concentrations.

Contaminated clams and other invertebrates are a potential continuing source of petroleum hydrocarbons for sea otters and otherspecies that forage in the shallow subtidal zone. Samples from pollock, which feed in the water column, taken as far away as 200 mile from the wreck site on Bligh Reef, showed elevated petroleum hydrocarbon metabolite concentrations in their bile. This indicates that the water column or food supply was affected at great distances from the spill. Initial 1990 study results show a significant effect on benthic organisms associated with eelgrass beds. These are known to be highly productive habitats. The composition of benthic animal communities on soft-bottom habitats as deep as 40 meters were also significantly altered in oiled areas.

ARCHAEOLOGICAL AND SUBSISTENCE RESOURCES

The spill directly impacted archaeological sites and subsistence resources. Cleanup activities and the associated significant increases in human activity throughout the spill zone resulted in additional injuries to these resources.

Archaeological Resources: Archaeological sites along the shoreline were injured by the

spill. Review of spill response data revealed injuries from oil to a minimum of 26 archaeological sites. Among these are burial sites and home sites. Twenty-one (21) of these sites are on federally-owned land, with the remaining five on State of Alaska and private lands. Of the 21 sites on federal land, 10 are on national parks, six on national wildlife refuges, four within Chugach National Forest, and one on Bureau of Land Management land. While injury to these 26 sites was documented during cleanup, a spill-wide assessment of injuries to archaeological resources has yet to be completed. In addition to oil contamination, increased knowledge of the location of archaeological sites may put them at risk from looting. Loss of rye grass cover may threaten some sites. A comprehensive survey of injuries to archaeological resources on public lands throughout the spill zone will be conducted during 1991.

A study was conducted to determine impacts caused by oil contamination on radiocarbon dating of archaeological resources and to investigate the potential for cleaning artifacts and materials to allow such dating. Preliminary results indicate significant injury to the ability to contextually date artifacts and materials by Carbon 14 analysis. It also appears that these materials cannot be successfully "cleaned" to allow accurate dating.

Subsistence Resources: Surveys undertaken by state researchers before the spill and in 1990 indicated that subsistence harvesters in the area affected by the oil spill significantly reduced their use of subsistence resources after the spill, primarily because of their concerns about possible contamination of these resources. The oil spill disrupted the subsistence lifestyle of some communities that have historically relied upon these resources. Some communities virtually or entirely ceased subsistence harvests in 1989 and have only gradually begun to resume harvests, while other communities continued some reduced level of subsistence harvest in 1989 and thereafter. The attached report (Subsistence Use of Fish and Wildlife in 15 Alutiiq Villages after the Exxon Valdez Oil Spill) details these studies. Warnings were issued by the state in 1989 for people to avoid consumption of intertidal invertebrates (such as mussels and clams, which bioaccumulate petroleum hydrocarbons) found along shorelines contaminated by oil. After the spill, an oil spill health task force was formed, including the state and federal governments, subsistence users, and Exxon. This group helped oversee studies conducted by the state and others in conjunction with FDA and NOAA in 1989 and 1990, on subsistence food resources such as seals, deer, salmon, ducks, clams, and bottomfish. Based upon the test results these resources, with the exception of clams and mussels in certain oiled areas such as Windy Bay, were determined to be safe for human consumption.

CONCLUSION

The federal and state Trustee agencies have now concluded two field seasons of study and are currently preparing to begin a third year of studies to assess injuries to natural resources resulting from the Exxon Valdez oil spill. The information contained in this

summary is based upon the field work and data analysis conducted to date, and is preliminary. Many studies will likely need to continue for additional years before a full understanding of injuries is developed. For example, long-lived species such as bald eagles, murre, and sea otters, may not manifest some effects until a number of years have passed. For other species, such as herring and salmon that return to spawn years after hatching, it is necessary to wait for these key life history events to occur before one can determine the extent to which or if they have been injured. At present there is no indication of long-term injury for species other than those noted in this summary. Although two field seasons of study are complete, only a portion of the data gathered has been fully analyzed and interpreted. As studies and data analysis are completed, some of the information contained in this summary may need to be modified.

For the reasons given above, injury assessment studies will continue in 1991, and thereafter until the process is complete. The need to continue to understand the long-term effects of the spill will be accomplished through monitoring projects that will measure the natural recovery of resources injured by the spill as well as the effectiveness of restoration measures implemented by the Trustee agencies. The information gathered by the injury assessment studies, the restoration monitoring studies, and other studies will be used to develop and implement a restoration program that will accelerate the recovery of injured resources.

Restoration measures will begin in 1991 and are expected to become more comprehensive as the understanding of the effects of the spill improves and as experts and the public provide input on where restoration measures should be concentrated. Wherever possible, restoration will focus on those projects that will provide ecosystem-wide benefits, thereby benefitting a variety of species. These projects may include various initiatives to protect habitat; in other cases it may be necessary to conduct restoration programs that will primarily benefit a particular resource injured by the spill.

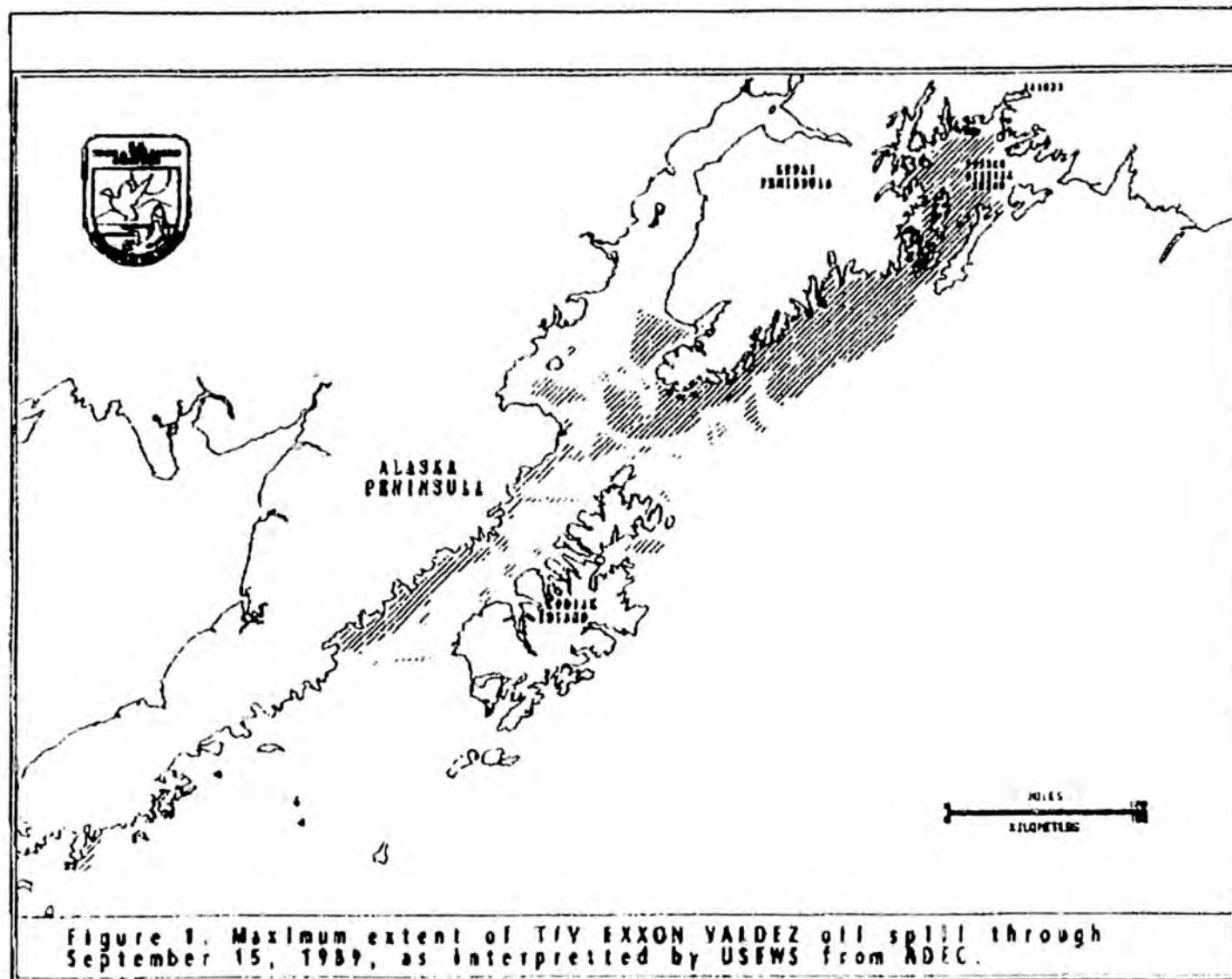


Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989.

Species	Total	Valdez	Seward	Homer	Kodiak
Total	35,279	3,360	3,503	5,778	22,638
Unidentified bird	2,927	476	414	916	1,121
Unidentified loon	69	27	6	25	11
Common Loon	216	142	23	32	19
Yellow-billed Loon	87	72	5	3	7
Pacific Loon	18	8	5	0	5
Red-throated Loon	5	3	1	1	0
Unidentified grebe	65	27	8	11	19
Red-necked Grebe	120	79	22	12	7
Horned Grebe	277	233	15	22	7
Northern Fulmar	426	0	22	12	116
Unidentified shearwater	579	5	22	14	538
Sooty Shearwater	360	4	90	34	242
Short-tailed Shearwater	2,460	1	84	4	2,371
Unidentified petrel	69	2	24	14	29
Fork-tailed Storm-petrel	363	1	50	19	293
Leach's Storm-petrel	12	0	9	0	3
Unidentified cormorant	219	76	27	56	60
Double-crested Cormorant	38	19	10	0	9
Pelagic Cormorant	418	277	65	29	47
Red-faced Cormorant	151	90	29	9	33
Great Blue Heron	1	1	0	0	0
Unidentified swan	3	0	2	1	0
Emperor Goose	2	0	0	0	2
Canada Goose	1	0	0	1	0
Brant	3	0	1	2	0
Unidentified duck	30	4	6	20	0
Unidentified seaduck	112	63	2	11	36
Mallard	11	2	4	1	4
Northern Pintail	4	0	3	1	0
Green-winged Teal	5	0	5	0	0
Unidentified Scaup	4	1	3	0	0
Greater Scaup	27	2	21	4	0
Lesser Scaup	2	0	2	0	0
Unidentified Goldeneye	25	8	2	14	1
Common Goldeneye	6	3	0	2	1
Barrow's Goldeneye	33	19	9	4	1
Bufflehead	21	17	1	0	3
Oldsquaw	185	131	43	6	5

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989. (Cont'd)

Species	Total	Valdez	Seward	Homer	Kodiak
Harlequin Duck	213	148	10	35	20
Unidentified Eider	3	0	0	3	0
Stellar's Eider	4	4	0	0	0
Common Eider	17	5	0	2	10
King Eider	9	0	0	0	9
Unidentified Scoter	162	23	17	51	71
White-winged Scoter	342	164	13	137	23
Surf Scoter	175	45	28	9	6
Black Scoter	132	112	4	8	8
Ruddy Duck	1	0	1	0	0
Unidentified merganser	3	1	0	0	2
Common Merganser	2	2	0	0	0
Red-breasted Merganser	33	30	1	1	1
Sandhill Crane	2	1	1	0	0
Black Oystercatcher	9	2	2	0	5
Golden Plover	1	0	0	1	0
Unidentified sandpiper	11	1	5	1	4
Unidentified turnstone	1	0	0	0	1
Common Snipe	1	0	0	1	0
Semipalmated Sandpiper	1	0	1	0	0
Lesser Yellowlegs	2	0	0	2	0
Western Sandpiper	5	0	0	5	0
Baird's Sandpiper	1	0	0	0	1
Least Sandpiper	4	0	2	0	2
Surfbird	3	3	0	0	0
Short-billed Dowitcher	1	0	0	0	1
Red Phalarope	2	0	0	2	0
Red-necked Phalarope	7	1	3	0	3
Long-tailed Jaeger	1	0	0	0	1
Unidentified gull	99	6	34	39	20
Glaucous-winged Gull	555	33	188	28	213
Herring Gull	8	3	5	0	0
Mew Gull	33	0	3	3	27
Black-legged Kittiwake	1,225	8	214	74	929
Arctic Tern	3	1	1	0	1
Aleutian Tern	1	0	0	0	1

Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989. (Cont'd)

Species	Total	Valdez	Seward	Homer	Kodiak
Unidentified alcid	173	24	0	15	134
Unidentified murre	8,851	21	775	2,101	5,954
Common Murre	10,428	399	523	1,353	3,153
Thick-billed Murre	669	16	142	73	438
Pigeon Guillemot	614	136	109	155	214
Unidentified murrelet	413	21	37	121	234
Marbled Murrelet	612	289	97	82	144
Kittlitz's Murrelet	67	23	19	21	4
Ancient Murrelet	311	3	40	73	195
Cassin's Auklet	48	0	36	2	10
Least Auklet	5	0	0	1	4
Parakeet Auklet	31	1	2	1	27
Rhinoceros Auklet	141	0	31	31	79
Unidentified puffin	46	0	7	4	35
Horned Puffin	139	0	32	13	94
Tufted Puffin	361	0	29	15	317
Bald Eagle	125	31	20	15	59
Unidentified raptor	7	1	3	2	1
Peregrine Falcon	2	0	0	0	2
Willow Ptarmigan	1	0	0	0	1
Unidentified owl	1	0	0	1	0
Great-horned Owl	3	0	0	3	0
Unidentified woodpecker	1	0	0	1	0
Cliff Swallow	3	0	3	0	0
Violet-green Swallow	1	0	1	0	0
Unidentified passerine	9	1	7	1	0
Stellar's Jay	1	1	0	0	0
Magpie	7	1	0	0	6
Common Raven	18	1	4	0	13
Northwestern Crow	34	6	3	3	22
American Robin	2	0	2	0	0
Varied Thrush	1	0	0	0	1
Hermit Thrush	1	0	1	0	0
Unidentified warbler	1	0	0	0	1
Yellow Warbler	3	0	3	0	0
Pine Grosbeak	1	0	0	0	1
Unidentified sparrow	15	0	10	2	3
Savannah Sparrow	1	0	1	0	0
Golden-crowned Sparrow	4	0	3	0	1
White-winged Crossbill	8	0	0	6	2

DIVISION OF LEGAL SERVICES

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Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

April 9, 1991

SUBJECT: Disclosure of scientific data relating to Exxon Valdez litigation
(Work Order No. 7LS1171)

TO: Representative Max Gruenberg, Jr.
Attn: Andy Hemenway

FROM: John B. Gaguine *JBG*
Legislative Counsel

You have asked whether the attorney general may keep confidential scientific data relating to the Exxon Valdez oil spill, or whether the information is public under AS 09.25.110-09.25.125. If the recent proposed settlement terminated all Exxon Valdez litigation, then I would say that the information probably could not be kept confidential, based on a recent Alaska Supreme Court decision. However, since there is litigation ongoing naming the state as a defendant, I think that the attorney general is probably acting within his authority. The law, though, is not completely clear on either of these points.

First, it seems that the scientific data, absent litigation considerations, clearly would be subject to public disclosure under AS 09.25.110 - 09.25.125. The definition of public records in AS 09.25.220(6) is extremely broad:

(6) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.

I think that the data plainly falls under this definition.

In Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), the court ruled that a public agency may not circumvent the public records statutes

(AS 09.25.110 - 09.25.125) by agreeing to keep the terms of a lawsuit settlement agreement confidential. Despite the importance of the issue, the court dealt with it quite briefly, thus indicating (in my opinion) that the court found the answer clear:

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

Alaska's public records disclosure statutes apply to records maintained by municipalities. In general, they provide broad public access to municipal "books, records, papers, files, accounts, writings and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the record should not be disclosed. Exceptions to the statutory disclosure requirements are narrowly construed. Doubtful cases are resolved by permitting public inspection.

We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Id. at 1192-93 (citations and footnotes omitted; emphasis in original).

If all Exxon Valdez litigation was concluded, I do not think that the "work product" exception to discovery would have any relevance to post-settlement disclosure of the

data. That exception is intended to prevent a litigant from obtaining access during litigation to documents prepared by his or her adversary for the litigation. While, as discussed below, it may override the public records statutes as long as litigation is ongoing, the exception would seem to have no applicability once the litigation is over.

My thinking on the work product question is based in part on the legislature's enactment of AS 09.25.122 as part of the 1990 overhaul of the public records laws. That statute, which codifies the substance of 6 AAC 95.150 (a section of Governor Hammond's freedom-of-information regulations), provides:

Sec. 09.25.122. LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

I read this statute as implying that when a person is not involved in litigation with the state, which is everyone after the litigation has been settled, the normal rules of disclosure, i.e., the public records laws, apply, and not the court rules. Since "work product" is a creature of the court rules, it would not seem to apply after a settlement.

A recent Florida case, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985), supports my conclusion. In that case the court held that communications between the members of a city council and the city's attorney relating to litigation were not exempt from disclosure under the broad Florida public records law. The court held that the law did not incorporate such non-statutory exceptions as attorney-client privilege and attorney work product.^{1/} However, the language of the Florida public records law is different from the Alaska law, so that North Miami might not be persuasive to an Alaska court.

It is clear that under federal law the Exxon Valdez scientific data would not be disclosable to the public, even after all litigation is settled. The federal Freedom of Information Act, 5 U.S.C. 552, contains a provision, subsection (b)(5), that exempts from FOIA disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." In Federal

^{1/} The court did note, however, that a specific Florida statute authorized the city to withhold disclosure while the litigation was ongoing.

Trade Commission v. Grolier Incorporated, 462 U.S. 19, 76 L.Ed.2d 387 (1983) (copy attached), the U.S. Supreme Court ruled that the (b)(5) exemption applied even when the litigation for which the requested documents had been generated was over.

I think that an Alaska court would not be likely to follow Grolier, both because of the strong presumption of public access to public records (expressed in Anchorage School District, supra), and because of the absence of any language in AS 09.25.110 - 09.25.125 similar to (b)(5).^{2/} I think that this absence is especially significant because, as noted, the Alaska public records statutes were overhauled in 1990, and a special section, AS 09.25.122 (quoted above), dealt specifically with litigation, without including (b)(5)-type language. Thus, as noted, I believe that an Alaska court would be more inclined to follow North Miami than Grolier. However, both the majority and the concurring opinions in Grolier set out strong policy arguments for exempting "work product" from FOIA disclosure, and an Alaska court might thus choose to follow Grolier notwithstanding the presumption of public access and the absence of (b)(5)-type language in the Alaska statutes.

At any rate, there is litigation ongoing, and so the question of whether an exemption to disclosure applies in the absence of litigation is premature. I believe that the existence of this litigation in my opinion would support the attorney general's non-disclosure decision.

First, I believe that the scientific data constitutes "work product" that is generally not available for discovery under Civil Rule 26(b)(3) - it is my understanding that the data was produced "in anticipation of litigation or for trial", and that the production was coordinated by the attorney general's office.^{3/} Although the state was primarily producing the data for its litigation against Exxon, it seems obvious that the state was also anticipating use of the data in the suits naming it as a defendant, if those suits were not settled or dismissed. Even if the suits were not filed at the time that the data was produced (and I believe some were; I recall that some suits were filed against Exxon, the state and the federal government almost immediately), it seems that the "work product" exception to discovery would still apply, especially in light of the "anticipation of litigation" language of Rule 26(b)(3). I think it would be impossible to dispute an assertion by the state that it was gathering data not only for

^{2/} Some states, such as Maryland and Rhode Island, have adopted language in their public records statutes essentially identical to that in (b)(5). Others have included language that the courts have read as incorporating the (b)(5) principle. See, e.g., Denver Post Corp. v. University of Colorado, 739 P.2d 874, 880 (Colo. App. 1987) (use of term "privileged information" in Colorado public records statute authorizes non-disclosure of attorney litigation work product).

^{3/} If I am wrong, and the data was produced by the agencies in their normal course of business not specifically for use in litigation, then AS 09.25.122 would clearly make the data public.

Representative Max Gruenberg, Jr.

April 9, 1991

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litigation then pending, but also for litigation that might be subsequently brought against it.

In Grolier, the Court, interpreting Fed.R.Civ.P. 26(b)(3) (from which the Alaska rule derives), held that the language of the rule "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." 76 L.Ed.2d at 393 (emphasis in original). I see no reason why an Alaska court would not follow Grolier in interpreting Alaska Rule 26(b)(3).

Thus it seems clear that the state may refuse to disclose the data to litigants against it. But what about those plaintiffs who have sued only Exxon, and not the state, or those members of the public who have no interest in any litigation? The answer here is not entirely clear. AS 09.25.122 suggests that such persons would be entitled to inspect the data, as only litigants are bound by the court rules.^{4/} But such an interpretation would effectively remove the work product protections for public litigants. I am inclined to think that a court would not support such a reading of the statutes.

As noted, the Florida Supreme Court in North Miami, supra, held, based on a specific statute, that there is no right of public access to a public litigant's work product during the pendency of the litigation.^{5/} I am inclined to think that an Alaska court would, as a matter of policy, read the same limitation of access into Alaska law even though no specific statutory limitation exists. However, it is certainly possible that an Alaska court would read the absence of a specific limitation in statute as precluding a court from creating such a limitation, notwithstanding the powerful policy arguments in favor of it. At any rate, it seems clear that, no matter how the courts might finally rule on this question, the attorney general can assert reasonable justifications for his policy; he is not acting in contravention of clearly stated law.

I hope that this memorandum has been of assistance to you. Please feel free to let me know if I can be of further assistance.

JBG:pl:mi

91-239.plm

^{4/} However, if such a person were seeking to obtain the data so that he or she could transfer it to a litigant, then the person would be "involved in litigation" within the meaning of AS 09.25.122.

^{5/} Note that North Miami, unlike many public access/work product cases (such as Grolier), involved a request by a news organization, rather than by a former litigant.

[462 US 19]
FEDERAL TRADE COMMISSION, et al., Petitioners

v

GROLIER INCORPORATED

462 US 19, 76 L Ed 2d 387, 103 S Ct 2209

[No. 82-372]

Argued March 29, 1983. Decided June 6, 1983.

Decision: Agency attorney work product held exempt from mandatory FOIA disclosure without regard to status of litigation for which it was prepared.

SUMMARY

A corporation filed a request with the Federal Trade Commission for disclosure of documents concerning the investigation of a subsidiary corporation. The Commission had investigated the subsidiary in connection with a civil penalty action but the suit had been dismissed with prejudice. The Commission refused to release some documents on the basis that they were exempt from mandatory disclosure under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency. The United States District Court for the District of Columbia held that all the requested documents were exempt from disclosure under Exemption 5. The United States Court of Appeals for the District of Columbia Circuit held that four documents could not be withheld unless the Commission could show that litigation related to the terminated action existed or potentially existed (671 F2d 553).

On certiorari, the United States Supreme Court reversed. In an opinion by WHITE, J., joined by BURGER, Ch. J., and MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., it was held that attorney work product is exempt under Exemption 5 of the Freedom of Information Act from mandatory disclosure without regard to the status of the litigation for which it was prepared.

BRENNAN, J., joined by BLACKMUN, J., concurring in part and concurring

Briefs of Counsel, p 865, *infra*.

in the judgment, expressed the view that the holding should rest exclusively on a construction of Rule 26(b)(3) of the Federal Rules of Civil Procedure.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Administrative Law § 64 — FOIA — attorney work product exemption

1a-1d. Under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memo-

randums or letters which would not be available by law to a party in litigation with the agency, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

2 Am Jur 2d, Administrative Law § 232; 66 Am Jur 2d, Records and Recording Laws § 39

15 Federal Procedure, L Ed, Freedom of Information §§ 38:90 et seq.

1 Federal Procedural Forms, L Ed, Administrative Procedure §§ 2:53.3, 2:175, 2:175.5, 2:192

1 Am Jur Pl & Pr Forms (Rev), Administrative Law, Form 54.1

2 Am Jur Trials 409, Locating Public Records

5 USCS § 552

US L Ed Digest, Administrative Law § 64

L Ed Index to Annos, Freedom of Information Act

ALR Quick Index, Freedom of Information Acts

Federal Quick Index, Freedom of Information Act; Work Product Doctrine

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Freedom of Information Act exemption (5 USCS § 552(b)(5)) for interagency and intraagency memorandums or letters as applicable to communications to or from attorneys for the government. 54 ALR Fed 280.

Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation. 41 ALR Fed 123.

What are interagency or intraagency memorandums or letters exempt from disclosure under the Freedom of Information Act (5 USCS § 552(b)(5)). 7 ALR Fed 855.

Development, since *Hickman v Taylor*, of attorney's "work product" doctrine. 35 ALR3d 412.

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Depositions and Discovery § 36 — work product — immunity

2. Rule 26(b)(3) of the Federal Rules of Civil Procedure protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation.

Administrative Law § 64 — FOIA — attorney work product exemption

3. The test under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, is whether the docu-

ments would be routinely or normally disclosed upon a showing of relevance.

Administrative Law § 64; Depositions and Discovery § 36 — FOIA — attorney work product exemption

4. Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context.

SYLLABUS BY REPORTER OF DECISIONS

Exemption 5 of the Freedom of Information Act (FOIA) exempts from disclosure under the Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Petitioner Federal Trade Commission (FTC) conducted an investigation of a subsidiary of respondent in connection with a civil penalty action against the subsidiary in Federal District Court filed by the Department of Justice. The action was later dismissed with prejudice when the Government declined to comply with a discovery order. Thereafter, respondent filed a request with the FTC for disclosure of certain documents concerning the investigation of the subsidiary, but the FTC denied the request on the ground that the documents were exempt from disclosure under Exemption 5. Respondent then brought suit in Federal District Court to compel release of the documents. The District Court held that the documents were exempt from disclosure under Exemption 5 as, inter alia, attorney work product. The Court of Appeals held that the documents generated during the action against the subsidiary could not be withheld on the basis of the work-product rule unless the FTC could show that "litigation related to the terminated action exists or potentially exists." The court reasoned that the work-product rule encompassed by Exemption 5 was coextensive with the

work-product privilege under the Federal Rules of Civil Procedure, and that a requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation best comported with the fact that the work-product privilege is a qualified one.

Held: Under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation with the agency. Under a literal reading of Federal Rule of Civil Procedure 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and thus would fall within the scope of Exemption 5. But regardless of how Rule 26(b)(3) is construed, the Court of Appeals erred in construing Exemption 5 to protect work-product material only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. The Court of Appeals' determination that its rule concerning related litigation best comported with the qualified nature of the work-product rule is irrelevant in the FOIA context. Whether its

immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure. Work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt

information, implements the FOIA's purpose to provide "workable" rules. 217 US App DC 47, 671 F2d 553, reversed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Marshall, Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Brennan, J., filed an opinion concurring in part and concurring in the judgment, in which Blackmun, J., joined.

APPEARANCES OF COUNSEL

Kenneth S. Geller argued the cause for petitioners.

Daniel S. Mason argued the cause for respondent.

Briefs of Counsel, p 865, *infra*.

OPINION OF THE COURT

[462 US 20]

Justice **White** delivered the opinion of the Court.

[1a] The Freedom of Information Act (FOIA), 5 USC § 552 [5 USCS § 552], mandates that the Government make its records available to the public. Section 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It is well established that this exemption was intended to encompass the attorney work-product rule. The question presented in this case is the extent, if any, to which the work-product component of Exemption 5 applies when the litigation for which the requested docu-

ments were generated has been terminated.

[462 US 21]

In 1972, the Federal Trade Commission undertook an investigation of Americana Corp., a subsidiary of respondent Grolier Inc. The investigation was conducted in connection with a civil penalty action filed by the Department of Justice.¹ In 1976, the suit against Americana was dismissed with prejudice when the Government declined to comply with a District Court discovery order. In 1978, respondent filed a request with the Commission for disclosure of documents concerning the investigation of Americana.² The Commission initially denied the entire request, stat-

1. *United States v Americana Corp.*, Civ No. 388-72 (NJ). Americana was charged with violation of a 1948 cease-and-desist order in making misrepresentations regarding its encyclopedia advertisements and door-to-door sales.

2. By letter to the Commission, respondent requested the following:

"1) All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid; and

"2) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any of the following companies: [listing 14 companies, including respondent and Americana Corporation].

"3) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any person, company or other entity." App 15-16.

"Covert investigation" was defined by respondent to be "any investigation of which the subject entity was not notified in advance and

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ing that it did not have any information responsive to some of the items and that the remaining portion of the request was not specific enough to permit the Commission to locate the information without searching millions of documents contained in investigatory files. The Commission refused to release the few items that were responsive to the request on the basis

[462 US 22]

that they were exempt from mandatory disclosure under § 552(b)(5).³

Pursuant to the Commission's Rules, respondent appealed to the agency's General Counsel. Following review of respondent's request, and after a considerable process of give and take, the dispute finally centered on seven documents.⁴ Following in camera inspection, the District Court determined that all the requested documents were exempt from disclosure under § 552(b)(5), either as attorney work product, as confidential attorney-client communications, or as internal predecisional agency material. On appeal, the Court of Appeals held that four documents generated during the Americana litigation could not be withheld on the basis of the work-

product rule unless the Commission could show that "litigation related to the terminated action exists or potentially exists."⁵ 217 US App DC 47, 50, 671 F2d 553, 556 (1982).

The Court of Appeals reasoned that the work-product rule encompassed by § 552(b)(5) was coextensive with the work-product privilege under the Federal Rules of Civil Procedure.

[462 US 23]

A requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation, in the Court of Appeals' view, best comported with the fact that the work-product privilege is a qualified one. We granted the Commission's petition for certiorari, 459 US 986, 74 L Ed 2d 381, 103 S Ct 339 (1982). Because we find that the Court of Appeals erred in its construction of Exemption 5, we reverse.

Section 552(b) lists nine exemptions from the mandatory disclosure requirements that "represent[t] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." EPA v Mink, 410 US 73, 80, 35 L Ed 2d 119, 93 S Ct 827 (1973).

prior to acts taken pursuant to such investigation." Id., at 16. Respondent later abandoned its requests for any documents other than those related to the Americana investigation, defined in the first category of its request.

3. The requested documents are subject to mandatory disclosure as "identifiable records" under § 552(a)(3), unless covered by a specific exemption. In this case, the Commission claims exemption only under § 552(b)(5), which provides:
"This section does not apply to matters that are—

(5) inter-agency or intra-agency memorandums or letters which would not be available

by law to a party other than an agency in litigation with the agency"

4. The Commission released a number of documents after respondent filed this suit. Respondent abandoned its claim for many others. See n 2, *supra*.

5. Respondent withdrew its claim for disclosure of one of the seven documents. The Court of Appeals affirmed the District Court's judgment that another was exempt as an attorney-client communication, 217 US App DC at 48, n 3, 671 F2d, at 554, n 3, and held that still another was clearly a predecisional document not subject to disclosure under Exemption 5, id., at 51, 671 F2d, at 557. These rulings are not at issue here.

The primary purpose of one of these, Exemption 5, was to enable the Government to benefit from "frank discussion of legal or policy matters." S Rep No. 813, 89th Cong, 1st Sess, 9 (1965). See HR Rep No. 1497, 89th Cong, 2d Sess, 10 (1966). In keeping with the Act's policy of "the fullest responsible disclosure," S Rep No. 813, at 3, Congress intended Exemption 5 to be "as narrow as [is] consistent with efficient Government operation." *Id.*, at 9. See HR Rep No. 1497, at 10.

Both the District Court and the Court of Appeals found that the documents at issue were properly classified as "work product" materials, and there is no serious argument about the correctness of this classification.⁶ "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5," the privilege being that enjoyed in the context of discovery in civil litigation. *NLRB v Sears, Roebuck & Co.*, 421 US 132, 154-155, 44 L Ed 2d 29, 95 S Ct 1504 (1975); HR Rep No. 1497 at 10; S Rep No. 813, at 2.

[462 US 24]

In *Hickman v Taylor*, 329 US 495, 510, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947), the Court recognized a qualified immunity from discovery for the "work product of

the lawyer"; such material could only be discovered upon a substantial showing of "necessity or justification." An exemption from discovery was necessary because, as the *Hickman* Court stated:

"Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395.

The attorney's work-product immunity is a basic rule in the litigation context, but like many other rules, it is not self-defining and has been the subject of extensive litigation.

Prior to 1970, few District Courts had addressed the question whether the work-product immunity extended beyond the litigation for which the documents at issue were prepared. Those courts considering the issue reached varying results.⁷ By 1970, only one Court of Appeals had addressed the issue. In *Republic*

6. Respondent makes some assertions concerning the ethical conduct of the Commission in continuing its investigations after the *Americana* suit had been instituted and claims that the work-product rule would not apply to documents containing evidence of unethical conduct. Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it.

7. See *Honeywell, Inc. v Piper Aircraft Corp.*, 50 FRD 117 (MD Pa 1970); *Bourget v Government Employees Ins. Co.* 48 FRD 29 (Conn 1969); *Stix Products, Inc. v United*

Merchants & Mfrs., Inc. 47 FRD 334 (SDNY 1969); *LaRocca v State Farm Mutual Automobile Ins. Co.* 47 FRD 278 (WD Pa 1969); *Kirkland v Morton Salt Co.*, 46 FRD 28 (ND Ga 1968); *Chitty v State Farm Mutual Automobile Ins. Co.* 36 FRD 37 (EDSC 1964); *Insurance Co. of North America v Union Carbide Corp.*, 35 FRD 520 (Colo 1964); *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 207 F Supp 407 (MD Pa 1962); *Thompson v Holtsma*, 19 FRD 112 (NJ 1956); *Tobacco and Allied Stocks, Inc. v Transamerica Corp.*, 16 FRD 534 (Del 1954).

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Gear Co. v Borg-Warner Corp., 381 F2d 551, 557 (CA2 1967), the Court of Appeals held that documents prepared in connection with litigation that was on

[462 US 25]

appeal were not subject to discovery in a related case. The court also noted that there was potential for further related litigation. Thus, at the time FOIA was enacted in 1966, other than the general understanding that work-product materials were subject to discovery only upon a showing of need, no consensus one way or the other had developed with respect to the temporal scope of the work-product privilege.

[1b, 2] In 1970, the Federal Rules of Civil Procedure were amended to clarify the extent to which trial preparation materials are discoverable in federal courts. Rule 26(b)(3) provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Rule 26(b)(3) does not in so many

words address the temporal scope of the work-product immunity and a review of the Advisory Committee's comments reveals no express concern for that issue. Notes of Advisory Committee on 1970 Amendments, 28 USC App, pp 441-442. But the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, p 201 (1970). Whatever problems such a construction of Rule 26(b)(3) may engender in the civil discovery area, see *id.*, at 201-202, it provides a satisfactory resolution to the question whether

[462 US 26]

work-product documents are exempt under the FOIA. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation *with the agency*. Under a literal reading of Rule 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and would thus fall within the scope of Exemption 5.

[3, 4] We need not rely exclusively on any particular construction of Rule 26(b)(3), however, because we find independently that the Court of Appeals erred in construing Exemption 5 to protect work-product materials only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. *NLRB v Sears, Roebuck & Co.* 421 US, at 148-149, 44 L Ed 2d 29, 95 S Ct 1504. At the time this case came to the Court of Appeals, all of the courts of appeals that

had decided the issue under Rule 26(b)(3) had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated.⁸ In addition, an overwhelming majority of the Federal District Courts reporting decisions on the issue under Rule 26(b)(3) were in accord with that view.⁹ "Exemption 5 incorporates

[462 US 27]

the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v Grumman Aircraft Engineering Corp.*, 421 US 168, 184, 44 L Ed 2d 57, 95 S Ct 1491 (1975) (emphasis added). Under this state of the work-product rule it cannot fairly be said that work-product materials are "routinely" available in subsequent litigation.

The Court of Appeals' determination that a related-litigation test best comported with the qualified nature of the work-product rule in civil discovery—a proposition with which we do not necessarily agree—is irrelevant in the FOIA context. It makes little difference whether a

privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure.

[1c] Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt information, implements the congressional intent to provide "workable" rules. See S Rep No. 813, at 5; HR Rep No. 1497, at 2.

Respondent urges that the meaning of the statutory language is "plain" and that, at least in this case, the requested

[462 US 28]

documents must be disclosed because the same documents were ordered disclosed during discovery in previous litigation. It does not follow, however, from an

8. See *In re Murphy*, 560 F2d 326, 334 (CA8 1977); *United States v Leggett & Platt, Inc.*, 542 F2d 655 (CA6 1976) cert denied, 430 US 945, 51 L Ed 2d 792 97 S Ct 1579 (1977); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 487 F2d 480, 483-384 (CA4 1973). See also *In re Grand Jury Proceedings*, 604 F2d 798, 803 (CA3 1979) (work-product privilege continues at least when subsequent litigation is related). Cf. *Kent Corp. v NLRB*, 530 F2d 612 (CA5) (work-product privilege does not turn on whether litigation actually ensued), cert denied, 429 US 920, 50 L Ed 2d 287, 97 S Ct 316 (1976).

9. See *In re Federal Copper of Tennessee, Inc.*, 19 BR 177 (Bkrtcy MD Tenn 1982); *In re International Systems & Controls Corp. Secu-*

rities Litigation, 91 FRD 552 (SD Tex 1981); *United States v Capitol Service, Inc.* 89 FRD 578 (ED Wis 1981); *In re LTV Securities Litigation*, 89 FRD 595 (ND Tex 1981); *First Wisconsin Mortgage Trust v First Wisconsin Corp.*, 86 FRD 160 (ED Wis 1980); *Panter v Marshall Field & Co.* 80 FRD 718 (ND Ill 1978); *United States v O. K. Tire & Rubber Co.* 71 FRD 465 (Idaho 1976); *SCM Corp. v Xerox Corp.* 70 FRD 508 (Conn., appeal dismissed, 534 F2d 1031 (1976); *Burlington Industries v Exxon Corp.* 65 FRD 26 (Md 1974). See also *Hercules, Inc. v Exxon Corp.* 434 F Supp 136 (Del 1977) (protected when cases are closely related in parties or subject matter); *Ohio-Sealy Mattress Mfg. Co. v Sealy, Inc.*, 90 FRD 45 (ND Ill 1981) (protected in later related litigation).

ordered disclosure based on a showing of need that such documents are routinely available to litigants. The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis. In *NLRB v Sears, Roebuck & Co.*, supra, we construed Exemption 5 to "exempt those documents, and only those documents, normally privileged in the civil discovery context." 421 US, at 149, 44 L Ed 2d 29, 95 S Ct 1504. (Emphasis added.) It is not difficult to imagine litigation in which one party's need for otherwise privileged

documents would be sufficient to override the privilege but that does not remove the documents from the category of the normally privileged. See *id.*, at 149, n 16, 44 L Ed 2d 29, 95 S Ct 1504.

[1d] Accordingly, we hold that under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered. The judgment of the Court of Appeals is reversed.

It is so ordered.

SEPARATE OPINION

Justice **Brennan**, with whom Justice **Blackmun** joins, concurring in part and concurring in the judgment.

The Court rests its judgment on two alternative holdings: one a construction of Federal Rule of Civil Procedure 26(b)(3), ante, at 26, 76 L Ed 2d, at 393; the other a more limited holding under Exemption 5 of the Freedom of Information Act (FOIA), 5 USC § 552(b)(5) [5 USCS § 552(b)(5)], ante, at 26, 76 L Ed 2d, at 393. I find the latter holding unpersuasive and accordingly would rest exclusively on the former.

[462 US 29]

I

I agree wholeheartedly with the Court that Rule 26(b)(3) itself does not incorporate any requirement that there be actual or potential related litigation before the protection of the work-product doctrine applies. As the Court notes, "the

literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." Ante, at 25, 76 L Ed 2d, at 393. A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect. We described the reasons for protecting work product from discovery in *Hickman v Taylor*, 329 US 495, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947):

"In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless

interference This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 510-511, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395.

[462 US 30]

The Court of Appeals is doubtless correct in its view that the need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress; but it does not follow that the need for protection disappears once that litigation (and any "related" litigation) is over. The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later rather than sooner. More concretely, disclosure of work product connected to

prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved. Many Government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. Few of these cases will be "related" to each other in the sense of involving the same private parties or arising out of the same set of historical facts; yet large classes of them may present recurring, parallel factual settings and identical legal and policy considerations.¹ It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate "on wits borrowed from the adversary."

[462 US 31]

Id., at 516, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (Jackson, J., concurring). Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled. Nor is the problem limited to Government agencies. Any litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer

1. It is possible, I suppose, that such suits might be considered "related" in a very broad reading of the Court of Appeals' "related litigation" test; the courts adopting the test have not had occasion to explore its outer boundaries. But this possibility merely reveals a dilemma: If the test is read so broadly as to classify similar but factually unrelated suits as "related," it is virtually no limitation on

the work-product doctrine at all, since almost any work-product document otherwise discoverable under Rule 26(b)(1) will have originated in "related" litigation. But to the extent that the "related" test is read any more narrowly than that, it threatens to cause the harm discussed in text. Hence, the test is either harmful or toothless.

products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an "unrelated" opponent against him and his client. Counsel for less litigious clients as well might have cause for concern in particular cases; fear of even one future "unrelated" but similar suit might instill an undesirable caution, and neither client nor counsel can always be entirely sure what might lie over the horizon. This is precisely the danger of "[i]nefficiency, unfairness[,] . . . sharp practices" and demoralization that Hickman warned against.²

[462 US 32]

I do not understand the Court's holding on this point to be limited to

the FOIA context. The Court itself quite accurately characterizes its first holding as a "particular construction of Rule 26(b)(3)." Ante, at 26, 76 L Ed 2d, at 393. Indeed, it could hardly do otherwise, since the plain meaning of Exemption 5 is that the scope of the Exemption is coextensive with the scope of the discovery privileges it incorporates. "Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v Sears, Roebuck & Co.*, 421 US 132, 149, 44 L Ed 2d 29, 95 S Ct 1504 (1975) (footnote omitted). See also *id.*, at 154-155, 44 L Ed 2d 29, 95 S Ct 1504; *Federal Open Market Committee v Merrill*, 443 US 340, 353, 61 L Ed 2d 587, 99 S Ct 2800 (1979); *Renegotiation Board v Grumman Aircraft Corp.*, 421 US 168, 184, 44 L Ed 2d 57, 95 S Ct 1491 (1975); *EPA v Mink*, 410 US 73, 85-86, 91, 35 L Ed 2d 119, 93 S Ct 827 (1973).³ Thus, nothing in either FOIA or our decisions construing it authorizes us to

2. See generally, e. g., *In re Murphy*, 560 F2d 326, 333-335 (CA8 1977); *United States v Leggett & Platt, Inc.*, 542 F2d 655, 659-660 (CA6 1976); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 509 F2d 730 (CA4 1974); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 487 F2d 480 (CA4 1973).

The Court of Appeals reasoned that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." 217 US App DC 47, 50, 671 F2d, 553, 556 (1982) (footnote omitted). In my view, this mistakes by 180 degrees the significance of the qualified nature of the privilege. As another Court of Appeals has explained:

"Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery. . . ." *Leggett & Platt, supra*, at 660.

Indeed, to the extent that the need for protection of work product does decrease after the end of a suit, that fact might in some cases lower the threshold for overcoming the work-product barrier. A party seeking discovery of work product must show that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means," Rule 26(b)(3). What hardship is "undue" depends on both the alternative means available and the need for continuing protection from discovery. See 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, p 202 (1970).

3. But see *Federal Open Market Committee v Merrill*, 443 US, at 354, 61 L Ed 2d 587, 99 S Ct 2800: "[I]t is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." Of course, it is settled that the Exemption does incorporate the work-product doctrine. *NLRB v Sears, Roebuck & Co.*, 421 US, at 154-155, 44 L Ed 2d 29, 95 S Ct 1504.

define the coverage of the work-product doctrine under Exemption 5 differently from the definition of its coverage that would obtain under Rule 26(b)(3) in an ordinary lawsuit. If a document is work product under the Rule, and if it is an "inter-agency or intra-agency memorandum[m] or letter[r]" under the Exemption, it is absolutely exempt.⁴

[462 US 33]

II

Since the Court rejects the "related litigation" test under Rule 26(b)(3), and since that holding necessarily governs the application of the work-product doctrine under Exemption 5, it need go no further. The Court proceeds, however, to put forward a second holding directly under FOIA. It reasons that work product generated in connection with a prior, unrelated litigation would not be "'routinely' available in subsequent litigation," ante, at 27, 76 L Ed 2d, at 394, because at the time of the Court of Appeals' decision in this case a majority of federal courts that had decided the

issue had rejected the "related litigation" test. Ante, at 26-27, 76 L Ed 2d, at 393-394. This holding apparently would preclude disclosure under FOIA even in a district or circuit where the precedents under Rule 26(b)(3) do incorporate the "related litigation" test, since the "majority view" does not depend on the location of the library in which one reads the cases.⁵ I grant that uniformity of statutory interpretation is a good thing as a general matter, but I cannot see taking it this far.

I confess that the source from which the Court draws its reasoning is a mystery to me. I know of no other statutory context in which the test of discoverability (or anything else) is not what the *correct* view of the law is, but what the *current* [462 US 34]

majority view is.⁶ Certainly the plain language of the statute is to the contrary; it directs a court to exempt material "which would not be available by law to a party . . . in litigation with the agency." 5 USC § 552(b)(5) [5 USCS § 552(b)(5)] (emphasis added). "By law" presumably means "by the law as correctly con-

4. We held in *Sears* that Exemption 5 does not apply to "final opinions" explaining agency actions already taken or agency decisions already made. *Id.*, at 150-154, 44 L Ed 2d 29, 95 S Ct 1504. The gist of our holding was that such documents are not within any privilege incorporated into Exemption 5—specifically, that they are not covered by the Government's executive privilege. *Ibid.* The same would be true of the work-product doctrine; it is difficult to imagine how a final decision could be "prepared in anticipation of litigation or for trial." Rule 26(b)(3). It is also questionable whether such decisions would constitute "inter-agency or intra-agency memorandums or letters." 5 USC § 552(b)(5) [5 USCS § 552(b)(5)].

5. Presumably, this principle would work in reverse as well. That is, if the settled law of a particular district under Rule 26(b)(3) were that a particular type of document (some sort

of investigative report, say) is within the work-product doctrine, but a majority of other courts disagreed, the district court entertaining a FOIA suit would be obliged to follow the majority view and grant disclosure, even though the same document would not be "routinely" disclosed in an ordinary lawsuit in that district.

6. One might posit a different sort of incorporation of case law—one in which the relevant law was that in existence in 1966, when FOIA was enacted. The Court wisely declines to adopt this reading. There is nothing in FOIA that indicates that it intended to "freeze" the law that existed in 1966; the phrase "available by law" certainly seems to refer to the law at any given time. Indeed, this reading would preclude recognition of subsequent changes in statutory law, such as the adoption of Rule 26(b)(3) in 1970.

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462 US 19, 76 L Ed 2d 387, 103 S Ct 2209

strued by the court deciding the case at hand," not "by the law as construed (whether correctly or incorrectly) by a majority of other federal courts." The Court draws the words "routinely" and "normally" from *Sears*, supra, at 149, and n 16, 44 L Ed 2d 29, 95 S Ct 1504. But as a quick perusal of that case reveals, all we were saying there was that once a privilege is held to apply under Exemption 5, it applies absolutely, without regard to whether a party in ordinary discovery might be able to overcome the privilege by some showing of need (an understanding the Court itself embraces, ante, at 28, 76 L Ed 2d, at 395). Alternatively, the Court cites our statement in *Grumman Aircraft*, supra, at 184, 44 L Ed 2d 57, 95 S Ct 1491, that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Ante, at 26-27, 76 L Ed 2d, at 394 (emphasis by the Court). Again, however, the context of the quoted passage makes clear that it refers simply to the extent to which the correct state of the law with regard to a privilege may be embodied in cases interpreting a statute or erecting a nonstatu-

tory privilege. The scope of the work-product doctrine on a particular disputed point, for example, may be laid out in some binding precedent of the district court entertaining a given FOIA suit, of the court of appeals for that circuit, or of this Court. Absent a controlling [462 US 35]

precedent, of course, the district court would ordinarily look to the decisions of other courts to inform its own construction of Rule 26(b)(3). But nothing in Exemption 5, *Sears*, *Grumman Aircraft*, or anything else of which I am aware authorizes or directs that district court to do anything other than to determine what the legally correct interpretation of the doctrine is, and then to apply it—even if the interpretation it reaches is contrary to that of a majority of other courts. Under the Court's reading of the word "routinely," however, it appears that the district court would be obliged to adhere to the majority view even if there were unmistakable precedent in its circuit construing Rule 26(b)(3) to the contrary. I see no warrant for this astonishing principle. Hence, although I agree with the Court's construction of Rule 26(b)(3), I join only its judgment.

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April 8, 1991

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").

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.

⁴Stipulation 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 through 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.

⁸ Oil 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 ads 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]

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 "Betty-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."

¹⁴Investigation 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.

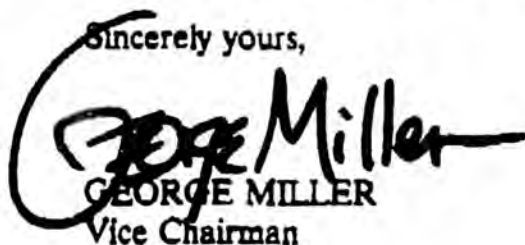
²⁰ Under Alaska law, punitive damages are awarded for the public policy reasons of punishment and deterrent when the defendant's conduct was outrageous, reckless, or malicious. In this instance, there is clear and convincing evidence that Alyeska's conduct merits the award of punitive damages.

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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

FILED

APR 16 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-CR
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S MEMORANDUM
	)	IN AID OF SENTENCING
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

agreement seeks imposition of the largest criminal fine in an environmental case to date. This fine would reflect the seriousness of the conduct that caused the grounding of the Exxon Valdez, and the resulting environmental injury, and would send a strong message that companies that violate environmental statutes face serious punishment. In addition, the plea agreement provides for immediate payment of substantial compensation to the State of Alaska. This payment will provide needed funds for the rehabilitation of Prince William Sound and other areas affected by the spill.

The plea agreement addresses more than punishment and compensation. It also acknowledges that the defendants made substantial efforts to rectify the consequences of their conduct by financing oil spill clean-up efforts. Consequently, the plea agreement does not ask that either defendant be placed on probation, and provides that one-half of the fine be remitted. It thus provides a message that the government will take into account steps voluntarily taken by responsible parties to correct the consequences of acts that constitute environmental crimes.

This criminal prosecution and the resulting plea agreement cannot resolve all the issues relating to the oil spill. However, the government believes that the purposes of criminal prosecution -- conviction of the guilty, just punishment for wrongful conduct, deterrence of future criminal conduct, and the need to provide compensation to

victims -- are effectively addressed by the plea agreement, and the United States respectfully urges the Court to approve it.

II. FACTUAL BACKGROUND

Most of the significant facts that underlie the criminal charges in this case have been set forth in prior pleadings.¹ Consequently, this memorandum does not provide a lengthy factual background of the grounding, but summarizes briefly what the government's evidence would have shown if the case had gone to trial. While most of this evidence relates to conduct of Exxon Shipping's employees, the government would have been prepared to prove that Exxon Shipping was acting as Exxon's agent, making Exxon liable under this Court's ruling upholding the government's theory of agency liability.

The VLCC tanker² vessel Exxon Valdez departed Valdez on March 23, 1989 at about 9:20 p.m., transporting crude oil owned by Exxon Corporation. Assigned to direct the ship through the initial portion of Prince William Sound was

¹See e.g., Bill of Particulars, July 31, 1990; Government's Consolidated Opposition to Motions of Exxon Corporation to Dismiss Counts One, Two, Three, Four and Five, Sept. 20, 1990; Government's Opposition to Motion of Exxon Shipping Company to Dismiss Count Four for Failure to Charge an Offense, Sept. 20, 1990; Factual Basis for Guilty Plea of Exxon Shipping Company, March 22, 1991.

²Very large crude carrier, a tanker exceeding 160,000 dead-weight tons. The Exxon Valdez had a capacity of more than 60 million gallons of crude oil.

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Captain William Murphy, a certified marine pilot. The master of the Exxon Valdez was Captain Joseph Hazelwood. Prior to leaving port, Captain Hazelwood had consumed several alcoholic beverages with two of his shipmates.³

Captain Murphy disembarked at 11:24 p.m. Before doing so, he informed Captain Hazelwood of the presence of glacial ice blocking the shipping lanes. Captain Hazelwood, who was the only person on the vessel who had the required pilotage certification for Prince William Sound, then resumed responsibility for navigating the ship. In order to avoid the ice, Hazelwood ordered the ship to alter course to 180 degrees, a course out of the shipping lanes and directly toward Bligh Reef. He placed the ship on autopilot and ordered the ship to "load program up."⁴ After the course was changed, the individuals on the bridge with Captain Hazelwood were Third Mate Gregory Cousins and helmsman Robert Kagan, a "step-up" (or temporary) able-bodied seaman (AB).

Captain Hazelwood instructed Cousins to turn the ship back into the shipping lanes when it reached a point

³Ten hours after the grounding of the Exxon Valdez, blood and urine samples were taken from Captain Hazelwood. The blood sample showed an alcohol concentration of .061 percent and the urine sample showed an alcohol concentration of .09 percent. The government has no evidence that Captain Hazelwood consumed alcohol between the time of the grounding and the time the blood and urine samples were obtained.

⁴ At "load program up," the speed of the main engine was being increased slowly by a computer from maneuvering full ahead (55 rpm) to full-ahead sea speed (78.9 rpm). It would have required about 43 minutes to attain the maximum speed.

about three minutes to the south. He then left the bridge and went to his cabin to "get out some messages," leaving the bridge critically undermanned while Cousins had to perform a dangerous nighttime maneuver around ice and near reefs.⁵

After Hazelwood left the bridge, Cousins disengaged the autopilot, took navigational fixes, and ordered a series of rudder commands intended to route the ship between Bligh Reef and the leading edge of the glacial ice, a distance estimated by Cousins to be .9 mile. As a result of errors by Cousins and Kagan, the Exxon Valdez ran aground on Bligh Reef shortly after midnight on March 24, 1989, rupturing eight cargo tanks and discharging approximately 11 million gallons of crude oil into the pristine waters of Prince William Sound, causing the death of several hundred thousand migratory birds.⁶

The person with the primary responsibility for safely navigating the Exxon Valdez was Captain Hazelwood. He was known to both defendants to be an alcoholic. Medical records provided to both defendants in 1985 showed that he was hospitalized in an alcohol rehabilitation facility and diagnosed as suffering from episodic alcohol abuse and dysthymia and that he needed aftercare treatment. After

⁵ There is no evidence that Captain Hazelwood sent out any messages that evening.

⁶As stated at page 8 of the government's Summary of Damage to Natural Resources, preliminary estimates of the total number of birds killed range from 260,000 to 580,000.

Hazelwood's hospitalization and a three-month leave of absence, Exxon Shipping's managers returned him to duty as a ship's master. Unfortunately, his rehabilitation proved unsuccessful; he continued to use and abuse alcohol on and off duty up to the time of the grounding. Exxon Shipping failed to respond to reports and evidence that it received of Captain Hazelwood's ongoing alcohol use and abuse, and to take adequate steps to monitor his fitness to serve as a master in light of his history of alcohol abuse.

Robert Kagan was the helmsman at the time of the grounding. He had been an ordinary seaman with Exxon Shipping since 1974. In 1985, Kagan was "stepped-up" to AB for a few months, but then returned to ordinary seaman because of his unsatisfactory performance. In late 1988, Mr. Kagan was again "stepped up" to AB and assigned to serve on the Exxon Valdez. After serving 30 days on the ship, the chief mate prepared a written evaluation of Mr. Kagan's performance as an AB, which was received by the Exxon Shipping Fleet Manning Department prior to the grounding. This performance evaluation stated that "Mr. Kagan lacks the necessary skills to do the AB's job" and rated him "unsatisfactory" in his ability to work without supervision. A few weeks before the grounding, the alternate master of the Exxon Valdez told Captain Hazelwood that Mr. Kagan could not steer a ship and required too much supervision.

III. THE PLEA AGREEMENT

Pursuant to the plea agreement, Exxon Corporation has pled guilty to a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a), and Exxon Shipping has pled guilty to violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1)(A); the Refuse Act, 33 U.S.C. §§ 407 and 411; and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a). The total maximum statutory fines that the court could impose for these violations as to both defendants is \$420,000.00, unless the loss-doubling provision of 18 U.S.C. § 3571(d) is applied. However, in the plea agreement, Exxon Shipping has agreed to the imposition of a fine of \$75 million, with \$37.5 million remitted, and Exxon has agreed to a fine of \$25 million with \$12.5 remitted. In addition to the agreed-upon fines, the defendants have agreed to make compensatory payments of \$50 million to the State of Alaska. The parties have agreed that the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., apply to the plea agreement.

IV. FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE

The court has asked the parties to address succinctly the plea agreement in light of the sentencing factors in 18 U.S.C. § 3553. The relevant factors are discussed below.

A. § 3553(a)(1) - The nature and circumstances of the offense

A significant factor in the grounding of the Exxon

Valdez was Captain Joseph Hazelwood's decision to leave the bridge while the ship was executing a critical nighttime maneuver around glacial ice in the vicinity of Bligh Reef. In the face of increasing danger, which demanded greater precaution, Captain Hazelwood's decision to leave the bridge was a dereliction of his duty to supervise the safe navigation of the vessel. His unsound judgment in leaving the bridge undermanned set into motion a chain of events that culminated foreseeably in the ship running aground.

Third Mate Gregory Cousins, the junior officer left alone in charge of trying to guide the VLCC tanker, travelling at approximately 12 knots, through a .9 mile passage separating a field of glacial ice and Bligh Reef, was overwhelmed by the task that confronted him. As a result of having to do both the job of conning the vessel and fixing the vessel's position frequently, he failed to ensure that his rudder commands were properly executed and failed to assess the increasingly dangerous situation as the vessel approached Bligh Reef. The failure of the third mate and the helmsman to exercise due care in directing the ship safely past the reef were proximate causes of the grounding.

Neither Exxon Corporation nor Exxon Shipping should find refuge in the fact that Captain Hazelwood's conduct

violated company policy.⁷ Both defendants were aware that Captain Hazelwood had a history of alcohol abuse and dysthymia. After returning him to command of one of the world's largest oil tankers, it was incumbent upon them to monitor him carefully for alcohol abuse. This was not done. Had effective monitoring occurred, Captain Hazelwood would have been relieved of duty prior to the grounding. As Lawrence Rawl, C.E.O. of Exxon Corporation said after the grounding, "The first drink the captain had after he had (been) rehabilitated was a basis for dismissal."

The Fleet Manning Department of Exxon Shipping, which made the decision to temporarily assign Robert Kagan as an AB to the Exxon Valdez, was notified prior to the grounding that he lacked the skills necessary to do an AB's job. In light of this evaluation, and a long history of poor performance ratings, he should not have been retained in that capacity on the Exxon Valdez.

B. § 3553(a)(2)(A) - The need of the sentence to reflect the seriousness of the offense

The Exxon Valdez oil spill is the largest oil spill in United States history. As an aid to the Court in determining whether the sentence set forth in the plea agreement is appropriate, the United States filed a "Summary of Effects of the Exxon Valdez Oil Spill on Natural Resources

⁷ In a 1987 performance evaluation of Captain Hazelwood, the evaluator noted that he "does not proactively support co. policies at times."

and Archaeological Resources" on April 8, 1991. This document summarizes the injuries to natural resources that have been documented to date. Based on the seriousness of the harm resulting from the oil spill, the fine contained in the plea agreement is appropriate.

C. § 3553(a)(2)(A) - The need of the sentence to promote respect for the law

More than any other case in environmental litigation, this case has riveted the attention of the nation, and has been a sobering lesson that the environment is a vulnerable victim that requires great care in the conduct of environmentally hazardous activities. Acceptance of the plea agreement should heighten the business community's and the public's awareness of and respect for laws designed to protect the environment.

D. § 3553(a)(2)(A) - The need of the sentence to provide just punishment for the offense

The maximum statutory penalties allowable for the crimes to which the defendants have pled guilty total \$420,000.00. The fine agreed to in this plea agreement is \$100 million with \$50 million remitted. This fine would be the largest criminal fine ever imposed in an environmental criminal case. A fine of this magnitude is warranted in light of the egregiously deficient conduct of the defendant's employees and agents, both aboard the Exxon Valdez and in management, and of the tremendous harm to the environment and the people of Alaska caused by those failings.

E. § 3553(a)(2)(B) - The need of the sentence to afford adequate deterrence to criminal conduct

Criminal violations of environmental statutes have the potential to and often result in enormous injury. The United States believes that the fine imposed in this case must send a strong message to businesses and individuals alike. As the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping in failing to exercise the high standard of care required in transporting crude oil through a pristine environment. Imposition of the statutory fines that would apply in this case, amounting to no more than \$420,000.00, would utterly fail to send that message. For that reason, the United States believes that the loss-doubling provision of 18 U.S.C. § 3571(d) should be applied. The fines contained in the plea agreement and agreed to by the defendants are of a magnitude that should deter future corporate carelessness with the environment.

F. § 3553(a)(3) - The kinds of sentences available

Only two sanctions apply to an organization convicted of a crime. Those sanctions - a fine or a term of probation - are set forth in 18 U.S.C. §3551(c). In considering whether to impose a fine and the amount of the fine, the court should consider, in addition to the factors set forth in § 3553(a) and described elsewhere in this

sentencing memorandum, the factors set forth in 18 U.S.C. § 3572. Those factors, which are discussed below, amply support imposition of the \$100 million fine set forth in the plea agreement as well as the remission of a portion of it.

The first of those factors is whether the defendant is an organization. If so, the Court should consider its size. Exxon Corporation is one of the largest and most profitable corporations in the world, and its wholly owned subsidiary, Exxon Shipping Company, has assets worth hundreds of millions of dollars.

The next factor to be considered is any measure taken by the organization to discipline any employee responsible for the offense. In this case, Exxon Shipping fired Captain Hazelwood for his conduct of using alcohol four hours before assuming duty and for his leaving the bridge during a hazardous maneuver. Mr. Cousins was reassigned to the status of AB as disciplinary action for his role on the grounding.⁸

The last factor the court can consider in determining the amount of the fine are any measures taken by the defendants to prevent a recurrence of the offense. Since the grounding, Exxon Corporation has revised its substance

⁸ Following the grounding, Mr. Cousins' license was suspended for nine months by the USCG. The government is unaware of any other disciplinary action taken against Exxon Shipping employees as a result of the events related to the grounding.

abuse policy substantially. Specifically, employees who have had or are found to have a substance abuse problem will not be permitted to work in safety sensitive positions and employees who have returned from rehabilitation will be required to participate in an aftercare program. The policy subjects persons in safety sensitive positions to unannounced periodic or random drug and alcohol testing and permits the defendants to conduct unannounced searches for drugs and alcohol on property owned or controlled by the defendants.

In addition, the defendants have created the position of loading mate in the Ports of Valdez and San Francisco. The loading mate has the responsibility of loading and unloading cargo from tanker vessels in port. The creation of this position should eliminate a significant source of fatigue. The National Transportation Safety Board concluded that the third mate's fatigue and excessive workload contributed to the grounding of the Exxon Valdez, and that Exxon Shipping's personnel policies encouraged marine employees "to work long hours without concern for debilitating fatigue."

A primary reason the government would request a term of probation in this case would be to serve as a vehicle for the Court to order restitution as a condition of probation. Since the terms of the plea agreement include a payment of \$50 million in compensatory payments to the State of Alaska by the defendants, the United States does not

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believe probation is required in this matter.

G. § 3553(a)(6) - The need to avoid unwarranted sentence disparities among defendants guilty of similar conduct

There have been only a few other prosecutions for negligent oil spills, and none have involved environmental harm as widespread as that caused by the Exxon Valdez spill. The only other case that approaches this one is United States v. Ashland Oil Co., No. 88-146 CR (W.D. Penn. 1988), where the court imposed a fine of \$2.25 million for a negligent spill of about 700,000 gallons of diesel oil into the Monongahela River. That spill was the largest inland oil spill in U.S. history. The present case involves a spill about 16 times larger than the Ashland spill, and Exxon Corporation is several times larger than Ashland Corporation. Thus, it is appropriate that the fine in this case be much larger than in Ashland. The government believes that the record \$100 million fine agreed to in this case, with \$50 million remitted, appropriately reflects the seriousness of the offenses to which defendants have pled guilty, and is not inconsistent with other fines for oil spills.

H. § 3553(a)(7) - The need to provide restitution to any victim of the offense

While restitution is an important consideration, the criminal sentence cannot provide relief to every victim of the oil spill. However, many of those injured by the spill have been compensated or will be compensated. For

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example, the plea agreement provides \$50 million in compensatory payments to the State of Alaska and a separate civil settlement requires the defendants pay up to \$900 million over the next ten years, and possibly an additional \$100 million if reopener conditions are met, for the restoration of Prince William Sound. The defendants have also paid more than \$300 million to third parties in settlement of claims resulting from the oil spill and there are presently pending, in federal and state court, a multitude of claims requesting various forms of relief. It would be extremely complicated, in light of all the pending litigation, for this Court to fashion an order of restitution for all those who claim to have suffered losses resulting from the oil spill.

Under 18 U.S.C. § 3663(d), the Court may decline to make a restitution order if the Court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any of the victims. A protracted hearing to determine restitution for every victim of the oil spill may run afoul of Fed. R. Crim. P. 32(a)(1), which generally requires that sentence shall be imposed without unnecessary delay.

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V. **LEGAL AUTHORITY TO IMPOSE THE FINE SET FORTH IN THE PLEA AGREEMENT AND TO THEREAFTER REMIT A PART OF THE FINE**

The Court asked the [redacted] to address the Court's authority to impose the agreed [redacted] and to remit a portion of a fine once the fine has been imposed. The plea agreement calls for imposition of a \$75 million fine on Exxon Shipping, and a \$25 million fine on Exxon Corporation. The Court's authority to impose these fines rests on 18 U.S.C. § 3571(d), which permits a fine of up to double the gross pecuniary loss to persons other than the defendant caused by the offense. If sentencing under this statute were litigated, the government would be prepared to prove that the offenses to which the defendants have entered pleas of guilty caused pecuniary losses to others in excess of \$50 million, providing a basis for a fine of \$100 million. In the plea agreement at page 4, defendants agree that there is a legal basis for the Court to impose the agreed fines.

The plea agreement calls for remission of \$37.5 million of Exxon Shipping's fine, and \$12.5 million of Exxon Corporation's fine, in recognition of defendants' conduct following the spill. The Court has the authority to order remission of part of a fine it has imposed, because the Court has the inherent authority to reduce a sentence it has imposed. In United States v. Benz, 282 U.S. 304 (1931), the Supreme Court upheld a district court's reduction of a

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defendant's prison sentence after it began, stating:

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented.

Id. at 306-07 (citations omitted). More recent decisions of the Supreme Court on sentencing authority have cited the rule laid down in Benz without question. See United States v. DiFrancesco, 449 U.S. 117, 138 (1980). Lower courts following Benz have distinguished between a court's power to reduce a sentence inherent, and a court's power to suspend execution of a sentence, which a court may do imposing probation. United States v. Ellenbo F.2d 537, 540-41 (3d Cir. 1968), cert. denied 393 U.S.

The distinction between reduction and suspension is logical: reduction of a sentence is unconditional, while a suspended sentence may be reimposed at some future date. A defendant whose sentence is suspended is entitled to be placed on a term of probation with a definite ending date and express conditions, so that he knows what conduct, during what period, will subject him to reimposition of his sentence. A defendant whose sentence is reduced without

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condition has no such need.

VI. RESPONSE TO COMMENTS FROM THE PUBLIC

The Court has directed the parties to respond to the public's comments on the plea agreement. The Court received 87 comments in response to the Court's invitation to the public to express their views on the criminal plea agreement in this case. Almost all the comments were from private citizens residing in Alaska. The Audubon Society, the Green Party, and the National Wildlife Federation also submitted comments, as did two attorneys representing plaintiffs in the civil oil spill litigation. Finally, three Alaskan villages and one native corporation submitted comments.

Many of the comments raise similar objections or concerns about the plea agreement. Hence, instead of responding to each comment separately, we have grouped the comments into several categories sharing common themes, and have responded to each of those themes. One characteristic that almost all of the comments share is that they address both the criminal plea agreement and the proposed consent decree, often confusing the two. Many of the objections concern the adequacy of the civil recoveries under the consent decree, rather than the sentence proposed under the plea agreement. The proposed consent decree is independent from the plea agreement; consequently, it is not appropriate for the government to respond here to objections to th

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consent decree.

A. Comments Favoring the Plea Agreement

Eleven commenters urged the Court to accept the plea agreement. In general, those commenters cited the value of obtaining a certain result in this case immediately, rather than an uncertain result after years of litigation. Some commenters also cited a desire to give Exxon credit for its efforts to clean up the spill. The government agrees that the definite sentence set forth in the plea agreement is preferable to the uncertain sentence that could result even if convictions were obtained after trial. The range of uncertainty in this case is particularly broad, because of the dramatic difference between the normal maximum fines and the level of fines that the Court could, in its discretion, impose under the Alternative Fines Act.

B. Comments Opposing Agreement Not to Prosecute Alyeska

Representative George Miller, Vice-Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, wrote to the Court to say that he objects to the provision in that plea agreement in which the government agreed not to prosecute Alyeska Pipeline Service Company for any offense arising from Alyeska's preparation of oil spill contingency plans. The National Wildlife Federation raised a similar objection. Vice-Chairman Miller stated that Alyeska knew that it could not and would not

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respond effectively to a major oil spill, and suggested that the government could charge Alyeska with violating the false statement provision of the Clean Water Act, 33 U.S.C. § 1319(c)(4), or the false statement provision at 18 U.S.C. § 1001.

At the outset, it is necessary to clarify the meaning of the non-prosecution provision of the plea agreement and respond to this comment. The plea agreement preserves the federal government's right to prosecute any employees of Alyeska for any criminal conduct that may have been associated with the spill plan. This would, of course, include the government's ability to prosecute any individuals for possible false statements in violation of 18 U.S.C. § 1001. Moreover, the State of Alaska retains full authority to prosecute Alyeska and its employees for any criminal violation of state law that may have occurred.

The government conducted a thorough investigation of possible criminal conduct associated with Alyeska's submission of spill plans. The evidence would not support a prosecution for false statements under the Clean Water Act, 33 U.S.C. § 1319(c)(4), because that section applies only to documents required to be filed under the Clean Water Act. Alyeska's spill plans were not required to be filed under that Act. After carefully weighing the evidence, the relevant law and attendant litigation risks, the possible

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sanctions for any criminal charges that might have been brought against Alyeska,⁹ and the unprecedented criminal fines and guilty pleas the government would obtain from Exxon under the plea agreement, the government concluded that it was in the best interests of the public to include a non-prosecution agreement for Alyeska in the plea agreement.

C. Objections to Lack of Data on Spill Damage

In order to assist the Court in reviewing the plea agreement, the government filed a summary of preliminary results of a number of extensive oil spill damage assessment studies. That summary does not purport to offer a definitive tally of the tremendous damage done by the spill to the waters, wildlife and people of Alaska. It does, however, provide the government's present best estimate of these damages, based on all the information they have collected over the two years since the spill. This assessment of the harm caused by the spill was available to responsible government officials who negotiated the plea agreement and consent decree. While the full scope of that harm may not be known for several years, there are no present indications of significant long term injury to resources other than those specifically identified in the summary.

⁹The maximum corporate fine for a false statement in violation of 18 U.S.C. § 1001 is \$500,000, pursuant to 18 U.S.C. § 3571(c).

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Notwithstanding the government's release of a full summary of the natural resource damage assessment study results, a number of commenters object that they cannot evaluate the plea agreement without access to all state and federal studies on injury to natural resources caused by the spill. However, the plea agreement does not seek to redress all injury caused by the Exxon Valdez spill; it seeks only to affix criminal responsibility for the spill, to impose just punishment, and to begin a flow of restitution that will continue in the civil context. In order to determine whether punishment in this case is just, it is enough to know that Exxon and its subsidiary, in violation of applicable environmental laws, caused an environmental disaster of unprecedented proportions, warranting a fine of unprecedented proportions.

D. Objections to Dismissal of Felony Charges

A few letters opposed the plea agreement because it calls for the dismissal of Counts 4 and 5 of the Indictment, which charged felony offenses. The decision by the Department of Justice to dismiss certain counts in an indictment at the time of sentencing is one committed to the discretion of the prosecutors.

E. Objections That Fine Is Insufficient

A number of letters ask the Court to not accept the plea agreement on the basis that the fine and the restitution called for in the agreement are inadequate. The plea

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agreement provides for the largest criminal fine ever imposed in an environmental prosecution. To date, the largest criminal fine for an oil spill is \$2.25 million, paid by the Ashland Oil Company in a Clean Water Act prosecution arising out a serious river spill, which contaminated drinking water in several states and disrupted the lives of thousands of people.

The size of the proposed fine in this case is much greater than that imposed on Ashland just over two years ago. The magnitude of the fine reflects both the larger size of these corporate defendants and the damage created by the Exxon Valdez oil spill. The record fine and the concomitant restitution are designed to punish both defendants for their actions and send a strong message of deterrence to other potential polluters.

F. Objections That the Settlement Deprives Public of a Public Trial

A few of the comments oppose the plea agreement because it means that there will be no public trial of the criminal charges. This is the result of any plea agreement, and is the manner in which most convictions in federal criminal cases are obtained. The commenters misconstrue the purpose of a criminal trial, which is not to satisfy the public's curiosity, but to determine guilt.

In any event, unlike most criminal cases, most of the evidence of the defendants' criminal conduct in this case

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has been made public. This evidence was aired in inquiries by the National Safety Transportation Board, several Congressional committees, and the Alaska State Oil Spill Commission, as well as in U.S. Coast Guard proceedings to suspend the licenses of Joseph Hazelwood and Gregory Cousins, and the State of Alaska's six-week trial of Joseph Hazelwood, much of which was broadcast on radio and television.

G. Objections to Payment of Civil Damages Over Ten-Year Period

Comments that the plea agreement should not be accepted because of the payment schedule set forth in the settlement of state and federal civil claims have no relevance to this separate criminal case. The fines and restitution specified in the plea agreement will be paid within thirty days of the Court's acceptance of the agreement.

H. Objections By Alaska Native Villages

Three Alaska Native Villages, a council of elders, and one Native corporation submitted comments objecting to the plea agreement. For example, Mr. Patrick Norman, President of the Port Graham Corporation, objected to the agreement because the fine monies will go into a national fund for victims of crime. Mr. Norman stated that since the money compensates for crimes committed in Alaska, "the money should be spent on the cities, and villages that were traumatized emotionally and physically by the oil spill and

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the clean up efforts."

By statute, federal criminal fines are deposited in the fund established by the Victims of Crimes Act, 42 U.S.C. § 10601, et. seq. There is no mechanism for a federal criminal fine to be used as compensation for a particular class of victims, or for natural resource damages. For this reason, the plea agreement imposes a substantial criminal fine as punishment and then specifies that an additional \$50 million be paid as restitution to the State of Alaska. Paragraph IV.A. expressly provides that: "Such [restitution] monies are to be used by the State of Alaska exclusively for restoration projects relating to the 'EXXON VALDEZ' oil spill." By this provision, the plea agreement provides generally for redress of injuries similar to those sought by Mr. Norman and the Port Graham Corporation. The restitution monies will be paid soon after the acceptance of the plea agreement, and will be earmarked for the restoration of areas adversely affected by the Exxon Valdez oil spill.

I. Objections to Lack of Provision Regarding Damage to Archeological Resources

Seven commenters objected to the plea agreement because it does not address damage to cultural resources protected by the Archeological Resources Protection Act. None of the commenters suggested how such damage might be addressed. There are extensive pending civil claims by private parties that rest on damage to cultural resources.

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Issues concerning possible archeological damage are issues concerning the civil settlement, and not the resolution of the criminal prosecution.

VII. CONCLUSION

This prosecution was brought after investigation determined that criminal conduct was involved in the grounding of the Exxon Valdez. In a plea agreement submitted to the Court for approval, both defendant have offered guilty pleas and have agreed to pay a fines totalling \$100 million, \$50 million of which would be remitted, and have agreed to pay \$50 million in compensatory payments to the State of Alaska. The government believes that this would be a just resolution of the criminal charges, and respectfully urges the Court to accept the plea agreement.

Dated this 16th day of April, 1991, at Anchorage, Alaska.


CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
U.S. Department of Justice

MARK B. HARMON
Trial Attorney
Environmental Crimes Section

ERIC W. NAGLE
Trial Attorney
Environmental Crimes
Section

MARK R. DAVIS
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U.S. Attorney

FILED

APR 16 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
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Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-CR
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S MEMORANDUM
	)	IN AID OF SENTENCING
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

consent decree.

A. Comments Favoring the Plea Agreement

Eleven commenters urged the Court to accept the plea agreement. In general, those commenters cited the value of obtaining a certain result in this case immediately, rather than an uncertain result after years of litigation. Some commenters also cited a desire to give Exxon credit for its efforts to clean up the spill. The government agrees that the definite sentence set forth in the plea agreement is preferable to the uncertain sentence that could result even if convictions were obtained after trial. The range of uncertainty in this case is particularly broad, because of the dramatic difference between the normal maximum fines and the level of fines that the Court could, in its discretion, impose under the Alternative Fines Act.

B. Comments Opposing Agreement Not to Prosecute Alyeska

Representative George Miller, Vice-Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, wrote to the Court to say that he objects to the provision in that plea agreement in which the government agreed not to prosecute Alyeska Pipeline Service Company for any offense arising from Alyeska's preparation of oil spill contingency plans. The National Wildlife Federation raised a similar objection. Vice-Chairman Miller stated that Alyeska knew that it could not and would not

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Respond effectively to a major oil spill, and suggested that the government could charge Alyeska with violating the false statement provision of the Clean Water Act, 33 U.S.C. § 1319(c)(4), or the false statement provision at 18 U.S.C. § 1001.

At the outset, it is necessary to clarify the meaning of the non-prosecution provision of the plea agreement and respond to this comment. First, the plea agreement preserves the federal government's right to prosecute any employees of Alyeska for any criminal conduct that may have been associated with the spill plan. This would, of course, include the government's ability to prosecute any individuals for possible false statements in violation of 18 U.S.C. § 1001. Moreover, the State of Alaska retains full authority to prosecute Alyeska and its employees for any criminal violation of state law that may have occurred.

The government conducted a thorough investigation of possible criminal conduct associated with Alyeska's submission of spill plans. The evidence would not support a prosecution for false statements under the Clean Water Act, 33 U.S.C. § 1319(c)(4), because that section applies only to documents required to be filed under the Clean Water Act. Alyeska's spill plans were not required to be filed under that Act. After carefully weighing the evidence, the relevant law and attendant litigation risks, the possible

sanctions for any criminal charges that might have been brought against Alyeska,⁹ and the unprecedented criminal fines and guilty pleas the government would obtain from Exxon under the plea agreement, the government concluded that it was in the best interests of the public to include a non-prosecution agreement for Alyeska in the plea agreement.

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⁹The maximum corporate fine for a false statement in violation of 18 U.S.C. § 1001 is \$500,000, pursuant to U.S.C. § 3571(c).

Alyeska Group Is Subpoenaed By Grand Jury

Inquiry Involves the Oil Spill By Tanker Exxon Valdez In Prince William Sound

By CHARLES MCCOY

Staff Reporter of THE WALL STREET JOURNAL
A federal grand jury has issued subpoenas to Alyeska Pipeline Service Co. and at least one of its owners as part of an investigation into possible criminal wrongdoing in connection with the disastrous Valdez oil spill.

The grand jury investigation, long rumored, was confirmed in documents filed with the Securities and Exchange Commission by Atlantic Richfield Co. Arco's Arco Pipeline Co. unit owns 21% of Alyeska, the consortium set up by several oil companies to operate the Trans-Alaska Pipeline. A separate but related Federal Bureau of Investigation investigation has been under way since shortly after the March 24 spill, caused when the Exxon Valdez super-tanker crashed into a reef and dumped 11 million gallons of crude oil into Alaska's Prince William Sound.

Alyeska is responsible for mounting the first efforts to contain damage from spills in the sound and had long assured state regulatory bodies that it was capable of responding speedily to any major spill. It has been bitterly criticized for a slow, stumbling response in the hours immediately after the Exxon Valdez ran aground. Although Alyeska has defended its efforts, environmentalists and many state officials maintain that Alyeska's failure to corral more of the oil before it drifted away from the ship greatly increased the environmental damage done as the oil roamed the sound and washed up on its rocky shoreline.

Late yesterday, Alyeska confirmed that it had been subpoenaed but said that the Justice Department had informed it that it was "not a target" of the probe. An Alyeska spokesman declined to specify the target. Neither the Justice Department nor the FBI had any immediate comment on the grand jury probe.

In its filings, Arco said Arco Pipeline had been subpoenaed by a federal grand jury in Anchorage for records of its "review and evaluation of Alyeska's oil spill equipment, personnel, capabilities and contingency plans."

To operate the pipeline, Alyeska is required by state law to submit contingency plans spelling out how it will respond to spills or other disasters. In the Valdez spill, Alyeska failed to do many of the things it had said it could do in its plan. For example, the plan called for Alyeska to respond in less than five hours to spills in the area where the Exxon Valdez crashed. Significant emergency equipment didn't begin arriving at the site until

nearly 14 hours after the tanker went aground. In addition, some of Alyeska's spill-fighting equipment was in disarray or quickly broke down.

Lawyers familiar with the numerous investigations and lawsuits surrounding the spill also said it was likely that, in addition to Arco, the other owners of Alyeska had been or will be subpoenaed, too. Those companies are Exxon Corp. (which owns the Exxon Valdez), British Petroleum Co., Mobil Corp., Amerada Hess Corp., Unocal Corp. and Phillips Petroleum Co.

Arco wouldn't elaborate on precisely what the grand jury is looking into. A spokesman would say only that "we have been asked for records, and we are in the process of compiling those records." None of the other owners could be reached to comment.

However, the probe most likely focuses on whether any of the companies may have been guilty of negligence that would constitute violations of federal anti-pollution laws such as the Clean Water Act. The laws authorize sizable fines and—in certain circumstances—prison sentences of as many as 15 years. Last month, Alaska dropped a criminal probe of Alyeska, saying that federal laws have stiffer penalties and tougher provisions than state laws and thus were better suited to the case.

Alyeska has already been named a co-defendant in many of the suits filed in connection with the spill, including the massive civil lawsuit filed by the state earlier this month.

A6 THE WALL STREET JOURNAL THURSDAY, AUGUST 31, 1989

STATE OF ALASKA

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

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

MEMORANDUM

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

Representative Kay Brown, Chair
House DEC Budget Subcommittee

FROM: Randy S. Welker 
Legislative Auditor

DATE: April 18, 1991

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

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

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

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

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

COST REIMBURSEMENT

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

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

DEPARTMENT	Estimated Recorded Expenditures (thousands)	Reimbursements from Exxon or CERCLA (thousands)	Remaining Expenditures or Costs (thousands)
Administration	3,591.0	488.0	3,103.0
Commerce and Economic Development	627.0	499.0	128.0
Community and Regional Affairs	1,429.0	40.0	1,389.0
Environmental Conservation	38,652.0	24,621.0	14,031.0
Fish and Game	23,467.0	6,440.0	17,027.0
Governor's Office	1,345.0	730.0	615.0
Health and Social Services	827.0	7.0	820.0
Labor	895.0	273.0	622.0
Law	17,342.0	0.0	17,342.0
Military and Veterans' Affairs	949.0	653.0	296.0
Natural Resources	2,989.0	1,341.0	1,648.0
Public Safety	334.0	18.0	316.0
Transportation and Public Facilities	1,131.0	1,013.0	118.0
University of Alaska	439.0	53.0	386.0
TOTALS	94,017.0	36,176.0	57,841.0
NON-CASH EXPENDITURE ADDED IN MOA TOTALS:			
Overhead (4,600.0)/Financing (3,900.0) Estimates			8,500.0
Damage Assessment Obligations (costs incurred but not paid by 12/31/90)			3,100.0
Litigation Obligations (costs incurred but not paid by 12/31/90)			2,500.0
Total Expenditures used to set MOA Cost Recovery Cap			71,941.0

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

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

(Continued) DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
MILITARY AND VETERANS' AFFAIRS (949.0):		Significant initial response effort from the Division of Emergency Services.
NATURAL RESOURCES (2,989.0): Personal Services Equipment	2,000.0 600.0	Most personal services costs were for temporary project hires for oil spill response. Fiscal staff is confident total covers costs incurred.
PUBLIC SAFETY (334.0): Increased Enforcement Two Enforcement Vessels	100.0 142.0	Personal services costs for overtime/sea pay for troopers and Fish and Wildlife vessel crew for increased enforcement. Little, if any, regular compensation for permanent employees is included.
TRANSPORTATION AND PUBLIC FACILITIES (1,131.0): MV Aurora MV Bartlett	488.0 46.0	MV Aurora provided floating lodging for oil spill workers.

Almost half of the State expenditures were made with 470 funds

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

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

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

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

OBSERVATIONS AND QUESTIONS

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

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

April 18, 1991

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

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

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

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

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

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

Members of the Legislative Budget
and Audit Committee

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

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

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

Prepared by:

Sarah Chasis
Robert Adler
Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

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

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

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

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

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

I. PUBLIC PARTICIPATION IN THE INJURY ASSESSMENT AND RESTORATION PROCESS

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

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

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

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

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

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

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

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

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

II. OTHER COMMENTS ON THE MOA

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

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

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

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

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

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

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

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

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

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

III. INDEPENDENT ENDOWMENT/FOUNDATION

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

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

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

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

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

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

ATTACHMENT 1

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

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

Members

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

The categories we suggest¹:

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

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

Mechanics of Advisory Committee

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

We suggest that:

-- the committee have a small, paid staff and these staff members will not be employees of the trustees' respective agencies;

-- the committee members will have their expenses paid and will have a per diem;

-- the committee will meet bi-monthly and in consultation with their staff and with government agency professionals² will propose an annual workplan/spending plan for the trust; this plan will include a reasonable list of options from which the trustees would choose (trustees would have to choose options only from this list, however);

-- the staff should include a public participation expert and a scheme of adequate public participation should be guaranteed;

-- the committee would be chaired by a distinguished public citizen (for example, Jay Hammond or Russell Train) and members of the committee would be chosen by the groups/organizations/individuals that make up the specific categories of interests listed above³; private mediators/facilitators could be used to aid in this selection process.

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

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

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

ON THE
PROPOSED SETTLEMENT AGREEMENT
CONCERNING THE EXXON VALDEZ OIL SPILL
BETWEEN THE UNITED STATES, THE STATE OF ALASKA
AND THE EXXON CORP., EXXON SHIPPING CO.
AND THE EXXON PIPELINE CO.

Prepared by:

Sarah Chasis
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Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

The following environmental organizations submit these comments on the proposed Exxon Valdez settlement agreement in response to the request for written comments appearing in the Federal Register (56 FR 11636, March 19, 1991): Alaska Center for the Environment, Defenders of Wildlife, Greenpeace, National Audubon Society, Natural Resources Defense Council, Northern Alaska Environmental Center, Prince William Sound Conservation Alliance, Sierra Club and Trustees for Alaska.¹ These groups have major reservations about the proposed settlement. Most importantly, since the scientific and economic data on natural resource damages and restoration collected by the government trustees and Exxon have been kept secret, the public, the Congress, the Alaska State legislature and the Federal Court in Alaska cannot determine whether the settlement is fair, reasonable and equitable and whether the trustees have met their statutory and common law duties under the Clean Water Act, section 311(f), and other applicable law to recover natural resource damages, including the costs of restoring, replacing, or acquiring the equivalent of the natural resources damaged or destroyed as a result of the spill.² The environmental organizations ask that

1. These groups are also submitting comments on the Memorandum of Agreement and those comments are incorporated here by reference.

2. The Clean Water Act will be used throughout these comments as the shorthand way of referring to all statutory and common law principals under which the trustees may recover from Exxon.

these data be made available to the public immediately and that approval of the settlement by the court await such disclosure and the opportunity for public comment on the proposed settlement in light of such disclosure.

Even without the data, we are very concerned about the apparent inadequacy of the settlement to compensate for natural resource damages and to cover the costs of restoring, replacing and acquiring equivalent resources. The present value to the governments of the settlement money is approximately \$500 million. This compares with \$3 to 10 billion in damages found by state and federal economic studies. Moreover, after past expenses and future clean-up costs are deducted, the amount actually available for restoration in the early years appears inadequate to undertake important and needed restoration and acquisition projects.

We also are concerned about the \$100 million cap placed on future recovery for unknown damages and the virtually impossible standard the government must meet in order to obtain such future recovery; and the release of Alyeska from any liability for natural resource damages.

Following are more detailed comments on the proposed settlement and the memorandum of agreement between the state and federal governments.

I. NEED FOR THE DATA

Before approving the proposed settlement, the court must be satisfied that it is "fundamentally fair, adequate and reasonable" and that it conforms to applicable law and public policy. United States v. State of Oregon, 913 F.2d 576, 580 (9th Cir. 1990); Sierra Club v. Electronic Data Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990). Without knowing how extensive the natural resource damages are, the economic value of these damages and the costs of restoring or replacing these resources (or acquiring equivalent resources), it is impossible for the court, the public, Congress or the Alaska State legislature to evaluate whether the proposed settlement is fair, adequate or reasonable or whether the trustees have met their duty under the Clean Water Act, section 311(f), and other applicable law to recover for natural resource damages, including the costs of restoring, replacing or acquiring the equivalent of the natural resources destroyed or damaged as a result of the spill.

The summary of effects of the spill submitted to the federal court in Alaska on April 8 in no way is sufficient to judge the adequacy of the settlement. No economic data on the diminution of use values, including intrinsic values, nor information on the cost of restoring, replacing or acquiring equivalent resources have been provided. Yet these data are crucial to evaluating the

adequacy of the settlement amount since these represent the measure of the damages to which the public is entitled. State of Ohio, et. al. v. Department of the Interior, 880 F.2d 432 (D.C. Cir. 1989). Moreover, without disclosure of the underlying scientific data the public cannot judge the ecological, long-term significance of the losses described in the summary nor the comprehensiveness nor accuracy of the summary. The trustees of the damaged resources have an affirmative obligation not only to disclose these data, but to provide a clear, well-supported explanation of how the amount of the settlement was calculated, and why it is sufficient to compensate the public.

Release of these data is important for a number of reasons in addition to providing crucial information to evaluate the settlement. Opening up the science to public scrutiny would provide the public with the best possible understanding of the natural resource damages that have resulted and are likely to result from the spill. Moreover, release of the data would enable meaningful public and independent scientific input into the design of future damage assessment studies and restoration planning in Prince William Sound -- something that has been virtually impossible in the face of the secrecy surrounding the data. Finally, the data would inform other important public policy decisions that must assess the benefits and risks of proceeding with oil development and transportation. The scientific truth of what has happened may not be withheld from

the public which has suffered the results of this catastrophic spill.

As an enforceable condition of the proposed settlement, all data concerning the nature, extent and economic value of natural resource damages and restoration should be made publicly available by all parties to the settlement on an ongoing basis. Currently, there is no such condition in the settlement. There is only a public commitment by the federal trustees to release data. However, this is not reflected in the proposed settlement or Memorandum of Agreement. No commitment at all on the part of the Coast Guard, the State of Alaska or Exxon is made to release data at any time.

II. INADEQUACY OF SETTLEMENT MONEY

Even without the scientific and economic data that we seek, we seriously question the adequacy of the settlement to compensate for the natural resource damages suffered as a result of the spill and to cover the costs of restoring, replacing and acquiring equivalent resources.

First, the long pay-out schedule of eleven years and the tax-deductibility of the payments substantially reduce the real value of the settlement money to the government. The Congressional Research Service has estimated that the present value to the federal and state governments of settlement (including the \$100

million criminal fine), taking into account the present value of the money and Exxon's ability to deduct civil payments from its taxes, ranges from \$421 million to \$524 million, depending on the discount rate used. (Attachment 1, CRS, "Net Present Values of the Exxon Valdez Settlement," March 19, 1991).

Second, by no means all of the civil settlement money will go for restoration for at least three reasons. First, \$134 million will go to reimburse the federal and state governments for past expenses associated with the spill. Memorandum of Agreement, Para V.B. Second, Exxon's 1991 and 1992 clean-up costs, will be credited against the amount of settlement money it must pay. Proposed Settlement, Para. 8(b). Third, all future state and federal clean-up costs, over and above Exxon's, will come out of the settlement money. MOA, Para. V.B. These future clean-up costs could be substantial.³ This could mean that, of the \$900 million to be paid out over 11 years, \$500-600 million or less (at present value, approximately \$300-400 million) actually will be available for restoration and acquisition.

In light of the Summary of Effects filed with the federal court on April 8 and reports that state and federal economic studies have shown damages to be in the \$3-10 billion range (see attachment 2, Washington Post article, March 20, 1991), the

3. For example, Exxon claims to have spent \$180-200 million in 1990 on clean-up.

available \$500-600 million (or less) clearly cannot compensate for the disastrous ecological consequences of the spill. Indeed, the Trustees apparently ignored lost use values, including intrinsic values, in determining the appropriate settlement amount. In State of Ohio, cited above, the D.C. Circuit clearly rejected the Interior Department's "lesser of" rule, whereby the lesser of restoration or replacement costs or diminution of use values, would dictate the recovery amount. Yet in his testimony before the House Merchant Marine Committee, Assistant Attorney General Richard Stewart indicated that, with respect to amount, the criterion for an adequate settlement was "sufficient recovery of damages for the trustees to undertake a prompt and thorough restoration program for the Sound...."(p.4) Especially given the Washington Post article cited above, which reported that state and federal economic studies found lost use values to be at least \$3 billion, it appears that the trustees simply ignored the State of Ohio holding in calculating the settlement amount.

Nor does the \$500-600 million appear adequate to cover restoration costs. Acquisition of timber rights for habitat and fisheries protection was identified repeatedly as a priority in public comments on the restoration process. See August 1990 Progress Report "Restoration Planning Following the Exxon Valdez Oil Spill," prepared by the Restoration Planning Work Group,

pages 22-23.⁴ It has been estimated that acquisition of timber rights on private lands adjacent to Prince William Sound and the Lower Kenai, in order to prevent logging that could harm the resources adversely affected by the spill, alone would cost \$200-300 million. (Attachment 3, Coastal Coalition Proposal, page 16)⁵. This one acquisition proposal, if implemented, could consume most of the money available under the settlement for restoration (using the present value figure). And this proposal does not include acquisition of timber in many areas affected by the oil, including the Kodiak Archipelago.

Whether there will be money in the first few years for any significant restoration and acquisition at all is another major concern. Past expenses are to be recouped over the first five years. See Memorandum of Agreement. Para. V.B. We understand that these payments may be front-loaded: \$45 million (1991), \$40 million (1992), \$40 million (1993), \$5 million (1994), \$5 million (1995). If the payments are front-loaded in this manner, then only \$45 million will be available in the first year of the settlement to cover state/federal clean-up expenses, scientific

4. The groups were distressed to learn that the state trustees are backing off from their original commitment to use settlement money to acquire timber rights. See April 17, 1991 Anchorage Daily News, page C-1. In our view, such acquisition should be a high priority of the fund.

5. EPA's recent federal register notice also proposes as one of four restoration activities for 1991, the protection of strategic fish and wildlife habitats and recreation sites. See 56 Fed. Reg. at 8902-3. Properly implemented, this could encompass timber rights on key lands proposed to be logged.

studies and restoration. (\$90 million less \$45 million). How much of this will be available for restoration and acquisition is a real question. Since Exxon may credit its clean-up expenses for 1991 and 1992 against its second payment of \$150 million, there may be no payment at all in the second year. Not until the third year would there clearly be money for restoration -- and that amount would be relatively small (\$60 million, or \$100 million less \$40 million). Given the estimated costs of important restoration projects (see, e.g. Coastal Coalition Proposal for timber acquisition), it appears that there would be insufficient money in the early years to undertake extensive restoration and acquisition projects.

Yet such early expenditures are critical. For example, there are at least five areas within the oil-impacted region where timber-harvesting is presently ongoing and where an all-out effort should be made to prevent harmful logging.⁶ In addition, three other areas in the region, are scheduled to be cut this summer. (Fish Bay, Patton Bay and Kachemak Bay).

III. REOPENER PROVISION

The reopener provision contained in Para. 17 is totally inadequate. It places a cap of \$100 million on any future recovery. We strongly oppose such a cap. The longterm

6. Copper River Delta, Two Moon Bay, Windy Bay, Dogfish Bay and Afognak Island.

ecological damages from the spill are still unknown and could be very substantial. The March 1991 Summary of Effects, submitted to the federal court in Alaska on April 18, repeatedly confirms this. For example, the degree of injury to several important species, such as salmon and herring, will not be known for years; injuries to many other species, such as harbor seals, killer whales, river otters, murrees and bald eagles are continuing.

For the government to agree to a cap on future recovery for damages currently unknown places the public in the untenable position of underwriting the longterm costs of this spill. This violates the trustees' obligation to recover the costs of restoration, replacement and acquisition of equivalent resources from the spiller, under section 311(f), and violates the important public policy of making the spiller, rather than the public, pay for the problems caused by the pollution.

Moreover, the terms under which the government may invoke the reopener are so stringent that it will be virtually impossible for the government to obtain a future recovery from Exxon. In order to be able to recover under the reopener clause, the injury cannot have reasonably been known or anticipated by any trustee based on any information in the possession of or reasonably available to the trustees at the time of the settlement. This will be a very difficult standard of proof to meet and one which will inevitably lead to years of litigation.

CERCLA requires that settlements contain a reopener for unknown conditions, except in extremely rare circumstances:

a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such a person concerning future liability resulting from the release or threatened release that is subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies... that remedial action has been completed at the facility concerned. 42 U.S.C. Sec. 9622(f)(6)(A) (emphasis added).

The standard articulated in the CERCLA reopener provision should be employed in this settlement and no cap should be placed on future recovery.

Two additional criticisms of the reopener are that 1) future payments are limited to a particular four year period (2002-2006), when in fact the money may be needed earlier or later, and 2) there is no procedure specifying that Exxon must pay within 30 days (or another similarly reasonable period) following a demand by the government for payment and that the burden falls on Exxon to bring a challenge should it disagree with such a demand for payment.

IV. LETTING ALYESKA OFF THE HOOK

The United States' agreement in the criminal plea not to seek criminal charges, civil penalties or administrative penalties against Alyeska and the federal and state governments' agreement in the civil settlement not to sue Alyeska for natural resource

damages mean that Alyeska will not be held accountable despite its negligent, perhaps even fraudulent conduct. It was Alyeska after all that was completely unprepared to carry out its oil spill contingency plan. Alyeska's failure to comply with the plan significantly compounded the environmental damage that occurred. According to material recently submitted to the federal court by Representative George Miller, Vice Chairman of the U.S. House of Representatives Committee on Interior and Insular Affairs, Alyeska and its owners had knowledge of Alyeska's inability to respond to an oil spill in Prince William Sound, and deliberately decided not to take remedial action.

What kind of message does the government's actions send to others responsible for oil spill contingency planning and response -- that no matter how grossly negligent they are in implementing their contingency plans and carrying out spill response, they can escape all criminal and civil penalties and liability for natural resources damages? We regard this as one of the most egregious elements of the proposed settlement.

V. OTHER MISCELLANEOUS COMMENTS ON THE PROPOSED SETTLEMENT

We question whether future clean-up should be paid for out of the same fund as restoration. As Congressman Studds pointed out in his April 12 letter to Judge Holland, this will create competition between cleanup funding and restoration funding, when both are required under the Clean Water Act.

We request clarification concerning Exxon's continuing obligations to conduct clean-up. We read the settlement to require Exxon to continue to conduct clean-up as directed by the Federal and State On-Scene Coordinators. Para. 11(a). However, Para. 11(b) could be read to relieve Exxon from future clean-up obligation once the settlement is approved. This should be clarified. As part of its continuing clean-up obligations, we would like to see Exxon required to test and, if effective, use clean-up technologies, methods and substances which are environmentally benign and which have proven effective elsewhere or have been shown to be highly promising in past test results.

We read the settlement to permit a one-time credit to Exxon for its clean-up expenses, which would be used to reduce the \$150 million payment due September 1, 1992. Para. 8(b). Thereafter, no such credits appear to be allowed.

It is not clear whether the provision in Para. 11(a), removing from Exxon any liability by reason of its clean-up, covers negligently performed clean-up. Clearly it should not. In addition, there must be a mechanism to independently assess the legitimacy of those Exxon clean-up expenditures which may be deducted from the \$150 million payment due in 1992. Otherwise, unreasonably high or otherwise improper expenditures may be deducted, in turn unfairly reducing the money available for

restoration.

The governments' rationale for agreeing to Para. 12 is totally perplexing. Why should they agree to such an offset, should the settlement fail? What are they getting in return? Moreover, why did the government agree to such a stringent standard for disallowing expenditures over \$35 million? It will be very difficult for the government to prove these costs should not be offset.

Under Para. 20, why was Exxon not explicitly required to drop its pending administrative claim against the Coast Guard? What is the status of this claim under the settlement?

Finally, we also object to the settlement's failure to impose civil penalties against Exxon for violation of the Migratory Bird Treaty Act, which it admitted violating, as well as the Marine Mammal Protection Act, the Endangered Species Act and the Bald and Golden Eagle Protection Act.

VI. CONCLUSION

For all these reasons, the environmental groups request that the scientific and economic data so critical to an evaluation of the settlement be released immediately and that approval of the settlement be delayed pending such release and opportunity for public comment. We also would like to see the settlement

modified to respond to the other concerns raised.

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April 17, 1991

DANIEL P. BEARD
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 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

Alaska State Legislature

House of Representatives



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House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

M E M O R A N D U M

TO: Rep. Max F. Gruenberg, Jr., Chairman

FROM: Andy Hemenway, Counsel to the Special Committee

DATE: April 21, 1991

SUBJECT: Alternatives to Acceptance or Rejection

At your request, I have reviewed the Committee minutes, my notes, and the comments submitted to this Committee and to the federal district court with the intent of focussing discussion on possible alternatives to outright rejection or unconditional acceptance of the proposed settlement.

In considering whether specific changes in the proposed settlement are desirable and achievable, the Committee should keep in mind that there is no assurance that any requested changes would be acceptable, or that appropriate legal mechanisms can be devised within the framework of the proposed settlement. Furthermore, the effort to condition approval on specific changes could result in the collapse of the settlement altogether.

With that caveat, this document briefly describes a variety of approaches that might be considered, should the Committee wish to seek a middle ground between acceptance and rejection of the current proposal. The suggestions included are intended to address the major areas of public and legislative concern raised in the course of the Committee's hearings, and in comments submitted to the legislature and to the federal district court.

I
AVAILABILITY OF SCIENTIFIC AND ECONOMIC DATA

The Committee could condition its approval of the settlement on a specific agreement by the parties regarding the release of information gathered since the spill. Such an agreement would have to address a number of issues, including:

- (1) Which information should be released -- solely scientific data, or also economic data?
- (2) Who should be required to release their information -- the State? the United States? Exxon? all the parties?
- (3) When should the information be released -- should time be allowed to encourage settlement of private suits against the State prior to the release?
- (4) Should additional assistance in interpreting or documenting the information be required?

II
AMOUNT AND STRUCTURE OF SETTLEMENT

Clearly, the negotiators for the State and federal governments believe that the amount of the proposed settlement is the best that could have been done. If the Committee is nonetheless persuaded that the amount is insufficient, or that the payment structure is inappropriate, it could condition its approval of the proposal on changes in either the amount or the structure of payments.

Without speculating on what amount the Committee might deem appropriate, there are a number of changes in the structure of payments that might be considered, including:

- (1) Conditioning approval on payment of the the present value of the settlement in a lump sum.
- (2) Conditioning approval on immediate payment in full of the State's past expenditures.
- (3) Conditioning approval on a specific schedule for reimbursement of the State's past expenditures.

III PUBLIC PARTICIPATION IN THE RESTORATION PROCESS

The proposed settlement requires "meaningful public participation" in the restoration process. However, the manner of public participation is entirely up to the Trustees. There are a wide variety of steps that could be taken to clarify the manner of public participation in the Memorandum of Agreement between the State and federal governments, including:

- (1) Providing for a public or legislative role in the designation of State Trustees. Under federal law, the Governor must designate the State Trustees for purposes of any recovery under the Clean Water Act. It is unclear, however, that the State's recovery in this case is under the Clean Water Act. Furthermore, the administration has not pointed to any provision in federal or state law which prevents the legislature from establishing the process by which the Governor may make his designations. Even if there is such a limitation, the Governor could choose to waive it, in order to obtain legislative approval of the settlement agreement.
- (2) Making a Citizens Advisory Board mandatory, rather than optional.
- (3) Legislatively establishing the makeup of a Citizens Advisory Board, e.g., by requiring the membership of certain elective officials, or representatives of named interest groups. If such a group is designated by the legislature, a provision for funding its operations through the trust fund should be devised.
- (4) Requiring the Trustees to submit specific plans for public participation to the legislature for approval, prior to final acceptance of the settlement. This would require gaining the approval of all parties to an extension of time.
- (5) Requiring State representatives to abide by Alaska law governing Open Meetings and Public Records, and requiring that the Trustees promulgate policies of general application substantially in accordance the requirements for issuing regulations under Alaska law.
- (6) Clarifying the nature of projects qualifying for funding by: (a) specifically designating certain categories of projects as eligible or ineligible; (b) enacting legislation establishing funding priorities or criteria; or (c) requiring the Trustees to submit priorities/criteria to either the Citizens Advisory Board or the legislature.

IV LEGISLATIVE OVERSIGHT

The issue of legislative oversight has been discussed primarily in terms of its appropriation power. While the Attorney General and legislative counsel have both addressed the constitutional issues raised in this case, the only sure way of determining whether the proposed settlement is constitutional would be to obtain a ruling by the Alaska Supreme Court. Alaska rules of court provide that the United States District Court may certify directly to the Alaska Supreme Court questions of state law which "may be determinative of the cause then pending". The Committee may wish to consider making its approval of this settlement conditional on that procedure being followed.

In addition to seeking clarification of the constitutional issues, the Committee may wish to seek clarification of the precise funding mechanisms envisaged by the parties. Testimony before the Committee indicates that the Trustees will grant monies to State and federal agencies to perform much of the scientific work associated with the restoration process. If that is the case, the money spent by the State agencies will presumably flow through the general fund, with the specific conditions for spending the money attached. If this is the plan, then the legislature will in effect have a veto power over any such expenditures, since it will not be obligated to appropriate any such grants.

Other issues that might be clarified include the relationship between Trust funding and the Section 470 Fund, ensuring that any changes to the Consent Decree or the Memorandum of Agreement are submitted to the legislature for approval, and whether the Legislative Budget and Audit Committee will have full access to Trust records for auditing purposes.

V OTHER ISSUES

A variety of issues have been raised that do not fall into the broad categories above, but which the Committee may wish to see addressed in the settlement documents before recommending approval. Among the more significant issues are these:

- (1) Exxon's payment of Fish Enhancement Taxes.
- (2) Clarification of the legal claims preserved, e.g., damages to archaeological resources.
- (3) Completion of damage assessment.
- (4) Tax deductibility of payments under State law.
- (5) Assurance that adequate public health studies will be done.

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April 21, 1991

MEMORANDUM ON EXXON VALUATION ISSUES

This memorandum addresses several economic issues in consideration of the proposed settlement of government claims from the Exxon Valdez oil spill. These issues include the valuation of the settlement, the valuation of the natural resources damage, some comparisons of this settlement with other natural resource damage cases, and related matters.

VALUATION OF THIS SETTLEMENT

Various sources have estimated of value of the proposed settlement at amounts ranging from a low of \$421 million (under one of six scenarios used by the Congressional Research Service, Library of Congress) to a high of \$757 million (memorandum from Jim Kelly, research and liaison officer for the Permanent Fund Corp., to staff for Rep. Barnes). The majority of the estimates cluster in the \$500-600 million range. Several uncertainties account for the range.

- Inflation will erode the real value of the large bulk of the settlement that will be received in the future, but no one can know future inflation rates with certainty.
- A similar discount is usually appropriate to reflect the real earnings that could be collected if the funds were available to use or invest now, instead of in the future. The real earnings rate varies independently of inflation.
- The dates on which payments will be made under the settlement are not in all cases certain, i.e., the date for payment of the \$72 million reimbursement of state out-of-pocket costs.
- Some payments result from calculations involving amounts that are not yet known, i.e., Exxon's clean-up costs between January 1, 1991 to the date of final approval.
- An unknown portion of the settlement covers a part of future state clean-up costs that have a high probability of being recoverable from Exxon without litigation.

MEMORANDUM ON EXXON VALUATION ISSUES, page 2

- Tax effects will lower the cost of the settlement to Exxon and reduce its value to the governments by a significant but unknown amount. Whether to include the tax effects is itself a judgement.
- The final installment payment is contingent on unknown future events.
- Additional but unknown liabilities for legal expenses and possible damages may arise as a result of entering the settlement, a factor not accounted for in any of the estimates.

There is no single correct way to deal with these uncertainties. Most economists familiar with the settlement seem to be comfortable in casual calculation and discussion with rounding its present cash value to a half-billion dollars.

NON-USE VALUES

Although the governments have attempted to keep confidential their economic valuations of the Exxon damage, the major results of those studies have been widely discussed in economic circles and with the press. Some of the economic studies attempted to evaluate losses of use values to recreationists, sports fishermen, hunters, subsistence users, and losses associated with commercial fishing. The major thrust of the economic studies, however, and the major part of the several million dollars spent by the governments on economic valuations has been devoted to determining non-use values.

Direct Measures of Non-use Values

Non-use values reflect the worth people give to things like eagles, sea otters, and pristine ecosystems that individuals don't directly use, and which are rarely bought and sold at market prices. These values may reflect a desire to preserve options for future recreational use (option value), to preserve options for future generations (bequest value), or simply because the very existence of the resource (existence value) is something an individual is willing to pay to preserve.

The concept of non-use values is widely accepted in economics. Some methods of measuring the values of non-market goods such as eagles and sea otters are also well established. If people are willing to pay \$50,000 to preserve the life of an injured sea otter, as they apparently were in the case of the rescue program after the Exxon spill, it is inferred that the value of the otter to people must be at least that amount. Thus, one approach to determining the values of Exxon oil spill losses calculates known, inferred, and projected losses and multiplies those numbers by values for individual animals. In addition to looking at rescue efforts, values can be imputed from information such as the costs zoos incur to acquire animals. For example, zoos are

estimated to be paying \$200-500 per bird for murres. The costs of transplant programs, and spending on management and protection can also be used. These relatively accepted approaches to non-use valuation have received little publicity, but studies employing the techniques, together with the emerging picture of the biological injury, reliably support claims of several hundreds of millions of dollars. Mortality to sea otters, murres, other sea birds, eagles, whales, and seals would likely account for the bulk of these values.

Contingent Valuation Measures

The biggest part of the governments' economic effort on the Exxon case has been directed toward determining non-use values using a survey technique called contingent valuation (CV). Respondents are asked how much they would pay to preserve a natural resource, assuming such a transaction were possible; the hypothetical transaction is thus *contingent* on the situation posed by the questioner. The technique is controversial within the economic profession, but has won acceptance in various applications. Although the technique has never been tested directly in a trial, it was approved in theory by a 1989 U.S. Court of Appeals decision in the Ohio case, a proceeding involving challenges to natural resource valuation regulations issued by the Dept. of the Interior. The breadth of that decision was expanded later that same year in the related Colorado case.

Non-use values are not limited to those who live in proximity to the resource; the governments' Exxon contingent valuation surveys were designed to determine the values lost by the entire population of the U.S. The state's national survey was conducted early this year, but it was preceded by extensive focus group studies used to evaluate the proposed questionnaire, and pilot studies to verify survey validity. The federal work had not reached the survey stage when it was suspended.

The state's survey essentially asked the 1000 or more respondents questions to elicit the amount they would be willing to pay in higher taxes and gasoline costs to prevent another accident like the Exxon oil spill. The total amount all U.S. residents would pay was estimate by multiplying the average among the respondents by an figure representing the entire population.

The state's approach to its CV survey has been conservative. For example, respondents were asked questions to elicit the amount they would pay this year to protect against damage over the next ten years. A more accurate (and likely higher) value would have been returned had the questions been designed to elicit the value that the respondents would have been willing to pay if they could have spread the payments over the entire ten year period.

MEMORANDUM ON EXXON VALUATION ISSUES, page 4

Economists working on the federal economic studies criticized the state's approach for being too conservative. Concern was expressed that the state's economic consultants had been pressured on this point. The attorneys, it was suggested, were stunned by the real values of the damage being returned by the focus groups and pilot surveys, and were fearful that these "too large" values would be more vulnerable to methodological challenge in court. One result of this conservative approach was that the wording of the survey questions provided little or no information to respondents on the issue of long-term injury to the environment. This silence may have left the survey vulnerable to an Exxon counter strategy using a major advertising campaign to influence respondent perceptions of the severity of the natural resources damage. One of the major reasons for keeping the CV survey dates secret was to make it difficult for Exxon to employ this strategy. Nevertheless, in October 1990, the company launched a multi-million dollar television campaign designed to reach half of U.S. households in that month with video pictures of a "now almost recovered" Prince William Sound. An extensive print campaign followed.

The state's economists do not believe the Exxon strategy was successful. Comparing data from pilot surveys conducted before October with the results of the final survey suggest that the Exxon strategy had little effect on the final survey values. In any event, the state's C.V. studies nevertheless yielded significant values for the damage done by the spill to Alaska's natural resources. The CV results have been variously reported as \$2.5 billion to \$5 billion (*N.Y. Times*, March 13, 1991), \$3 billion (*Washington Post*, March 20), \$3 to \$5 billion (Tom Campbell, general counsel of the National Oceanic and Atmospheric Administration in March testimony to Congress), and \$3 billion to \$8 billion (*Anchorage Daily News*, March 31). Economists working on the studies have independently confirmed the \$3 to \$8 billion range, and suggest that because of the state's conservative approach, the actual value is likely to be in the higher end of that range.

Evaluating the Economic Studies

The academic economists and other experts who served on the two governments' litigation teams are largely, perhaps unanimously, opposed to the settlement. Experts, of course are not the final arbiters of these issues. Attorneys usually make the decisions that finally set the values in these cases. Dr. Norman Meade, a U.S. government economist who has studied the historical data, found that natural resource damage issues have generally been settled by U.S. attorneys for 25 to 40 percent of the present values of the economic damage estimated by expert economists. Applying those percentages to the values reported above suggests that the present value of the Exxon natural resources damage settlement should be between \$750

MEMORANDUM ON EXXON VALUATION ISSUES, page 5

million (25 percent of \$3 billion) and \$3.2 billion (40 percent of \$8 billion). Reimbursements of government expenses, and other damage claims would have to be added to these amounts.

RECOVERIES IN OTHER CASES

Another approach to evaluating this settlement is to compare it directly to the values recovered in other oil spill cases. In terms of present value of the recovery per gallon of spilled oil, this approach tends to confirm the relative severity of the damages and penalties assessed against Exxon in the proposed settlement. On the other hand all of the spills described below differ in many respects from the Exxon Alaska spill, and none extended over as large a geographic area. The listing below is selective, but typical of recent oil spill settlements.

Shell Oil San Francisco Bay Spill

In 1988, the Shell Oil Co. spilled 400,000 gallons of crude oil from its Martinez refinery into San Francisco Bay. In December 1989, the federal and California governments announced the settlement of all state, local, and federal claims arising out of the spill for \$19.75 million, or just under \$50 per gallon. Payments were not extended. At \$50 per gallon, the comparable recovery for the 11 million gallons spilled in the Exxon case would be a present value of \$550 million, well within the range estimated to have been achieved under the Exxon settlement.

The Shell spill affected waters that are among the most polluted on the Pacific Coast. It could be argued that the relatively undamaged nature of the environment affected by the Exxon spill makes it more valuable. On the other hand, the Shell spill affected an area that humans use far more intensively and directly than the Alaska environments hit by the Exxon spill, factors that could increase the likely damages in the more populous area.

Amoco Cadiz Spill

The tanker Amoco Cadiz struck the French Atlantic coast and eventually broke up, spilling an estimated 66 million gallons. The case is still on appeal, but it seems unlikely that the plaintiffs will receive much more than the equivalent of \$61 million, or 92¢ per gallon. While the trial was in the United States, it was conducted under French recovery theories, and did not include any natural resources damages.

U.S. laws and attitudes have evolved considerably since 1978. Most would argue that the precedent is not controlling. Nevertheless, the

MEMORANDUM ON EXXON VALUATION ISSUES, page 6

fact that a major oil company could be assessed such a small liability for such a large oil spill on the coast of a Western democracy is a fact that cannot be wholly dismissed in considering the vicissitudes of potential litigation.

Exxon Arthur Kill Spill

In 1990, an underwater pipeline rupture in Arthur Kill, a waterway between New York City and New Jersey, resulted in a 567,000 gallon spill of heating oil. State, federal and local government claims arising out of the spill were recently settled for \$15 million, or \$26 per gallon. At that rate the Exxon spill in Alaska would be worth only \$230 million. Comparability with Exxon's Alaska spill is clouded by the already polluted nature of the Kill, that the New York/New Jersey waterway was not heavily used or appropriate for recreation, the relatively high percentage of the oil recovered (26 percent), and the difference in the kind of oil spilled.

Glacier Bay Cook Inlet Spill

The 1987 spill from the tanker Glacier Bay into Cook Inlet resulted in a recent damage recovery by the state of \$700,000. The volume spilled was never accurately determined; based on estimates, the recovery amounted to \$14 to \$28 per gallon.

Arco Anchorage Port Angeles Spill

This was a spill of 240,000 gallons of North Slope crude oil from the Arco tanker *Anchorage* in 1985. The total state recovery was \$348,000, or \$1.45 per gallon. A relatively high percentage of the spilled oil was recovered, and relatively little biological damage resulted.

ORGANIZATION OF THE TRUSTEESHIP

Concern has been expressed regarding the organizational structure of the trusteeship proposed under the settlement. The negotiators could have chosen other models for trust organization that might have provided the public with greater confidence that the recovered funds will be put to good use. In several recent environmental pollution cases funds recovered as damages have been dedicated much more strictly and directly to environmental purposes.

- In a 1981 settlement of a federal pollution case against the Occidental Chemical Company, the defendants provided a \$1.5 million contribution to California Universities for environmental research.

MEMORANDUM ON EXXON VALUATION ISSUES, page 7

- In 1988, as part of a settlement of a case against General Electric for pollution of a Massachusetts river, the company paid the Fund for New England, a private non-profit philanthropic organization, \$100,000 to undertake projects to enhance river water quality.
- In the largest environmental criminal case up to that date, the Allied Chemical Company agreed in 1977 to put \$8 million into a Virginia Environmental Endowment, an independent grantmaking foundation whose purpose is to improve the environment in Virginia.
- In 1987, the endowment established in the Allied case received an additional \$1 million in settlement of claims against Bethlehem Steel Corp. for pollution of Chesapeake Bay, also under a federal consent decree.

ADEQUACY OF EXXON'S PUNISHMENT

The less tangible effects of the civil and criminal settlements are legitimate matters of legislative interest. Even if the civil settlement was considered the best outcome likely, it might still be rejected on the grounds that accepting it would send the wrong message to future negotiators, or would set an undesirable precedent. Certain economic factors may bear on this judgement, one of which relates to the severity of the punishment.

Exxon officers have stated that the settlement will have no significant future effect on the company's earnings. This is in part because it is largely covered by already established reserves. Had the present cost of the settlement been absorbed last year it would have lowered the corporation's 1990 profits of \$5 billion by about 10-12 percent.

In the Justice Department's 1987 Browning Ferris environmental pollution case the consent decree included a provision that barred the defendant from claiming deductibility for federal tax purposes. Had this provision been included in the settlement it would have likely increased the share of 1990 earnings taken by about three percentage points.

Total expenditures by the company as a result of the spill are likely to be about \$3 billion, all told. An estimated \$450 million of this was covered by insurance, and an estimated \$850 million was offset by tax savings, leaving a net cost to the company of about \$1.7 billion. This figure is about one-third of Exxon's 1990 net earnings, and about 7 percent of Exxon's value to its stockholders.

ABILITY TO CARRY THE CASE FORWARD

The Committee has taken testimony bearing on the state's ability to go forward with this case should the proposed settlement be rejected, including testimony on the extent to which the federal government would assist in pursuing the two government's joint civil claims. The likely future costs of litigation are a factor to be considered. Further work on the natural resources damage assessment, including economic studies would likely require several tens of millions of dollars over the next several years.

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



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PROCEEDINGS

APRIL 24, 1991

(Tape: 1)

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(On record: 8:37 a.m.)

THE CLERK: All rise. His Honor The Court, the United States District Court for the district of Alaska is now in session. The Honorable H. Russell Holland presiding. Please be seated.

THE COURT: Good morning ladies and gentlemen. We are taking up first this morning case A90-15 Criminal, United States of America vs. Exxon Corporation and Exxon Shipping Company. The matter is set down for imposition of sentence. We have a necessary preliminary to that, which is the question of whether or not I should accept the plea agreement which was negotiated between the government and the defendants.

In connection with making that decision, I have, of course, reviewed the sentencing memoranda that have been submitted by counsel. I have received from counsel subsequently summaries of reports of various environmental assessments of the damage which flowed from the grounding of the Exxon Valdez, and I have considered those reports. I have received a considerable number of 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

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.

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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***

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U.S.A. vs. EXXON CORPORATION
SENTENCING HEARING - (4/24/91)

1 CERTIFICATE

2 SUPERIOR COURT)
3 STATE OF ALASKA) SS.

4 I, Georgi Ann Haynes, Certified Professional
5 Court Reporter for the Third Judicial District, State of
6 Alaska, hereby certify:

7 That the foregoing pages contain a full, true
8 and correct transcript.

9 That this transcript was prepared to the best
10 of my knowledge and ability from United States District
11 Court tapes.

12 IN WITNESS WHEREOF, I have hereunto set my hand
13 and affixed my seal this 24th day of April, 1991.

14 _____
15 Notary Public in and for Alaska
16 My commission expires: 1/24/95
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U.S.A. vs. EXXON CORPORATION
SENTENCING HEARING - (4/24/91)

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