

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672

1918 SCOMM 76: HOUSE SPEC. COMM. EXXON VALDEZ OIL SPILL. . 1991-92

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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/}

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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.

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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
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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.

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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
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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.
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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:

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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 8th 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 unoiled areas. The larger cutthroat trout showed similar levels of mortality in oiled and unoiled 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.

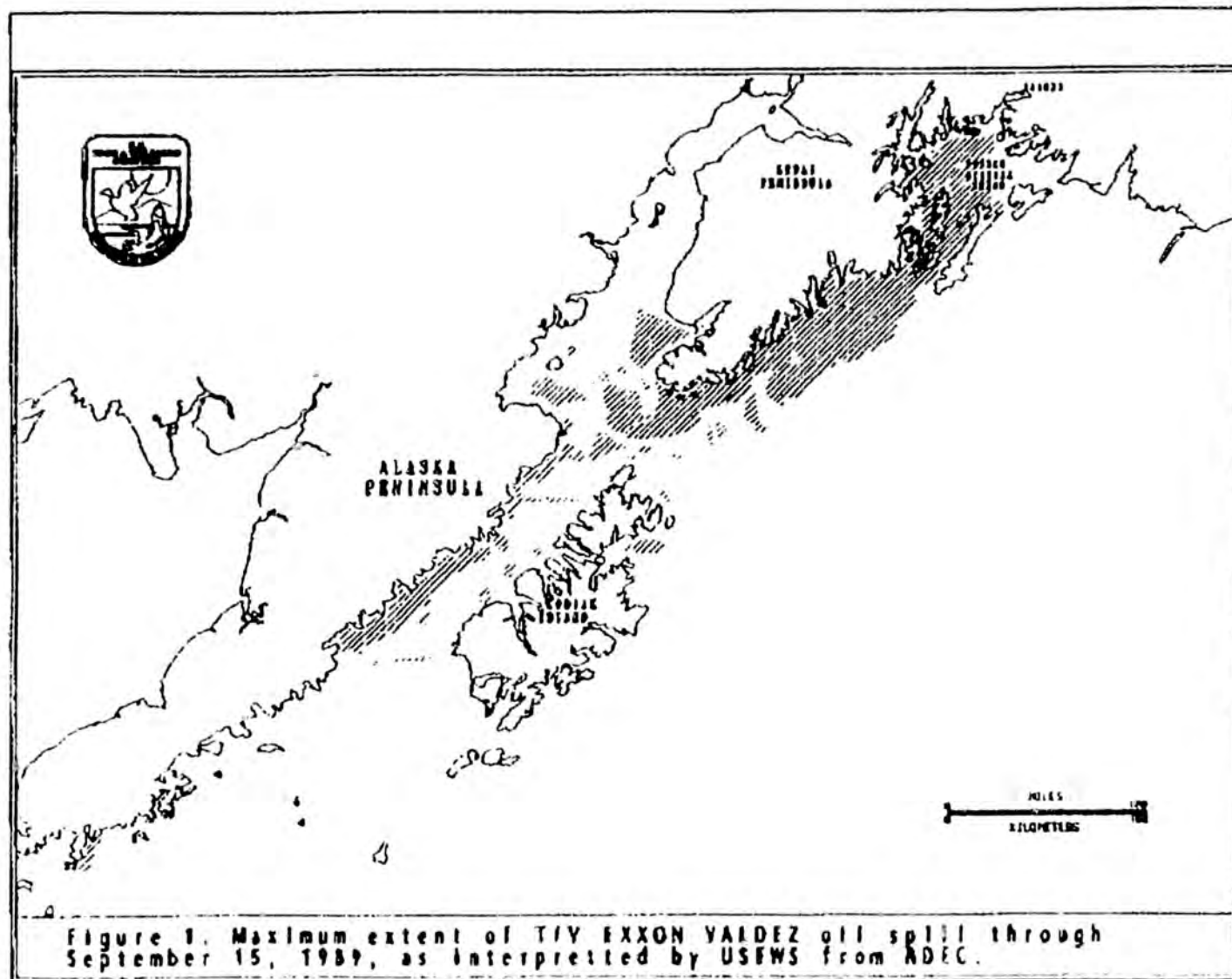


Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989.

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	528
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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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.

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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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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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 GEORGE MILLER CALIFORNIA VICE CHAIRMAN
 PHILIP R. SHARP INDIANA
 EDWARD J. MARKEY MASSACHUSETTS
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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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Honorable Stanley Sporkin
April 8, 1991
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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.

⁴ Stipulation 2.14 to Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline, January 23, 1974, between United States of America and Alyeska owners. As used in Stipulation 2.14, Oil Spill Control is defined as: (1) detection of the spill; (2) location of the spill; (3) confinement of the spill; and (4) cleanup of the spill.

At the time of the Exxon Valdez spill

According to the "purpose" section of Alyeska's Oil Spill Contingency Plan (the "contingency plan") which was in effect on March 23, 1989, Alyeska promised rapid and effective response to any oil spill using state-of-the-art technology.

"The objective of the Alyeska Oil Spill Contingency Plan is to minimize damage to the environment...in the event of an oil spill...the resources of [Alyeska] are organized in a preplanned manner to assure rapid and effective response to any oil spill emergency. This manual outlines the techniques which will be in accordance with state-of-the-art oil spill cleanup technology. [Emphasis added.]"⁵

In section 102 of the contingency plan, Alyeska promised that it is the policy of the owner companies to fully comply with the laws and to take "every reasonable action" to minimize environmental damage from oil spills:

"It is the policy of the eight owner companies, constituting the Permittees under the Federal Right-of-Way Grant and the Lessees under the State Right-of-Way Lease and represented by their agent, Alyeska Pipeline Service Company, to take every reasonable action to prevent oil spills and, if they occur, to minimize environmental damage. Alyeska will comply with the relevant pollution laws for the protection and conservation of environmental resources. [Emphasis added.]"⁶

Alyeska also promised in section 102 of the contingency plan that it will be fully prepared to implement the contingency plan even in the event of a major oil spill:

⁵ Section 101, Alyeska Pipeline Service Company Oil Spill Contingency Plan General Provisions (January, 1987).

⁶ The "relevant pollution laws" according to Alyeska are: "Alaska Statute Title 46, and 18 AAC75, and the National Oil and Hazardous Substances Pollution Contingency Plan, and any revisions thereof, as issued by the Council on Environmental Quality (CEQ) under the authority of the Federal Water Control Act [sic], as amended (Public Law 92-500). Alyeska Policy and these plans are intended to be written and executed so as to comply with the Grant and Agreement of Right-of-Way and the Right-of-Way lease with the United States of America and the State of Alaska, respectfully. Alyeska Pipeline Service Company will ensure that the National Contingency Plan is followed during any spill event." p.1-1

"Regularly scheduled training programs will be conducted....The objectives of this training program are:....To maintain the Plans as fully operable working documents [and] To update the Plans to reflect state-of-the-art capability....Full scale, company-wide field exercises will be held at least once per year to insure overall readiness for response to large scale oil spills.... [Emphasis added.]"

Alyeska further promised in section 102 of the contingency plan that, as agent for the owner companies, it will effectively direct and conduct cleanup operations, including those related to any spill in Prince William Sound:

"[C]leanup operations within the areas of liability and responsibility [imposed by law] will be conducted by Alyeska as Agent for the Owner companies and will be conducted in a manner as not to require assumption of control of such cleanup operations by federal or state officials....Alyeska will direct cleanup operations of spills resulting from...[O]peration, involving tankers carrying or destined to carry crude oil transported 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]