

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
1919 SCOMM 76: HOUSE SPEC. COMM. EXXON VALDEZ OIL SPILL. 1991-92

134

When Polasek testified, under oath, at a hearing I chaired in Valdez on May 7, 1989, he acknowledged that: "the equipment in this plan was similar to the plan in 1977. We increased the amount of boom and take [sic] other actions, but essentially that was the same equipment decided upon."¹⁴

Polasek's briefing includes a reference to the planned acquisition of a 10,000 barrel tank barge by late 1988. In fact, this oil spill barge -- the "Betty-K" -- was stored in Washington state for the winter of 1989 and was not available in the Exxon Valdez cleanup.

Moreover, Polasek's briefing refers to a "mobile contingency command center with communications repeaters" which would be installed by "mid 1988." In fact, such a system was not in place at the time of the Exxon Valdez spill.

Exxon and the Alyeska Owner Companies Secretly Decided that Alyeska Would Not Respond to an Oil Spill In Prince William Sound in the Manner Prescribed in the Contingency Plan.

According to a June 30, 1988 telex from Roger A. Gale, Manager, Marine Operations, Sohio Oil (now BP) to Polasek of Alyeska, the Marine Services Subcommittee decided to make five recommendations to the Owners Committee as part of an "acceptable compromise" [Exhibit F]:

First, the "current stockpile of clean up equipment is adequate" for spills at the terminal, but "should be maintained to the highest state of readiness."

Second, for spills in Prince William Sound, additional equipment should be purchased of the "type best suited for near shore and beach operations."

Third, a large barge (50-100,000 barrel capacity) equipped with ocean boom and skimmers was needed.

Fourth, a "study of the best and quickest methods of moving the barge around" including predeployment in Prince William Sound.

Fifth, that Alyeska and the owners "press" state and federal officials for "preapproval to use chemicals on a widespread basis."

¹⁴Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Part I at p. 155.

Honorable H. Russel Holland
Honorable Stanley Sporkin
April 8, 1991
Page 10

However, on July 6, 1988, Stanley Factor, Vice President, Chartering and Evaluations, Arco Marine, Inc., objected to Roger Gale's recommendations because the owners had already decided that Alyeska would not respond to spills in Prince William Sound in the manner required by the Oil Spill Contingency Plan [Exhibit G]:

"Arco Marine Inc. does not agree with this telex nor do we concur that this represents the thoughts of the subcommittee.

"At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only. Further efforts in the Prince William Sound would be limited to the use of dispersants and any additional effort would be the responsibility of the spiller. [Emphasis added.]"¹⁵

Conclusion

At my subcommittee's hearing on May 7, 1989 in Valdez, Theo Polasek testified under oath on Alyeska's behalf that "[w]e fulfilled our promises in that [oil spill contingency] plan. We have not broken our promises to the people of this State."¹⁶

But the evidence I have set forth indicates that Alyeska broke the law as well as its promises to the State of Alaska and the Congress.

For example, section 309(c)(4) of the Clean Water Act (33 U.S.C. section 1319(c)(4)) provides that substantial criminal penalties may be imposed upon any corporation or responsible corporate official that files information with Federal authorities with knowledge that the documents contain material misstatements.¹⁷ In addition, criminal penalties may be imposed on any person who knowingly submits false information to any agency of the United States under 18 U.S.C. section 1001.¹⁸

¹⁵The Chairman of the Owners Committee at the time was Darrell Warner, President of Exxon Pipeline Company.

¹⁶"Investigation of the Exxon Valdez Oil Spill," Part I at p. 169.

¹⁷ A fine of up to \$10,000, or a prison term of up to two years or both may be imposed under this section.

¹⁸A fine of up to \$10,000, or a prison term of up to five years, or both, may be imposed under this section.

Honorable H. Russel Holland
Honorable Stanley Sporkin
April 8, 1991
Page 11

Thus, since Alyeska knew that it could not and would not respond to an oil spill in Prince William Sound as required by its oil spill contingency plans, Alyeska and any responsible officer could be exposed to substantial criminal penalties.

However, the Department of Justice has not even filed any criminal charges against Alyeska or its owner companies other than Exxon. Furthermore, in the proposed Criminal Plea Agreement, the United States would waive its rights not only to pursue any criminal charges against Alyeska and its owner companies, but also waive its rights to pursue civil or administrative penalties against Alyeska and its owner companies.¹⁹

The proposed Agreement and Consent Decree also provides generous protection for Alyeska. The United States and the State of Alaska both waive their rights to raise claims against Alyeska for natural resource damages in Paragraph 20. In addition, should either government recover any amount from Alyeska for claims of any kind, Exxon is entitled to be reimbursed for 20.34 percent of the governments' recovery (this figure represents the percentage ownership by Exxon of Alyeska). Yet Alyeska, including its shareholders and owner companies other than Exxon Pipeline, expressly reserves their rights to sue the United States or the State of Alaska in Paragraph 19 of the proposed settlement agreement.

In my view, the inclusion of Alyeska in the proposed Criminal Plea Agreement and in the proposed settlement Agreement and Consent Decree is contrary to the public interest. Based on the evidence, it is inconceivable that the Department of Justice would waive its rights to pursue criminal claims, and virtually all civil claims, against Alyeska.

In sum, the proposed Exxon settlement fails to hold Alyeska accountable to the public for its wrongdoing and fails to serve as a deterrent for similar conduct in the future.²⁰

¹⁹ Section III.A. of the Plea Agreement states that "[t]he United States agrees not to seek additional criminal charges or any civil or administrative penalties.... against Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives, for any violation of federal law arising out of the grounding of the 'EXXON VALDEZ,' the resulting oil spill, the containment or cleanup of that spill, or its or their conduct in connection with the preparation or submission of oil spill contingency plans or related, by Alyeska Pipeline Service Company to the federal or state government...." p.5.

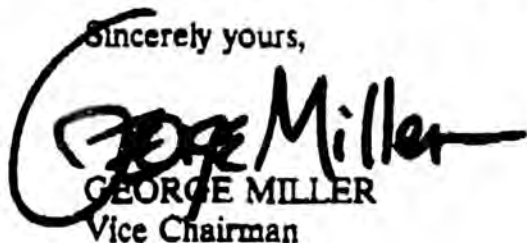
²⁰ Under Alaska law, punitive damages are awarded for the public policy reasons of punishment and deterrent when the defendant's conduct was outrageous, reckless, or malicious. In this instance, there is clear and convincing evidence that Alyeska's conduct merits the award of punitive damages.

Honorable H. Russel Holland
Honorable Stanley Sporkin
April 8, 1991
Page 12

After extensive debate about the environmental risks, the Trans-Alaska Pipeline System was approved in 1973 by only a one-vote margin in the U.S. Senate. In exchange for access to environmentally sensitive public lands, the Congress was assured by Alyeska and the owner companies that the pipeline system would be operated in a safe and environmentally sound manner, using state-of-the-art technology.

The oil industry betrayed its own promises and deceived the Congress with respect to operations of Alyeska and the Exxon Valdez oil spill. Without a commitment by the Department of Justice to prosecute this intentional deception, how is it that Congress and the people of the State of Alaska can rely on such assurances in the future?

Sincerely yours,


GEORGE MILLER
Vice Chairman

cc:

The Honorable Walter J. Hickel, Governor, State of Alaska
The Honorable Ben Grussendorf, Speaker, Alaska House of Representatives
The Honorable Richard Eliason, President, Alaska Senate
The Honorable Senator Ted Stevens
The Honorable Senator Frank Murkowski
The Honorable Representative Don Young
The Honorable Richard L. Thornburgh, Attorney General, U.S. Department of Justice
The Honorable Manuel Lujan Jr., Secretary, U.S. Department of the Interior
The Honorable Samuel K. Skinner, Secretary, U.S. Department of Transportation
The Honorable Edward R. Madigan, Secretary, U.S. Department of Agriculture
The Honorable William K. Reilly, Administrator, U.S. Environmental Protection Agency
The Honorable John A. Knauss, Undersecretary for Oceans and Administrator, National Oceanic and Atmospheric Administration, U.S. Department of Commerce
Members, Committee on Interior and Insular Affairs

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APR 16 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-CR
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S MEMORANDUM
	)	IN AID OF SENTENCING
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

agreement seeks imposition of the largest criminal fine in an environmental case to date. This fine would reflect the seriousness of the conduct that caused the grounding of the Exxon Valdez, and the resulting environmental injury, and would send a strong message that companies that violate environmental statutes face serious punishment. In addition, the plea agreement provides for immediate payment of substantial compensation to the State of Alaska. This payment will provide needed funds for the rehabilitation of Prince William Sound and other areas affected by the spill.

The plea agreement addresses more than punishment and compensation. It also acknowledges that the defendants made substantial efforts to rectify the consequences of their conduct by financing oil spill clean-up efforts. Consequently, the plea agreement does not ask that either defendant be placed on probation, and provides that one-half of the fine be remitted. It thus provides a message that the government will take into account steps voluntarily taken by responsible parties to correct the consequences of acts that constitute environmental crimes.

This criminal prosecution and the resulting plea agreement cannot resolve all the issues relating to the oil spill. However, the government believes that the purposes of criminal prosecution -- conviction of the guilty, just punishment for wrongful conduct, deterrence of future criminal conduct, and the need to provide compensation to

victims -- are effectively addressed by the plea agreement, and the United States respectfully urges the Court to approve it.

II. FACTUAL BACKGROUND

Most of the significant facts that underlie the criminal charges in this case have been set forth in prior pleadings.¹ Consequently, this memorandum does not provide a lengthy factual background of the grounding, but summarizes briefly what the government's evidence would have shown if the case had gone to trial. While most of this evidence relates to conduct of Exxon Shipping's employees, the government would have been prepared to prove that Exxon Shipping was acting as Exxon's agent, making Exxon liable under this Court's ruling upholding the government's theory of agency liability.

The VLCC tanker² vessel Exxon Valdez departed Valdez on March 23, 1989 at about 9:20 p.m., transporting crude oil owned by Exxon Corporation. Assigned to direct the ship through the initial portion of Prince William Sound was

¹See e.g., Bill of Particulars, July 31, 1990; Government's Consolidated Opposition to Motions of Exxon Corporation to Dismiss Counts One, Two, Three, Four and Five, Sept. 20, 1990; Government's Opposition to Motion of Exxon Shipping Company to Dismiss Count Four for Failure to Charge an Offense, Sept. 20, 1990; Factual Basis for Guilty Plea of Exxon Shipping Company, March 22, 1991.

²Very large crude carrier, a tanker exceeding 160,000 dead-weight tons. The Exxon Valdez had a capacity of more than 60 million gallons of crude oil.

- 4 -

Captain William Murphy, a certified marine pilot. The master of the Exxon Valdez was Captain Joseph Hazelwood. Prior to leaving port, Captain Hazelwood had consumed several alcoholic beverages with two of his shipmates.³

Captain Murphy disembarked at 11:24 p.m. Before doing so, he informed Captain Hazelwood of the presence of glacial ice blocking the shipping lanes. Captain Hazelwood, who was the only person on the vessel who had the required pilotage certification for Prince William Sound, then resumed responsibility for navigating the ship. In order to avoid the ice, Hazelwood ordered the ship to alter course to 180 degrees, a course out of the shipping lanes and directly toward Bligh Reef. He placed the ship on autopilot and ordered the ship to "load program up."⁴ After the course was changed, the individuals on the bridge with Captain Hazelwood were Third Mate Gregory Cousins and helmsman Robert Kagan, a "step-up" (or temporary) able-bodied seaman (AB).

Captain Hazelwood instructed Cousins to turn the ship back into the shipping lanes when it reached a point

³Ten hours after the grounding of the Exxon Valdez, blood and urine samples were taken from Captain Hazelwood. The blood sample showed an alcohol concentration of .061 percent and the urine sample showed an alcohol concentration of .09 percent. The government has no evidence that Captain Hazelwood consumed alcohol between the time of the grounding and the time the blood and urine samples were obtained.

⁴ At "load program up," the speed of the main engine was being increased slowly by a computer from maneuvering full ahead (55 rpm) to full-ahead sea speed (78.9 rpm). It would have required about 43 minutes to attain the maximum speed.

about three minutes to the south. He then left the bridge and went to his cabin to "get out some messages," leaving the bridge critically undermanned while Cousins had to perform a dangerous nighttime maneuver around ice and near reefs.⁵

After Hazelwood left the bridge, Cousins disengaged the autopilot, took navigational fixes, and ordered a series of rudder commands intended to route the ship between Bligh Reef and the leading edge of the glacial ice, a distance estimated by Cousins to be .9 mile. As a result of errors by Cousins and Kagan, the Exxon Valdez ran aground on Bligh Reef shortly after midnight on March 24, 1989, rupturing eight cargo tanks and discharging approximately 11 million gallons of crude oil into the pristine waters of Prince William Sound, causing the death of several hundred thousand migratory birds.⁶

The person with the primary responsibility for safely navigating the Exxon Valdez was Captain Hazelwood. He was known to both defendants to be an alcoholic. Medical records provided to both defendants in 1985 showed that he was hospitalized in an alcohol rehabilitation facility and diagnosed as suffering from episodic alcohol abuse and dysthymia and that he needed aftercare treatment. After

⁵ There is no evidence that Captain Hazelwood sent out any messages that evening.

⁶As stated at page 8 of the government's Summary of Damage to Natural Resources, preliminary estimates of the total number of birds killed range from 260,000 to 580,000.

Hazelwood's hospitalization and a three-month leave of absence, Exxon Shipping's managers returned him to duty as a ship's master. Unfortunately, his rehabilitation proved unsuccessful; he continued to use and abuse alcohol on and off duty up to the time of the grounding. Exxon Shipping failed to respond to reports and evidence that it received of Captain Hazelwood's ongoing alcohol use and abuse, and to take adequate steps to monitor his fitness to serve as a master in light of his history of alcohol abuse.

Robert Kagan was the helmsman at the time of the grounding. He had been an ordinary seaman with Exxon Shipping since 1974. In 1985, Kagan was "stepped-up" to AB for a few months, but then returned to ordinary seaman because of his unsatisfactory performance. In late 1988, Mr. Kagan was again "stepped up" to AB and assigned to serve on the Exxon Valdez. After serving 30 days on the ship, the chief mate prepared a written evaluation of Mr. Kagan's performance as an AB, which was received by the Exxon Shipping Fleet Manning Department prior to the grounding. This performance evaluation stated that "Mr. Kagan lacks the necessary skills to do the AB's job" and rated him "unsatisfactory" in his ability to work without supervision. A few weeks before the grounding, the alternate master of the Exxon Valdez told Captain Hazelwood that Mr. Kagan could not steer a ship and required too much supervision.

III. THE PLEA AGREEMENT

Pursuant to the plea agreement, Exxon Corporation has pled guilty to a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a), and Exxon Shipping has pled guilty to violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1)(A); the Refuse Act, 33 U.S.C. §§ 407 and 411; and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a). The total maximum statutory fines that the court could impose for these violations as to both defendants is \$420,000.00, unless the loss-doubling provision of 18 U.S.C. § 3571(d) is applied. However, in the plea agreement, Exxon Shipping has agreed to the imposition of a fine of \$75 million, with \$37.5 million remitted, and Exxon has agreed to a fine of \$25 million with \$12.5 remitted. In addition to the agreed-upon fines, the defendants have agreed to make compensatory payments of \$50 million to the State of Alaska. The parties have agreed that the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., apply to the plea agreement.

IV. FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE

The court has asked the parties to address succinctly the plea agreement in light of the sentencing factors in 18 U.S.C. § 3553. The relevant factors are discussed below.

A. § 3553(a)(1) - The nature and circumstances of the offense

A significant factor in the grounding of the Exxon

Valdez was Captain Joseph Hazelwood's decision to leave the bridge while the ship was executing a critical nighttime maneuver around glacial ice in the vicinity of Bligh Reef. In the face of increasing danger, which demanded greater precaution, Captain Hazelwood's decision to leave the bridge was a dereliction of his duty to supervise the safe navigation of the vessel. His unsound judgment in leaving the bridge undermanned set into motion a chain of events that culminated foreseeably in the ship running aground.

Third Mate Gregory Cousins, the junior officer left alone in charge of trying to guide the VLCC tanker, travelling at approximately 12 knots, through a .9 mile passage separating a field of glacial ice and Bligh Reef, was overwhelmed by the task that confronted him. As a result of having to do both the job of conning the vessel and fixing the vessel's position frequently, he failed to ensure that his rudder commands were properly executed and failed to assess the increasingly dangerous situation as the vessel approached Bligh Reef. The failure of the third mate and the helmsman to exercise due care in directing the ship safely past the reef were proximate causes of the grounding.

Neither Exxon Corporation nor Exxon Shipping should find refuge in the fact that Captain Hazelwood's conduct

violated company policy.⁷ Both defendants were aware that Captain Hazelwood had a history of alcohol abuse and dysthymia. After returning him to command of one of the world's largest oil tankers, it was incumbent upon them to monitor him carefully for alcohol abuse. This was not done. Had effective monitoring occurred, Captain Hazelwood would have been relieved of duty prior to the grounding. As Lawrence Rawl, C.E.O. of Exxon Corporation said after the grounding, "The first drink the captain had after he had (been) rehabilitated was a basis for dismissal."

The Fleet Manning Department of Exxon Shipping, which made the decision to temporarily assign Robert Kagan as an AB to the Exxon Valdez, was notified prior to the grounding that he lacked the skills necessary to do an AB's job. In light of this evaluation, and a long history of poor performance ratings, he should not have been retained in that capacity on the Exxon Valdez.

B. § 3553(a)(2)(A) - The need of the sentence to reflect the seriousness of the offense

The Exxon Valdez oil spill is the largest oil spill in United States history. As an aid to the Court in determining whether the sentence set forth in the plea agreement is appropriate, the United States filed a "Summary of Effects of the Exxon Valdez Oil Spill on Natural Resources

⁷ In a 1987 performance evaluation of Captain Hazelwood, the evaluator noted that he "does not proactively support co. policies at times."

and Archaeological Resources" on April 8, 1991. This document summarizes the injuries to natural resources that have been documented to date. Based on the seriousness of the harm resulting from the oil spill, the fine contained in the plea agreement is appropriate.

C. § 3553(a)(2)(A) - The need of the sentence to promote respect for the law

More than any other case in environmental litigation, this case has riveted the attention of the nation, and has been a sobering lesson that the environment is a vulnerable victim that requires great care in the conduct of environmentally hazardous activities. Acceptance of the plea agreement should heighten the business community's and the public's awareness of and respect for laws designed to protect the environment.

D. § 3553(a)(2)(A) - The need of the sentence to provide just punishment for the offense

The maximum statutory penalties allowable for the crimes to which the defendants have pled guilty total \$420,000.00. The fine agreed to in this plea agreement is \$100 million with \$50 million remitted. This fine would be the largest criminal fine ever imposed in an environmental criminal case. A fine of this magnitude is warranted in light of the egregiously deficient conduct of the defendant's employees and agents, both aboard the Exxon Valdez and in management, and of the tremendous harm to the environment and the people of Alaska caused by those failings.

E. § 3553(a)(2)(B) - The need of the sentence to afford adequate deterrence to criminal conduct

Criminal violations of environmental statutes have the potential to and often result in enormous injury. The United States believes that the fine imposed in this case must send a strong message to businesses and individuals alike. As the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping in failing to exercise the high standard of care required in transporting crude oil through a pristine environment. Imposition of the statutory fines that would apply in this case, amounting to no more than \$420,000.00, would utterly fail to send that message. For that reason, the United States believes that the loss-doubling provision of 18 U.S.C. § 3571(d) should be applied. The fines contained in the plea agreement and agreed to by the defendants are of a magnitude that should deter future corporate carelessness with the environment.

F. § 3553(a)(3) - The kinds of sentences available

Only two sanctions apply to an organization convicted of a crime. Those sanctions - a fine or a term of probation - are set forth in 18 U.S.C. §3551(c). In considering whether to impose a fine and the amount of the fine, the court should consider, in addition to the factors set forth in § 3553(a) and described elsewhere in this

sentencing memorandum, the factors set forth in 18 U.S.C. § 3572. Those factors, which are discussed below, amply support imposition of the \$100 million fine set forth in the plea agreement as well as the remission of a portion of it.

The first of those factors is whether the defendant is an organization. If so, the Court should consider its size. Exxon Corporation is one of the largest and most profitable corporations in the world, and its wholly owned subsidiary, Exxon Shipping Company, has assets worth hundreds of millions of dollars.

The next factor to be considered is any measure taken by the organization to discipline any employee responsible for the offense. In this case, Exxon Shipping fired Captain Hazelwood for his conduct of using alcohol four hours before assuming duty and for his leaving the bridge during a hazardous maneuver. Mr. Cousins was reassigned to the status of AB as disciplinary action for his role on the grounding.⁸

The last factor the court can consider in determining the amount of the fine are any measures taken by the defendants to prevent a recurrence of the offense. Since the grounding, Exxon Corporation has revised its substance

⁸ Following the grounding, Mr. Cousins' license was suspended for nine months by the USCG. The government is unaware of any other disciplinary action taken against Exxon Shipping employees as a result of the events related to the grounding.

abuse policy substantially. Specifically, employees who have had or are found to have a substance abuse problem will not be permitted to work in safety sensitive positions and employees who have returned from rehabilitation will be required to participate in an aftercare program. The policy subjects persons in safety sensitive positions to unannounced periodic or random drug and alcohol testing and permits the defendants to conduct unannounced searches for drugs and alcohol on property owned or controlled by the defendants.

In addition, the defendants have created the position of loading mate in the Ports of Valdez and San Francisco. The loading mate has the responsibility of loading and unloading cargo from tanker vessels in port. The creation of this position should eliminate a significant source of fatigue. The National Transportation Safety Board concluded that the third mate's fatigue and excessive workload contributed to the grounding of the Exxon Valdez, and that Exxon Shipping's personnel policies encouraged marine employees "to work long hours without concern for debilitating fatigue."

A primary reason the government would request a term of probation in this case would be to serve as a vehicle for the Court to order restitution as a condition of probation. Since the terms of the plea agreement include a payment of \$50 million in compensatory payments to the State of Alaska by the defendants, the United States does not

- 14 -

believe probation is required in this matter.

G. § 3553(a)(6) - The need to avoid unwarranted sentence disparities among defendants guilty of similar conduct

There have been only a few other prosecutions for negligent oil spills, and none have involved environmental harm as widespread as that caused by the Exxon Valdez spill. The only other case that approaches this one is United States v. Ashland Oil Co., No. 88-146 CR (W.D. Penn. 1988), where the court imposed a fine of \$2.25 million for a negligent spill of about 700,000 gallons of diesel oil into the Monongahela River. That spill was the largest inland oil spill in U.S. history. The present case involves a spill about 16 times larger than the Ashland spill, and Exxon Corporation is several times larger than Ashland Corporation. Thus, it is appropriate that the fine in this case be much larger than in Ashland. The government believes that the record \$100 million fine agreed to in this case, with \$50 million remitted, appropriately reflects the seriousness of the offenses to which defendants have pled guilty, and is not inconsistent with other fines for oil spills.

H. § 3553(a)(7) - The need to provide restitution to any victim of the offense

While restitution is an important consideration, the criminal sentence cannot provide relief to every victim of the oil spill. However, many of those injured by the spill have been compensated or will be compensated. For

- 15 -

example, the plea agreement provides \$50 million in compensatory payments to the State of Alaska and a separate civil settlement requires the defendants pay up to \$900 million over the next ten years, and possibly an additional \$100 million if reopener conditions are met, for the restoration of Prince William Sound. The defendants have also paid more than \$300 million to third parties in settlement of claims resulting from the oil spill and there are presently pending, in federal and state court, a multitude of claims requesting various forms of relief. It would be extremely complicated, in light of all the pending litigation, for this Court to fashion an order of restitution for all those who claim to have suffered losses resulting from the oil spill.

Under 18 U.S.C. § 3663(d), the Court may decline to make a restitution order if the Court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any of the victims. A protracted hearing to determine restitution for every victim of the oil spill may run afoul of Fed. R. Crim. P. 32(a)(1), which generally requires that sentence shall be imposed without unnecessary delay.

- 16 -

V. **LEGAL AUTHORITY TO IMPOSE THE FINE SET FORTH IN THE PLEA AGREEMENT AND TO THEREAFTER REMIT A PART OF THE FINE**

The Court asked the [redacted] to address the Court's authority to impose the agreed [redacted] and to remit a portion of a fine once the fine has been imposed. The plea agreement calls for imposition of a \$75 million fine on Exxon Shipping, and a \$25 million fine on Exxon Corporation. The Court's authority to impose these fines rests on 18 U.S.C. § 3571(d), which permits a fine of up to double the gross pecuniary loss to persons other than the defendant caused by the offense. If sentencing under this statute were litigated, the government would be prepared to prove that the offenses to which the defendants have entered pleas of guilty caused pecuniary losses to others in excess of \$50 million, providing a basis for a fine of \$100 million. In the plea agreement at page 4, defendants agree that there is a legal basis for the Court to impose the agreed fines.

The plea agreement calls for remission of \$37.5 million of Exxon Shipping's fine, and \$12.5 million of Exxon Corporation's fine, in recognition of defendants' conduct following the spill. The Court has the authority to order remission of part of a fine it has imposed, because the Court has the inherent authority to reduce a sentence it has imposed. In United States v. Benz, 282 U.S. 304 (1931), the Supreme Court upheld a district court's reduction of a

- 17 -

defendant's prison sentence after it began, stating:

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented.

Id. at 306-07 (citations omitted). More recent decisions of the Supreme Court on sentencing authority have cited the rule laid down in Benz without question. See United States v. DiFrancesco, 449 U.S. 117, 138 (1980). Lower courts following Benz have distinguished between a court's power to reduce a sentence inherent, and a court's power to suspend execution of a sentence, which a court may do imposing probation. United States v. Ellenbo F.2d 537, 540-41 (3d Cir. 1968), cert. denied 393 U.S.

The distinction between reduction and suspension is logical: reduction of a sentence is unconditional, while a suspended sentence may be reimposed at some future date. A defendant whose sentence is suspended is entitled to be placed on a term of probation with a definite ending date and express conditions, so that he knows what conduct, during what period, will subject him to reimposition of his sentence. A defendant whose sentence is reduced without

- 18 -

condition has no such need.

VI. RESPONSE TO COMMENTS FROM THE PUBLIC

The Court has directed the parties to respond to the public's comments on the plea agreement. The Court received 87 comments in response to the Court's invitation to the public to express their views on the criminal plea agreement in this case. Almost all the comments were from private citizens residing in Alaska. The Audubon Society, the Green Party, and the National Wildlife Federation also submitted comments, as did two attorneys representing plaintiffs in the civil oil spill litigation. Finally, three Alaskan villages and one native corporation submitted comments.

Many of the comments raise similar objections or concerns about the plea agreement. Hence, instead of responding to each comment separately, we have grouped the comments into several categories sharing common themes, and have responded to each of those themes. One characteristic that almost all of the comments share is that they address both the criminal plea agreement and the proposed consent decree, often confusing the two. Many of the objections concern the adequacy of the civil recoveries under the consent decree, rather than the sentence proposed under the plea agreement. The proposed consent decree is independent from the plea agreement; consequently, it is not appropriate for the government to respond here to objections to the

- 19 -

consent decree.

A. Comments Favoring the Plea Agreement

Eleven commenters urged the Court to accept the plea agreement. In general, those commenters cited the value of obtaining a certain result in this case immediately, rather than an uncertain result after years of litigation. Some commenters also cited a desire to give Exxon credit for its efforts to clean up the spill. The government agrees that the definite sentence set forth in the plea agreement is preferable to the uncertain sentence that could result even if convictions were obtained after trial. The range of uncertainty in this case is particularly broad, because of the dramatic difference between the normal maximum fines and the level of fines that the Court could, in its discretion, impose under the Alternative Fines Act.

B. Comments Opposing Agreement Not to Prosecute Alyeska

Representative George Miller, Vice-Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, wrote to the Court to say that he objects to the provision in that plea agreement in which the government agreed not to prosecute Alyeska Pipeline Service Company for any offense arising from Alyeska's preparation of oil spill contingency plans. The National Wildlife Federation raised a similar objection. Vice-Chairman Miller stated that Alyeska knew that it could not and would not

- 20 -

respond effectively to a major oil spill, and suggested that the government could charge Alyeska with violating the false statement provision of the Clean Water Act, 33 U.S.C. § 1319(c)(4), or the false statement provision at 18 U.S.C. § 1001.

At the outset, it is necessary to clarify the meaning of the non-prosecution provision of the plea agreement and respond to this comment. The plea agreement preserves the federal government's right to prosecute any employees of Alyeska for any criminal conduct that may have been associated with the spill plan. This would, of course, include the government's ability to prosecute any individuals for possible false statements in violation of 18 U.S.C. § 1001. Moreover, the State of Alaska retains full authority to prosecute Alyeska and its employees for any criminal violation of state law that may have occurred.

The government conducted a thorough investigation of possible criminal conduct associated with Alyeska's submission of spill plans. The evidence would not support a prosecution for false statements under the Clean Water Act, 33 U.S.C. § 1319(c)(4), because that section applies only to documents required to be filed under the Clean Water Act. Alyeska's spill plans were not required to be filed under that Act. After carefully weighing the evidence, the relevant law and attendant litigation risks, the possible

- 21 -

sanctions for any criminal charges that might have been brought against Alyeska,⁹ and the unprecedented criminal fines and guilty pleas the government would obtain from Exxon under the plea agreement, the government concluded that it was in the best interests of the public to include a non-prosecution agreement for Alyeska in the plea agreement.

C. Objections to Lack of Data on Spill Damage

In order to assist the Court in reviewing the plea agreement, the government filed a summary of preliminary results of a number of extensive oil spill damage assessment studies. That summary does not purport to offer a definitive tally of the tremendous damage done by the spill to the waters, wildlife and people of Alaska. It does, however, provide the government's present best estimate of these damages, based on all the information they have collected over the two years since the spill. This assessment of the harm caused by the spill was available to responsible government officials who negotiated the plea agreement and consent decree. While the full scope of that harm may not be known for several years, there are no present indications of significant long term injury to resources other than those specifically identified in the summary.

⁹The maximum corporate fine for a false statement in violation of 18 U.S.C. § 1001 is \$500,000, pursuant to 18 U.S.C. § 3571(c).

- 22 -

Notwithstanding the government's release of a full summary of the natural resource damage assessment study results, a number of commenters object that they cannot evaluate the plea agreement without access to all state and federal studies on injury to natural resources caused by the spill. However, the plea agreement does not seek to redress all injury caused by the Exxon Valdez spill; it seeks only to affix criminal responsibility for the spill, to impose just punishment, and to begin a flow of restitution that will continue in the civil context. In order to determine whether punishment in this case is just, it is enough to know that Exxon and its subsidiary, in violation of applicable environmental laws, caused an environmental disaster of unprecedented proportions, warranting a fine of unprecedented proportions.

D. Objections to Dismissal of Felony Charges

A few letters opposed the plea agreement because it calls for the dismissal of Counts 4 and 5 of the Indictment, which charged felony offenses. The decision by the Department of Justice to dismiss certain counts in an indictment at the time of sentencing is one committed to the discretion of the prosecutors.

E. Objections That Fine Is Insufficient

A number of letters ask the Court to not accept the plea agreement on the basis that the fine and the restitution called for in the agreement are inadequate. The plea

- 23 -

agreement provides for the largest criminal fine ever imposed in an environmental prosecution. To date, the largest criminal fine for an oil spill is \$2.25 million, paid by the Ashland Oil Company in a Clean Water Act prosecution arising out a serious river spill, which contaminated drinking water in several states and disrupted the lives of thousands of people.

The size of the proposed fine in this case is much greater than that imposed on Ashland just over two years ago. The magnitude of the fine reflects both the larger size of these corporate defendants and the damage created by the Exxon Valdez oil spill. The record fine and the concomitant restitution are designed to punish both defendants for their actions and send a strong message of deterrence to other potential polluters.

F. Objections That the Settlement Deprives Public of a Public Trial

A few of the comments oppose the plea agreement because it means that there will be no public trial of the criminal charges. This is the result of any plea agreement, and is the manner in which most convictions in federal criminal cases are obtained. The commenters misconstrue the purpose of a criminal trial, which is not to satisfy the public's curiosity, but to determine guilt.

In any event, unlike most criminal cases, most of the evidence of the defendants' criminal conduct in this case

- 24 -

has been made public. This evidence was aired in inquiries by the National Safety Transportation Board, several Congressional committees, and the Alaska State Oil Spill Commission, as well as in U.S. Coast Guard proceedings to suspend the licenses of Joseph Hazelwood and Gregory Cousins, and the State of Alaska's six-week trial of Joseph Hazelwood, much of which was broadcast on radio and television.

G. Objections to Payment of Civil Damages Over Ten-Year Period

Comments that the plea agreement should not be accepted because of the payment schedule set forth in the settlement of state and federal civil claims have no relevance to this separate criminal case. The fines and restitution specified in the plea agreement will be paid within thirty days of the Court's acceptance of the agreement.

H. Objections By Alaska Native Villages

Three Alaska Native Villages, a council of elders, and one Native corporation submitted comments objecting to the plea agreement. For example, Mr. Patrick Norman, President of the Port Graham Corporation, objected to the agreement because the fine monies will go into a national fund for victims of crime. Mr. Norman stated that since the money compensates for crimes committed in Alaska, "the money should be spent on the cities, and villages that were traumatized emotionally and physically by the oil spill and

- 25 -

the clean up efforts."

By statute, federal criminal fines are deposited in the fund established by the Victims of Crimes Act, 42 U.S.C. § 10601, et. seq. There is no mechanism for a federal criminal fine to be used as compensation for a particular class of victims, or for natural resource damages. For this reason, the plea agreement imposes a substantial criminal fine as punishment and then specifies that an additional \$50 million be paid as restitution to the State of Alaska. Paragraph IV.A. expressly provides that: "Such [restitution] monies are to be used by the State of Alaska exclusively for restoration projects relating to the 'EXXON VALDEZ' oil spill." By this provision, the plea agreement provides generally for redress of injuries similar to those sought by Mr. Norman and the Port Graham Corporation. The restitution monies will be paid soon after the acceptance of the plea agreement, and will be earmarked for the restoration of areas adversely affected by the Exxon Valdez oil spill.

I. Objections to Lack of Provision Regarding Damage to Archeological Resources

Seven commenters objected to the plea agreement because it does not address damage to cultural resources protected by the Archeological Resources Protection Act. None of the commenters suggested how such damage might be addressed. There are extensive pending civil claims by private parties that rest on damage to cultural resources.

- 26 -

Issues concerning possible archeological damage are issues concerning the civil settlement, and not the resolution of the criminal prosecution.

VII. CONCLUSION

This prosecution was brought after investigation determined that criminal conduct was involved in the grounding of the Exxon Valdez. In a plea agreement submitted to the Court for approval, both defendant have offered guilty pleas and have agreed to pay a fines totalling \$100 million, \$50 million of which would be remitted, and have agreed to pay \$50 million in compensatory payments to the State of Alaska. The government believes that this would be a just resolution of the criminal charges, and respectfully urges the Court to accept the plea agreement.

Dated this 16th day of April, 1991, at Anchorage, Alaska.


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

MARK B. HARMON
Trial Attorney
Environmental Crimes Section

ERIC W. NAGLE
Trial Attorney
Environmental Crimes
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MARK R. DAVIS
Special Assistant
U.S. Attorney

FILED

APR 16 1991

UNITED STATES DISTRICT COURT
 DISTRICT OF ALASKA
 Deputy

CHARLES A. De MONACO
 Assistant Chief
 Environmental Crimes Section
 Environment and Natural Resources
 Division
 U.S. Department of Justice
 P.O. Box 23985
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 202-272-9879

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-CR
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S MEMORANDUM
	)	IN AID OF SENTENCING
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

consent decree.

A. Comments Favoring the Plea Agreement

Eleven commenters urged the Court to accept the plea agreement. In general, those commenters cited the value of obtaining a certain result in this case immediately, rather than an uncertain result after years of litigation. Some commenters also cited a desire to give Exxon credit for its efforts to clean up the spill. The government agrees that the definite sentence set forth in the plea agreement is preferable to the uncertain sentence that could result even if convictions were obtained after trial. The range of uncertainty in this case is particularly broad, because of the dramatic difference between the normal maximum fines and the level of fines that the Court could, in its discretion, impose under the Alternative Fines Act.

B. Comments Opposing Agreement Not to Prosecute Alyeska

Representative George Miller, Vice-Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, wrote to the Court to say that he objects to the provision in that plea agreement in which the government agreed not to prosecute Alyeska Pipeline Service Company for any offense arising from Alyeska's preparation of oil spill contingency plans. The National Wildlife Federation raised a similar objection. Vice-Chairman Miller stated that Alyeska knew that it could not and would not

- 20 -

Respond effectively to a major oil spill, and suggested that the government could charge Alyeska with violating the false statement provision of the Clean Water Act, 33 U.S.C. § 1319(c)(4), or the false statement provision at 18 U.S.C. § 1001.

At the outset, it is necessary to clarify the meaning of the non-prosecution provision of the plea agreement and respond to this comment. First, the plea agreement preserves the federal government's right to prosecute any employees of Alyeska for any criminal conduct that may have been associated with the spill plan. This would, of course, include the government's ability to prosecute any individuals for possible false statements in violation of 18 U.S.C. § 1001. Moreover, the State of Alaska retains full authority to prosecute Alyeska and its employees for any criminal violation of state law that may have occurred.

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sanctions for any criminal charges that might have been brought against Alyeska,⁹ and the unprecedented criminal fines and guilty pleas the government would obtain from Exxon under the plea agreement, the government concluded that it was in the best interests of the public to include a non-prosecution agreement for Alyeska in the plea agreement.

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⁹The maximum corporate fine for a false statement in violation of 18 U.S.C. § 1001 is \$500,000, pursuant to U.S.C. § 3571(c).

Alyeska Group Is Subpoenaed By Grand Jury

Inquiry Involves the Oil Spill
By Tanker Exxon Valdez
In Prince William Sound

By CHARLES MCCOY

Staff Reporter of THE WALL STREET JOURNAL
A federal grand jury has issued subpoenas to Alyeska Pipeline Service Co. and at least one of its owners as part of an investigation into possible criminal wrongdoing in connection with the disastrous Valdez oil spill.

The grand jury investigation, long rumored, was confirmed in documents filed with the Securities and Exchange Commission by Atlantic Richfield Co. Arco's Arco Pipeline Co. unit owns 21% of Alyeska, the consortium set up by several oil companies to operate the Trans-Alaska Pipeline. A separate but related Federal Bureau of Investigation investigation has been under way since shortly after the March 24 spill, caused when the Exxon Valdez super-tanker crashed into a reef and dumped 11 million gallons of crude oil into Alaska's Prince William Sound.

Alyeska is responsible for mounting the first efforts to contain damage from spills in the sound and had long assured state regulatory bodies that it was capable of responding speedily to any major spill. It has been bitterly criticized for a slow, stumbling response in the hours immediately after the Exxon Valdez ran aground. Although Alyeska has defended its efforts, environmentalists and many state officials maintain that Alyeska's failure to corral more of the oil before it drifted away from the ship greatly increased the environmental damage done as the oil roamed the sound and washed up on its rocky shoreline.

Late yesterday, Alyeska confirmed that it had been subpoenaed but said that the Justice Department had informed it that it was "not a target" of the probe. An Alyeska spokesman declined to specify the target. Neither the Justice Department nor the FBI had any immediate comment on the grand jury probe.

In its filings, Arco said Arco Pipeline had been subpoenaed by a federal grand jury in Anchorage for records of its "review and evaluation of Alyeska's oil spill equipment, personnel, capabilities and contingency plans."

To operate the pipeline, Alyeska is required by state law to submit contingency plans spelling out how it will respond to spills or other disasters. In the Valdez spill, Alyeska failed to do many of the things it had said it could do in its plan. For example, the plan called for Alyeska to respond in less than five hours to spills in the area where the Exxon Valdez crashed. Significant emergency equipment didn't begin arriving at the site until

nearly 14 hours after the tanker went aground. In addition, some of Alyeska's spill-fighting equipment was in disarray or quickly broke down.

Lawyers familiar with the numerous investigations and lawsuits surrounding the spill also said it was likely that, in addition to Arco, the other owners of Alyeska had been or will be subpoenaed, too. Those companies are Exxon Corp. (which owns the Exxon Valdez), British Petroleum Co., Mobil Corp., Amerada Hess Corp., Unocal Corp. and Phillips Petroleum Co.

Arco wouldn't elaborate on precisely what the grand jury is looking into. A spokesman would say only that "we have been asked for records, and we are in the process of compiling those records." None of the other owners could be reached to comment.

However, the probe most likely focuses on whether any of the companies may have been guilty of negligence that would constitute violations of federal anti-pollution laws such as the Clean Water Act. The laws authorize sizable fines and—in certain circumstances—prison sentences of as many as 15 years. Last month, Alaska dropped a criminal probe of Alyeska, saying that federal laws have stiffer penalties and tougher provisions than state laws and thus were better suited to the case.

Alyeska has already been named a co-defendant in many of the suits filed in connection with the spill, including the massive civil lawsuit filed by the state earlier this month.

A6 THE WALL STREET JOURNAL THURSDAY, AUGUST 31, 1989

STATE OF ALASKA

AUDIT DIVISION
P.O. BOX W
JUNEAU, ALASKA 99811-3300

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

MEMORANDUM

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

Representative Kay Brown, Chair
House DEC Budget Subcommittee

FROM: Randy S. Welker 
Legislative Auditor

DATE: April 18, 1991

SUBJECT: Information Regarding Expenditures Covered by the Memorandum of Agreement between the State, the Federal Government, and Exxon.

This memorandum has been prepared in response to your request regarding information on state expenditures involved in responding to the *Exxon Valdez* oil spill. In order to respond to your questions, we reviewed the Memorandum of Agreement (MOA) between Exxon and the State and federal governments.

We were able to obtain expenditure information compiled by Peterson and Associates that appears to have been the basis for the \$72 million cost recovery amount included in the MOA. Due primarily to time constraints, we are not able to provide you with total assurance regarding the reasonableness of the MOA's cost recovery provisions.

The expenditure information used in the development of the MOA's \$72 million ceiling is comprehensive. From our cursory review of the Peterson and Associates information, and discussions with a Peterson and Associates representative and agency staff of the significantly involved departments, we believe that the \$72 million amount in the MOA appears to reasonably represent the oil spill response, assessment, and litigation costs incurred by the State through December 31, 1990.

Using the Peterson and Associates information, compiled from the State's accounting system, we have developed the following information. We also offer some observations and concerns that we have regarding cost recovery under the terms of the MOA.

COST REIMBURSEMENT

Section V. B of the MOA allows the State to receive up to \$72 million for "reimbursement of allowed expenses," incurred through December 31, 1990. The section further allows the State to receive reimbursement of "response and cleanup costs incurred after December 31, 1990."

From the detailed listing of expenditures prepared by Peterson and Associates, we developed the following table summarizing expenditures by agency through December 31, 1990.

DEPARTMENT	Estimated Recorded Expenditures (thousands)	Reimbursements from Exxon or CERCLA (thousands)	Remaining Expenditures or Costs (thousands)
Administration	3,591.0	488.0	3,103.0
Commerce and Economic Development	627.0	499.0	128.0
Community and Regional Affairs	1,429.0	40.0	1,389.0
Environmental Conservation	38,652.0	24,621.0	14,031.0
Fish and Game	23,467.0	6,440.0	17,027.0
Governor's Office	1,345.0	730.0	615.0
Health and Social Services	827.0	7.0	820.0
Labor	895.0	273.0	622.0
Law	17,342.0	0.0	17,342.0
Military and Veterans' Affairs	949.0	653.0	296.0
Natural Resources	2,989.0	1,341.0	1,648.0
Public Safety	334.0	18.0	316.0
Transportation and Public Facilities	1,131.0	1,013.0	118.0
University of Alaska	439.0	53.0	386.0
TOTALS	94,017.0	36,176.0	57,841.0
NON-CASH EXPENDITURE ADDED IN MOA TOTALS:			
Overhead (4,600.0)/Financing (3,900.0) Estimates			8,500.0
Damage Assessment Obligations (costs incurred but not paid by 12/31/90)			3,100.0
Litigation Obligations (costs incurred but not paid by 12/31/90)			2,500.0
Total Expenditures used to set MOA Cost Recovery Cap			71,941.0

The table on the following pages highlights the major, but not all, components of each department's costs and includes our observations.

DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
ADMINISTRATION (3,591.0): Valdez Oil Spill Commission Telecommunications	952.0 2,200.0	The Telecommunication costs may be understated. We reviewed information as of 8/15/90 that showed expenditures of 3,300.0 primarily for two projects: Prince William Sound microwave system (2,091.0) and a non-microwave system for the South Kenai/Kodiak link (1,206.0).
COMMERCE AND ECONOMIC DEVELOPMENT (627.0): Alaska Seafood Marketing Institute (ASMI) Weigh Stations	475.0 130.0	ASMI received 800.0 directly from Exxon. Actual expenditures were somewhat greater than reflected here, however it is immaterial as any costs are paid from funds already received, with a net zero effect on nonreimbursed costs.
COMMUNITY AND REGIONAL AFFAIRS (1,429.0): Community Assistance Grants	1,173.0	Grants were awarded on a competitive/needs based evaluation. Eighteen grants were awarded ranging from 2.3 to Port Lions for equipment repair to 684.0 to Kodiak for a Social/Economic Study.
ENVIRONMENTAL CONSERVATION (38,652.0): Personal Services Travel Contractual Equipment	14,000.0 2,218.0 20,000.0 1,000.0	The oil spill drastically impacted DEC. Personal services included significant overtime, project new hires, and back-fills for employees assigned to the spill. We are more confident in the accounting section at DEC than most of the impacted departments. However, we will verify that further with a detailed financial review for FY 90.
FISH AND GAME (23,476.0): Personal Services Travel Contractual	10,350.0 1,000.0 8,455.0	The majority of the department's work dealt with impact assessment studies on a wide variety of fish and wildlife species. The department fiscal staff believes the total recorded expenditures adequately cover costs incurred.
GOVERNOR'S OFFICE (1,345.0): Oil Spill Coordination Office	995.0	
HEALTH AND SOCIAL SERVICES (827.0): Substance Abuse Grants Mental Health and DD Grants	522.0 231.0	
Labor (895.0): OSHA/Inspections/Job Service Training Spill Workers in Safety Compliance	325.0 174.0	
LAW (17,342.0): Legal Expenses Experts and Consultants	11,400.0 4,682.0	According to the department, the total amount recorded plus the 2,500.0 litigation obligation will cover costs through 12/31/90. It is estimated an additional 4,000.0 will be needed for 1991 costs.
Continued on Next Page.		

(Continued) DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
MILITARY AND VETERANS' AFFAIRS (949.0):		Significant initial response effort from the Division of Emergency Services.
NATURAL RESOURCES (2,989.0): Personal Services Equipment	2,000.0 600.0	Most personal services costs were for temporary project hires for oil spill response. Fiscal staff is confident total covers costs incurred.
PUBLIC SAFETY (334.0): Increased Enforcement Two Enforcement Vessels	100.0 142.0	Personal services costs for overtime/sea pay for troopers and Fish and Wildlife vessel crew for increased enforcement. Little, if any, regular compensation for permanent employees is included.
TRANSPORTATION AND PUBLIC FACILITIES (1,131.0): MV Aurora MV Bartlett	488.0 46.0	MV Aurora provided floating lodging for oil spill workers.

Almost half of the State expenditures were made with 470 funds

Of the \$94 million in expenditures, it has been estimated that more than \$46.7 million has been spent out of the Oil and Hazardous Substance Response Fund (OHSRF), also known as "470 Funds." According to a draft of an internal audit report prepared by the Department of Environmental Conservation, the expenditures from the fund, broken down by agency, are:

EXPENDITURES BY DEPARTMENT FROM THE OIL AND HAZARDOUS SUBSTANCE RESPONSE FUND	Estimated Recorded Expenditures (thousands)
Administration	2,281.0
Environmental Conservation	32,889.0
Fish and Game	7,095.0
Governor's Office	275.0
Labor	272.0
Law	92.0
Military and Veterans' Affairs	60.0
Natural Resources	1,529.0
Transportation and Public Facilities	786.0
University of Alaska	59.0
Other	1,400.0
Total	46,738.0

According to the information compiled by Peterson and Associates, the Department of Fish and Game has received \$5.7 million in reimbursements from the Federal CERCLA process. As of December 31, 1990, Exxon had reimbursed \$30 million to the State's Oil and Hazardous Substance Response Fund (OHSRF). Given these reimbursements, total "out-of-pocket expenditures," broken down by "funding source," are as follows.

Expenditures by "Funding Source"	Expenditures (thousands)
General Fund	41,100.0
CERCLA Reimbursement to General Fund	5,700.0
EXXON Reimbursement to the Oil and Hazardous Substance Response Fund	30,000.0
EXXON Reimbursement to Alaska Seafood Marketing Institute	500.0
Unreimbursed Oil and Hazardous Substance Response Fund Expenditures	16,700.0
Total "Out-of-Pocket" Expenditures by State	94,000.0

OBSERVATIONS AND QUESTIONS

1. What requirements, if any, must the State meet to receive recovery? - It is our understanding that the cost recovery totals listed in the MOA are to settle all expenditure claims still pending before Exxon, in addition to reimbursing the State for expenditures not yet submitted. According to a January 4, 1991 summary, \$49.7 million in state expenditures had been submitted to Exxon. Of this amount Exxon had paid just over \$30 million, was still considering \$4.4 million, and had rejected \$14.8 million in submitted claims. As suggested by the summary of expenditures submitted to Exxon already, a significant part of the \$72 million recovery amount contemplated in the MOA has previously been rejected for reimbursement. Does the cost recovery amount allowed for in the MOA supersede earlier decisions by Exxon officials not to reimburse the State for some of the costs claimed? Does the use of the phrase "allowed expenses" in the MOA imply that the State's expenditures must meet some specific criteria or requirement prior to being eligible for reimbursement?

We have been informally advised by Legal Services Director Tam Cook that the agreement is silent about any specific criteria for "allowed" expenditures. She commented that this possibly could be an issue subject to further discussion and negotiation between the State and Exxon. However, Ms. Cook also reported that Attorney General Cole testified before the Committee that the reimbursement would be paid without further audit or scrutiny by Exxon. We suggest that the Committee get a clear understanding of any further review and approvals to which these expenditures may be subjected.

April 18, 1991

2. Ownership of assets and other personal property - From the outset of the cost reimbursement process, Exxon had told the State that any durable goods and equipment purchased by the State and reimbursed by Exxon belonged to the company after the oil spill activity was finished. The summary of expenditures that make up the MOA's \$72 million recovery cap, lists over \$4 million in equipment bought by the State. Additionally, more than \$11 million was paid by Exxon directly to vendors. This amount may also include payment for equipment used by the State.

Is Exxon going to continue to insist on the return of the numerous computers, filing cabinets, boats, and telecommunications equipment paid for by the company? If so, a significant effort will be required to inventory, centralize, and value this property, which may require future appropriations from the legislature. It may be in the State's best interest to compensate Exxon for the current diminished value of the equipment.

3. Audit Access to Restoration Funding - In a March 18, 1991 overview memorandum, the Division of Legal Services raised the issue of audit access to the expenditures of the trustees. The memorandum rhetorically asks who, if anyone, will perform audits of the trustees' expenditures? We concur that audit access should be clarified. Due to the unique relationship between the state and federal governments in administering these funds, some provision should be made that clearly gives the Legislative Auditor access, on behalf of the State, to expenditures of the trustees.

In summary, we believe that the \$72 million amount appears reasonable. Additionally, the overhead and financing amount of \$8.5 million is not based on identified expenditures, but on estimates. Therefore, we believe there may be some "cushion" in this number to cover costs not identified as of December 31, 1990.

We hope this memorandum provides some insight into the make-up of the \$72 million ceiling in the MOA. If you need further clarification or detail please contact me at 465-3830.

cc: Representative Ron Larson, Chairman
Legislative Budget and Audit Committee

Members of the Legislative Budget
and Audit Committee

Members of the Senate Special Committee on the
Exxon Valdez Oil Spill Claims Settlement

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

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

Prepared by:

Sarah Chasis
Robert Adler
Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

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

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

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

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

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

I. PUBLIC PARTICIPATION IN THE INJURY ASSESSMENT AND RESTORATION PROCESS

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

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

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

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

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

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

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

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

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

II. OTHER COMMENTS ON THE MOA

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

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

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

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

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

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

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

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

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

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

III. INDEPENDENT ENDOWMENT/FOUNDATION

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

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

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

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

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

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

ATTACHMENT 1

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

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

Members

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

The categories we suggest¹:

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

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

Mechanics of Advisory Committee

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

We suggest that:

-- the committee have a small, paid staff and these staff members will not be employees of the trustees' respective agencies;

-- the committee members will have their expenses paid and will have a per diem;

-- the committee will meet bi-monthly and in consultation with their staff and with government agency professionals² will propose an annual workplan/spending plan for the trust; this plan will include a reasonable list of options from which the trustees would choose (trustees would have to choose options only from this list, however);

-- the staff should include a public participation expert and a scheme of adequate public participation should be guaranteed;

-- the committee would be chaired by a distinguished public citizen (for example, Jay Hammond or Russell Train) and members of the committee would be chosen by the groups/organizations/individuals that make up the specific categories of interests listed above³; private mediators/facilitators could be used to aid in this selection process.

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

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

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

ON THE
PROPOSED SETTLEMENT AGREEMENT
CONCERNING THE EXXON VALDEZ OIL SPILL
BETWEEN THE UNITED STATES, THE STATE OF ALASKA
AND THE EXXON CORP., EXXON SHIPPING CO.
AND THE EXXON PIPELINE CO.

Prepared by:

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Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

The following environmental organizations submit these comments on the proposed Exxon Valdez settlement agreement in response to the request for written comments appearing in the Federal Register (56 FR 11636, March 19, 1991): Alaska Center for the Environment, Defenders of Wildlife, Greenpeace, National Audubon Society, Natural Resources Defense Council, Northern Alaska Environmental Center, Prince William Sound Conservation Alliance, Sierra Club and Trustees for Alaska.¹ These groups have major reservations about the proposed settlement. Most importantly, since the scientific and economic data on natural resource damages and restoration collected by the government trustees and Exxon have been kept secret, the public, the Congress, the Alaska State legislature and the Federal Court in Alaska cannot determine whether the settlement is fair, reasonable and equitable and whether the trustees have met their statutory and common law duties under the Clean Water Act, section 311(f), and other applicable law to recover natural resource damages, including the costs of restoring, replacing, or acquiring the equivalent of the natural resources damaged or destroyed as a result of the spill.² The environmental organizations ask that

1. These groups are also submitting comments on the Memorandum of Agreement and those comments are incorporated here by reference.

2. The Clean Water Act will be used throughout these comments as the shorthand way of referring to all statutory and common law principals under which the trustees may recover from Exxon.

these data be made available to the public immediately and that approval of the settlement by the court await such disclosure and the opportunity for public comment on the proposed settlement in light of such disclosure.

Even without the data, we are very concerned about the apparent inadequacy of the settlement to compensate for natural resource damages and to cover the costs of restoring, replacing and acquiring equivalent resources. The present value to the governments of the settlement money is approximately \$500 million. This compares with \$3 to 10 billion in damages found by state and federal economic studies. Moreover, after past expenses and future clean-up costs are deducted, the amount actually available for restoration in the early years appears inadequate to undertake important and needed restoration and acquisition projects.

We also are concerned about the \$100 million cap placed on future recovery for unknown damages and the virtually impossible standard the government must meet in order to obtain such future recovery; and the release of Alyeska from any liability for natural resource damages.

Following are more detailed comments on the proposed settlement and the memorandum of agreement between the state and federal governments.

I. NEED FOR THE DATA

Before approving the proposed settlement, the court must be satisfied that it is "fundamentally fair, adequate and reasonable" and that it conforms to applicable law and public policy. United States v. State of Oregon, 913 F.2d 576, 580 (9th Cir. 1990); Sierra Club v. Electronic Data Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990). Without knowing how extensive the natural resource damages are, the economic value of these damages and the costs of restoring or replacing these resources (or acquiring equivalent resources), it is impossible for the court, the public, Congress or the Alaska State legislature to evaluate whether the proposed settlement is fair, adequate or reasonable or whether the trustees have met their duty under the Clean Water Act, section 311(f), and other applicable law to recover for natural resource damages, including the costs of restoring, replacing or acquiring the equivalent of the natural resources destroyed or damaged as a result of the spill.

The summary of effects of the spill submitted to the federal court in Alaska on April 8 in no way is sufficient to judge the adequacy of the settlement. No economic data on the diminution of use values, including intrinsic values, nor information on the cost of restoring, replacing or acquiring equivalent resources have been provided. Yet these data are crucial to evaluating the

adequacy of the settlement amount since these represent the measure of the damages to which the public is entitled. State of Ohio, et. al. v. Department of the Interior, 880 F.2d 432 (D.C. Cir. 1989). Moreover, without disclosure of the underlying scientific data the public cannot judge the ecological, long-term significance of the losses described in the summary nor the comprehensiveness nor accuracy of the summary. The trustees of the damaged resources have an affirmative obligation not only to disclose these data, but to provide a clear, well-supported explanation of how the amount of the settlement was calculated, and why it is sufficient to compensate the public.

Release of these data is important for a number of reasons in addition to providing crucial information to evaluate the settlement. Opening up the science to public scrutiny would provide the public with the best possible understanding of the natural resource damages that have resulted and are likely to result from the spill. Moreover, release of the data would enable meaningful public and independent scientific input into the design of future damage assessment studies and restoration planning in Prince William Sound -- something that has been virtually impossible in the face of the secrecy surrounding the data. Finally, the data would inform other important public policy decisions that must assess the benefits and risks of proceeding with oil development and transportation. The scientific truth of what has happened may not be withheld from

the public which has suffered the results of this catastrophic spill.

As an enforceable condition of the proposed settlement, all data concerning the nature, extent and economic value of natural resource damages and restoration should be made publicly available by all parties to the settlement on an ongoing basis. Currently, there is no such condition in the settlement. There is only a public commitment by the federal trustees to release data. However, this is not reflected in the proposed settlement or Memorandum of Agreement. No commitment at all on the part of the Coast Guard, the State of Alaska or Exxon is made to release data at any time.

II. INADEQUACY OF SETTLEMENT MONEY

Even without the scientific and economic data that we seek, we seriously question the adequacy of the settlement to compensate for the natural resource damages suffered as a result of the spill and to cover the costs of restoring, replacing and acquiring equivalent resources.

First, the long pay-out schedule of eleven years and the tax-deductibility of the payments substantially reduce the real value of the settlement money to the government. The Congressional Research Service has estimated that the present value to the federal and state governments of settlement (including the \$100

million criminal fine), taking into account the present value of the money and Exxon's ability to deduct civil payments from its taxes, ranges from \$421 million to \$524 million, depending on the discount rate used. (Attachment 1, CRS, "Net Present Values of the Exxon Valdez Settlement," March 19, 1991).

Second, by no means all of the civil settlement money will go for restoration for at least three reasons. First, \$134 million will go to reimburse the federal and state governments for past expenses associated with the spill. Memorandum of Agreement, Para V.B. Second, Exxon's 1991 and 1992 clean-up costs, will be credited against the amount of settlement money it must pay. Proposed Settlement, Para. 8(b). Third, all future state and federal clean-up costs, over and above Exxon's, will come out of the settlement money. MOA, Para. V.B. These future clean-up costs could be substantial.³ This could mean that, of the \$900 million to be paid out over 11 years, \$500-600 million or less (at present value, approximately \$300-400 million) actually will be available for restoration and acquisition.

In light of the Summary of Effects filed with the federal court on April 8 and reports that state and federal economic studies have shown damages to be in the \$3-10 billion range (see attachment 2, Washington Post article, March 20, 1991), the

3. For example, Exxon claims to have spent \$180-200 million in 1990 on clean-up.

available \$500-600 million (or less) clearly cannot compensate for the disastrous ecological consequences of the spill. Indeed, the Trustees apparently ignored lost use values, including intrinsic values, in determining the appropriate settlement amount. In State of Ohio, cited above, the D.C. Circuit clearly rejected the Interior Department's "lesser of" rule, whereby the lesser of restoration or replacement costs or diminution of use values, would dictate the recovery amount. Yet in his testimony before the House Merchant Marine Committee, Assistant Attorney General Richard Stewart indicated that, with respect to amount, the criterion for an adequate settlement was "sufficient recovery of damages for the trustees to undertake a prompt and thorough restoration program for the Sound...."(p.4) Especially given the Washington Post article cited above, which reported that state and federal economic studies found lost use values to be at least \$3 billion, it appears that the trustees simply ignored the State of Ohio holding in calculating the settlement amount.

Nor does the \$500-600 million appear adequate to cover restoration costs. Acquisition of timber rights for habitat and fisheries protection was identified repeatedly as a priority in public comments on the restoration process. See August 1990 Progress Report "Restoration Planning Following the Exxon Valdez Oil Spill," prepared by the Restoration Planning Work Group,

pages 22-23.⁴ It has been estimated that acquisition of timber rights on private lands adjacent to Prince William Sound and the Lower Kenai, in order to prevent logging that could harm the resources adversely affected by the spill, alone would cost \$200-300 million. (Attachment 3, Coastal Coalition Proposal, page 16)⁵. This one acquisition proposal, if implemented, could consume most of the money available under the settlement for restoration (using the present value figure). And this proposal does not include acquisition of timber in many areas affected by the oil, including the Kodiak Archipelago.

Whether there will be money in the first few years for any significant restoration and acquisition at all is another major concern. Past expenses are to be recouped over the first five years. See Memorandum of Agreement. Para. V.B. We understand that these payments may be front-loaded: \$45 million (1991), \$40 million (1992), \$40 million (1993), \$5 million (1994), \$5 million (1995). If the payments are front-loaded in this manner, then only \$45 million will be available in the first year of the settlement to cover state/federal clean-up expenses, scientific

4. The groups were distressed to learn that the state trustees are backing off from their original commitment to use settlement money to acquire timber rights. See April 17, 1991 Anchorage Daily News, page C-1. In our view, such acquisition should be a high priority of the fund.

5. EPA's recent federal register notice also proposes as one of four restoration activities for 1991, the protection of strategic fish and wildlife habitats and recreation sites. See 56 Fed. Reg. at 8902-3. Properly implemented, this could encompass timber rights on key lands proposed to be logged.

studies and restoration. (\$90 million less \$45 million). How much of this will be available for restoration and acquisition is a real question. Since Exxon may credit its clean-up expenses for 1991 and 1992 against its second payment of \$150 million, there may be no payment at all in the second year. Not until the third year would there clearly be money for restoration -- and that amount would be relatively small (\$60 million, or \$100 million less \$40 million). Given the estimated costs of important restoration projects (see, e.g. Coastal Coalition Proposal for timber acquisition), it appears that there would be insufficient money in the early years to undertake extensive restoration and acquisition projects.

Yet such early expenditures are critical. For example, there are at least five areas within the oil-impacted region where timber-harvesting is presently ongoing and where an all-out effort should be made to prevent harmful logging.⁶ In addition, three other areas in the region, are scheduled to be cut this summer. (Fish Bay, Patton Bay and Kachemak Bay).

III. REOPENER PROVISION

The reopener provision contained in Para. 17 is totally inadequate. It places a cap of \$100 million on any future recovery. We strongly oppose such a cap. The longterm

6. Copper River Delta, Two Moon Bay, Windy Bay, Dogfish Bay and Afognak Island.

ecological damages from the spill are still unknown and could be very substantial. The March 1991 Summary of Effects, submitted to the federal court in Alaska on April 18, repeatedly confirms this. For example, the degree of injury to several important species, such as salmon and herring, will not be known for years; injuries to many other species, such as harbor seals, killer whales, river otters, murre and bald eagles are continuing.

For the government to agree to a cap on future recovery for damages currently unknown places the public in the untenable position of underwriting the longterm costs of this spill. This violates the trustees' obligation to recover the costs of restoration, replacement and acquisition of equivalent resources from the spiller, under section 311(f), and violates the important public policy of making the spiller, rather than the public, pay for the problems caused by the pollution.

Moreover, the terms under which the government may invoke the reopener are so stringent that it will be virtually impossible for the government to obtain a future recovery from Exxon. In order to be able to recover under the reopener clause, the injury cannot have reasonably been known or anticipated by any trustee based on any information in the possession of or reasonably available to the trustees at the time of the settlement. This will be a very difficult standard of proof to meet and one which will inevitably lead to years of litigation.

CERCLA requires that settlements contain a reopener for unknown conditions, except in extremely rare circumstances:

a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such a person concerning future liability resulting from the release or threatened release that is subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies... that remedial action has been completed at the facility concerned. 42 U.S.C. Sec. 9622(f)(6)(A) (emphasis added).

The standard articulated in the CERCLA reopener provision should be employed in this settlement and no cap should be placed on future recovery.

Two additional criticisms of the reopener are that 1) future payments are limited to a particular four year period (2002-2006), when in fact the money may be needed earlier or later, and 2) there is no procedure specifying that Exxon must pay within 30 days (or another similarly reasonable period) following a demand by the government for payment and that the burden falls on Exxon to bring a challenge should it disagree with such a demand for payment.

IV. LETTING ALYESKA OFF THE HOOK

The United States' agreement in the criminal plea not to seek criminal charges, civil penalties or administrative penalties against Alyeska and the federal and state governments' agreement in the civil settlement not to sue Alyeska for natural resource

damages mean that Alyeska will not be held accountable despite its negligent, perhaps even fraudulent conduct. It was Alyeska after all that was completely unprepared to carry out its oil spill contingency plan. Alyeska's failure to comply with the plan significantly compounded the environmental damage that occurred. According to material recently submitted to the federal court by Representative George Miller, Vice Chairman of the U.S. House of Representatives Committee on Interior and Insular Affairs, Alyeska and its owners had knowledge of Alyeska's inability to respond to an oil spill in Prince William Sound, and deliberately decided not to take remedial action.

What kind of message does the government's actions send to others responsible for oil spill contingency planning and response -- that no matter how grossly negligent they are in implementing their contingency plans and carrying out spill response, they can escape all criminal and civil penalties and liability for natural resources damages? We regard this as one of the most egregious elements of the proposed settlement.

V. OTHER MISCELLANEOUS COMMENTS ON THE PROPOSED SETTLEMENT

We question whether future clean-up should be paid for out of the same fund as restoration. As Congressman Studds pointed out in his April 12 letter to Judge Holland, this will create competition between cleanup funding and restoration funding, when both are required under the Clean Water Act.

We request clarification concerning Exxon's continuing obligations to conduct clean-up. We read the settlement to require Exxon to continue to conduct clean-up as directed by the Federal and State On-Scene Coordinators. Para. 11(a). However, Para. 11(b) could be read to relieve Exxon from future clean-up obligation once the settlement is approved. This should be clarified. As part of its continuing clean-up obligations, we would like to see Exxon required to test and, if effective, use clean-up technologies, methods and substances which are environmentally benign and which have proven effective elsewhere or have been shown to be highly promising in past test results.

We read the settlement to permit a one-time credit to Exxon for its clean-up expenses, which would be used to reduce the \$150 million payment due September 1, 1992. Para. 8(b). Thereafter, no such credits appear to be allowed.

It is not clear whether the provision in Para. 11(a), removing from Exxon any liability by reason of its clean-up, covers negligently performed clean-up. Clearly it should not. In addition, there must be a mechanism to independently assess the legitimacy of those Exxon clean-up expenditures which may be deducted from the \$150 million payment due in 1992. Otherwise, unreasonably high or otherwise improper expenditures may be deducted, in turn unfairly reducing the money available for

restoration.

The governments' rationale for agreeing to Para. 12 is totally perplexing. Why should they agree to such an offset, should the settlement fail? What are they getting in return? Moreover, why did the government agree to such a stringent standard for disallowing expenditures over \$35 million? It will be very difficult for the government to prove these costs should not be offset.

Under Para. 20, why was Exxon not explicitly required to drop its pending administrative claim against the Coast Guard? What is the status of this claim under the settlement?

Finally, we also object to the settlement's failure to impose civil penalties against Exxon for violation of the Migratory Bird Treaty Act, which it admitted violating, as well as the Marine Mammal Protection Act, the Endangered Species Act and the Bald and Golden Eagle Protection Act.

VI. CONCLUSION

For all these reasons, the environmental groups request that the scientific and economic data so critical to an evaluation of the settlement be released immediately and that approval of the settlement be delayed pending such release and opportunity for public comment. We also would like to see the settlement

modified to respond to the other concerns raised.

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Committee on Interior and Insular Affairs

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April 17, 1991

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 REPUBLICAN STAFF DIRECTOR

The Honorable H. Russel Holland
 United States District Judge
 U.S. District Court
 222 West 7th Avenue No. 4
 Anchorage, Alaska 99513

Dear Judge Holland:

I have reviewed the U.S. Department of Justice's memorandum supporting the government's criminal plea agreement in United States v. Exxon Corporation and Exxon Shipping Company (No. A90-015-CR) which was filed in your court yesterday (April 16, 1991).

In my view, the Department of Justice's memorandum fails to satisfactorily explain why it is in the public interest to agree not to bring criminal charges or any civil or administrative penalties against Alyeska Pipeline Service Company ("Alyeska") or its owner companies, including British Petroleum and Arco, for their conduct related to the Exxon Valdez oil spill.

In my April 8, 1991, letter, I set forth compelling evidence from company documents that Alyeska and its owner companies were aware long before the Exxon Valdez spill that Alyeska could not effectively respond to an oil spill in Prince William Sound, failed to make recommended improvements in Alyeska oil spill response capabilities, and secretly decided that Alyeska would not respond to an oil spill in the manner prescribed by Alyeska's Oil Spill Contingency Plan.

Despite this evidence, the Department of Justice failed to file any criminal charges or pursue any civil litigation against Alyeska or its owner companies other than Exxon. Yet Alyeska and its owner companies and shareholder representatives are immunized in both the proposed criminal plea agreement and civil settlement with Exxon.

The Department of Justice's memorandum acknowledges that criminal charges could have been brought against Alyeska for false statements in violation of 18 U.S.C. section 1001 (p.21). However, Justice asserts that "it was in the best interests of the public" to

The Honorable H. Russel Holland

April 17, 1991

Page 2

let Alyeska and its owner companies off the hook by including them in the proposed plea agreement with Exxon. However, Justice failed to explain how they weighed the evidence against Alyeska to arrive at this conclusion.

How can it be "in the best interests of the public" when the Department of Justice is not even attempting to recover a single penny in compensation from Alyeska or its owner companies other than Exxon?

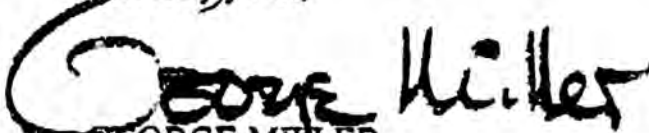
As Justice's memorandum points out, factors to be considered by the court pursuant to 18 U.S.C. section 3553 in reviewing the proposed plea agreement include the need of the sentence to: reflect the seriousness of the offense; promote respect for the law; provide just punishment; afford adequate deterrence; and provide restitution for victims.

It is difficult to understand how granting Alyeska and its owner companies immunity from criminal prosecution can conceivably "promote respect for the law" or meet any of the other sentencing criteria.

In defending the non-prosecution of Alyeska, Justice's memorandum states that the plea agreement "preserves the federal government's right to prosecute any employee of Alyeska for any criminal conduct that may have been associated with the spill plan." Yet this obfuscates the reality that it was the Alyeska owner companies and their representatives on Alyeska's Owners Committee who are most culpable since they decided not to commit the resources necessary for the Alyeska employees to respond effectively to an oil spill in Prince William Sound.

The Department of Justice has failed to meet its burden of proof that providing immunity for Alyeska, its owner companies, and their shareholder representatives, is in the public interest. I urge you to reject the plea agreement as currently written.

Sincerely yours,


GEORGE MILLER
Vice Chairman

cc: The Honorable Richard L. Thornburgh
Attorney General, U.S. Department of Justice

Alaska State Legislature

House of Representatives



Official Business

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House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

M E M O R A N D U M

TO: Rep. Max F. Gruenberg, Jr., Chairman

FROM: Andy Hemenway, Counsel to the Special Committee

DATE: April 21, 1991

SUBJECT: Alternatives to Acceptance or Rejection

At your request, I have reviewed the Committee minutes, my notes, and the comments submitted to this Committee and to the federal district court with the intent of focussing discussion on possible alternatives to outright rejection or unconditional acceptance of the proposed settlement.

In considering whether specific changes in the proposed settlement are desirable and achievable, the Committee should keep in mind that there is no assurance that any requested changes would be acceptable, or that appropriate legal mechanisms can be devised within the framework of the proposed settlement. Furthermore, the effort to condition approval on specific changes could result in the collapse of the settlement altogether.

With that caveat, this document briefly describes a variety of approaches that might be considered, should the Committee wish to seek a middle ground between acceptance and rejection of the current proposal. The suggestions included are intended to address the major areas of public and legislative concern raised in the course of the Committee's hearings, and in comments submitted to the legislature and to the federal district court.

I
AVAILABILITY OF SCIENTIFIC AND ECONOMIC DATA

The Committee could condition its approval of the settlement on a specific agreement by the parties regarding the release of information gathered since the spill. Such an agreement would have to address a number of issues, including:

- (1) Which information should be released -- solely scientific data, or also economic data?
- (2) Who should be required to release their information -- the State? the United States? Exxon? all the parties?
- (3) When should the information be released -- should time be allowed to encourage settlement of private suits against the State prior to the release?
- (4) Should additional assistance in interpreting or documenting the information be required?

II
AMOUNT AND STRUCTURE OF SETTLEMENT

Clearly, the negotiators for the State and federal governments believe that the amount of the proposed settlement is the best that could have been done. If the Committee is nonetheless persuaded that the amount is insufficient, or that the payment structure is inappropriate, it could condition its approval of the proposal on changes in either the amount or the structure of payments.

Without speculating on what amount the Committee might deem appropriate, there are a number of changes in the structure of payments that might be considered, including:

- (1) Conditioning approval on payment of the the present value of the settlement in a lump sum.
- (2) Conditioning approval on immediate payment in full of the State's past expenditures.
- (3) Conditioning approval on a specific schedule for reimbursement of the State's past expenditures.

III PUBLIC PARTICIPATION IN THE RESTORATION PROCESS

The proposed settlement requires "meaningful public participation" in the restoration process. However, the manner of public participation is entirely up to the Trustees. There are a wide variety of steps that could be taken to clarify the manner of public participation in the Memorandum of Agreement between the State and federal governments, including:

- (1) Providing for a public or legislative role in the designation of State Trustees. Under federal law, the Governor must designate the State Trustees for purposes of any recovery under the Clean Water Act. It is unclear, however, that the State's recovery in this case is under the Clean Water Act. Furthermore, the administration has not pointed to any provision in federal or state law which prevents the legislature from establishing the process by which the Governor may make his designations. Even if there is such a limitation, the Governor could choose to waive it, in order to obtain legislative approval of the settlement agreement.
- (2) Making a Citizens Advisory Board mandatory, rather than optional.
- (3) Legislatively establishing the makeup of a Citizens Advisory Board, e.g., by requiring the membership of certain elective officials, or representatives of named interest groups. If such a group is designated by the legislature, a provision for funding its operations through the trust fund should be devised.
- (4) Requiring the Trustees to submit specific plans for public participation to the legislature for approval, prior to final acceptance of the settlement. This would require gaining the approval of all parties to an extension of time.
- (5) Requiring State representatives to abide by Alaska law governing Open Meetings and Public Records, and requiring that the Trustees promulgate policies of general application substantially in accordance the requirements for issuing regulations under Alaska law.
- (6) Clarifying the nature of projects qualifying for funding by: (a) specifically designating certain categories of projects as eligible or ineligible; (b) enacting legislation establishing funding priorities or criteria; or (c) requiring the Trustees to submit priorities/criteria to either the Citizens Advisory Board or the legislature.

IV LEGISLATIVE OVERSIGHT

The issue of legislative oversight has been discussed primarily in terms of its appropriation power. While the Attorney General and legislative counsel have both addressed the constitutional issues raised in this case, the only sure way of determining whether the proposed settlement is constitutional would be to obtain a ruling by the Alaska Supreme Court. Alaska rules of court provide that the United States District Court may certify directly to the Alaska Supreme Court questions of state law which "may be determinative of the cause then pending". The Committee may wish to consider making its approval of this settlement conditional on that procedure being followed.

In addition to seeking clarification of the constitutional issues, the Committee may wish to seek clarification of the precise funding mechanisms envisaged by the parties. Testimony before the Committee indicates that the Trustees will grant monies to State and federal agencies to perform much of the scientific work associated with the restoration process. If that is the case, the money spent by the State agencies will presumably flow through the general fund, with the specific conditions for spending the money attached. If this is the plan, then the legislature will in effect have a veto power over any such expenditures, since it will not be obligated to appropriate any such grants.

Other issues that might be clarified include the relationship between Trust funding and the Section 470 Fund, ensuring that any changes to the Consent Decree or the Memorandum of Agreement are submitted to the legislature for approval, and whether the Legislative Budget and Audit Committee will have full access to Trust records for auditing purposes.

V OTHER ISSUES

A variety of issues have been raised that do not fall into the broad categories above, but which the Committee may wish to see addressed in the settlement documents before recommending approval. Among the more significant issues are these:

- (1) Exxon's payment of Fish Enhancement Taxes.
- (2) Clarification of the legal claims preserved, e.g., damages to archaeological resources.
- (3) Completion of damage assessment.
- (4) Tax deductibility of payments under State law.
- (5) Assurance that adequate public health studies will be done.

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April 21, 1991

MEMORANDUM ON EXXON VALUATION ISSUES

This memorandum addresses several economic issues in consideration of the proposed settlement of government claims from the Exxon Valdez oil spill. These issues include the valuation of the settlement, the valuation of the natural resources damage, some comparisons of this settlement with other natural resource damage cases, and related matters.

VALUATION OF THIS SETTLEMENT

Various sources have estimated of value of the proposed settlement at amounts ranging from a low of \$421 million (under one of six scenarios used by the Congressional Research Service, Library of Congress) to a high of \$757 million (memorandum from Jim Kelly, research and liaison officer for the Permanent Fund Corp., to staff for Rep. Barnes). The majority of the estimates cluster in the \$500-600 million range. Several uncertainties account for the range.

- Inflation will erode the real value of the large bulk of the settlement that will be received in the future, but no one can know future inflation rates with certainty.
- A similar discount is usually appropriate to reflect the real earnings that could be collected if the funds were available to use or invest now, instead of in the future. The real earnings rate varies independently of inflation.
- The dates on which payments will be made under the settlement are not in all cases certain, i.e., the date for payment of the \$72 million reimbursement of state out-of-pocket costs.
- Some payments result from calculations involving amounts that are not yet known, i.e., Exxon's clean-up costs between January 1, 1991 to the date of final approval.
- An unknown portion of the settlement covers a part of future state clean-up costs that have a high probability of being recoverable from Exxon without litigation.

MEMORANDUM ON EXXON VALUATION ISSUES, page 2

- Tax effects will lower the cost of the settlement to Exxon and reduce its value to the governments by a significant but unknown amount. Whether to include the tax effects is itself a judgement.
- The final installment payment is contingent on unknown future events.
- Additional but unknown liabilities for legal expenses and possible damages may arise as a result of entering the settlement, a factor not accounted for in any of the estimates.

There is no single correct way to deal with these uncertainties. Most economists familiar with the settlement seem to be comfortable in casual calculation and discussion with rounding its present cash value to a half-billion dollars.

NON-USE VALUES

Although the governments have attempted to keep confidential their economic valuations of the Exxon damage, the major results of those studies have been widely discussed in economic circles and with the press. Some of the economic studies attempted to evaluate losses of use values to recreationists, sports fishermen, hunters, subsistence users, and losses associated with commercial fishing. The major thrust of the economic studies, however, and the major part of the several million dollars spent by the governments on economic valuations has been devoted to determining non-use values.

Direct Measures of Non-use Values

Non-use values reflect the worth people give to things like eagles, sea otters, and pristine ecosystems that individuals don't directly use, and which are rarely bought and sold at market prices. These values may reflect a desire to preserve options for future recreational use (option value), to preserve options for future generations (bequest value), or simply because the very existence of the resource (existence value) is something an individual is willing to pay to preserve.

The concept of non-use values is widely accepted in economics. Some methods of measuring the values of non-market goods such as eagles and sea otters are also well established. If people are willing to pay \$50,000 to preserve the life of an injured sea otter, as they apparently were in the case of the rescue program after the Exxon spill, it is inferred that the value of the otter to people must be at least that amount. Thus, one approach to determining the values of Exxon oil spill losses calculates known, inferred, and projected losses and multiplies those numbers by values for individual animals. In addition to looking at rescue efforts, values can be imputed from information such as the costs zoos incur to acquire animals. For example, zoos are

estimated to be paying \$200-500 per bird for murres. The costs of transplant programs, and spending on management and protection can also be used. These relatively accepted approaches to non-use valuation have received little publicity, but studies employing the techniques, together with the emerging picture of the biological injury, reliably support claims of several hundreds of millions of dollars. Mortality to sea otters, murres, other sea birds, eagles, whales, and seals would likely account for the bulk of these values.

Contingent Valuation Measures

The biggest part of the governments' economic effort on the Exxon case has been directed toward determining non-use values using a survey technique called contingent valuation (CV). Respondents are asked how much they would pay to preserve a natural resource, assuming such a transaction were possible; the hypothetical transaction is thus *contingent* on the situation posed by the questioner. The technique is controversial within the economic profession, but has won acceptance in various applications. Although the technique has never been tested directly in a trial, it was approved in theory by a 1989 U.S. Court of Appeals decision in the Ohio case, a proceeding involving challenges to natural resource valuation regulations issued by the Dept. of the Interior. The breadth of that decision was expanded later that same year in the related Colorado case.

Non-use values are not limited to those who live in proximity to the resource; the governments' Exxon contingent valuation surveys were designed to determine the values lost by the entire population of the U.S. The state's national survey was conducted early this year, but it was preceded by extensive focus group studies used to evaluate the proposed questionnaire, and pilot studies to verify survey validity. The federal work had not reached the survey stage when it was suspended.

The state's survey essentially asked the 1000 or more respondents questions to elicit the amount they would be willing to pay in higher taxes and gasoline costs to prevent another accident like the Exxon oil spill. The total amount all U.S. residents would pay was estimate by multiplying the average among the respondents by an figure representing the entire population.

The state's approach to its CV survey has been conservative. For example, respondents were asked questions to elicit the amount they would pay this year to protect against damage over the next ten years. A more accurate (and likely higher) value would have been returned had the questions been designed to elicit the value that the respondents would have been willing to pay if they could have spread the payments over the entire ten year period.

MEMORANDUM ON EXXON VALUATION ISSUES, page 4

Economists working on the federal economic studies criticized the state's approach for being too conservative. Concern was expressed that the state's economic consultants had been pressured on this point. The attorneys, it was suggested, were stunned by the real values of the damage being returned by the focus groups and pilot surveys, and were fearful that these "too large" values would be more vulnerable to methodological challenge in court. One result of this conservative approach was that the wording of the survey questions provided little or no information to respondents on the issue of long-term injury to the environment. This silence may have left the survey vulnerable to an Exxon counter strategy using a major advertising campaign to influence respondent perceptions of the severity of the natural resources damage. One of the major reasons for keeping the CV survey dates secret was to make it difficult for Exxon to employ this strategy. Nevertheless, in October 1990, the company launched a multi-million dollar television campaign designed to reach half of U.S. households in that month with video pictures of a "now almost recovered" Prince William Sound. An extensive print campaign followed.

The state's economists do not believe the Exxon strategy was successful. Comparing data from pilot surveys conducted before October with the results of the final survey suggest that the Exxon strategy had little effect on the final survey values. In any event, the state's C.V. studies nevertheless yielded significant values for the damage done by the spill to Alaska's natural resources. The CV results have been variously reported as \$2.5 billion to \$5 billion (*N.Y. Times*, March 13, 1991), \$3 billion (*Washington Post*, March 20), \$3 to \$5 billion (Tom Campbell, general counsel of the National Oceanic and Atmospheric Administration in March testimony to Congress), and \$3 billion to \$8 billion (*Anchorage Daily News*, March 31). Economists working on the studies have independently confirmed the \$3 to \$8 billion range, and suggest that because of the state's conservative approach, the actual value is likely to be in the higher end of that range.

Evaluating the Economic Studies

The academic economists and other experts who served on the two governments' litigation teams are largely, perhaps unanimously, opposed to the settlement. Experts, of course are not the final arbiters of these issues. Attorneys usually make the decisions that finally set the values in these cases. Dr. Norman Meade, a U.S. government economist who has studied the historical data, found that natural resource damage issues have generally been settled by U.S. attorneys for 25 to 40 percent of the present values of the economic damage estimated by expert economists. Applying those percentages to the values reported above suggests that the present value of the Exxon natural resources damage settlement should be between \$750

MEMORANDUM ON EXXON VALUATION ISSUES, page 5

million (25 percent of \$3 billion) and \$3.2 billion (40 percent of \$8 billion). Reimbursements of government expenses, and other damage claims would have to be added to these amounts.

RECOVERIES IN OTHER CASES

Another approach to evaluating this settlement is to compare it directly to the values recovered in other oil spill cases. In terms of present value of the recovery per gallon of spilled oil, this approach tends to confirm the relative severity of the damages and penalties assessed against Exxon in the proposed settlement. On the other hand all of the spills described below differ in many respects from the Exxon Alaska spill, and none extended over as large a geographic area. The listing below is selective, but typical of recent oil spill settlements.

Shell Oil San Francisco Bay Spill

In 1988, the Shell Oil Co. spilled 400,000 gallons of crude oil from its Martinez refinery into San Francisco Bay. In December 1989, the federal and California governments announced the settlement of all state, local, and federal claims arising out of the spill for \$19.75 million, or just under \$50 per gallon. Payments were not extended. At \$50 per gallon, the comparable recovery for the 11 million gallons spilled in the Exxon case would be a present value of \$550 million, well within the range estimated to have been achieved under the Exxon settlement.

The Shell spill affected waters that are among the most polluted on the Pacific Coast. It could be argued that the relatively undamaged nature of the environment affected by the Exxon spill makes it more valuable. On the other hand, the Shell spill affected an area that humans use far more intensively and directly than the Alaska environments hit by the Exxon spill, factors that could increase the likely damages in the more populous area.

Amoco Cadiz Spill

The tanker Amoco Cadiz struck the French Atlantic coast and eventually broke up, spilling an estimated 66 million gallons. The case is still on appeal, but it seems unlikely that the plaintiffs will receive much more than the equivalent of \$61 million, or 92¢ per gallon. While the trial was in the United States, it was conducted under French recovery theories, and did not include any natural resources damages.

U.S. laws and attitudes have evolved considerably since 1978. Most would argue that the precedent is not controlling. Nevertheless, the

MEMORANDUM ON EXXON VALUATION ISSUES, page 6

fact that a major oil company could be assessed such a small liability for such a large oil spill on the coast of a Western democracy is a fact that cannot be wholly dismissed in considering the vicissitudes of potential litigation.

Exxon Arthur Kill Spill

In 1990, an underwater pipeline rupture in Arthur Kill, a waterway between New York City and New Jersey, resulted in a 567,000 gallon spill of heating oil. State, federal and local government claims arising out of the spill were recently settled for \$15 million, or \$26 per gallon. At that rate the Exxon spill in Alaska would be worth only \$230 million. Comparability with Exxon's Alaska spill is clouded by the already polluted nature of the Kill, that the New York/New Jersey waterway was not heavily used or appropriate for recreation, the relatively high percentage of the oil recovered (26 percent), and the difference in the kind of oil spilled.

Glacier Bay Cook Inlet Spill

The 1987 spill from the tanker Glacier Bay into Cook Inlet resulted in a recent damage recovery by the state of \$700,000. The volume spilled was never accurately determined; based on estimates, the recovery amounted to \$14 to \$28 per gallon.

Arco Anchorage Port Angeles Spill

This was a spill of 240,000 gallons of North Slope crude oil from the Arco tanker *Anchorage* in 1985. The total state recovery was \$348,000, or \$1.45 per gallon. A relatively high percentage of the spilled oil was recovered, and relatively little biological damage resulted.

ORGANIZATION OF THE TRUSTEESHIP

Concern has been expressed regarding the organizational structure of the trusteeship proposed under the settlement. The negotiators could have chosen other models for trust organization that might have provided the public with greater confidence that the recovered funds will be put to good use. In several recent environmental pollution cases funds recovered as damages have been dedicated much more strictly and directly to environmental purposes.

- In a 1981 settlement of a federal pollution case against the Occidental Chemical Company, the defendants provided a \$1.5 million contribution to California Universities for environmental research.

MEMORANDUM ON EXXON VALUATION ISSUES, page 7

- In 1988, as part of a settlement of a case against General Electric for pollution of a Massachusetts river, the company paid the Fund for New England, a private non-profit philanthropic organization, \$100,000 to undertake projects to enhance river water quality.
- In the largest environmental criminal case up to that date, the Allied Chemical Company agreed in 1977 to put \$8 million into a Virginia Environmental Endowment, an independent grantmaking foundation whose purpose is to improve the environment in Virginia.
- In 1987, the endowment established in the Allied case received an additional \$1 million in settlement of claims against Bethlehem Steel Corp. for pollution of Chesapeake Bay, also under a federal consent decree.

ADEQUACY OF EXXON'S PUNISHMENT

The less tangible effects of the civil and criminal settlements are legitimate matters of legislative interest. Even if the civil settlement was considered the best outcome likely, it might still be rejected on the grounds that accepting it would send the wrong message to future negotiators, or would set an undesirable precedent. Certain economic factors may bear on this judgement, one of which relates to the severity of the punishment.

Exxon officers have stated that the settlement will have no significant future effect on the company's earnings. This is in part because it is largely covered by already established reserves. Had the present cost of the settlement been absorbed last year it would have lowered the corporation's 1990 profits of \$5 billion by about 10-12 percent.

In the Justice Department's 1987 Browning Ferris environmental pollution case the consent decree included a provision that barred the defendant from claiming deductibility for federal tax purposes. Had this provision been included in the settlement it would have likely increased the share of 1990 earnings taken by about three percentage points.

Total expenditures by the company as a result of the spill are likely to be about \$3 billion, all told. An estimated \$450 million of this was covered by insurance, and an estimated \$850 million was offset by tax savings, leaving a net cost to the company of about \$1.7 billion. This figure is about one-third of Exxon's 1990 net earnings, and about 7 percent of Exxon's value to its stockholders.

ABILITY TO CARRY THE CASE FORWARD

The Committee has taken testimony bearing on the state's ability to go forward with this case should the proposed settlement be rejected, including testimony on the extent to which the federal government would assist in pursuing the two government's joint civil claims. The likely future costs of litigation are a factor to be considered. Further work on the natural resources damage assessment, including economic studies would likely require several tens of millions of dollars over the next several years.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

UNITED STATES OF AMERICA,

Plaintiff,

VS

EXXON CORPORATION and EXXON SHIPPING
COMPANY,

Defendant.

No. A90-015 CRIMINAL

SENTENCING HEARING
APRIL 24, 1991
PAGES 1 THROUGH 11

Before the Honorable Russell Holland
United States District Court Judge



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PROCEEDINGS

APRIL 24, 1991

(Tape: 1)

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(On record: 8:37 a.m.)

THE CLERK: All rise. His Honor The Court, the United States District Court for the district of Alaska is now in session. The Honorable H. Russell Holland presiding. Please be seated.

THE COURT: Good morning ladies and gentlemen. We are taking up first this morning case A90-15 Criminal, United States of America vs. Exxon Corporation and Exxon Shipping Company. The matter is set down for imposition of sentence. We have a necessary preliminary to that, which is the question of whether or not I should accept the plea agreement which was negotiated between the government and the defendants.

In connection with making that decision, I have, of course, reviewed the sentencing memoranda that have been submitted by counsel. I have received from counsel subsequently summaries of reports of various environmental assessments of the damage which flowed from the grounding of the Exxon Valdez, and I have considered those reports. I have received a considerable number of public comments pursuant to notice which we gave

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U.S.A. vs. EXXON CORPORATION
SENTENCING HEARING - (4/24/91)