

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
1931 SCOMM 76: HOUSE SPEC. COMM. EXXON VALDEZ OIL SPILL. 1991-92

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to transport petroleum products for Exxon USA. EXXON CORPORATION or its affiliates were the source of all of EXXON SHIPPING COMPANY's initial assets and personnel, and EXXON CORPORATION continued to be the primary source of capital for EXXON SHIPPING COMPANY at all times pertinent to this indictment.

4. At all times pertinent to this indictment, EXXON SHIPPING COMPANY operated oil tankers for the benefit of EXXON CORPORATION; one such tanker was the Exxon Valdez. EXXON CORPORATION guaranteed the debt issued by EXXON SHIPPING COMPANY to build the Exxon Valdez.

5. At all times pertinent to this indictment, EXXON SHIPPING COMPANY's headquarters were in Houston, Texas, in the same building that housed the headquarters of Exxon Company USA. EXXON CORPORATION provided all of the computer, medical, accounting, administrative, and legal services used by EXXON SHIPPING COMPANY. EXXON CORPORATION set policies for EXXON SHIPPING COMPANY regarding capital expenditures, personnel, employee compensation, alcohol abuse, and contracting.

6. At all times pertinent to this indictment, the president of EXXON SHIPPING COMPANY reported to a vice-president of Exxon Company USA. All major investments by EXXON SHIPPING COMPANY were subject to the approval of EXXON CORPORATION.

7. At all times pertinent to this indictment, EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON CORPORATION.

8. At all times pertinent to this indictment, EXXON SHIPPING COMPANY employed "able seamen" and officers aboard the Exxon Valdez who were responsible for the operation, direction, and control of the Exxon Valdez.

9. On March 23, 1989, at approximately 9:20 p.m., the Exxon Valdez departed from the Port of Valdez, Alaska carrying 53 million gallons of crude oil owned by EXXON CORPORATION, bound for an EXXON CORPORATION facility in Long Beach, California.

10. On March 23, 1989, shortly before midnight, the Exxon Valdez deviated from the designated shipping lanes in Prince William Sound. These lanes are used by ships entering or leaving the Port of Valdez, Alaska, and establish a route for the passage of ships.

11. After the Exxon Valdez deviated from the designated shipping lanes, the master left the ship's bridge. The ship then proceeded under the direction of an officer who lacked the required Coast Guard certification for pilotage in Prince William Sound, and a helmsman who was known by EXXON SHIPPING COMPANY to be incompetent at performing his assigned duties.

12. On March 24, 1989, shortly after midnight, the Exxon Valdez ran aground on Bligh Reef, a well-known and well-marked navigational hazard, and discharged more than ten million gallons of crude oil into Prince William Sound.

13. From March 24, 1989 through November 9, 1989, crude oil that discharged from the Exxon Valdez migrated more

than 700 miles from Bligh Reef, contaminating the waters and shorelines of Prince William Sound, the Gulf of Alaska, Kenai Fjords National Park, the Katmai National Park and Preserve, the Aniakchak National Monument and Preserve, the Alaska Peninsula National Wildlife Refuge, the Alaska Maritime National Wildlife Refuge, the Becharof National Wildlife Refuge, the Kodiak National Wildlife Refuge, the lower Kenai Peninsula, the Earren Islands, Kodiak Island, Shelikof Strait, and other parts of the Alaska Peninsula, causing the death of more than 36,000 migratory birds, including more than 100 bald eagles, and numerous other varieties of wildlife.

14. On March 24, 1989, in the District of Alaska, and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did negligently cause pollutants, namely more than ten million gallons of crude oil, to be discharged from a point source, namely the tank vessel Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all of which is in violation of and contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(1).

COUNT TWO

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY unlawfully did throw, discharge and deposit, and did cause, suffer and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all in violation and contrary to Title 33, United States Code, Sections 407 and 411.

COUNT THREE

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. From on or about March 24, 1989 to on or about September 25, 1989, in the District of Alaska and elsewhere, the defendants EXXON CORPORATION and EXXON SHIPPING COMPANY, without being permitted to do so by regulation as required by law, did kill migratory birds, all in violation and contrary to Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

COUNT FOUR

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 33, United States Code, Chapter 25, in that defendants, being the owners of the tank vessel Exxon Valdez, and the master of the Exxon Valdez, acting as the agent of the defendants, did willfully and knowingly fail to ensure that the wheelhouse of the Exxon Valdez, while underway, was constantly manned by persons who directed and controlled the movement of the vessel, each of whom was competent to perform that duty, all in violation of and contrary to Title 33, United States Code, Section 1232(b)(1), and Title 33, Code of Federal Regulations, Section 164.11(b).

COUNT FIVE

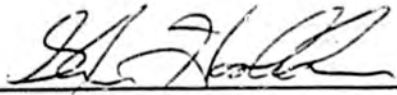
The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 46, United States Code, Chapter 37, in that defendants did employ and cause persons to be engaged on the crew of the tank vessel Exxon Valdez, knowing such persons to be physically and mentally incapable of performing the duties assigned them.

In violation of Title 46, United States Code, Section 3718(b), and Title 46, Code of Federal Regulations, Section 35.05-20.

A true bill,



Foreperson



PETER C. GAMACHE
Assistant U.S. Attorney

For:

MARK R. DAVIS
Acting United States Attorney



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

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ASHLAND OIL, INC.

Criminal No. 88-146

GOVERNMENT'S RESPONSE TO THE DEFENDANT, ASHLAND
OIL, INC.'S MOTION FOR DETERMINATION THAT APPLICATION
OF THE ALTERNATIVE FINES PROVISION, TITLE 18,
UNITED STATES CODE, SECTION 3571, WOULD UNDULY
COMPLICATE OR PROLONG THE SENTENCING PROCESS

Now comes the United States of America by its attorneys, Charles D. Sheehy, Acting United States Attorney, and Charles A. DeMonaco, and Constance M. Bowden, Assistant United States Attorneys, and respectfully requests that this Court deny the defendant, Ashland Oil, Inc.'s Motion to preclude the use of the alternate fines provision, Title 18 United States Code, Section 3571 for the following reasons:

STATEMENT OF FACTS

At approximately 5:00 p.m. on January 2, 1988, at Ashland's Floreffe facility located in Jefferson Borough, a 96,000 barrel tank containing approximately four million gallons of diesel fuel completely ruptured, spewing its contents into the surrounding area, including the Monongahela River. Just minutes before the tank collapsed, John Gajdosek, an Ashland employee, had been on top of the tank.

Shortly after the spill occurred, local police, fire and haz-mat teams responded to the spill. As Chief Don Withers of the Floreffe Fire Department testified at the hearing on the

defendant, Ashland Oil, Inc.'s motion to plead nolo contendere, these response teams were faced with a volatile situation arising from the fact that the Floreffe facility is a storage facility for gasoline as well as diesel fuel. Indeed, because a pipe leading into one of the gasoline storage tanks suffered a leak, it was necessary to evacuate the residents who lived in the neighborhoods bordering on the Floreffe facility. As Withers further testified, the Floreffe facility is located in close proximity to railroad tracks that are used by Conrail on a daily basis, a glass factory, Duquesne Light's Elrama Plant, and a chemical company, which has its own storage tanks: including a tank containing liquid hydrogen. These circumstances made the collapse of a tank at Ashland's Floreffe facility an extremely dangerous occurrence.

Additionally, during the course of the early evening hours, in excess of 500,000 gallons of diesel fuel spilled into the river through a storm drain located on property owned by Duquesne Light Company, through Lobbs Run, a stream which borders the Floreffe facility, and by percolating through the ground. The proximity of the Floreffe facility to the Monongahela River creates a strong likelihood that a total collapse of a tank, like the one involved in this case, will result in oil going into the river. Additionally, because of the topography of the area, and because there are few access roads to the river, it is almost impossible to stop the oil from going downstream once it enters the river. In this case, as the diesel fuel flowed downriver, it

polluted the water supply systems of numerous communities located along the Monongahela and Ohio Rivers, and resulted in many of those communities being without water for a substantial period of time.

It has been determined that the spill resulted in the immediate death of many fish and waterfowl. However, biologists and scientists, lacking adequate pre-spill data, may never be able to determine the total effect of the spill on the ecosystem of the Ohio River Valley. There is some evidence that the spill may have adversely affected the food chain. If so, the spill could adversely affect the Ohio River Valley's ecosystem for years to come.

The spill constitutes one of the largest environmental catastrophes in the Western District of Pennsylvania and is one of the largest inland water spills to have ever occurred anywhere in the world. Subsequent investigations by Batelle Memorial Institute, a private independent research organization contracted by Ashland to conduct an investigation into the cause of the collapse, and the National Bureau of Standards of the United States Department of Commerce, lend credence to the conclusion that Ashland was negligent in its reconstruction, testing and inspection of Tank 1338. A report issued by the Pennsylvania Tank Collapse Task Force characterizes the defendant's conduct as "grossly negligent". As this Court emphasized at the hearing with respect to Ashland's proffer of a plea of nolo contendere,

At approximately 5:00 p.m. on January 2, 1988, Tank 1338 suffered a total collapse. Subsequent failure investigations conducted by Batelle Memorial Institute and the National Bureau of Standards indicated that the collapse was caused by a brittle fracture that initiated at a flaw in the tank shell about eight feet above the base and just below the horizontal weld between the first and second courses of steel. The flaw at which the fracture initiated was determined by Batelle to be present prior to the reconstruction of Tank 1338 at the Floreffe site. Deposits on the surface of the flaw indicate it was formed during a cutting operation. The fracture propagated to complete rupture of the tank shell because the steel lacked sufficient toughness to arrest a propagating fracture at the temperature and with the stresses existing in the tank shell.

Despite the age of the steel used to construct Tank 1338, Ashland failed to conduct the tests required by industry standards and those necessary in the ordinary exercise of due care that would have determined whether the steel used in Tank 1338 was of sufficient toughness to withstand the temperatures and stress to which it would be exposed. The nationally recognized standard for above-ground, atmospheric, welded steel tanks is the American Petroleum Institute Standard 650 (Welded Steel Tanks for Oil Storage, 1984). Although API 650 does not explicitly address the reconstruction of existing tanks, the National Bureau of Standards concluded that API 650 can be used for reconstruction of a tank when documentation is not available for

the steel. Ashland also has acknowledged that it was, at the time, corporate policy to comply with API 650 whether the tank to be erected was new or reconstructed.

Tests conducted by the National Bureau of Standards on the plate material of the tank following its collapse indicate that the steel used to construct the tank did not comply with the toughness requirements of API 650 and was seriously deficient in this respect. In accordance with the standard, according to the National Bureau of Standards, the material used was inappropriate for the climactic conditions of Pittsburgh. Professor Harold W. Paxton, Ph.D., Department of Metallurgical Engineering and Material Science, Carnegie Institute of Technology, Carnegie Mellon University, will testify as an expert witness that the dominant cause of the failure was the pre-existing flaw and the totally inadequate toughness of the material at the service temperature. Consequently, this steel should have never been used in this project.

Industry standards, including API 650, require that butt-welded joints of the shell plate, both vertical and horizontal, be spot-radiographed. The spot radiographs are to be taken as the welding progresses and are intended to determine if a welder is making good quality welds. The acceptance criteria for welds examined by radiography are contained in the ASME Boiler and Pressure Vessel Code and are adopted by reference in API 650.

In this case, the government's proof would have shown that Progress Services, Inc., was hired to conduct radiographic

inspections on only 40 welds. The National Bureau of Standards, concluded that fewer radiographs were taken than required, and the radiographs were not taken during construction but after construction was completed, which is in deviation of industry standards as set forth in API 650.

The government's evidence would also have shown that Progress Services, Inc., found that 22 of 39 welds which it had radiographically inspected were defective. The welds which were defective were old welds which were present in the tank at the time of its reconstruction. Although Progress Services notified a representative of Ashland of the defective welds and provided Ashland with the radiographs, Ashland never took steps to correct the defective welds. Nor did Ashland order radiograph inspection of additional welds. The National Bureau of Standards concluded that, had API 650 been followed, there would have been a radiograph at the location of the flaw that initiated the fracture of the shell that might have revealed the presence of the flaw.

In addition, API requires testing of the tank shell and requires that if water is available, the tank shall be filled with water to the maximum design level or to a level two inches above the weld connection of the roof plate. The National Bureau of Standards concluded that, in accordance with API 650, the tank should have been filled with 46 feet of water and carefully inspected during the filling, before external oil piping was connected.

The Government's evidence would further have shown that despite the availability of sufficient quantities of water from either the West Penn Water Company or the Monongahela River itself, Ashland did not fill the tank to the appropriate level. Instead, it pumped in only five feet of water into the tank. According to the National Bureau of Standards, the tank might have failed during the water test, preventing the severe environmental damage that occurred.

Finally, the Government's evidence would have shown that the project engineer whom Ashland assigned to oversee construction of the tank was wholly unqualified. He had little formal training in engineering, he had no previous experience with reconstruction of such a large tank, and his work was inadequately reviewed by his supervisors. In short, as the Pennsylvania Tank Collapse Task Force Report concludes:

The . . . milestones on the Tank 1338 are joined by a common road. At each step along the way Ashland as an entity failed to take any active or effective role in controlling its contractors or establish any procedures which might lead to a quality job. It was a passive consumer of the worst kind - apathetic as to potential problems, ignorant of actual events, unwilling to take any engaged role. Its employees were both institutionally and often personally unable to respond in any other way. Both the details and big picture equally escaped Ashland's attention. Compared against the applicable standards, its indus-

try peers, or even common-sense, Ashland's conduct and procedures can only be considered grossly negligent. The structural collapse at Floreffe can be directly traced to the supervisory bankruptcy at Ashland.

ARGUMENT

THIS IS AN APPROPRIATE CASE FOR APPLICATION OF THE ALTERNATIVE FINE PROVISION, TITLE 18 UNITED STATES CODE, SECTION 3571(d).

On February 7, 1988, the defendant, Ashland Oil, Inc., entered a plea of nolo contendere to an indictment charging it with unlawfully throwing, discharging and depositing and causing suffering, and procuring to be thrown, discharged and deposited refuse matter including, but not limited to oil, from a storage tank on the shore, into the Monongahela River, a navigable water of the United States without a permit in violation of Title 33 United States Code, Sections 407 and 411, and with negligently discharging and negligently causing to be discharged pollutants, including, but not limited to oil, from a point source, including a storm drain, into the Monongahela River, a navigable water of the United States without a permit in violation of Title 33 United States Code, Sections 1311(a) and 1319(c)(1).

Having entered a plea of nolo contendere to the offenses with which it was charged, Ashland Oil Inc. stands convicted of negligently discharging oil into the Monongahela. It is no longer free for purposes of this proceeding at least to deny that

its conduct was negligent, or that its negligence caused the oil to be discharged into the Monongahela River. see Lott v. United States, 367 U.S. 421, 426-427 (1961) (citations omitted) in which the United States Supreme Court held:

[a]lthough it is said that a plea of nolo contendere means literally 'I do not contest it, '...., and 'is a mere state-ment of unwillingness to contest and no more,'....., it does admit 'every essential element of the offense [that is] well pleaded in the charge.'..Hence, it is tantamount to 'an admission of guilt for purposes of the case,'... and 'nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record,...'

Aside from the admission of negligence inherent in the plea of nolo contendere the facts, as set forth in the statement of facts portion of this response and, as found by the Pennsylvania Tank Collapse Task Force Report, a copy of which is attached hereto , and the Reports issued by the National Bureau of Standards, and Battelle Memorial Institute, copies of which have been previously supplied to this Court, clearly lead to the conclusion that the defendant, Ashland Oil Inc. was negligent, if not "grossly negligent with respect to the relocation, reconstruction, and testing of Tank 1338; that Ashland's negligence led to in excess of 500,000 gallons of diesel fuel being discharged into the Monongahela River, and that the tank collapse, and subsequent discharge of the diesel fuel into the

river posed a grave threat to a major watershed upon which millions of people rely for water and commerce.

Given the above, the government submits that a substantial penalty is warranted in this case. The serious nature of this offense is indicated by the fact that pursuant to the sentencing guidelines, §2Q1.3(a) the severity level of the offenses at issue in this case is a level 29, taking into consideration the fact that the offense involved a discharge, release or emission of a pollutant; the fact that there existed a substantial likelihood of death or serious bodily injury; the fact that the spill resulted in disruption of public utilities and the evacuation of a community, the fact that the cleanup required a substantial expenditure, and because the offense involved a discharge without a permit. With an offense severity level of 29, and assuming no criminal history, the guidelines call for a sentence of imprisonment of 87-108 months.

Since Ashland Oil, Inc. is a Corporation it cannot be sentenced to a term of imprisonment. See Title 18 United States Code, Section 3551 which states that:

An organization found guilty of an offense shall be sentenced, in accordance with the provision of section 3553, to-

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by Subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation....

As such, the only real penalty that can be imposed in this case is a pecuniary one. Pursuant to Title 18 United States Code, Section 3572, this Court, in deciding the amount of the fine to be imposed in this case, is to take into consideration those factors set forth in Title 18 United States Code, Section 3553, which include: 1)"the nature and circumstance of the offense, and characteristics of the defendant," 2)."the need for the sentence imposed- (a) to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct, and (c) to protect the public from further crimes of the defendant,..."

In addition, pursuant to Title 18 United States Code, Section 3572, this Court, in setting a pecuniary penalty, is to take into consideration:

(1) The defendant's income, earning capacity, and financial resources, (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose; (3) any pecuniary loss inflicted upon others as a result of the offense; (4) whether restitution is ordered or made and the amount of such restitution; (5) the need to deprive the defendant of illegally obtained gains from the offense; (6) whether the defendant can pass on to consumers or other persons the expense of the fine; and (7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the

organization responsible for the offense and to prevent a recurrence of such offense. (b).... If, as a result of a conviction, the defendant has the ability to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

Although we do not intend to discuss these factors at great length, since we intend to file a more comprehensive sentencing memorandum at a later date, we do intend to discuss them to the extent that such a discussion is necessary to establish that a substantial fine is warranted in this case, and that the circumstances of this case justify some expenditure of this Court's time, and resources; assuming such expenditure proves to be necessary in order to establish the basis for imposing such a fine in this case.

Applying the factors set forth in Title 18 United States Code, Sections 3553 and 3572 to the circumstances of this case, the government would submit, as the facts set forth in the factual portion of this response, and as this Court, itself noted during the course of the hearing with respect to the defendant's request to enter a plea of nolo contendere, the charges of which the defendant, Ashland Oil, Inc. has been found guilty of are serious in nature. Although Ashland Oil Inc., is charged with a "negligent" discharge, the acts which caused the collapse, and other actions taken by Ashland Oil, Inc., during the course of relocation, reconstruction and inspection of Tank 1308, including

the decision to reconstruct Tank 1338 from a tank composed of forty year old steel totally inadequate for the climatic conditions of Pittsburgh, the decision not to correct the defective welds, and the decision not to conduct a full hydrostatic test of Tank 1338, were intentional in nature, and could only have been made based on monetary considerations.

Ashland's decision to save money by cutting corners cannot be viewed in isolation, but must be viewed in light of the harm and inconvenience to the public resulting from that decision. As Chief Withers testified at the hearing with respect to Ashland's petition to enter a nolo contendere plea, over 300 local voluntary firemen, policemen, and members of local haz-mat teams responded to the scene of the spill. The spill resulted in the evacuation of local residences; caused nearby businesses, including the Elrama Plant, to shut down; resulted in the Allegheny river being closed to traffic for two days; led in the temporary closing of railroad tracks located behind Ashland's Floreffe facility, and caused a disruption of water service to surrounding communities for a substantial period of time; not only inconveniencing members of the communities, who were without water, but also causing businesses to suffer losses as a result of not being able to keep normal operating hours.

Additionally, although it has been determined that the spill resulted in the immediate death of many fish and waterfowl, biologists and scientists, lacking adequate pre-spill data, may

never be able to determine the total effect of the spill on the ecosystem of the Ohio River Valley. There is some evidence that the spill may have adversely affected the food chain. If so the spill could adversely affect the Ohio River Valley's ecosystem for years to come.

Moreover, although the government has not fully documented the losses resulting from the spill, according to remarks made by John R. Hall, the Chairman and Chief Executive Officer of Ashland Oil inc., at a News Conference held in Pittsburgh, Pennsylvania on May 26, 1988, indicated that Ashland Oil, Inc. had, as of that date, received claims amounting to \$18 million, including the cost of cleanup, and had paid \$7 million in claims-including cleanup costs. The Environmental Protection Agency, alone can document approximately \$700,000 in costs resulting from the federal government's response to the spill.

It is true, as Ashland Oil, inc., contends in its motion that it has reimbursed many of the governmental agencies and individuals, who have suffered a loss as a result of the spill. the legislative history to the Comprehensive Crime Control Act of 1984, indicates although the extent to which the defendant has made reparation is germane to this Court's consideration of whether to impose a fine, as well as the amount of the fine to be imposed, this consideration

is not intended necessarily to result in the court's avoiding imposition of a fine that might otherwise be imposed or reducing a fine by the amount of restitution to be paid. Either of these results might, however, be appropriate

in a particular case, depending upon the effect of payment of restitution upon the defendant's ability to pay a fine and upon the purposes of sentencing to be served by requiring payment of a particular fine. Of course, if the defendant, has, prior to sentencing made reparation or made arrangements to make reparation to the victims of his offense, this will have an effect on his financial resources which should be taken into account in addressing the ability of a defendant to pay a fine, and may also alleviate somewhat the need to impose a high fine for purposes of punishment and deterrence.

Senate Report No. 98-225 at 108, reprinted in, 1984 U.S. Code, Cong. and Admin. News at 3291. .

Thus, while the extent to which Ashland Oil, Inc., had made reparations is relevant this Court's determination in this case, it is not dispositive. We submit that considering the factors set forth in Title 18 United States Code, Section 3553, including the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant, the fact that Ashland Oil Inc., has made reparations in this case, should be accorded little if no weight.

More specifically, we note that in his remarks of May 26, 1988, John R. Hall, Chairman and Chief Executive Officer of Ashland Oil, Inc., indicated that "the company is fully covered by insurance for any claims for compensation related to the incident, including lawsuits. The company's insurance provides

up to \$400 million in coverage, after a 2.5 million deductible. We do not expect the diesel spill to have a material adverse impact on Ashland's financial condition." Thus, to the extent Ashland Oil, Inc., has made reparations in this case, the reparations have been covered by its insurance; a cost of doing business which is generally passed on to the consumer.

In this respect we note this Court in assessing the amount of fine to be imposed consider the extent to which the cost of the fine can be passed on to the consumer. The legislative history of the Crime Control Act of 1984, also indicates that Congress in increasing the fines that could be imposed in criminal cases, recognized that "[t]he need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide the minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners." Senate Report No. 98-225 at 106-107, reprinted in 1984 U.S. Code, Cong. and Admin. News at 3289. Thus, not only should this Court not consider the amount of reparations that have already been made in this case, but this Court should impose a fine which is sufficiently high in amount that it cannot be passed on to consumers.

Moreover, while the \$400,000 fine, which this Court could impose without applying the alternative fine provision, see Title 18 United States Code, Section 3571(c)(5) may appear to be

a substantial fine, the adequacy of the fine must be viewed in light of whether Ashland Oil, Inc., would feel the effect of such a fine. We submit that given the size and financial resources of Ashland Oil, Inc., as well as its ability to pass such a fine on to the consumer as a hidden cost, a \$400,000 fine would be an inadequate penalty in this case.

More specifically, the defendant, according to its 1987 annual report, is "one of the largest industrial corporations in America" and is "The nation's largest independent refiner." According to that same report, Ashland Oil, Inc. had net income of 133 million dollars (\$133,000,000), resulting from over seven billion (\$7,189,000,000) in sales and operating revenues for the fiscal year ending September 30, 1987.

As the legislative history to the Comprehensive Crime Control Act of 1984 indicates, "[w]hile it is not intended that a fine for a solvent individual be so high as to force him into a lifetime of poverty, if a defendant is wealthy and the court finds that a high fine is necessary to serve the purposes of sentencing, it should not be reluctant to sentence the defendant to pay a high fine . . ." Senate Report 98-225 at 108, reprinted in 1984 U.S. Code, Cong. and Admin. News at 3290.

Moreover, since Ashland Oil, Inc. is adequately insured, see remarks of John R. Hall, Chairman and Chief Executive Officer, Ashland Oil, Inc., made at a news conference which was held in Pittsburgh, PA on May 26, 1988 in which Mr. Hall indicates that Ashland Oil, Inc. has 400 million dollars

(\$400,000,000) in insurance coverage, the imposition of a large fine in this case will not hinder Ashland Oil, Inc. from making further reparations, to the extent that such reparations are warranted.

Nor will use of the alternative fine provision unduly complicate or prolong the sentencing process. At the outset, because of the claims procedure utilized by Ashland Oil, Inc. in this case, it should be a fairly simple matter to establish the gross loss resulting from the spill. To the extent that Ashland Oil, Inc. has already paid many of the claims, it has no legitimate reason for contesting the validity of these claims in the course of this proceeding. Since Ashland Oil, Inc. has, according to its memorandum filed in support of its motion to preclude use of the alternative fine provision, obtained releases from liability from those individuals and/or organizations whose claims it has paid, it can not be harmed by admitting to the validity of those claims. Given this fact, and the fact that corporations, unlike individuals, do not have a Fifth Amendment right against self-incrimination, see Braswell v. United States, 101 L.Ed 2d 98 106-115 (1988), the government submits that if Ashland Oil, Inc. does not admit to the validity of these claims, for purposes of establishing gross loss in this matter, this Court can take Ashland Oil Inc.'s lack of cooperation into consideration in determining the appropriate penalty to be imposed in this case. See Roberts v. United States, 445 U.S. 552 (1980). Compare United States v. Heubel, No. 88-3548 (3d Cir.

January, 1989). Moreover, to the extent that Ashland Oil, Inc. forces the government to prove such losses, even though it has no basis for contending that such losses are invalid, this Court, pursuant to Title 28 United States Code, Section 1918(b), can impose the costs of the sentencing proceeding on the defendant, Ashland Oil, Inc.

Moreover, even without the cooperation of the defendant, Ashland Oil, Inc., the gross losses attributable to the offense at issue in this case are readily ascertainable and provable. At the outset, contrary to the defendant's assertion in its memorandum, which it filed in support of its motion to preclude use of the alternative fine provision, the government believes that this Court can enter an order pursuant to Rule 17(c), Federal Rules of Criminal Procedure, requiring that Crawford and Company, the firm hired by Ashland Oil, Inc., to adjust the claims submitted as a result of the spill, produce its records before this Court prior to the date of the sentencing hearing, and permitting the government, and its agents to inspect said documents. A motion requesting that such an order be entered, is being filed simultaneously with the filing of this response.

We also submit that the entering of the order to produce, which the government is requesting would not violate Rule 408, Federal Rules of Evidence. That Rule states that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising

or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

At the outset, pursuant to Rule 1101, Federal Rules of Evidence, the "rules (other than with respect to privileges) do not apply in the following situations: (3) Miscellaneous proceedings. Proceedings for . . . sentencing." Thus, pursuant to Rule 1101, Rule 408 has no applicability to the proceeding at issue here. Cf In Re Special Nov. 1985 Grand Jury, 433 F.Supp. 1094, 1096-1097 (N.D. Ill. 1977), in which the Court held that pursuant to Rule 1101(d)(2), Federal Rules of Evidence, Rule 408, Federal Rules of Evidence is not applicable to grand jury proceedings. See also United States v. Gonzales, 748 F.2d 74, 78 (2d Cir. 1984), in which the Court of Appeals for the Second Circuit held that Rule 408's exclusionary provision does not apply to criminal proceedings. In so holding the Court reasoned that:

In addition, the primary policy justification for Rule 408's exclusion in the civil context does not apply to criminal prosecutions. Rule 408 is premised on the idea that encouraging settlement of civil claims justifies excluding otherwise probative

evidence from civil lawsuits. Fed. R. Evid. 408 advisory committee note. However, encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions. the public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of disputes. It follows that since nothing in the Rule specifically prohibits receiving in evidence the admissions and statements made at a conference to settle claims of private parties, they are admissible in any criminal proceeding.

But see United States v. Meadows, 598 F.2d 984, 988-989 (5th Cir. 1979), in which the Court assumed arguendo that Rule 408 would apply in criminal proceedings.

Moreover, where there is no real dispute over the validity of a claim, Rule 408, even if applicable, would not preclude the government from using the payment of the claim as proof of its validity. See Antilles S.S. Co. v. Members of American Hull Ins., 733 F.2d 195, 200 N.3 (2d Cir. 1984); Dallas v. Aetna Life Ins. Co., 768 F.2d 1303, 1306-1307 (11th Cir. 1985); Deere and Co. v. International Harvester Co., 710 F.2d 1551, 1556 (Fed. Cir. 1983); In Re B.D. Intern. Discount Corp., 701 F.2d 1071, 1074 (2d Cir. 1983).

We also note that Ashland Oil Inc., in its memorandum has put into dispute its good faith efforts to make restitution in this matter. At the time of the hearing on the nolo contendere plea, Ashland Oil Inc., through its counsel, represented to this Court that it had paid 80% of the claims, which have been submitted. (See page 10 of hearing transcript). In the affidavit

of Charner Little, submitted in support of its motion to preclude use of the alternative fine provision, Ashland Oil Inc., represents that one half of the claims submitted have not been settled. Thus, to the extent that Ashland Oil, Inc. intends to rely on its willingness to make restitution as a mitigating factor, the extent and nature of the claims made, and those that have been paid are relevant to this Court's determination of the sentence to be imposed in this case, whether the alternative fines provision is to be applied or not, and whether Rule 408, Federal Rules of Evidence applies or not. Pursuant to that Rule, evidence of compromise and or offers to compromise is admissible for any purpose other than to prove the validity of the claim.

Once the government has access to the records of Crawford and Company, proving loss in this case will be a simple matter. Even without the records of Crawford Claims Co., the government believes that it will be able to prove the "gross loss" resulting from the spill in an expeditious manner. Since this is a sentencing proceeding, the Rules of Evidence, including the rules excluding hearsay do not apply. See Rule 1101(d)(3). See also Williams v. Oklahoma, 358 U.S. 576 (1959), Williams v. New York, 337 U.S. 241, 246-247 (1949); United States v. Baylin, 696 F.2d 1030, 1038-1039 (3rd Cir. 1982).

We also note that the Rules and Statutory provisions do not appear to impose a particular burden of proof upon the government. While we believe that out of an abundance of caution, this Court should utilize the preponderance of the

evidence standard, see United States v. Palma, 760 F.2d 475 (3rd Cir 1985) in which the Court of Appeals for the Third Circuit held that for purposes of title 18 United States Code, Section 3579 [Now Title 18 United States Code, Sections 3663 and 3664], the government has the burden of proving the loss suffered by the victim by a preponderance of the evidence, it is arguable that a lesser burden of proof applies. See McMillan v. Pennsylvania, 91 L.ED.2d 67, 75-79 (1986). In McMillan, the Supreme Court in holding that the due process clause did not require that the state prove that the defendant possessed the firearm by clear and convincing evidence, reasoned that:

[we] have little difficulty concluding that, in this case, the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process clause as understood in Patterson plainly sanctioned Pennsylvania's scheme, while the same clause explained in some other line of less clearly relevant cases, imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment. Furthermore, petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all....

See also McMillan v. Pennsylvania, supra, 91 L.Ed.2d at 80 n.8 in which the United States Supreme Court stated that;

Addington v. Texas, 441 U.S. 418 (1979), and Santosky v. Kramer, 455 U.S. 765 (1982), which respectively applied the

of the water shortage caused by the oil spill, and the closing of the river to river traffic. Additionally, the government anticipates having its proof with respect to losses gathered in advance of sentencing, and intends to provide this Court with a sentencing memorandum detailing the extent and nature of gross loss, as well as the proof in support thereof, prior to the date of sentencing. Thus, we believe that gross loss can be established in this case without "unduly complicating or prolonging the sentencing process." To the extent that Ashland Oil, Inc., by its motion to preclude use of the alternative fine provision, and memorandum in support thereof, has indicated an intent to attempt to complicate these matters, we suggest that this Court has the authority to preclude such an attempt by making it clear to Ashland Oil, Inc. that its failure to cooperate in establishing "gross loss" resulting from the spill will weigh heavily in this Court's decision as to what penalty should be imposed. As noted earlier, this Court also has the authority to impose the costs associated with the sentencing proceeding upon Ashland Oil, Inc. See Title 28 United States Code, Section 1918(b).

We also note that contrary to Ashland's contention in its memorandum, permitting the government to establish gross loss in this case will not deprive it of its Seventh Amendment right to a jury trial. This is a criminal sentencing proceeding. It is well established that a defendant has no right to a jury determination with respect to the penalty, which should be

imposed in this case. See Spazziano v. Florida, 468 U.S. 447, 457-465 (1984). See also, United States v. Palma, 760 F.2d 475 479-480 (3d Cir. 1985) in which the Court of Appeals for the Third Circuit held that the Victim Witness Protection Act, Title 18 United States Code, Section 3579 [Now Title 18 United States Code, Sections 3663 and 3664] did not violate the Seventh Amendment by providing a method pursuant to which restitution is to be made to victims of federal crimes. Moreover, to the extent the government relies on claims already paid by Ashland, Ashland is not likely to be prejudiced since these claims will not give rise to civil proceedings.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny Ashland Oil Inc.'s motion to preclude the use of the alternative fine provision in this case.

Respectfully submitted,

CHARLES D. SHEEHY

Acting United States Attorney

Charles A. Demonaco
CHARLES A. DEMONACO

Assistant United States Attorney

Constance M. Bowden

CONSTANCE M. BOWDEN

Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and correct copy of the
within Response was served by mail upon:

Thomas A. Donovan, Esquire
Kirkpatrick and Lockhart
1500 Oliver Building
Pittsburgh, PA 15222

Cynthia M. Bowler
Assistant United States Attorney

Dated: February 17 , 1989

CMB:dmb: (2/27/89)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ASHLAND OIL, INC.,

Criminal No. 88-146

GOVERNMENT'S OFFER OF PROOF
WITH RESPECT TO GROSS LOSS

AND NOW comes the United States of America by Charles D. Sheehy, Acting United States Attorney for the Western District of Pennsylvania, and Constance M. Bowden, Assistant United States Attorney for said district, and Charles A. DeMonaco, Assistant Chief Environmental Crimes Section, Land and Natural Resources Division, and Eric W. Nagle, trial attorney, Environmental Crimes Section, Land and Natural Resources Division, and submits the following offer of proof with respect to gross loss for purposes of the alternative fines provision, Title 18, United States Code, Section 3751:

Initially, the government submits that this case is uncommonly well-suited to application of the alternative sentencing provision of 18 U.S.C. §3571(d). Unlike most criminal cases, a large proportion of the losses caused by the offenses in this case have been thoroughly documented, analyzed, verified, and tallied by a corps of professional claims adjusters. One could hardly ask for a more ideal situation in which to assess the loss caused by a crime.

PROFFER

The United States intends to prove the gross pecuniary loss resulting from the January 2, 1988 oil spill at Ashland's Floreffe facility through the following documentation:

A computer printout produced by Crawford and Company, Ashland's claim adjuster, indicating all claims paid by Ashland to date, and the type of loss upon which each claim is based. Additionally, the government has identified forty (40) entities, including water companies, business, schools, municipalities, and state, local and federal agencies, that suffered a total of \$5,965,189.39 in losses as a result of the spill.

All of these entities have submitted claims to Crawford and Company, the claims adjuster for Ashland Oil, Inc., requesting compensation for pecuniary losses incurred as a result of the spill.

Contrary to Ashland's assertion, the government does not intend to prove gross losses simply by offering evidence of Ashland's settlement of claims. Rather, the government intends to provide the Court with detailed documentation of these losses that the government has obtained from Crawford and Company as well as from the individual entities. This documentation will provide independent proof of the losses suffered and demonstrate that Ashland's claim adjusters analyzed each claim in detail and authorized payment of those claimants' amounts found to be valid.

The government intends to provide this documentation to the Court in the form of a summary pursuant to Rule 1006, Federal Rules of Evidence. The government will also have all of the

documents marked as exhibits and available for the Court's inspection.

In addition, to the extent it is necessary to introduce further proof of the relation of the loss claimed to the offense charged, the government intends to call Special Agent John Aduddell of the Environmental Protection Agency's Office of Criminal Investigation, and Special Agent Joseph Eddins, of the Federal Bureau of Investigation to testify to these matters. The government does not intend to call an individual witness from each entity that suffered a loss.

In the event that Ashland disputes the relationship of the losses incurred to the spill, the government is prepared to offer the testimony of witnesses from several of the entities which suffered the largest losses, if the Court believes that such testimony will be necessary.

The losses the government intends to prove are only a small part of the actual losses suffered by hundreds of individuals, businesses, and government agencies incurred losses as a result of the spill, including lost wages, lost business revenues, property damage, and extraordinary expenses for labor and supplies. In

order to avoid unduly complicating the sentencing process, the government does not intend to attempt to prove these losses.

Respectfully submitted,

CHARLES D. SHEEHY
Acting United States Attorney

By: CONSTANCE M. BOWDEN
Assistant U.S. Attorney

CHARLES A. DeMONACO
ASSISTANT CHIEF ENVIRONMENTAL
CRIMES SECTION LAND AND NATURAL
RESOURCES

ERIC W. NAGLE
ENVIRONMENTAL CRIMES SECTION
LAND AND NATURAL RESOURCES
DIVISION

"clear and convincing evidence" standard where the state sought involuntary commitment to a mental institution and involuntary termination of parental rights, are not to the contrary. Quite unlike the situation in these cases, criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable doubt standard had been applied to obtain a valid conviction "the criminal defendant has been constitutionally deprived of his liberty to the extent that the state may confine him".... As noted in text, sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioner's suggestion that we apply the clear and convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence.

We also note that unlike the statutory provisions relating to restitution, see Title 18 United States Code, Section 3664(d), the alternative fines provision does not provide a specific burden of proof where gross loss is disputed.

Thus, the government would anticipate introducing proof of gross loss, through a summary witness. The government also anticipates that it will rely only upon those losses, which are directly related to the offenses at issue in this case; that is those losses which are directly attributable to the discharge of the diesel fuel into the Monongahela River. The government also represents that it intends to prove only those types of losses, the validity of which cannot be disputed, including the losses sustained by the water companies affected by the spill; the response and removal costs of state, local, and federal agencies; and to some extent the losses suffered by businesses as a result

Ashland, by entering a plea of nolo contendere, admitted its negligence at least for the purposes of this proceeding.

More specifically, had the case gone to trial, the government would have proven that Tank 1338, which collapsed, was first placed in operation almost fifty years ago at Whiskey Island which is located near Cleveland, Ohio. It was a welded steel tank with a flat bottom and shallow conical roof. The cylindrical shell was one hundred twenty (120) feet in diameter and forty-eight (48) feet high. It consisted of six (6) shell courses, each approximately eight (8) feet high and thirty-two (32) feet long, which were butt welded.

In 1986, Ashland disassembled the tank and reconstructed it at its facility in Floreffe, Pennsylvania. According to the National Bureau of Standards, Tank 1338 had a nominal capacity of ninety-six thousand (96,000) barrels or four million (4,000,000) gallons. On August 24, 1987, Tank 1338 was placed into service. On January 2, 1988, Tank 1338 was filled to approximate capacity with diesel oil for the first time at the Floreffe facility.

Prior to January 2, 1988, the oil level in the tank had never exceeded 37 feet, and prior to its relocation to Floreffe, it had been used to store number 6 oil, a viscous petroleum product which, according to the National Bureau of Standards, is generally maintained at a temperature of approximately 150 degrees Fahrenheit.

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on.—If the defendant violates a condition of probation or termination of the term of probation, the court shall revoke the sentence of probation and the factors set forth in section 3553(a) to the extent

tion, with or without extending the term or modifying; or

in volume for text of (2)]

tion of this section, if a defendant is found by the court to have violated the condition of probation, the court shall revoke the sentence of probation and the factors set forth in section 3553(a) to the extent

possession of a firearm.—If the defendant is in possession of a firearm, at the time of the initial sentencing, the court shall revoke the sentence of probation and the factors set forth in section 3553(a) to the extent

power of the court to revoke a sentence of probation, and to impose another sentence, the term of probation for any period reasonably matters arising before its expiration if, prior to its expiration, a sentence has been issued on the basis of an allegation of

§ 5214, Title VII, § 7803(a)(2), Nov. 18, 1988, 102 Stat. 3585, Nov. 29, 1990, 104 Stat. 4330.)

Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

Law Review Commentaries

Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

Notes of Decisions

Offenses committed prior to term 1
Sentence 2
Sentencing guidelines 3

1. Offenses committed prior to term

District court had authority to revoke a defendant's probation for offenses committed prior to commencement of his probationary term. U.S. v. Durchslag, N.D.Ill.1990, 735 F.Supp. 298.

2. Sentence

Where probation revocation is not mandatory, district court may consider postsentencing conduct when deciding whether to revoke probation or to continue it, either on the same or different terms; furthermore, after revoking probation, district court has discretion to impose new sentence within the applicable range prescribed by law at time of initial sentencing, and court ought to be able to consider the conduct giving rise to the revocation when deciding what sentence to select within the guidelines range or even whether to

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depart from the guidelines, provided the conduct justifying departure was brought to the court's attention at initial sentencing hearing. U.S. v. Smith, C.A.11 (Ga.) 1990, 907 F.2d 133.

3. Sentencing guidelines

Statute governing sentencing after revocation of probation requires court to follow sentencing guideline applicable to a defendant's offense of conviction when sentencing defendant after revocation of probation. U.S. v. Von Washington, C.A.8 (Mo.) 1990, 915 F.2d 390.

§ 3566. Implementation of a sentence of probation

Historical and Statutory Notes

Effective Date. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to

offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

Notes of Decisions

50. Receipt of individual at penitentiary, reformatory, or jail

To same effect as second paragraph in main volume, see Flick v. Blevins, C.A.7 (Ind.) 1989, 887 F.2d 778.

§ 3569. Discharge of indigent prisoner

Notes of Decisions

4. Imprisonment until fine paid.

Holding defendant in prison past parole release date until "stand committed" fine of \$60,000 was paid was not unconstitutional where defendant

had substantial equity in \$200,000 home, despite defendant's argument that it was unconstitutional to suspend discretionary parole date while administrative proceedings to determine indigency were held. U.S. v. Ellis, C.A.1 (Mass.) 1990, 907 F.2d 12.

SUBCHAPTER C—FINES

Sec. 3572. Imposition of a sentence of fine and related matters.

Sec. 3573. Petition of the Government for modification or remission.

Historical and Statutory Notes
1987 Amendment. Pub.L. 100-185, § 8(b), Dec. 11, 1987, 101 Stat. 1282, substituted "Peti-

tion of the Government for modification or revision" for "Modification or remission of fine" in item 3573.

§ 3571. Sentence of fine

(a) In general.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Fines for individuals.—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$250,000;
- (4) for a misdemeanor resulting in death, not more than \$250,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$100,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$5,000; or
- (7) for an infraction, not more than \$5,000.

(c) Fines for organizations.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

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- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$500,000;
- (4) for a misdemeanor resulting in death, not more than \$500,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$200,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; and
- (7) for an infraction, not more than \$10,000.

(d) **Alternative fine based on gain or loss.**—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) **Special rule for lower fine specified in substantive provision.**—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

(As amended Pub.L. 100-185, § 6, Dec. 11, 1987, 101 Stat. 1280.)

Historical and Statutory Notes

1987 Amendment. Subsec. (a). Pub.L. 100-185 reenacted subsec. (a) without change.

Subsec. (b). Pub.L. 100-185 in the heading substituted "Fines for individuals" for "Authorized fines" and in text substituted provision that, except as provided in subsec. (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of the amount specified in the law setting forth the offense, the applicable amount under subsec. (d) of this section, for a felony, not more than \$250,000, for a misdemeanor resulting in death, not more than \$250,000, for a Class A misdemeanor that does not result in death, not more than \$100,000, for a Class B or C misdemeanor that does not result in death, \$5,000, or for an infraction, not more than \$5,000 for provision that, except as otherwise provided in the chapter, the authorized fines are, if the defendant is an individual, for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$250,000, for any other misdemeanor, not more than \$25,000, and for an infraction, not more than \$1,000, and if the defendant is an organization, for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$500,000, for any other misdemeanor, not more than \$100,000, and for an infraction, not more than \$10,000. See subsec. (c) of this section.

§ 3572. Imposition of a sentence of fine and related matters

(a) **Factors to be considered.**—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

- (1) the defendant's income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

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- (3) any pecuniary loss;
- (4) whether restitution is required;
- (5) the need to deprive the defendant of the means to commit the offense;
- (6) whether the deferment of the fine is in the interest of justice;
- (7) if the defendant is a minor, the measure taken by the court or agent of the organization to prevent the recurrence of such an offense.

(b) **Fine not to impair ability to pay.**—If the defendant has the ability to pay the fine, the court shall impose a fine if the fine or penalty will not impair the defendant's ability to pay.

(c) **Effect of finality of judgment.**—If a defendant pays a fine can subsequently

- (1) modified or remitted;
- (2) corrected under section 3742; or
- (3) appealed and modified.

a judgment that includes such a fine.

(d) **Time, method of payment.**—If a fine or other monetary penalty is imposed, the court, in the interest of justice, the court may order the defendant to pay in equal monthly payments. If the court provides for such payments, it shall establish another schedule of payments, the period provided served by the defendant as a condition of probation.

(e) **Alternative sentence.**—If a fine, the court may not impose a sentence of imprisonment if the fine is not paid.

(f) **Responsibility for payment.**—If a sentence includes a fine (including interest) with re make disbursements for the assets of the organization, shareholder, employee, or directly or indirectly, from such payment is expressly required.

(g) **Security for stayed judgment.**—If a judgment is stayed, absent exceptional circumstances, the court shall

- (1) require the defendant to pay the amount of the fine that is stayed;
- (2) require the defendant to pay the fine; or
- (3) restrain the defendant from committing further offenses.

(h) **Delinquency.**—A fine is delinquent if the defendant fails to pay the fine.

(i) **Default.**—A fine is in default if the defendant fails to pay the fine after notification of the default.

(j) **Redesignated (i)**

(As amended Pub.L. 100-185, § 3587, Nov. 29, 1990, 104 Stat.

Subsec. (c) to (e). Pub.L. 100-185 added subsec. (c) to (e).

Effective Date. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Legislative History. For legislative history and purpose of Pub.L. 100-185, see 1987 U.S. Code Cong. and Adm. News, p. 2137.

Law Review Commentaries

Commanding respect: Criminal sanctions for environmental crimes. Eva M. Fromm, 21 St. Mary's L.J. 821 (1990).

Notes of Decisions

1. Law governing

Although regulation provided that use of forged parking permit was "subject to a fine of not more than \$50," regulation also provided that "nothing in these rules and regulations shall be construed to abrogate any other Federal laws," and such Federal law was provided by statute authorizing fine of up to \$5,000. U.S. v. Pyatt, E.D.Va.1989, 725 F.Supp. 835.

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the law setting forth the offense;
 or subsection (d) of this section;
 or \$500,000;
 or in death, not more than \$500,000;
 or that does not result in death, not more than \$10,000.

or loss.—If any person derives pecuniary gain results in pecuniary loss to a person other than the defendant, the court shall impose a fine not more than the greater of twice the pecuniary loss or the amount of the fine imposed or the imposition of a fine under this subsection in the sentencing process.

specified in substantive provision.—If a law provides for a fine or a fine that is lower than the fine provided in this section, and such law, by specific reference, exempts the fine otherwise applicable under this section, the amount specified in the law setting

1987, 101 Stat. 1280.)

Subsec. (c) to (e). Pub.L. 100-185 added subsec. (c) to (e).

Effective Date. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Legislative History. For legislative history and purpose of Pub.L. 100-185, see 1987 U.S. Code Cong. and Adm. News, p. 2137.

Law Review Commentaries

Commanding respect: Criminal sanctions for environmental crimes. Eva M. Fromm, 21 St. Mary's L.J. 21 (1990).

Notes of Decisions

1. Law governing

Although regulation provided that use of forged parking permit was "subject to a fine of not more than \$30," regulation also provided that "nothing in these rules and regulations shall be construed to abrogate any other Federal law," and such Federal law was provided by statute authorizing fine of up to \$5,000. U.S. v. Pyatt, E.D.Va. 1989, 725 F.Supp. 885.

Fine and related matters

Determining whether to impose a fine, and the amount of payment of a fine, the court shall consider, under section 3553(a)—

the defendant's criminal history, including capacity, and financial resources;
 the harm caused by the offense;
 the need to protect the public, any person who is a victim of the offense, or any other person (including a person who is a victim of the offense) financially from the burden that alternative punishments

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- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether restitution is ordered or made and the amount of such restitution;
- (5) the need to deprive the defendant of illegally obtained gains from the offense;
- (6) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) Fine not to impair ability to make restitution.—If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(c) Effect of finality of judgment.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

- (1) modified or remitted under section 3573;
- (2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
- (3) appealed and modified under section 3742;

a judgment that includes such a sentence is a final judgment for all other purposes.

(d) Time, method of payment, and related items.—A person sentenced to pay a fine or other monetary penalty shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule. If the judgment permits other than immediate payment, the period provided for shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense.

(e) Alternative sentence precluded.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out if the fine is not paid.

(f) Responsibility for payment of monetary obligation relating to organization.—If a sentence includes a fine, special assessment, or other monetary obligation (including interest) with respect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation from assets of the organization. If such an obligation is imposed on a director, officer, shareholder, employee, or agent of an organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Security for stayed fine.—If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

- (1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;
- (2) require the defendant to provide a bond or other security to ensure payment of the fine; or
- (3) restrain the defendant from transferring or dissipating assets.

(h) Delinquency.—A fine is delinquent if a payment is more than 30 days late.

(i) Default.—A fine is in default if a payment is delinquent for more than 90 days. When a fine is in default, the entire amount of the fine is due within 30 days after notification of the default, notwithstanding any installment schedule.

[(j) Redesignated (i)]

(As amended Pub.L. 100-185, § 7, Dec. 11, 1987, 101 Stat. 1280; Pub.L. 101-647, Title XXXV, § 3587, Nov. 29, 1990, 104 Stat. 4930.)

[VESSEL SAFETY CLAUSES]

WHEREAS, the State of Alaska contains more than 50% of the coastline of the United States; and

WHEREAS, the State of Alaska operates a Marine Highway System, and the people of the state are highly dependent upon the safe and reliable conduct of maritime operations in international and intracoastal traffic; and

WHEREAS, the National Transportation Safety Bureau's investigation into the causes of the Exxon Valdez oil spill established that Exxon Shipping Company had deliberately and knowingly reduced crew levels aboard its vessels in the Alaska oil traffic to an unsafe degree; and

WHEREAS, the federal government has never successfully prosecuted any corporation or individual under the Ports and Waterways Safety Act, such that the threat of criminal prosecution is not a deterrent to unsafe practices outlawed by that Act; and

WHEREAS, in the past ____ years, more than ____ persons have perished as a result of maritime accidents involving vessels operating fisheries subject to the jurisdiction of the State of Alaska; and

WHEREAS, only the federal government has the authority to

April 17, 1991

M E M O R A N D U M

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

FROM: Chip Thoma

SUBJECT: Dropping of Felony Counts

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

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

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

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MEMORANDUM

April 16, 1991

SUBJECT: Criminal Penalties relating to the Exxon Valdez Oil Spill
(Work Order No. 17-LS1044)

TO: Representative Max Grueenberg, Chair
House Special Committee on the Exxon Valdez Settlement

FROM: Pam Finley *Pam Finley*
Assistant Revisor

You have asked us to summarize the federal criminal laws and penalties in the indictment against Exxon and Exxon Pipeline, and possible violations of state criminal laws by Exxon or Exxon Pipeline.

State Law. While there may be other possibilities, AS 46.03.710 seems the most obvious basis for state criminal charges against Exxon. (Note that AS 46.03.742 and 46.03.743, concerning reckless and negligent operation of a tank vessel were not enacted until 1990.) AS 46.03.710 prohibits the pollution of state land or water. The penalties are set forth in AS 46.03.790. A negligent violation is a class B misdemeanor and a knowing violation is a class A misdemeanor. AS 46.03.790(a) and (b), as they read at the time of the oil spill. Each day is a separate offense. AS 46.03.790(c), as it read at the time of the oil spill. Under AS 12.55.035(c), as it read at the time of the oil spill, a defendant that is an organization may be fined the greater of

(a) \$200,000 for the knowing violation or \$25,000 for the negligent violation;

(b) two times the pecuniary gain realized by the defendant as a result of the offense; or

(c) two times the pecuniary damage or loss caused by the defendant to another, or the property of another, as a result of the offense.

"Pecuniary gain" is defined as

...the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the

offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed.

AS 12.55.185(6). "Pecuniary damage or loss" is not defined.

Federal Law. Following is a discussion of each count of the superseding indictment filed March 27, 1990 in federal district court in Anchorage, A-90-015.

Count One. Negligent discharge of a pollutant, carrying a fine of \$2500-\$25,000 per day of violation, or imprisonment for one year, or both. 33 U.S.C. 1311(a), 1319(c)(1).

Count Two. Unlawful discharge of refuse, a misdemeanor carrying a penalty of \$500-\$2500. 33 U.S.C. 407 and 411.

Count Three. Killing of migratory birds, a misdemeanor carrying a penalty of not more than \$500 or six months' imprisonment, or both. 16 U.S.C. 703 and 707(a), 50 CFR 21.11.

Count Four. Vessel owner's willful and knowing failure to ensure that the wheelhouse of the vessel is constantly manned by competent persons, carrying a penalty of not more than \$50,000 or five years' imprisonment, or both. 33 U.S.C. 1232(b)(1), 33 CFR 164.11(b).

Count Five. Willful and knowing employment of crew known to be incompetent to perform the duties assigned to them, carrying a penalty of not more than \$50,000, or five years' imprisonment, or both. 46 U.S.C. 3718(b), 46 CFR 35.05-20.

PLF:pl
91-266.plm

Alaska State Legislature

House of Representatives



Official Business

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House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

April 22, 1991

Honorable H. Russel Holland
United States District Court
222 West 7th Avenue No. 54
Anchorage, Alaska 99513-7545

Re: United States v. Exxon Corporation
Case No. A90-015 Crim.

Dear Judge Holland:

The Committee appreciates the opportunity you have provided for legislative comment on the plea agreement. We particularly appreciate the courtesy of your April 12 letter.

We recognize the responsibility of all counsel not to make any threat of criminal prosecution to gain advantage in a pending civil case and your concern that the court not be a party to any such conduct.

However the legislature has its own responsibility, and that is to give thorough and thoughtful consideration to the civil agreement as well as to the plea agreement. That responsibility arises directly from, not only the civil agreement itself, but also the legislature's role as elected representatives of the people of Alaska.

In considering these agreements, it has become apparent that the civil agreement and the criminal plea agreement are in fact expressly and inextricably linked. Exxon can withdraw from the civil settlement if the criminal plea is not accepted. It was impossible (and probably inadvisable) for the parties, the public and this committee to consider them separately, without acknowledging their interrelationship. It has therefore not been possible for this committee to comment on the plea agreement alone, as if our judgment as to the public interest in that case had no relation to the civil agreement.

Page 2
April 22, 1991

At this time, we have not reached a final decision regarding either the plea agreement or the civil agreement. We intend to present our report to the House of Representatives later this week. We are therefore unable to comment on the plea agreement at this time. As we have previously stated in House Concurrent Resolution 19, copy enclosed, it is our view that, because these two matters are clearly linked, we would suggest and request that the court defer action on the plea agreement until May 3, when the legislature will have reached a final decision regarding the civil agreement.

x

This letter is being sent by motion of the Committee. Individual members who are so inclined may also submit separate comments.

Cordially,

Rep. Max F. Gruenberg, Jr.
Chairman

Encl.: HCR 19

AMENDMENTS TO HOLLAND LETTER

1. Page 2, first paragraph: after "clearly linked, we" delete "would suggest and"

2. Page 2, after the first paragraph: add this paragraph:

~~While we cannot comment at this time tell you what our final decision will be with respect to either the plea agreement or the civil agreement, we can state that our review of the settlement documents has raised several troubling questions about the proposed plea agreement, however, that we believe warrant a fuller explanation to the court:~~

The committee *concerns*

Should *be relieved*
(1) ~~Is it in the public interest to relieve Alyeska of all criminal liability, without specifying the conduct or charges at issue?~~

Should Court IV with respect to
(2) ~~Is it in the public interest to relieve Exxon Shipping Company of felony criminal liability for its conduct of shipping operations, when the National Transportation Safety Board has found that Exxon's failure...to provide a fit master and a rested and sufficient crew" was a probable cause of the grounding?~~

have been dismissed *Shipping's*

(3) Is the criminal fine sufficient to deter other *large* corporations from engaging in similar criminal conduct in the future?

and thus recognizing broader discretion in the judge to determine whether a charge bargain with sentencing consequences should be approved.

§ 20.4 Receiving the Defendant's Plea

(a) **Arraignment; Pleading Alternatives.** The word "arraignment" is sometimes used to refer to the defendant's first appearance in court before a magistrate. The defendant will not normally be called upon to plead at that time unless the offense charged is a minor one. The more common use of the word "arraignment" is to refer to a later appearance in the court of trial jurisdiction, when the defendant is advised of the formal charge and called upon to enter a plea. Typically this will occur weeks or even months after the initial appearance, and thus the defendant will have had adequate time to consult with counsel and to reflect on what his plea should be. On occasion, however, a defendant is brought into court after arrest, where he waives all rights and procedures which would delay the proceedings (right to counsel, preliminary hearing, grand jury indictment) and then immediately enters a guilty plea. Some courts have upheld this practice,¹ while others have criticized it.² Certainly the better view is that even a defendant who has waived his other rights should not be called upon to decide on his plea so promptly.³

When the defendant is called upon to enter his plea at arraignment, he may enter a plea of (1) not guilty, (2) guilty, (3) not guilty by reason of insanity (in a few jurisdictions where such a plea is a prerequisite to the presentation of an insanity defense at trial); or (4) *nolo contendere* (in the federal system and about half of the states). A plea of *nolo contendere*—sometimes referred to as a plea of *non vult contendere* or of *non vult*—is simply a device by which the defendant may assert that he does not want to contest the issue of guilt or innocence. Such a plea may not be entered as a matter of right, but only with the consent of the court.⁴ Although the prevailing view is that the consent of the prosecutor is not also required, it is common practice for the court to determine

lates to the dismissal of some of the charges," so that in such circumstances "the decision of the trial court as to sentencing [is] to prevail except in extreme circumstances"

§ 20.4

1. *People v. Mahler*, 329 Mich. 155, 45 N.W.2d 14 (1950) (3 hours from arrest to sentence).

2. *State ex rel. Burnett v. Burke*, 22 Wis.2d 486, 126 N.W.2d 91 (1964).

3. 3 ABA Standards for Criminal Justice § 14-1.3(b) (2d ed. 1980) provides: "A defendant who has properly waived counsel pursuant to these standards should not be called upon to plead until a reasonable time,

set by rule or statute, following the date defendant was held to answer. When a defendant has properly waived counsel and tenders a plea of guilty or *nolo contendere*, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, following the date the defendant received the advice from the court required in standard 14-1.4."

4. *State v. Fernald*, 248 A.2d 754 (Me. 1968); *State v. Erickson*, 53 Wis.2d 474, 122 N.W.2d 872 (1972). *Contra: Miller v. State*, 617 P.2d 516 (Alaska 1980).

the views of the prosecutor and to give them considerable weight in deciding whether to accept the nolo plea.⁵

Although some minor variations are to be found from jurisdiction to jurisdiction, a plea of nolo contendere usually has the following significance⁶: (1) Unlike a plea of guilty or a conviction following a plea of not guilty, a plea of nolo contendere may not be put into evidence in a subsequent civil action as proof of the fact that the defendant committed the offense to which he entered the plea.⁷ (2) Judgment following entry of a nolo contendere plea is a conviction, and may be admitted as such in other proceedings where the fact of conviction has legal significance (e.g., to apply multiple offender penalty provisions, to deny or revoke a license because of conviction, or to claim double jeopardy in a subsequent prosecution).⁸ (3) When a nolo contendere plea is accepted, it has essentially the same effect in that case as a guilty plea. The procedures for receiving the plea are the same,⁹ the defendant may receive the same sentence,¹⁰ and the nolo plea is like a guilty plea in terms of its finality,¹¹ its effect as a waiver of claims unrelated to the plea,¹² and the circumstances in which withdrawal of the plea would be permitted.¹³

Opinions differ as to whether it is desirable to have the nolo contendere pleading alternative. Some commentators have questioned whether the nolo plea serves any useful function.¹⁴ So the argument goes, there should not be such an "in between" plea, for if a defendant is innocent he

5. Sometimes this is mandated by law. See, e.g., Fed.R.Crim.P. 11(b), providing that a nolo plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

6. See also Comment, 13 Am.Crim.L. Rev. 249 (1975); Notes, 10 Memphis St.U.L. Rev. 550 (1980); 44 S.Cal.L.Rev. 737 (1971).

7. *United States v. Dorman*, 496 F.2d 438 (4th Cir. 1974), certiorari denied 419 U.S. 945, 95 S.Ct. 214, 42 L.Ed.2d 168; *State v. Steele*, 620 P.2d 1026 (Wyo.1980).

8. *Tempo Trucking and Transfer Corp. v. Dickson*, 405 F.Supp. 506 (E.D.N.Y.1975); *In re Lewis*, 389 Mich. 668, 209 N.W.2d 203 (1973).

9. As stated in *Cusick v. State*, 259 Ark. 720, 536 S.W.2d 119 (1976), the constitutional standards for receipt of a nolo plea are no less than for a guilty plea. As for additional procedures followed for guilty pleas, they are likely to be applicable to nolo pleas also, with the possible exception of the requirement that a factual basis for the plea be established. In some jurisdictions no factual basis for a nolo plea is required, *United States v. Prince*, 533 F.2d

205 (5th Cir. 1976); *State v. Steele*, 620 P.2d 1026 (Wyo.1980), while in some other jurisdictions a factual basis is required, *Dydek v. State*, 400 So.2d 1255 (Fla.App.1981); *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980). Of course, in a jurisdiction taking the latter approach, the factual basis must be established other than by direct inquiry of the defendant, for his direct admission of guilt would nullify the benefit of the nolo plea. *People v. Chilton*, 394 Mich. 34, 228 N.W.2d 210 (1975).

10. *United States v. Dorman*, 496 F.2d 438 (4th Cir. 1974), certiorari denied 419 U.S. 945, 95 S.Ct. 214, 42 L.Ed.2d 168; *State v. Sellers*, 273 N.C. 641, 161 S.E.2d 15 (1967).

11. *United States v. Williams*, 642 F.2d 136 (5th Cir. 1981).

12. *United States v. Broome*, 628 F.2d 403 (5th Cir. 1980); *Deal v. State*, 626 P.2d 1073 (Alaska 1980); *Mooney v. State*, 615 S.W.2d 776 (Tex.Cr.App.1981).

13. *State v. Tupko*, 161 Conn. 20, 282 A.2d 911 (1971); *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980).

14. *Lane-Reticker, Nolo Contendere in North Carolina*, 34 N.C.L.Rev. 280, 290-91 (1956); Note, 33 Neb.L.Rev. 428, 433 (1954).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

April 25, 1991

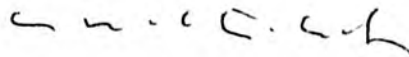
Hon. Max Gruenberg, Chairman
House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement
House of Representatives
P. O. Box V
Juneau, AK 99811

Dear Mr. Chairman:

This will confirm my remarks to you earlier this afternoon that Governor Hickel's position continues to be that the State will terminate the Agreement among the United States, the State of Alaska and Exxon Corporation, et al. if the Alaska Legislature does not approve the Agreement as written.

It will also confirm my view that action by the Legislature to approve the Agreement is inappropriate until Exxon decides whether to terminate it because of Judge Holland's rejection yesterday of the criminal plea agreement.

Very truly yours,



Charles E. Cole
Attorney General

CEC:pml

cc: Hon. Richard I. Eliason, President, Alaska State Senate
Assistant Attorney General Richard Stewart, U.S.
Department of Justice
J. G. Clarke, Senior Vice President, Exxon Corporation

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MEMORANDUM

April 24, 1991

SUBJECT: Criminal Penalties relating to the Exxon Valdez Oil Spill
(Work Order No. 17-LS1044)

TO: Representative Max Gruenberg, Chair
House Special Committee on the Exxon Valdez Settlement

FROM: Pam Finley *Pam Finley*
Assistant Revisor

After talking to Andy Hemenway, I realized that my April 19, 1991 memo to you on the referenced subject omitted relevant information, and after rereading it, I realized that it contained an error as well. What follows is a revised summary of the federal criminal laws and penalties in the indictment against Exxon and Exxon Pipeline, and possible violations of state criminal laws by Exxon or Exxon Pipeline.

State Law. While there may be other possibilities, AS 46.03.710 seems the most obvious basis for state criminal charges against Exxon. (Note that AS 46.03.742 and 46.03.743, concerning reckless and negligent operation of a tank vessel were not enacted until 1990.) AS 46.03.710 prohibits the pollution of state land or water. The penalties are set forth in AS 46.03.790. A negligent violation is a class B misdemeanor and a knowing violation is a class A misdemeanor. AS 46.03.790(a) and (b), as they read at the time of the oil spill. Each day is a separate offense. AS 46.03.790(c), as it read at the time of the oil spill. Under AS 12.55.035(c), as it read at the time of the oil spill, a defendant that is an organization may be fined the greater of

(a) \$100,000; or

(b) three times the pecuniary gain realized by the defendant as a result of the offense.

"Pecuniary gain" is defined in AS 12.55.185(6) as

...the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the

victim of the offense or seized by or surrendered to lawful authority before sentence is imposed.

Federal Law. Following is a discussion of each count of the superseding indictment filed March 27, 1990 in federal district court in Anchorage, A-90-015.

Count One. Negligent discharge of a pollutant, carrying a fine of \$2500-\$25,000 per day of violation, or imprisonment for one year, or both. 33 U.S.C. 1311(a), 1319(c)(1).

Count Two. Unlawful discharge of refuse, a misdemeanor carrying a penalty of \$500-\$2500. 33 U.S.C. 407 and 411.

Count Three. Killing of migratory birds, a misdemeanor carrying a penalty of not more than \$500 or six months' imprisonment, or both. 16 U.S.C. 703 and 707(a), 50 CFR 21.11.

Count Four. Vessel owner's willful and knowing failure to ensure that the wheelhouse of the vessel is constantly manned by competent persons, carrying a penalty of not more than \$50,000 or five years imprisonment, or both. 33 U.S.C. 1232(b)(1), 33 CFR 164.11(b).

Count Five. Willful and knowing employment of crew known to be incompetent to perform the duties assigned to them, carrying a penalty of not more than \$50,000, or five years imprisonment, or both. 46 U.S.C. 3718(b), 46 CFR 35.05-20.

Alternative Fines. As an alternative to the fines stated above, Exxon could be fined up to (1) two times the gross amount Exxon gained from the offense; or (2) two times the gross amount of the damage Exxon caused by the offense unless imposition of that fine would unduly complicate or prolong the sentencing process. 18 U.S.C. 3571(d).

PLF:pl:gc
91-304.plm

Andy
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MEMORANDUM

April 26, 1991

SUBJECT: Oil spill penalties (Work Order No. 7-LS1295)
TO: Representative Fran Ulmer
FROM: John B. Gaguine *JH*
Legislative Counsel

You have asked for a bill to increase the fines that may be imposed for oil spills. In my opinion no bill is necessary, as the 1990 legislature enacted a measure that would clearly authorize huge fines against a corporation in connection with a major spill.

The 1990 legislature rewrote AS 12.55.035(c), regarding fines that may be imposed on an organization (an entity other than a natural person, including a corporation). Paragraph (3) of subsection (c) now authorizes the imposition of a fine of "two times the pecuniary damage of loss caused by the defendant to another, or to the property of another, as a result of the offense." This fine may be imposed if the offense is a felony, a misdemeanor, or a violation. Obviously, in the case of a major catastrophe such as the Exxon Valdez spill, a fine under this paragraph could run into the hundreds of millions, or perhaps even billions, of dollars.

Prior to the 1990 amendment the maximum fine that could be imposed on an organization was \$100,000 or three times the gain that the organization realized as a result of its offense. Obviously Exxon did not realize a gain as a result of the spill. Thus the maximum fine that could be imposed was \$100,000, which would explain the reaction of the attorney general at the time.

Of course, the huge fines discussed above do not apply to individuals; they may not be fined more than \$50,000 for a felony (\$75,000 for a few very serious ones), \$5,000 for a class A misdemeanor, or \$1,000 for a class B misdemeanor. (AS 12.55.035(b)) However, individuals, unlike corporations, may be jailed - up to five years for a class C felony, one year for a class A misdemeanor, and 90 days for a class B misdemeanor. Note too that the 1990 legislature also made it a class C felony to discharge through criminal negligence over 10,000 barrels of oil, or to fail through criminal negligence to comply with an oil spill contingency plan when a spill is in excess of

Representative Fran Ulmer
April 26, 1991
Page 2

10,000 barrels. Thus there is a very real possibility that corporate officers such as you described in your memorandum could be facing up to five years in jail.

Please let me know if you would like a bill drafted in light of the current law, and, if so, what sort of bill you would like.

JBG:pl
91-308.plm

CHARLES E. COLE
ATTORNEY GENERAL
STATE OF ALASKA

March 12, 1991

Mr. Lee Raymond
President
Exxon Corporation
225 East Carpenter Freeway
Irving, Texas 75062-2298

Dear Mr. Raymond:

As a part of the settlement of certain issues covered by the Plea Agreement, the State of Alaska agrees that it will not bring criminal charges or seek any civil or criminal or administrative penalties, except as provided below, against Exxon Corporation, or any of its officers, directors or employees, past or present, or against any of its wholly-owned subsidiaries, their offices, directors of employees, past or present, for any violations of Alaska law arising out of or relating to the grounding of the "EXXON VALDEZ," the resulting oil spill, the containment or cleanup of that spill, the oil spill contingency plans or related documents of Alyeska Pipeline Service Company, including their preparation or submission to the State of Alaska.

Nothing in the foregoing paragraph shall prevent the State of Alaska from seeking criminal charges against Exxon Pipeline Company or Alyeska Pipeline Service Company, or any of their officers, directors, or employees, for any violation of Alaska law based on an allegation of false statements made to any agency of the State of Alaska arising out of its or their conduct in connection with the preparation or submission of oil spill contingency plans and related documents by Alyeska Pipeline Service Company to the State of Alaska.

You may advise Exxon Shipping Company of the contents of this letter and provide each of them with a copy.

Sincerely,

4-16-91 5:41

Charles Cole
Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 485-3600

June 21, 1989

Charles DiMonaco, Chief
Lands Division
Environmental Crime Section
Department of Justice
Washington D.C. 20038

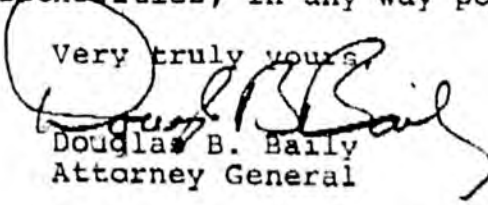
Dear Mr. DiMonaco:

We would like to inform you that the State of Alaska is no longer pursuing a criminal investigation of either Alyeska Pipeline Company or Exxon Shipping Company with respect to the Exxon Valdez oil spill. Based on our initial investigation, we believe that our remedies against these corporations are limited to B misdemeanors. For corporations, the maximum penalty for a B misdemeanor is a fine of \$100,000. In light of the state penalty structure, and the broader range of remedies available under federal law, we would defer any further investigation of the corporations involved in this matter to the Department of Justice.

Of course, if new evidence is developed that indicates additional criminal acts under state law have been committed by either defendant, we would be willing to resume our investigation. However, given our limited resources and limited remedies, we believe the best course of action at this time is to turn primary responsibility for any criminal prosecution of Alyeska and Exxon over to you. Part of the reason for our decision is the excellent cooperation we received from the Department of Justice during the course of our investigation.

As you continue your inquiry, please keep in mind that we will make available to you the information and materials we have developed to date. We will make every effort to cooperate with you, and the other federal authorities, in any way possible.

Very truly yours,


Douglas B. Bailly
Attorney General

cc: Mark Davis, Acting U.S. Attorney

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



PROCEEDINGS

APRIL 24, 1991

(Tape: 1)

(000)

(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)

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

4852444 P.02

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

UNITED STATES OF AMERICA,

Plaintiff,

VS

EXXON CORPORATION and EXXON SHIPPING
COMPANY,

Defendant.

No. A90-015 CRIMINAL

SENTENCING HEARING
APRIL 24, 1991
PAGES 1 THROUGH 11

Before the Honorable Russell Holland
United States District Court Judge



APPEARANCES:

For Plaintiff: Chuck DeMonaco, Esq.
Eric Nagle, Esq.
Mark Harmon, Esq.
Environmental Crimes Section
Department of Justice
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Washington, D. C. 20004

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(907) 258-7001

For Defendant: Patrick Lynch, Esq.
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Los Angeles, CA 90071
(213) 669-6000

Edward Lynch, Esq.
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1 PROCEEDINGS

2 APRIL 24, 1991

3 (Tape: 1)

4 (000)

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

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

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

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

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SENTENCING HEARING - (4/24/91)

1 indicating that we would accept and consider public
2 comment on this sentencing in lieu of a probation service
3 report. As, I think have been reported, those comments
4 ran rather heavily against the settlement agreement for
5 a whole variety of reasons.

6 Finally, I have received a number of
7 communications from the legislature of the state of
8 Alaska, and in particular, a special house committee,
9 which is considering the civil settlement, which has also
10 been negotiated between these same parties. That
11 committee had requested, at the time we took the changes
12 of plea, that we postpone decision on this matter as far
13 as sentencing until after the committee had had an
14 opportunity to complete its work. Subsequently, the
15 committee chair, I believe, indicated to me that he
16 expected that the committee would have completed its work
17 by today -- or, yesterday, at any rate, and would have
18 some input to me by yesterday, which I indicated was
19 quite acceptable.

20 Unfortunately, I heard again from the committee
21 yesterday, as was reported this morning, indicating that
22 the committee had not yet reached a decision, and, again,
23 asking that I delay this proceeding.

24 With respect to that request, and while I have
25 given it serious consideration, the fact is, I have

1 reached a decision on the acceptability of the plea
2 agreement, and I am not, at this time, persuaded that
3 there is any reason why I should delay or defer
4 announcing that decision.

5 With respect to the plea agreement: I am
6 satisfied that the parties worked very hard; that they
7 worked in complete good faith; and that they came up with
8 an agreement which they believed to be good and
9 acceptable, and one that they could justify to the court.

10 In evaluating that agreement, I had indicated
11 early on to counsel that while there were no applicable
12 federal sentencing commission guidelines for use in
13 sentencing corporations, that I would look to the general
14 sentencing factors set out in federal law with respect to
15 sentencing in general, and organizations in particular,
16 in evaluating the plea agreement which had been entered
17 into here.

18 I am satisfied that the pleas which were offered
19 and reflected in the agreement, adequately reflect the
20 seriousness of the underlying conduct. That is not a
21 problem with the agreement.

22 In that regard, and if you will excuse just a
23 little bit of editorializing on my part, I have some
24 difficulty with the concept that we criminalize
25 unintentional environmental accidents. In effect,

1 criminalizing the killing of birds and sea otter, and so
2 forth. Yet, we do not criminalize airline crashes, which
3 result from negligence, and which kill people.

4 Congress, in the sentencing guidelines has told
5 us -- the courts -- that we must do better in avoiding
6 disparity in sentencing. I suggest that Congress has
7 some work of its own to do in getting the disparity out
8 of the criminal laws. For, as I see it, we are affording
9 greater protection to birds and sea otter that aren't
10 even good for food, than we are people. I think that's
11 some pretty serious disparity. However, my job is to
12 enforce the law, as it is on the books at the present
13 time, and I mean to do that.

14 The sentencing factors that I alluded to earlier
15 include such things as the nature and circumstances of
16 the offense, history and characteristics of the
17 defendant; the seriousness of the offense; whether the
18 penalties to be imposed adequately deter others from
19 similar conduct. I am to seek to protect the public from
20 further crimes of the defendant. I am to consider
21 restitution with respect to fines and corporate
22 defendants. I am to consider the defendants income and
23 earning capacity and financial resources. In short, I am
24 to consider the size of the defendant organization.

25 I've used those factors in evaluating this plea

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1 agreement. I have come to the conclusion that the fines
2 which the agreement proposes to be imposed do not
3 adequately achieve deterrence. I am afraid that the
4 fines send the wrong message, suggesting that spills are
5 a cost of business, which can be absorbed. The fines, I
6 think, are also inadequate if, as the law requires at the
7 present time, defendants who commit environmental crimes
8 are to be punished. The fine proposed to me does not
9 appear to me to adequately punish the defendants for the
10 conduct to which guilty pleas were offered.

11 There has been a great deal said in the comments
12 which I received about the unavailability of scientific
13 data. In that regard, it is, of course, quite probable
14 that there is more scientific data available to some of
15 us than there is to the general public. But having said
16 that, I would further observe that the availability of
17 scientific data does not, I think, at this time, stand in
18 the way of making the decision which needs to be made
19 here. Much information is available. There is no
20 question but what the Exxon Valdez oil spill was off the
21 chart as far as other environmental disasters that we
22 have had in this country. It was very large, to say the
23 least.

24 The damage, although we cannot presently
25 quantify it with specificity, was very great.

1 Sufficiently so that I feel very comfortable saying that
2 the fines which were proposed to me were simply not
3 adequate.

4 One final matter which has been the subject of
5 some controversy, and which, in my view, should simply
6 not be a factor in connection with this case, has to do
7 with the role of Alyeska in these proceedings. And it is
8 my perception that Alyeska has no role whatsoever in
9 these proceedings.

10 A certain congressman has written me on the
11 subject. It's interesting to note that his communication
12 to me appeared in the press a day and a half before I
13 read about it in the newspaper. And it appears to me
14 that he was more interested in getting some publicity
15 than he was in informing me. Be that as it may, I do
16 not have any role in the decision of whether Alyeska
17 should or should not be prosecuted for anything. That's
18 an executive decision. It's a Justice Department
19 decision. I take no position on it. I have no role on
20 it. I take no responsibility for the decision that is to
21 be made. And I do not think that is an appropriate
22 provision for a plea agreement in connection with this
23 case.

24 As is obvious from my comments, the plea
25 agreement is rejected.

1 Mr. Neal, Mr. Lynch, at this point the
2 defendants are entitled to withdraw their pleas of guilty
3 pursuant to the plea agreement, if they wish to. Are you
4 gentlemen ready to make that decision now or do you
5 require some time to consider the matter?

6 MR. NEAL: May it please the court. James Neal,
7 representing Exxon Shipping. This is a matter we need
8 some time to consider, and we would ask for some time to
9 reflect on what the court said, and consider our course
10 with the court plea.

11 THE COURT: Thirty days?

12 MR. NEAL: Thirty days will be adequate, Your
13 Honor. Thank you.

14 THE COURT: If a decision is made earlier than
15 that, I would appreciate your letting me know about it.
16 We'll look for an answer no later than Friday the 24th of
17 May. As I say, I have some interest in moving this
18 matter along as quickly as it can and should be, but I
19 realize that this is a decision that is going to take
20 some thinking on your part.

21 Thirty days -- May 24. If you have a decision
22 earlier, I will appreciate it.

23 Will that be sufficient for Exxon Corporation,
24 also?

25 MR. LYNCH: Yes, Your Honor.

1 THE COURT: All right. Same will apply to Exxon
2 Corporation. I will expect a decision as soon as
3 possible and no later than the 24th of May.

4 Upon receiving your decision, I'll do one of two
5 things. We will schedule a status conference of some
6 sort at that point, to do whatever needs to be done in
7 the light of the decision that you make. And we will
8 communicate with you a time and place for that meeting.

9 Anything further we need to do, gentlemen?

10 (No response.)

11 Thank you very much. We'll be in recess subject
12 to call.

13 THE CLERK: This court now stands in recess
14 subject to call.

15 (1224)

16 (Off record - 8:50 a.m.)

17 ***END***
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25

411L -
Criminal

Andy

Lloyd Benton Miller
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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

EXXON CORPORATION AND
EXXON SHIPPING COMPANY,

Defendants.

NO. A90-015-1CR

NO. A90-015-2CR

CIVIL PLAINTIFFS' COMMENTS ON PROPOSED SENTENCE

All plaintiffs in Case No. A89-095 Civil (Consolidated) before this Court, and all plaintiffs and the classes they represent in Case No. 3AN-89-2533 Civil (Consolidated) in the Superior Court for the State of Alaska, Third Judicial District (hereinafter referred to as "the Civil Plaintiffs"), pursuant to this Court's Order of March 22, 1991, hereby submit their comments on the sentence specified in the Plea Agreement entered into by the United States and Defendants Exxon Corporation and Exxon Shipping Company.¹ Civil Plaintiffs urge the Court to defer

¹ Civil Plaintiffs continue to ask the Court, as they did in their motion dated March 21, 1991, to enter an Order to Impound or Otherwise Preserve All Grand Jury Documents, Subpoenae and Transcripts. Civil Plaintiffs also support the assertions and positions set forth in the letter of U.S. Representative George Miller addressed to this Honorable Court

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accepting the Plea Agreement, pursuant to Rule 11(e)(2), F.R.Crim.P., until such time as a complete record is before the Court on the impact of the offenses committed by Defendants and their history of violations of the environmental laws.

The Proposed Sentence Cannot Be Properly And Adequately Assessed By The Court Without (1) Full Disclosure Of The Scientific Data and Analyses Accumulated But Withheld By The United States; And (2) After Such Disclosure, Providing An Opportunity For Non-Government Experts to Comment On The Sentence In Light Of The Data.

The Sentencing Reform Act of 1984, as amended, 18 U.S.C. §3553(a), mandates that the Court consider before sentencing: "(1) the nature and circumstances of the offense,..."; and "(2) the need for the sentence imposed- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense...." To make these determinations in this case the Court will need an extensive assessment by the scientific community of the nature, circumstances, and seriousness of the effects of the oil spill at issue.

That inquiry is not possible now because the government has failed to provide the scientific community, the Civil Plaintiffs who are victims of defendants' offenses, and the public in general with the significant and relevant data and analyses which the government has had in its possession for months. The import of the granite barrier to scrutiny that has been maintained by the government, despite persistent requests for disclosure, is described in detail in the Affidavits of eminent scientists Drs. Capuzzo, McElroy, and Teal, and Bruce W. Tripp, whose affidavits were submitted to the Discovery Master, the Honorable David B. Ruskin, as Appendices F through I to "Plaintiffs' Memorandum in Support of Motion for Disclosure of All Scientific Data on the Impact of the Oil Spill on Natural Resources" in Case No. 3AN-89-2533 in the Superior Court for the State of Alaska, Third Judicial District of Anchorage. Because of this barrier, experts

and dated April 8, 1991.

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outside the government have been unable to provide a full assessment to the Court on the nature, circumstances, and seriousness of the effects of the oil spill at issue. The Court should clearly desire to have such expert opinions in light of the gravity of the offenses, the victims' right to provide comments, and the fact that the government is not acting solely as the enforcer of the law, free of non-prosecutorial bias, but rather is also pursuing this Plea Agreement as part of an overall settlement in which it is a settling defendant.

Perhaps recognizing that this Court could not perform its duties in this criminal proceeding without such information, the U.S. Justice Department, only three days before these comments were due, lodged an 18-page *summary* of 58 scientific studies (reportedly costing \$70 million) with this Court in Civil Action A91-002. This Court should require the government to disclose the complete scientific record, and not just a purported summary. Accordingly, the Court should defer sentencing until: (1) the United States makes available to the Court, the Civil Plaintiffs, and the public the *complete* scientific record needed to appraise "the nature and circumstances of the offenses" involved and "the need for the sentence imposed to reflect the seriousness of the offense...and to provide just punishment for the offense;" and (2) the Court affords the opportunity for comment on the sentence in light of that record. In any event, the Court should defer sentencing until the victims of the offense and experts provide comments in response to whatever the government has released and whatever it and Exxon submit on April 16.

The Fine Agreed To Is Insufficient To Serve The Needs Of Deterrence.

In deciding on the adequacy of the sentence, the Court must decide on the impact of that fine. 18 U.S.C. §3553. Here, the impact of the proposed fine on Exxon will be minimal and few if any purposes of the sentencing statute will be met.

Numerous statements have already been made by Exxon officials observing that the criminal fine (indeed the overall settlement) will have no appreciable effect on the Company's earnings. See, *The New York Times*, Thursday, March 14, 1991, page A16. With the relatively small size of this penalty, the sentence is unlikely to "afford adequate deterrence to [Exxon's] criminal conduct" or "to protect the public from further crimes of the defendant." 18 U.S.C. §3553(a) (2)(B) and (C).² This point is reinforced by the fact that the proposed penalty pales in comparison to the maximum penalty under the proposed Sentencing Guidelines. Under those Guidelines, Exxon's sentence could have been four times the overall loss to the victims of the spill.³ At a minimum, the Justice Department's conservative figure of \$600 million (2 times the victim loss as repeated by the defendants) would have been a much more appropriate penalty. Accordingly, the Court should reject this plea agreement.

**Exxon's History of Offenses Must Be Evaluated
Before The Court Rules On This Plea Agreement.**

The history of defendants' offenses must be evaluated in deciding the appropriateness of the sentence and the Plea Agreement. Civil Plaintiffs urge the Court to obtain a full report on the defendants' history of violations of environmental laws given the considerable record of offenses that is already known:

- A. Destruction of Wetlands in Arthur Kill Waterway Caused By Criminally Negligent Pipeline Rupture

On January 1, 1990, an underwater pipeline ruptured from Exxon's Bayway Refinery near Newark, New Jersey, causing approximately 570,000 gallons of refined oil to pollute

² It is noteworthy that the cost of the government's scientific studies, reported as \$70 million, constitutes 70% of the total fine, \$100 million, stipulated in the Plea Agreement.

³ Indeed, if the sentences on all five charges were to be imposed consecutively, the aggregate statutory maximum for each defendant would be \$3 billion, not \$600 million, again without considering the damages in excess of the \$300 million paid by Exxon to date.

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miles of shoreline and kill hundreds of birds. A guilty plea to criminally negligent discharge of oil under the Clean Water Act was entered on March 20, 1991 and a criminal fine of \$5 million (including \$4.8 million restitution) was imposed. Exxon admitted that it was negligent in training its employees and maintaining the pipeline.

B. *Exxon Corp. v. Yarema*, 516 A.2d 990 (Md. Ct. Spec. App. 1986)

A punitive damage award was upheld based upon the negligent discharge of gasoline from underground storage tanks.

C. *In the Matter of Exxon Corp.*, No. 84-0914AG (Tennessee Dept. of Health and Environment)

Exxon was adjudged to have violated solid waste regulations through improper storage of hazardous wastes.

D. *Exxon Co., U.S.A., v. State of Texas*, 646 S.W. 2d 536 (Tex. Ct. App. 1982)

Exxon was found to be criminally liable for the discharge of catalytic dust from its refinery.

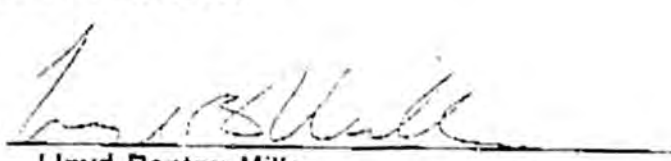
E. *Exxon Co. U.S.A. v. Dunn*, 474 So. 2d 1269 (Fla. Dist. Ct. App. 1985)

Exxon was found liable for personal and property damage caused by sulphurous gas emission and vibrations.

Once a full record on defendants' history of environmental violations is developed, the Court will be in a position to examine the extent to which the violations evidence a pattern of corporate indifference toward environmental issues. Only by engaging in such an inquiry will the purpose of 18 U.S.C. § 3553 be served.

DATED at Anchorage, Alaska this 11th day of April, 1991.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: 

Lloyd Benton Miller
Plaintiffs' Liaison Counsel

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STOLL, STOLL, BERNE & LOKTING

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CASEY, GERRY, CASEY, WESTBROOK,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA

vs.

EXXON SHIPPING COMPANY, AND EXXON CORP.

No. A90-015 CR.

COMMENTS OF THE NATIONAL WILDLIFE FEDERATION
ON THE PLEA AGREEMENT OF THE
UNITED STATES, EXXON SHIPPING, AND EXXON CORP.

Erik Olson
Douglas Wolf
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
April 11, 1991

ACE 447115

INTRODUCTION

The National Wildlife Federation ("NWF" or "the Federation"), the nation's largest private conservation education organization with 5.6 million members and supporters, welcomes this opportunity to comment on United States of America v. Exxon Shipping Company and Exxon Corporation (No. A90-015 CR.) (the plea bargain)¹. Such public comment is particularly appropriate given the overwhelming public interest in and concern with this oil spill and the important legal and public policy issues this plea bargain raises.

NWF is very concerned that the proposed plea bargain would let Alyeska Pipeline Service Company (Alyeska) off the hook entirely. This deal in Alyeska's favor was struck despite recent evidence of what a Congressional investigation has suggested was criminal behavior by Alyeska. NWF urges that the Court strike all provisions in the plea agreement which shield Alyeska from punishment. In addition, NWF urges the Court to require a magistrate investigation, or to name an independent counsel or special master to investigate the recent allegations of Alyeska's alleged criminal conduct, and recommend to the Court whether the plea agreement's immunization of Alyeska from criminal prosecution is justified and in the public interest.

NWF also urges that this Court order the government and Exxon to release all scientific and economic data documenting the extent of damage caused by the crimes, in order to assure the public and this court that the fines and restitution are appropriate to the offenses committed. These comments will discuss these and other concerns.

ALYESKA SHOULD NOT BE MADE IMMUNE FROM FUTURE PROSECUTION

In a very unusual provision which may be without precedent, paragraph III A of the Plea Agreement specifically waives the United States' right to prosecute a third party, Alyeska, which is not a defendant in this or any related criminal action, for any criminal violation of federal law arising out of the Valdez spill, the cleanup, or its preparations for a cleanup. This unusual promise was made without any plea, fine, restitution, admission, or extraction of any other benefit to the public or to the government from Alyeska. Our research has been unable to

¹ NWF, with the Wildlife Federation of Alaska and the Natural Resources Defense Council, and represented by the Trial Lawyers for Public Justice, has sued Exxon and Alyeska Pipeline in state court in Alaska to seek creation of a trust fund which would help restore the natural resources damaged by this catastrophe. NWF has actively commented on the natural resource damage assessment process in response to the Valdez spill.

document any previous case in which a corporate defendant has been provided a promise of no prosecution for environmental or other crimes as part of a plea bargain with some other legally separate company, particularly when that third party corporation has failed to provide any benefit to the government for such a promise.

This provision is particularly troubling in light of recent evidence of Alyeska's alleged criminal conduct. If Alyeska is not punished, the fundamental retributive, rehabilitative, and deterrent goals of criminal law with respect to Alyeska's alleged criminal behavior will not be served.

Documents recently submitted to this Court by the U.S. House Interior and Insular Affairs Committee Vice Chairman George Miller (collectively, "the Alyeska materials") establishes that eleven months before the Exxon Valdez spill, Alyeska knew that it could not adequately respond to a major spill in Prince William Sound.² In fact, these documents show that Alyeska unilaterally decided that it would only respond to spills in the Valdez Arm and Valdez Narrows and that it would rely on dispersants and cleanup efforts by the spiller to attempt to take care of any other spills³. In other words, Alyeska unilaterally abdicated a large part of its responsibility to protect the environment⁴.

The outrageous nature of this conduct becomes even clearer when one compares these internal statements with those Alyeska made in many public forums⁵ and makes in its Contingency Plan for Prince William Sound. In the Contingency Plan, Alyeska asserts that it can and will respond to all spills, no matter where they occur in the Sound and no matter what size⁶. The Congressional

² T.L. Polasek, [Alyeska] "Oil Spill Issues," (April 6-7, 1988) (filed with this Court with Alyeska materials).

³ See Cable from Stanley Factor, ARCO Marine, to Roger Gale, Sohio (July 6, 1988) (in Alyeska materials). Further, this document indicates that the Alyeska owner companies were unable to agree to even this incredibly low level of commitment.

⁴ In fact, Alyeska didn't even acquire and deploy the additional equipment that the documents indicate they were planning to purchase. Rep. Miller's April 8, 1991 letter to the Court, at 8-9.

⁵ *Id.* at 2-3 The misstatements made before the pipeline was approved are particularly significant as the pipeline was ultimately approved by only one vote in the United States Senate, with then-Vice-President Spiro Agnew casting the deciding vote.

⁶ *Id.* at 3-6.

investigators suggest that these were willful misstatements and probably were criminal violations of Alyeska's duty under the Clean Water Act and other laws.

The plea bargain, in section III A, specifically exempts Alyeska from any criminal liability for any acts associated with the grounding of the Exxon Valdez as well as any "conduct in connection with the preparation or submission of oil spill contingency plans or related documents, by Alyeska Pipeline Service Company to the federal or state government." The plea bargain exacts nothing from Alyeska in return for this beneficence. Plea bargains often are described as contracts; Alyeska has been given all of the benefits of such a contract without having provided any consideration.

NWF invites the Court to examine its law books to find a similar example of a third-party, legally separate from the accused, gaining the benefit of the plea bargain without suffering any detriment. The governments appear to have surrendered all criminal charges for Alyeska's incredible conduct because Exxon insisted.⁷ The record before this Court at a minimum suggests that Alyeska likely is an appropriate target of a criminal investigation. The record is completely devoid of any support for the promise not to prosecute Alyeska. This Court, therefore, has insufficient information for it to evaluate, pursuant to its obligations under Federal Rules of Criminal Procedure 11 and 32, whether the plea is in the public interest and whether the sentence fits the crime.⁹ NWF urges the Court to

⁷ The Act makes "[a]ny person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter," such as the Contingency Plan, liable for fines and/or prison. 33 U.S.C. §1319(c)(4). See also 18 U.S.C. §1001 (penalties for knowingly submitting false information to any agency of the United States).

⁸ In public testimony before several of the House Merchant Marine and Fisheries Committee's Subcommittees, which met in joint session on March 20, 1991 to examine the proposed settlement, United States Assistant Attorney General, Richard Stewart, asserted that the negotiators for the governments added Alyeska to the plea bargain and the consent decree between the United States and Alaska governments and Exxon Corp. and Exxon Shipping, simply because Exxon insisted they do so.

⁹ See generally, J.E. Bond, Plea Bargaining and Guilty Pleas § 6 (1983 & Supps.); W. R. LaFave & J.H. Israel, 2 Criminal Procedure: Criminal Practice Series § 20 (outlining rights and duties of court in reviewing plea bargain).

strike these unjust provisions from the plea bargain. Alyeska's cavalier and criminal actions must not go unpunished.

**THE COURT SHOULD APPOINT A MAGISTRATE, SPECIAL MASTER,
OR INDEPENDENT COUNSEL, TO REVIEW ALYESKA'S ACTIONS**

The Court should request that a magistrate, special master, or independent counsel¹⁰ review the allegations of Alyeska misconduct. The results of such an investigation would inform the Court's determination regarding whether the plea's provision exempting Alyeska from criminal prosecution is in the public interest and should be approved.

OTHER CONCERNS

1. Important Scientific Data Must Be Released

The plea agreement requires Exxon Corp. and Exxon Shipping to pay a total of \$100 million in criminal fines and restitution payments. However, there is no way the public or this Court can meaningfully assess the amount of restitution needed or economic impacts of the spill, to measure against this figure. The federal government's scientific study summary released this week regarding the biological impacts of the spill fails to include any estimates of the economic impacts of the spill or of the restoration costs. None of the numerous economic studies conducted by the government have been released, no information on the findings of Exxon's studies has been made available, and the public, independent experts, and this court are in no position to judge the accuracy even of the summary of biological impacts filed by the government since the studies themselves and all underlying data remain secret.¹¹

¹⁰ See, Bond, Plea Bargaining and Guilty Pleas § 6.18(c) (court may name special prosecutor in rejecting plea bargain as contrary to public interest); United States v. Cox, 342 F.2d 167, 179 (5th Cir.) (en banc), cert. denied, 381 U.S. 936 (1965) (Judge Griffin Bell and dissenters in part suggesting that where government decision not to prosecute is in bad faith or "irrational," court may be authorized to appoint counsel to prosecute case); United States v. Cowan, 381 F.Supp. 214, 223 & n. 11 (N.D.Tex. 1974), rev'd on other grounds, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (to same effect).

¹¹ What we do know is that Exxon says it has spent "in excess of \$300 million to claimants allegedly injured by the oil spill," Plea Agreement paragraph III C(3)(c), suggesting that under the Alternative Fines Act, 18 U.S.C. section 3571(d), if Exxon were convicted it could be subject to over \$600 million in fines, in addition to providing restitution. Thus, there is already substantial evidence of widespread injury from Exxon's actions, and there is suggestive evidence that the adequacy of

The Court should require that all these studies -- and not just the vague and conclusory summaries just released by the government -- be revealed by Exxon and the government so that the public can intelligently comment on this aspect of the plea bargain, and so that this Court can meaningfully exercise its duties to evaluate the grounds for and adequacy of this plea bargain, and the associated fines and restitution suggested in it.

3. Court Should Impose Prevention Measures

We hereby join in the comments of other conservation organizations before this court calling for the use of creative probation and other requirements requiring Exxon to take actions to prevent other environmental pollution and disasters.

4. Public Should Be Able to Challenge Use of Money

Paragraph IV B of the Plea Agreement purports to provide that Alaska can spend the restitution money it receives under the agreement "without objection, challenge, or judicial or administrative review." As much as the state and United States governments may want to insulate their actions from judicial or other review provided for under the Administrative Procedure Act and other laws, the governments simply cannot enter into a contract with Exxon that purports to eliminate the statutory and other legal rights of third parties to challenge government actions. Thus, this provision must be struck from the agreement as an ultra vires act that is contrary to law and public policy.

Respectfully Submitted,

Douglas Wolf / *[signature]*
Douglas Wolf, Esq.

Erik D. Olson / *[signature]*
Erik D. Olson, Esq.

the plea bargain can be questioned with respect to Exxon itself. This is particularly true in light of Exxon's widely reported statements in the wake of the settlement's announcements that the deal would have no effect on Exxon's financial position, suggesting the Company's management has no remorse for its actions and that there will be little or no deterrent effect from the fines imposed.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. A90-015 CR
	)	
EXXON CORPORATION and	)	JOINT SENTENCING MEMORANDUM
EXXON SHIPPING COMPANY,	)	OF EXXON CORPORATION AND
	)	EXXON SHIPPING COMPANY
Defendants.	)	

The defendants submit this Joint Sentencing Memorandum addressing the subjects identified in 18 U.S.C. §3553(a) and (c) and §3572(a)(7), including the nature and seriousness of the offense; acceptance of responsibility; discipline of officers and employees responsible; restoration or restitution involved,