

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

1984 SCOMM 77: SENATE SPEC. COMM. EXXON VALDEZ OIL SPILL. 1991

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I. NEED FOR THE DATA

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

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

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

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

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

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

II. INADEQUACY OF SETTLEMENT MONEY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. REOPENER PROVISION

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

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

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

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

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

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

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

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

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

IV. LETTING ALYESKA OFF THE HOOK

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

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

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

V. OTHER MISCELLANEOUS COMMENTS ON THE PROPOSED SETTLEMENT

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

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

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

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

restoration.

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

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

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

VI. CONCLUSION

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

modified to respond to the other concerns raised.

ATTACHMENT 1

ONE HUNDRED SIXTH CONGRESS

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**U.S. House of Representatives
Committee on**

Merchant Marine and Fisheries

**Room 1384, Longworth House Office Building
Washington, DC 20515-6230**

CHIEF CLERK
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MINORITY STAFF
DIRECTOR/CHIEF COUNSEL
GEORGE D. FENOE

CRS Estimates Value of Settlement

The attached memorandum from the Congressional Research Service (CRS) estimates the current value of the Exxon Valdez settlement at a low of \$421 million and a high of \$524 million.

The estimate takes into account the deductibility of the civil payments and discounts future payments to current value.

Majority Staff
House Fish and Wildlife
Subcommittee



Congressional Research Service • The Library of Congress • Washington, D.C. 20540

March 19, 1991

TO : House Committee on Merchant Marine and Fisheries
Attention: Will Stell

FROM : Bernard A. Galb
Specialist in Industry Economics
Economics Division
and
Jane G. Gravelle
Senior Specialist in Economic Policy

SUBJECT : Net Present Values of the Exxon Valdez Settlement

This memorandum is in response to your request for a calculation of the present value of the recent settlement of the Exxon Valdez case to the U.S. Government and to Exxon Corporation. (Such a "value" would be negative in the case of Exxon.) The gross amount received (or paid) can differ from the net cost to the firm depending on tax liabilities, and values could differ with choice of discount rate. Because of uncertainties we have prepared several alternative scenarios.

One uncertainty is the ultimate amount to be paid. The agreement provides for a \$100 million criminal penalty, which we assume will be paid May 1, 1991, and for a series of civil payments tentatively payable on September 1 of this and the following ten years. These payments are set at \$90 million in 1991, \$150 million in 1992, \$100 million in 1993 and \$70 million for the next eight years. These amounts total to \$1 billion. There also is, however, the possibility of up to \$100 million more being payable after the year 2001, if additional environmental damage is discovered. In this alternative, we assume the \$100 million will be paid in two installments in the two years following.

Undiscounted, the payments will sum to \$1 billion and \$1.1 billion in the two payment scenarios. The net cost to Exxon will be smaller, however, because the civil payments can be deducted from income for purposes of both State and Federal taxes. The Federal tax rate is set at 34 percent; and we add three percentage points to account for State income taxes net of the

deductibility against Federal taxes.¹ Thus, the combined tax rate is set at 37 percent. As a result, the net cost to Exxon (net receipts to the Government) will be \$655 and \$716 million, respectively, without discounting.

A second major uncertainty is the discount rate. The present value of both net and gross costs depend on the discount rate used, and the proper discount rate is not entirely clear.

We consider several. The Forestry Service uses a 4 percent real return, while the Office of Management and Budget (OMB) suggests a 10 percent real return. (The regulations on evaluating natural resource damages, 43 CFR 11, direct the use of the OMB rate). The General Accounting Office (GAO) suggests using a nominal rate of return similar to a Treasury security for the same maturity. The 4 percent rate of return is closer to a riskless rate; it is also quite similar to the Government bond yield for three to ten year maturities assuming an inflation rate of around 4 percent. The 10 percent rate seems quite high, and would be associated with a relatively risky investment. Our understanding is that this rate was based on an attempt to estimate the pre-tax real return on physical capital investment. We would estimate that the average pre-tax return on private capital investment is lower than these numbers, at around 7 percent.²

Since the payments are in nominal dollars, these real returns should be converted to nominal returns. Assuming an inflation rate of 4 percent, the nominal rates would be 8.16 percent for the Forestry Service number (and consistent with the GAO approach), 11.28 percent to correspond to the average pre-tax return on private capital, and 14.4 percent to correspond to suggested OMB rates.

Using the three discount rates with the two payment scenarios, we obtain the following results:

(1) For the 8.16 percent rate, the present value to the Government ranges between \$734 million and \$773 million. The cost net of taxes to Exxon would be \$499 to \$524.

¹ This adjustment was suggested to us by Andy Yood of the American Petroleum Institute, who indicated that an add on of two to three percentage points was a typical rule of thumb to obtain a combined Federal and State income tax rate.

² To estimate the pre-tax return requires a measure of yields on debt and equity and an estimate of the effective tax rate. See Jane G. Gravelle, *Differential Taxation of Capital Income: Another Look at the 1986 Tax Reform Act*, *National Tax Journal*, December 1988, pp. 441-464 for a discussion of the methods used to derive this number.

CRS-8

(2) For the 11.28 percent rate, the present value to the Government ranges from \$666 million to \$694 million. Exxon's cost net of taxes would be \$456 million to \$474 million.

(3) For the 14.4 percent rate, the present value ranges from \$611 million to \$631 million. The cost net of taxes would be \$421 million to \$434 million.

While we would consider the discount rate in (3) as probably too high, the choice between (1) and (2) is less clear. Since the stream of payments is fixed, there is some justification for using a relatively riskless rate of return. On the other hand, the present value using the estimated pre-tax return rate represents the quantity of actual physical capital that would be necessary to generate the stream of future payments.

Please contact us (at 7-7300) if you have further questions on this matter.

DEPARTMENT OF JUSTICE STATEMENT ON AVAILABILITY OF DOCUMENTS

AS WE HAVE SAID TO THE SUBCOMMITTEES INFORMALLY, WE ARE NOT ABLE TO PROVIDE DATA OR SUMMARIES TODAY WHICH DESCRIBE THE INJURIES TO NATURAL RESOURCES OR OUR EVALUATION OF THE COST OF RESTORING OR REPLACING THEM. WE ARE VERY RELUCTANT, PARTICULARLY BEFORE THE SETTLEMENTS HAVE BEEN APPROVED BY THE COURT AND ARE FINAL, TO MAKE EXTENSIVE DATA AVAILABLE TO EXXON WHICH COULD BE USED AGAINST US IN COURT. HOWEVER, WE ARE DEVELOPING A SUMMARY OF THE INJURY TO NATURAL RESOURCES CAUSED BY THE OIL SPILL WHICH WILL BE AVAILABLE DURING THE COMMENT PERIOD -- PERHAPS BY THE END OF NEXT WEEK -- AND WE WILL MAKE THAT AVAILABLE TO THE SUBCOMMITTEES AND THE PUBLIC AS SOON AS IT IS PREPARED. THE RESTORATION PLAN PUBLISHED BY THE TRUSTEES ON MARCH 1ST PROVIDES INFORMATION THAT SHOULD BE HELPFUL TO THE CONGRESS AND TO THOSE WHO WANT TO COMMENT ON THE SETTLEMENT. IT DISCUSSES IN DETAIL THE CATEGORIES OF NATURAL RESOURCES WHOSE RESTORATION WILL BE UNDERTAKEN. IN ADDITION, OTHER SCIENTIFIC DOCUMENTATION WILL BE PUBLICLY RELEASED AS SOON AS ITS QUALITY HAS BEEN ASSURED. CLEARLY, IT DOES NOT ADD TO AN INFORMED PUBLIC DIALOGUE TO RELEASE DATA THE QUALITY OF WHICH IS UNKNOWN. I SHOULD NOTE THAT THERE ARE SOME OTHER PUBLISHED REPORTS PRESENTLY AVAILABLE AT THE OIL SPILL PUBLIC INFORMATION CENTER IN ANCHORAGE TO THOSE WHO WANT TO COMMENT ON THE SETTLEMENTS.

A1 Wednesday, March 27, 1991

The Washington Post

Value of Intangible Losses From Exxon Valdez Spill Put at \$3 Billion

By John J. Langstaff
Washington Post Staff Writer

Confidential government studies have estimated the "social cost" of the Exxon Valdez oil spill at \$3 billion, nearly three times the \$1.1 billion that Exxon has agreed to pay to settle criminal and civil charges arising from the accident.

The controversial economic study, conducted by the state of Alaska and the federal government, is an attempt to assign a dollar value to intangible losses and to have been suffered by the American public as a result of damage to wildlife and natural habitat. Economists polled households nationwide to arrive at the estimate, which would have figured prominently in Exxon's trial had the case not been settled out of court.

There is no guarantee that a judge and jury would have accepted the \$3 billion estimate, which was provided to The Washington Post by one of the economists involved in the studies. Federal officials defended the settlement as a land mark penalty that avoids a costly and uncertain trial while providing immediate cash for clean-up and restoration.

But critics noted that several recent court decisions have upheld the validity of such economic studies for valuing environmental catastrophes, suggesting that Exxon may have gotten off too lightly. "The federal government has a fiduciary responsibility to the citizens to look out for these resources," said one economist, "and it is going to cost you," said an economist familiar with the studies.

In affirming the method five years ago, a three-judge federal appeals court ruled that, although the extent of damage to natural resources was not released of "an actual hazard," such as a volcanic eruption, it is in the interest of the public to know the public.

Exxon declined to comment on the study.

William J. Miller, spokesman for the Environmental Protection Agency, said in an interview that

they're new, there's not a lot of litigation, and courts haven't awarded anything on the basis of how much somebody says they're willing to pay to save a river or lake."

State and federal officials, citing unresolved claims from third parties such as fishermen and Native Alaskans, have refused to make any calculation from damage studies available to the public. "We won't do it unless we get contributions from the plaintiffs that they won't sue us with the information," said a spokesman for Alaska Gov. Walter J. Hickel III.

If nothing else, the debate over the economic studies illustrates the difficulty of assessing damage to natural resources from accidents

such as the Exxon Valdez spill, the nation's worst. Some values, such as cleanup costs and measurable financial damage to tourism and commercial fishing, are relatively easy to calculate. But the question of intangible losses has proved harder to resolve.

What, for example, is the price of a dead sea otter or sea bird, both of which society presumably holds dear even though they have no commercial value?

In the past, the federal government has assigned market values to dead wildlife, such as \$15 for a fur seal or \$35.74 for a Canada goose. But the appeals court decision found that such methods did not adequately compensate the public,

and ordered federal agencies to give more weight to intangible losses in figuring the bill for environmental catastrophes.

Mervyn Meade, chief economist of the damage assessment branch for the National Oceanic and Atmospheric Administration, declined to comment on the substance of the economic studies and said he feels "fine about the settlement."

But he also criticized the methodology of so-called contingent value studies, describing them as "the only way to get at these kinds of values." He added, "When these [resources] are interfered with, there is a social cost, the public has lost some general welfare, and that's what we're trying to estimate."

In evaluating the losses, economists hired by the state of Alaska developed elaborate surveys aimed at calculating the public's "willingness to pay" for a clean Prince William Sound. Beginning in 1989, the economists met with "focus groups" in Seattle, San Diego and Baltimore with the aim of exploring "how people think about the oil spill and its consequences," one of the surveyors said. "You use these to find out the language and assumptions people use so you can frame your questions accordingly."

After pilot surveys in San Francisco, Toledo and rural Georgia—"They're sort of middle America," the economists explained—the contractors surveyed 1,000 households

nationwide. Surveyors conducted face-to-face interviews in which they displayed photographs and other information about the spill, then asked respondents how much they would be willing to pay to protect Prince William Sound from future spills.

Preliminary results from the survey, conducted in January and February, showed a median amount of \$30 for each household, or—figuring there are 100 million households in the country—\$3 billion for the American public as a whole, according to one of the economists. Although the federal government had not progressed as far with its studies, a federal official said the \$3 billion figure was "in the ballpark."

The Coastal Coalition

Box 2424, Cordova, Alaska 99574
907-424-5509 FAX 907-424-5248

Dear Friends,

1990

Enclosed is a "Draft Proposal for a Comprehensive Settlement of Natural Resource Damages from the 'Exxon-Valdez' Oil Spill" and an attached discussion paper on the "Acquisition of Timber Harvesting Rights for Restoration".

This document was developed in response to requests from commercial fishermen, Alaska Natives, environmental groups, tour operators, recreationalists, and biologists that we now join together to formulate a constructive resolution to this disaster. It is intended to serve as a catalyst for settling natural resource damages in a fair and expeditious manner. As such, it is being circulated for review to the private and public plaintiffs and the defendants in the case.

It is hoped that a consensus will emerge among the parties involved to proceed in negotiating and finalizing such a settlement this year.

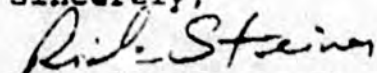
The Coastal Coalition is an informal network of concerned citizens that formed in response to the spill in order to provide a constructive focus for citizen input. Presently, our goal is to help formulate a comprehensive settlement for natural resource damages that is agreeable to all parties. Such a settlement would side-step years of costly litigation, provide for environmental restoration, and allow all of us to get on with life.

Our intent with this inquiry is to plant the seed and get some indication of your interest in having such settlement negotiations proceed. Please let us hear from you as soon as possible concerning any comments you might have on the enclosed document, and whether or not you agree to it in principle. Your thoughts are very important to this process. It is our intent that any final agreement should be molded to accommodate the most broadly based constituency possible.

We will be in touch with you regarding a meeting with other public and private plaintiff's representatives to discuss all of this, probably sometime in early August.

Let's join together to put this thing behind us.

Sincerely,



Rick Steiner, The Coastal Coalition

DRAFT PROPOSAL

for a

COMPREHENSIVE SETTLEMENT OF NATURAL RESOURCE DAMAGES FROM THE "EXXON-VALDEZ" OIL SPILL

TO: State/Federal Trustees for Natural Resources Damages

FROM: THE COASTAL COALITION
July 1990

It has become evident that all parties, both plaintiffs and defendants, involved in litigation for natural resource damages arising from the Exxon-Valdez oil spill would be best served by reaching a comprehensive settlement as soon as possible. This realization is predicated upon several considerations.

First, even after years of exhaustive impact assessment research, it would remain difficult to arrive at any consensus concerning how to quantify the extent of damage or how to value the damaged resources (i.e., how much to collect in damages).

Secondly, research should be driven by fundamental scientific interest in the behavior and response of this ecosystem to such a perturbation—not by the need to collect evidence for litigation.

Thirdly, restoration of the impacted environment can and should be done immediately. In addition to direct restoration efforts, there is an immediate opportunity to act, through acquisition, threatened habitat within the region.

And, finally, expensive, drawn-out litigation would only prolong the degree of psychological, social, and political impact of the spill. A settlement would provide a sense of resolution and relief from an otherwise quite protracted and tense situation.

In light of such considerations, it is proposed that the Natural Resource Trustees seek immediate settlement of all natural resource damages. Such settlement should extinguish all criminal liability (i.e., the Federal indictments) and all civil liability for natural resource damages. This settlement should be carefully structured so as not to influence the case for compensatory damages.

We respectfully suggest that a comprehensive disposition of this case should collect \$2 billion to endow an Alaska Restoration Fund.

The Alaska Restoration Fund should be managed by a non-profit corporation governed by a court-approved Board of Directors, so that people from the impacted region can be directly involved in the management of the Fund, and thus their own future.

The Fund should support the following principle elements:

1. Direct Restoration

The Fund should be used to support direct, on-site efforts to restore or replace damaged resources to their pre-spill condition. This would include such things as supplementing injured salmon runs, reinnoculating areas with herring, breeding and release programs for damaged bird populations, reestablishing plants in injured salt marshes, and improving or protecting the habitat of other spill-impacted species.

2. Acquisition of Equivalent Resources

The Fund should purchase or otherwise protect resources that are similar or related to the injured resource in terms of ecological value, functions, or services provided. Priority should be given to the acquisition of certain development rights (e.g., timber, minerals, oil, etc.) in order to protect threatened habitat. An example of such acquisitions is presented in more detail in the attached discussion paper.

3. Research

The Fund should support a broad array of scientific research projects that address critical resource issues and fundamental scientific pursuits within the region. A comprehensive program of baseline and monitoring studies should be initiated with which to more precisely understand the effects of future such events on this ecosystem.

4. Education

A variety of natural resource education initiatives should be supported by the Fund. Particularly a scholarship Fund should be established to support the education of residents from the region in natural resource science, management, economics, and conservation.

5. Sustainable Economic Development

The final goal of the Fund should be to design and implement economic development projects within the region that are compatible with the natural and cultural environment, and that are sustainable over the long-term. Inherent in this is a larger economic theme--that Restoration should, in some sense, assist the region in attaining long-term economic stability through sustainability. An important component of this should be the establishment of an Alaska Native Employment Fund.

Valuing the Case

It will always be difficult to establish the value of natural resource damages with precision in cases such as this. We suggest that the amount of \$2 billion would represent a fair and equitable disposition of natural resource damages in this case for several reasons.

First, this amount represents a workable approximation of what damages would come to if calculated as the average of damages derived by three principle economic valuation methodologies—Contingent Valuation, value of charismatic species, and public use value.

Secondly, \$2 billion is approximately the amount of money that will be needed to accomplish the various objectives of the Fund. It is envisioned that of the total amount collected, a portion would be expended immediately for acquisitions. The remaining balance would be maintained as a permanent endowment whose inflation-proofed interest income would support the other elements of the Fund. Such an endowment, providing substantial annual interest dividends, would provide stable support in perpetuity for these other restoration, research, education, and sustainable economic development initiatives.

Thirdly, the severity of impact adds considerable support for a settlement of this magnitude. For instance, it is theoretically possible that this ecosystem will never return to its pre-spill condition. Even small perturbations in natural systems are known to produce large, unpredictable and long-lasting consequences. It is possible that the impacted system will stabilize at an entirely different equilibrium than that existing before the spill. Additionally, it is probable that the population structure of certain long-lived, less fecund species will take several decades to return to pre-spill conditions.

And lastly, this amount of money is entirely proportionate to the value that could be assigned to the permanent loss of the pristine quality of this ecosystem. That the area is an aesthetic resource of global significance is attested to by the extraordinary amount of public attention paid to this spill throughout the world. In the same way that a rape victim can not be "un-raped," the lost pristine character of this region is, unfortunately, irreplaceable.

Thus, this settlement will afford the impacted environment a sufficient amount of care and protection; it will give science a better understanding of ecosystem dynamics; and it will provide the impacted communities more economic and educational opportunity as well as a sense of certainty in looking toward the future. It is, quite simply, the right thing to do.

ACQUISITION OF TIMBER HARVESTING RIGHTS FOR RESTORATION

- A Prerequisite for Recovery -

- I. Introduction**
- II. Biological Characteristics of the Forest within the Region**
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 - A. Biological**
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by
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THE COASTAL COALITION

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I. INTRODUCTION

As the clean-up of the Exxon-Valdez oil spill progresses toward completion, we must now decide what more can be done to aid the recovery of the impacted environment.

In the context of the Clean Water Act and the more extensive damage provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the Superfund, Federal law clearly directs that funds be collected from responsible parties to be used "to restore, replace, or acquire equivalent resources."

In the case of the Exxon-Valdez, in addition to what can be done in the way of direct restoration and replacement of damaged resources, the most practicable mechanism to compensate for natural resource damages is to offset this loss with a substantial "acquisition of equivalent resources." This entails purchasing or otherwise protecting resources that are similar or related to the injured resource in terms of ecological value, functions, or services provided.

The several hundred thousand acres of old growth forest along the coastline of the spill-impacted region, having been scheduled before the spill for logging, now present an ideal opportunity to exercise this Restoration option. The following is an overview of the concept of acquisition and retirement of timber harvesting rights to protect the impacted ecosystem from any further deterioration. This discussion is meant to provide a basis for further development of the idea, and to serve as an example of how other such acquisitions might work.

Conceptually, before trying to treat anything that has been injured, we must first protect it from any further injury. In the spill-impacted zone, marine, freshwater, and terrestrial systems are tightly connected through biogeochemical cycles into a functionally interlocking ecosystem. Perturbations (i.e. injuries) in one component usually produce significant secondary effects in the others. What's more, compound injuries often operate synergistically--that is, their combined effect is much more than the sum of the two injuries occurring independently. And regardless of how carefully it is carried out, the planned removal of old-growth forests from several hundred thousand acres of the region's coastline cannot help but to have a profound effect on the ecosystem as a whole. The clearcutting proposed for the region would represent an ecological alteration unmatched since the glacial retreat at the end of the Pleistocene. It is widely felt that the scars from logging will be even more persistent than those of the oil spill. This sort of massive perturbation, superimposed upon the deleterious effects of the spill, is likely to produce significant biological, economic, psychological, and socio-political effects far beyond what either one might have caused alone. A consensus is now emerging among many fishermen, biologists, tour operators and other local residents that, while the ecosystem might have been able to recover from either one of these rather large impacts in isolation, their combination could so seriously weaken the health and integrity of the system that its ability to recover would be severely compromised.

CLEARLY, THE FIRST STEP TOWARD FULL RESTORATION AND RECOVERY IS TO PROTECT THE ENTIRE SYSTEM AS COMPLETELY AS POSSIBLE FROM ANY FURTHER SIGNIFICANT HUMAN-INDUCED DISTURBANCE. Aside from the

threat of additional oil spills in the area, the most immediate threat to the integrity of this ecosystem appears to be the planned removal of over one billion board feet of old-growth timber throughout the coming decade. The acquisition of timber to protect undamaged but threatened wildlife habitat in the impacted region is considered by many to be the single highest priority for Restoration.

Biologically, timber acquisition would protect the terrestrial, freshwater, intertidal, and nearshore habitat of many populations impacted by the spill (e.g., sea otters, diving birds, salmon, herring, eagles, bear, deer, etc.). It would also prevent the diminution of the hydrocarbon metabolizing marine bacterial flora that depends upon natural hydrocarbons washing into nearshore waters from coastal forests. Economically, timber acquisition would maximize profits and minimize risk for timber owners, protect existing commercial and subsistence economies, protect the future of tourism and recreation in the region, and preserve other in-absentia values of the region. The acquisitions would also go a long way toward relieving an overwhelming sense of despair in the region's residents, and would clearly help mitigate other socio-political impacts of the spill.

It should be emphasized that before the spill, timber development represented a legitimate economic opportunity for the region. However, we must now reassess all prior development plans in terms of what is in the best interest of the impacted ecosystem.

Restoration without full protection would be as futile as applying band-aids on a victim with one hand while continuing to inflict serious wounds with the other. And, in a larger sense, Prince William Sound has come to symbolize a violated relationship between humanity and nature. The only way to regain this relationship is to protect the area as completely as possible. This is the least, and perhaps the most that we can now do. Without such protection, full recovery--biological, economic, psychological, and socio-political--will be impossible.

II. BIOLOGICAL CHARACTERISTICS OF THE FORESTS WITHIN THE REGION

These old-growth forests are stable biological communities that have developed over several centuries essentially free from catastrophic (including human) disturbance. They support a rich diversity of highly specialized and adapted organisms such as cavity nesting birds, canopy-dwelling animals, understory saprophytic plants, and epiphytic lichens. These undisturbed forests support two or three generations of dominant tree species, forming a highly partitioned, broken, multi-layered canopy. They are highly retentive of nutrients, both in living and dead organic matter, giving rise to significant detritus-based food webs. For example, small to medium sized streams depend almost entirely upon decaying forest litter as an energy base.

In addition to live spruce and hemlock, these forests are characterized by standing dead snags, and fallen logs on land and in streams. As such, they form a rather unique habitat for a large number of bird, mammal, fish and invertebrate species. With so much production high in their canopy, they provide ideal habitat for flying and climbing consumers, such as foliage-consuming insects, and insectivorous birds. Large snags are valuable as habitat for a variety of vertebrates (e.g. bald eagles) and invertebrates. Logs and bark slabs on the forest floor are important for small mammals that disperse seeds and fungi, for nitrogen-fixing bacteria, and as seed beds for trees and shrubs.

Fallen logs are also critical to the maintenance of the physical and biological stability of headwater streams. Debris dams, for instance, create stepped stream profiles that effectively dissipate energy that would otherwise go into transporting sediment, downcutting of stream channels and washouts. The associated pools and gravel beds provide a range of habitat requirements--temperature, shade, cover, current velocity, and oxygen - for a wide array of aquatic organisms.

The forests in the spill-impacted region are generally confined by steep mountain slopes to a relatively narrow band along shorelines. Three primary forest plant associations are found in the region:

1. The Sitka spruce series--occupies beachfront terraces and alluvial bottomlands. Common understory plants are blueberry, devil's club, skunk cabbage, lady fern, oak fern, and shield fern. Alder are dominant along streams.
2. The mountain hemlock series--found on lowland rolling hills, raised knolls in muskeg, and steep side slopes. Principal understory species on lowland hills are blueberry and devil's club; on raised knolls are copperbush, crowberry, bog blueberry, and deer cabbage; and on steep sideslopes are marten's cassiope, luetkea, shield fern, lady fern.
3. The western hemlock series--occupies some beachfront terraces and lowland rolling hills. Its understory consists of blueberry, rusty menziesii, devil's club, bunchberry, five-leaf bramble, and twisted stalk.

It is important to remember that the coastal forests of south central Alaska are rich, complex systems that produce more than just wood. They are important habitat for about one hundred species of birds, over 30 species of mammals, and several hundred species of invertebrates and plants.

III. JUSTIFICATIONS FOR ACQUISITION

A. Biological

There are seven principle biological arguments for using Restoration funds to retire timber harvesting rights in the region:

1. Protection of forest habitat for several spill-impacted species

Several of the bird and mammal species that depend to some extent on the old-growth forests in the region are known to have been impacted by the oil spill; (e.g. eagles, loons, murrelets, deer, bear, etc.). Removal of large tracts of this habitat through logging will only make it more difficult for these species to recover. (See #3 below)

2. Hydrological characteristics of watersheds

Regardless of how well buffer requirements are adhered to, the clearcutting planned for many steep sideslopes in the area would seriously alter the erosion, runoff, and sedimentation characteristics of entire watersheds. Watersheds disturbed by logging have dramatically altered hydrological characteristics. The removal of such large amounts of plant biomass, and

compaction of soils causes a dramatic reduction in the water-holding capacity of the area. This can affect the size and even timing of peak flows in nearby streams. This is evident where recent logging in Two Moon Bay has increased the frequency and magnitude of flooding, mudslides, soil erosion, and sediment loading in nearshore waters. Again, regardless of adherence to buffer requirements, percolation can still increase storm flow in streams, and the loss of forest shading will accelerate both the magnitude and timing of spring meltwater runoff. High storm flow can have devastating effects on salmon eggs and fry in streambed gravel.

Increased sedimentation of the intertidal and nearshore environments can be expected if upland forests are clearcut. These nearshore areas are critical habitat for outmigrant salmon smolts, herring spawning, clam and mussel production, and sea otter and bird feeding—all of which were impacted by the spill. Increased sedimentation of this environment could seriously reduce its biological productivity and habitability. Herring eggs and larvae, for instance, are very susceptible to reduced oxygen availability caused by increased sedimentation. Likewise, salmon fry migration and feeding can be affected by increased turbidity of nearshore waters. Also, any reduction in clam, mussel, or other invertebrate populations due to increased sedimentation from logging could have significant negative consequences for the recovery of sea otters, especially weanlings, and diving birds from oil spill impacts.

3. Habitat fragmentation

Logging causes a significant reduction in the most accessible, highest density timber stands, and as such, increases the fragmentation of old-growth habitat. Such habitat fragmentation is known to be a significant cause of reduced genetic variability within individual species. The theory of island biogeography substantiates the concern for reduced biodiversity caused by such habitat fragmentation. Because of their isolation from each other and resultant interruption in gene flow, habitat islands have been found to decline both in number of species present and genetic diversity. A reduction in genetic variability within certain populations of mammals, bird, and plant species would reduce the stability of that particular population, and the ecosystem as a whole. This means that the system would be much less capable of recovering from other perturbations such as insect pests, disease, earthquakes, etc.

It's important to realize that habitat fragmentation is a much more significant threat to the ecological stability of old-growth forests in this particular region because here, these forests constitute a smaller, patchier component of the entire ecosystem than do the forests in the Tongass, British Columbia, and the Pacific Northwest. Additionally, the high noise levels generated by logging operations expand the edge of habitat impacts far beyond the boundaries of the clearcut. Many mammals and birds will attempt to avoid such acoustic disturbance, and in so doing, be pushed further away from their preferred ranges and confined to progressively smaller refugia. Several forest species, such as deer, find it difficult to cross clearcuts, particularly during periods of heavy snow.

4. Regeneration

Because these forests are at the northernmost edge of their range, regeneration of critical habitat structure, composition, and functions in second growth forests is extremely slow. Such slow regeneration rates are due to short growing seasons, low solar irradiance, and soils with low fertility and poor structure due to comparatively recent glaciation. Soil fertility is further reduced by leaching of nutrients after logging. And, although there are a few isolated examples of clearcuts in the Sound that have regrown relatively densely within 50 years or so, these dense second-growth stands have been found to provide unsuitable habitat for many of the original bird, mammal, and plant species that inhabited the area before logging. With no snags, fallen logs, large live trees, or canopy heterogeneity for habitat, these second-growth areas are generally poor in species diversity.

5. Global significance

The forests in this region are unique globally in that they constitute the highest latitude temperate rain forests anywhere in the world. Temperate rain forests worldwide are rare and severely threatened ecosystems. In their original extent, they were distributed in 10 regions in the world covering an area of approximately 70 million acres; only 2-3% of the area of tropical rain forests. Four of the original areas in which they existed historically-- western Scotland, Ireland, a small area in the French Alps, and the southwest coast of Norway have been eliminated entirely.

In addition to the forest system extending from Kodiak to central Oregon, the only other significant stands left are found along the coasts of southern Chile, southern Australia, Tasmania, New Zealand, and Japan. It has been estimated that 60-80% of temperate rainforests worldwide have been logged in recent history.

For this reason alone, the forest in the spill zone should be conserved as a precious representative of disappearing temperate rainforest ecosystems worldwide.

6. The forest/marine bacteria/oil-spill connection

Oceanographers now believe that the large populations of hydrocarbon metabolizing bacteria that have been so important in degrading oil from man-made sources in the region (e.g., the Exxon-Valdez spill and the effluent from the ballast water treatment facility at the Alyeska Terminal) flourish precisely because of the continuous input of biogenic hydrocarbons from the coastal forest. Measurements of the hydrocarbon terpene dissolved in the canopy drip from spruce trees and in nearshore waters suggests that this is the primary energy source for naturally occurring hydrocarbon-oxidizing marine bacteria in the region. In this sense, the coniferous forest actually "immunizes" or prepares this marine system for oil spills. Removal of large tracts of these forests would, theoretically, reduce terpene input and thus the bacterial populations depending upon this

input, causing the waters in the region to become less capable of self-cleansing or bioremediation.

7. Cumulative impact

And finally, all these biological effects need to be understood in the broader long-term ecosystem context. Many local residents and biologists have observed a gradual but continuous reduction of certain wildlife populations associated with increased human use of the region over the past 30 years. Superimposed upon this gradual deterioration in the environment of PWS, the Exxon-Valdez oil spill in 1989 threw the system into a profound state of disequilibrium. Shocking the system with yet one more massive human-induced perturbation--the destruction of vast areas of old-growth forest habitat--would likely produce such a destabilizing effect that the resiliency of the entire ecosystem will be depressed for many decades. Also, it must be remembered that despite how well we think we might understand a particular biological system, even small perturbations can have large and unpredictable consequences (i.e. Chaos Theory). Beyond any doubt, the health and vitality of this coastal ecosystem would be best served by preserving its existing flora and fauna intact, in full interaction.

B. Economic

The economic advantages of the acquisition of timber for Restoration purposes are quite straightforward:

1. Profit Maximization

The timber owners would simply make more money by selling their trees for Restoration purposes than by harvesting them. By having money from such a sale up front, the corporations and shareholders could enjoy perhaps 50% more profit over 10 years from reinvestment income. To begin realizing significant dividends from logging, they would probably have to wait several years. Such a windfall of profits would open up many other personal and corporate economic development options. Also, the owners would not incur the expense and risk of operation, and Native Corporations would not have to begin paying taxes on these tracts as developed lands.

2. Market risk minimization

Timber markets are extremely volatile. Though they are now relatively strong, they are subject to at least the same magnitude of reduction that they experienced in the mid 1980s. Purchasing this timber now will allow timber owners to avoid the substantial risk of softening markets in the future.

3. Protection of existing economy

Any potentially negative effect that logging might have on either commercial fisheries or on local subsistence economies would be avoided.

4. Recreation and tourism development

It is widely agreed that the development of recreational and tourism economic opportunities in this region would be seriously impeded by timber harvesting. The scenic/aesthetic value of the area would be reduced in proportion to the number of vistas containing at least one noticeable clearcut. And, because areas planned for logging are relatively steep, virtually all can be seen from afar. It is widely felt that, in addition to commercial fishing, the recreation and tourism industry offers the PWS/Kenai Peninsula area its best opportunity for sustainable economic development that is compatible with the local environment. What is already a multi-million dollar industry probably has, in the absence of timber development, the potential to triple in size over the next decade. Recreation and tourism would also provide more local jobs on a sustainable basis than would a short-lived timber industry.

5. Timber price support

Because this acquisition would take a substantial amount of timber off the market, it is reasonable to expect timber prices elsewhere in the State to be enhanced somewhat.

6. Noncommercial economic value

And lastly, in the context of current economic theory (i.e., "Contingent Valuation") the actual economic value of a resource like the old-growth forests in this region is much more extensive than just its immediate commercial value. In addition to the commercial value of on-site recreation and timber harvesting, these forests offer many off-site, or "in-absentia" user values, including option, existence, and bequest value. Option value is essentially what people would pay to insure the availability of the forest system for future recreational opportunities. Existence value is the benefit derived from simply knowing that the forest exists. And bequest value is the willingness to pay for the economic benefits of saving forest resources for future generations. Timber harvesting could conflict with all nontimber values of these forests --subsistence, sport fishing and hunting, commercial fisheries, recreation, tourism, option, bequest, and existence value. And because the Restoration process should satisfy timber owners financially, it is clear that from a strict economic standpoint, it is in the highest public interest to preserve these forests. This acquisition would ensure a maximum flow of benefits to the greatest number of people.

C. Psychological

The psychological impact of the oil spill, has been, and will continue to be enormous. The pristine natural environment of the region comprises a powerful aspect of local residents' sense of identity, place, and purpose. Most of the people who make the region their home live here just because of its natural bounty, beauty, and wilderness quality. Native culture evolved within the fabric of forest and marine biological systems in the region. The area is, for many people, a sacred place.

The oil spill caused this sense of identity in local residents to rapidly disintegrate. Initial studies have clearly documented widespread perceptions of uncertainty about the future, deteriorating family relations, and Post Traumatic Stress Disorders in impacted communities. Even now, residents still feel a great deal of anger, remorse, and loss for what the spill did to their home. We must now allow these wounds to heal.

The most we can probably do to restore the psychological sense of well-being among local residents is to afford the impacted area as much protection as possible from further human insult. The psychological impact of clearcutting, superimposed upon that of the oil spill, would be devastating.

Prince William Sound has, in a very real sense, come to epitomize the plight of the Global environment. The phenomenal worldwide media attention given the area during the spill attests to the high degree of sympathetic identification felt by people throughout the world for such a spectacular pristine natural area essentially "lost" through corporate and governmental ineptitude. Many people, locally and elsewhere, express a sense of disbelief, indignation and even outrage that now, after perhaps the single greatest environmental disaster in our nation's history, humanity seems poised to inflict yet more environmental damage to the very same area through timber extraction, almost as if nothing had ever happened.

It is important to acknowledge that these are very real emotions and as such they must be addressed by the Restoration process. It should be a priority of the Restoration program to minimize any activity that might detract from an already damaged sense of psychological well-being throughout the region and the world. Another compelling reason, then, to retire timber harvesting rights in the region is to help restore the sense of solace and well-being that is so essential to the quality of life.

This acquisition would allow people to look forward with certainty to the full recovery of the natural environment, rather than despair over its continued degradation. This acquisition is absolutely essential for psychological recovery--without it, full recovery will be impossible.

D. Socio-Political

The oil spill has caused an overwhelming loss of faith in the institutions that manage our society.

The socio-political fallout from the spill has been characterized by bitterness and divisiveness within and between communities, anger toward the oil industry in Alaska and elsewhere, lack of confidence in government, and skepticism regarding economic development in general.

The social challenge for Restoration then, is to restore the cohesiveness within and between communities. Peoples within the impacted region now need a sense of solidarity, of being on the same side of an issue and of belonging to a joint enterprise together. It is now imperative to protect residents in the region from other highly divisive issues, such as logging.

The political impacts of this spill will undoubtedly reverberate through the halls of Juneau and Washington D.C., oil company board rooms, and the minds of voters for quite some time. If something powerful and persuasive isn't done to make amends for this environmental disaster, its dark shadow will continue to loom over such major public policy issues as ANWR, offshore oil leasing, and other important development proposals.

The public wants a clear sign that industry and government will make every effort to "right-their-wrongs." A positive outcome with the acquisitions set forth in this proposal would send a loud and clear message to people everywhere that corporate and political institutions can and do act responsibly--that they do indeed care about the natural environment. The public relations value of such an initiative would benefit the timber industry, Native corporations, government, and the oil industry.

It is increasingly evident that these acquisitions would be enormously popular throughout the nation, and would renew public confidence in our governmental and corporate institutions. Underlying such sentiment is the growing body of public opinion that old-growth rainforests worldwide are a precious, highly-threatened resource that deserve protection, and a greater sensitivity toward the environment in general, (e.g., "Earth Day, 1990").

In a very real sense then, this acquisition for Restoration has, for many, become the "canary in the mine shaft" concerning mankind's commitment to the environment. It's really quite simple--either we do care, or we don't. This will be the legacy we leave for future generations and should be pursued accordingly.

IV. TIMBER OWNERSHIP

The primary land owners in the region are the Federal government, Alaska Native Corporations, and, to a lesser extent, the State of Alaska. All own valuable tracts of old-growth forest. A decision to not allow timber harvesting on these public lands can be obtained simply through an administrative decision on the part of the U.S. Forest Service and the State of Alaska Department of Natural Resources. At this time, the Forest Service has no plans to sell or harvest any of the timber within the Chugach National Forest. The ADNRS is considering classifying several of its isolated land parcels within the region for timber harvesting. The Trustees should seek a Memorandum of Understanding or other legally binding agreement from these two agencies that, in the interest of Restoration, they will not permit any timber harvest on their lands in and around the spill zone.

The more important challenge for Restoration will be to retire the timber harvesting rights on the several hundred thousand acres of lands owned by Alaska Native Corporations in the region. Timber on these private lands is considered to be a valuable financial asset and thus timber owners will have to be sufficiently compensated in exchange for an agreement to extinguish any and all harvesting rights. The approach here should be to make it financially advantageous for the timber owners/land owners to enter into such an agreement, by providing them as much money as they would have earned in profits by harvesting their timber. The two principle areas of concern for acquisition purposes are Prince William Sound and the lower Kenai Peninsula.

Prince William Sound

The Native Corporations with land holdings in Prince William Sound itself are as follows:

Eyak Corporation PO Box 340 Cordova AK 99574 Phone: 424-7161	64,000 acres (Note: acreages here are approximate)
Tatitlek Corporation PO Box 650 Cordova AK 99574 Phone: 424-3777	65,000 acres
Chenega Corporation General Delivery Cordova AK 99574 Phone: 573-5118	76,000 acres
Chugach Alaska Corporation 3000 A Street, Suite 400 Anchorage AK 99503 Phone: 563-8866	57,000 acres in S.W. PWS

Approximate total area proposed for timber acquisition
in Prince William Sound = 262,000 acres

Most of the timber on these lands has been sold, in connection with Net Operating Loss Sale provisions of federal tax laws, and is now owned by the following companies:

Sherstone, Inc. PO Box 828 Cordova AK 99574 Phone: (907) 424-5524	Owens timber on Eyak lands
Citifor, Inc. 7171 Columbia Center 701 Fifth Ave. Seattle WA 98104-7090 Phone: (206) 622-3770	Owens some of the timber on Tatitlek lands between Fidalgo & Gravina
Koncor Forest Products, Inc. 3501 Denali Anchorage AK 99503 Phone: (907) 562-3335	(Timber Trading Company) owns timber on Chugach Corp. lands on Montague & Knight Islands and on Chenega lands

Tatitlek Corporation still retains title to some of their timber, and Chugach Alaska Corporation has purchased timber on Tatitlek lands at Fish Bay in Pt. Fidalgo.

Lower Kenai Peninsula

Beyond PWS itself, three village corporations on the Kenai Peninsula have considerable land holdings with timber that should be considered for acquisition:

English Bay Corp.
PO Box 8058
English Bay via Homer
Homer AK 99603
Phone: (907) 281-2220

45,000 acres at southern
tip of Kenai Peninsula
and 22,000 acres within
the Kenai Fjords National
Park

Port Graham Corp.
PO Box PGM
Pt. Graham AK 99603
Phone: (907) 284-2227

66,000 acres at southern
tip of the Kenai and
55,000 acres also within
the Kenai Fjords National
Park

Seldovia Native Ass'n.
PO Box 185
Seldovia AK 99663
Phone: (907) 234-7625

23,000 acres within
Kachemak Bay State Park
across from Homer and
423 acres on Island Peninsula

Approximate total area proposed for timber acquisition on
Lower Kenai Peninsula = 221,000 acres

These corporations have sold much of their timber, as in Prince William Sound, to the following companies.

Koncor Forest Products, Inc.
3501 Denali
Anchorage AK 99503
Phone: (907) 562-3335

(Timber Trading
Company) owns the
timber on Seldovia
Native Ass'n. land
holdings within
Kachemak Bay State
Park

Chugach Alaska Corporation
3000 A Street, Ste. 400
Anchorage AK 99503
Phone: (907) 563-8866

owns the timber at
Windy Bay, on Pt.
Graham lands

Kolon California, Inc.
c/o Ceretech International
515-16th Ave., Ste. 155
Bellevue WA 98004
Phone: (206) 455-4850

owns the timber on
English Bay lands

This would also be the appropriate forum to consider purchasing timber and possibly certain other development rights from Native Corporations with lands along the coastline of the Kenai Fjords National Park. Together, the Port Graham and English Bay Village Corporations have selected approximately 77,000 acres of waterfront land surrounded by the Park. The Chugach Alaska Corporation will receive the subsurface rights. These selections are yet to be conveyed, pending negotiations with the U.S. Bureau of Land Management. The development of timber and minerals on these lands would seriously conflict with the quality of the area as a National Park. Thus, it should be a high priority for Restoration purposes to acquire at least the timber, and perhaps the mineral rights on these lands.

V. ADDITIONAL CONSIDERATIONS

1. Cost of Acquisitions

While it is difficult to estimate, the timber acquisitions outlined above would probably cost on the order of \$200-\$300 million. An independent timber appraisal should be conducted to determine fair market value of timber assets in the region.

2. Urgency

Timber harvesting has already begun on three parcels within the region: one near Cordova, at Two Moon Bay near Tatitlek, and at Windy Bay on the lower Kenai. Several more areas are scheduled to begin cutting within a year.

Additionally, foreign timber buyers, who might be less sympathetic to selling timber assets for Restoration purposes, are reportedly very interested in purchases within the region.

If the Trustees decide to pursue timber acquisition, it should be done soon.

3. Short Term Contracts

The timber owners generally have rights to the timber only over short-term (10-15 year) contracts. After these contracts expire, the timber rights revert to the land owners. Thus, in negotiating to retire timber harvesting rights in perpetuity, the land owners will also have to enter into any agreement between current timber owners and the Trustees.

4. Lands selected but not conveyed

An additional aspect that has to be considered is Native Corporation lands in Prince William Sound that have been selected but not yet conveyed. Some of these contain timber that should be purchased in the context of Restoration.

5. Individual Allotments

Funds should also be made available to Native shareholders with individual land allotments who might wish to sell their timber assets for Restoration purposes.

6. Displaced jobs

A very legitimate concern exists over the jobs, particularly of Native shareholders, that would be displaced by this acquisition for Restoration. This concern is addressed by the Sustainable Economic Development section of the proposed comprehensive settlement. An "Alaska Native Employment Fund" should be established to provide on the order of \$5 million annually to be used to employ shareholders in jobs that, as determined by themselves, are sustainable and compatible with their cultural heritage and local environment.

7. Seward Sawmill

Withdrawing these forests from timber production will reduce the flow of raw logs to the newly constructed Chugach sawmill in Seward. Clearly, the Chugach Corporation deserves compensation for this loss. Either a genuine offer should be made for an outright purchase of the mill, or some other subsidy/settlement must be offered.

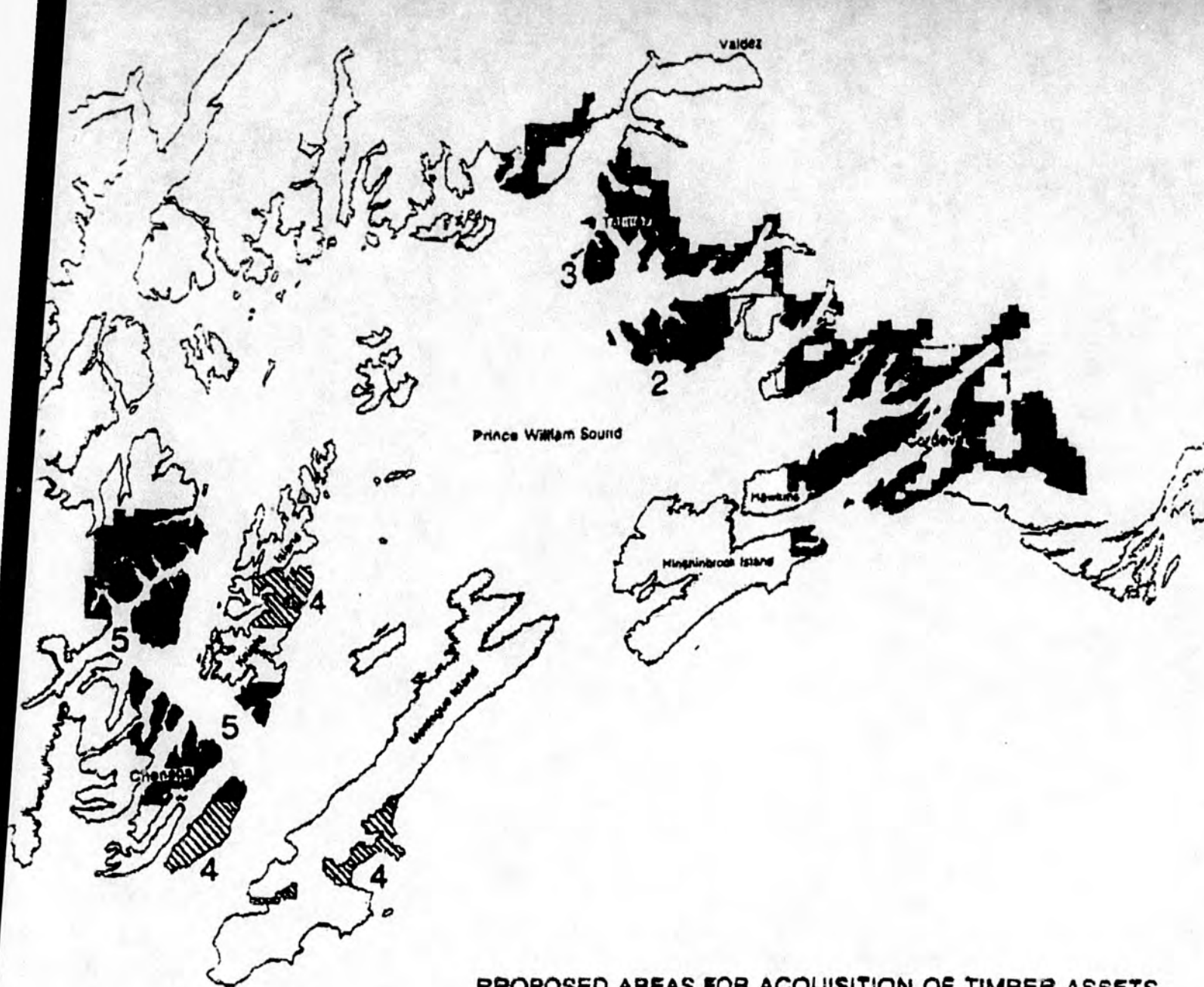
8. Protection of Native Sovereignty

One of the most important considerations for this initiative is to protect the right to self-determination of local Native people. As the principle private land owners in the region, they have the most at stake relative to this issue. It is essential that all the shareholders of each Native corporation in the region be fully informed concerning their options here, and that they come to some agreement among themselves as to what is in their own long-term interest. Presently, some shareholders support timber acquisition for Restoration, others oppose it.

It is incumbent upon the Restoration planning process to provide the corporations and their shareholders with an objective assessment of the implications of supporting or opposing such acquisitions.

IT IS ESSENTIAL THAT THE TRUSTEES REMAIN SENSITIVE TO THE DESIRES OF NATIVE SHAREHOLDERS ON THIS ISSUE, AND PURSUE ACQUISITIONS ONLY WITH THOSE CORPORATIONS THAT SUPPORT THE CONCEPT.

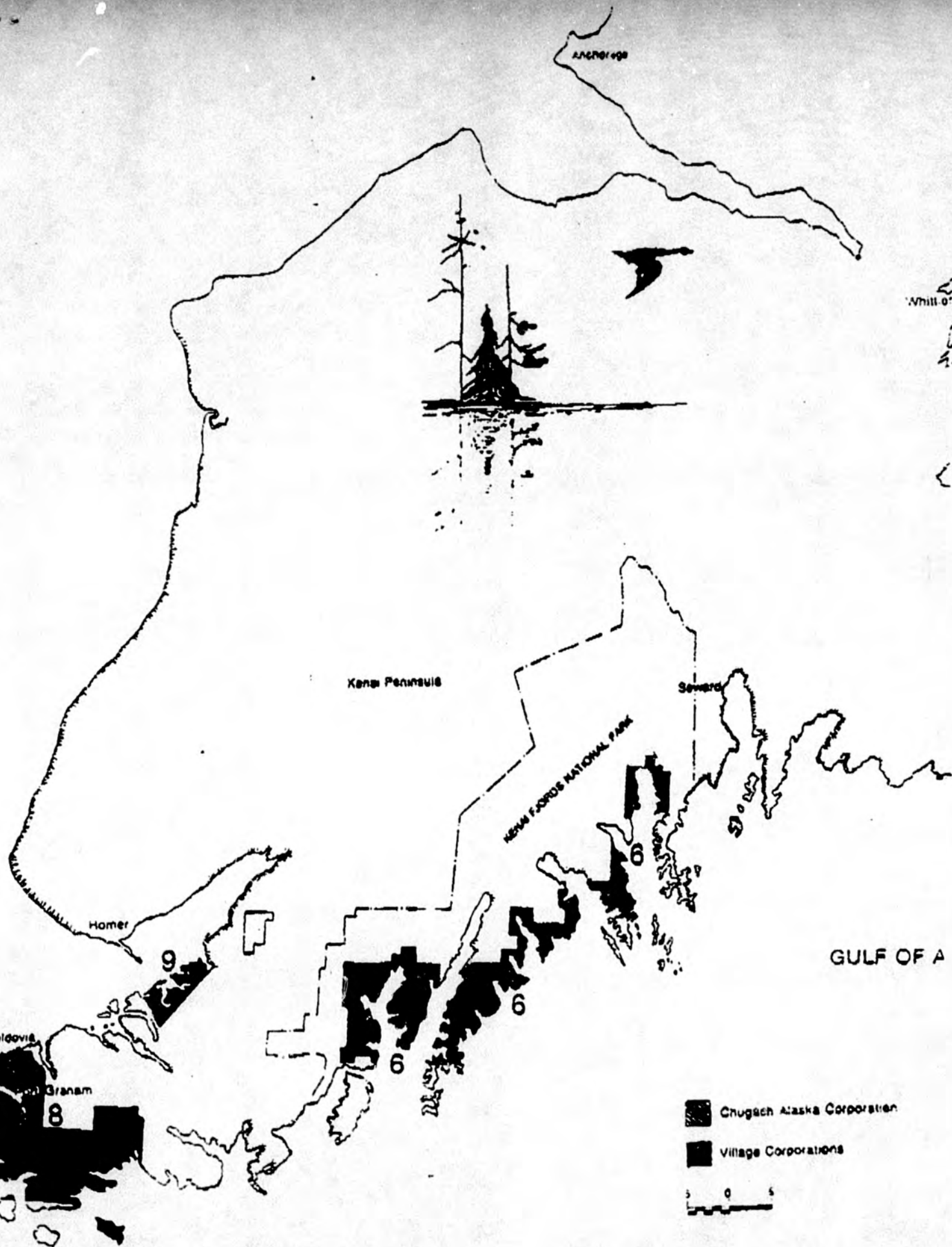
It should be recognized that, before the spill, timber development plans represented sincere and genuine commitment on the part of corporation managers to provide economic opportunity for their shareholders. Acquisitions for Restoration should be presented as a unique opportunity to redirect such development plans in light of the spill.



PROPOSED AREAS FOR ACQUISITION OF TIMBER ASSETS

1. EYAK/SHERSTONE
2. CITIFOR
3. TATITLEK
4. CHUGACH/KONCOR
5. CHENEGA/KONCOR
6. PORT GRAHAM/ENGLISH BAY SELECTIONS
7. ENGLISH BAY/KOLON CALIFORNIA
8. PORT GRAHAM/CHUGACH
9. SELDOVIA NATIVE ASSOCIATION/KONCOR

APPROXIMATE TOTAL AREA PROPOSED — 483,000 ACRES.





* * * For Immediate Release * * *

For More Information Contact:

Sarah Chasis, NRDC, New York, (212) 727-4424

Bob Adler, NRDC, Washington, (202) 783-7800

ENVIRONMENTALISTS CRITICIZE EXXON VALDEZ SETTLEMENT

-- Washington, D.C., Thursday, April 18, 1991

Today a coalition of environmental groups filed comments in Washington and Alaska strongly criticizing the proposed settlement reached between Exxon and federal and state agencies. The accord, which would require Exxon to pay \$1.1 billion dollars over an 11 year period and plead guilty to criminal charges, was agreed to in March. The comments will be reviewed by the government trustees who negotiated the settlement.

"We have major reservations about the proposed settlement," said Sarah Chasis, a senior attorney with Natural Resources Defense Council, who submitted the comments on behalf of the environmental groups. "It denies the public access to crucial scientific data collected by the government. It requires Exxon to pay a sum that appears inadequate to rectify the damage done to Prince William Sound, and it releases Alyeska from any liability despite its negligent, perhaps even fraudulent, conduct."

Throughout the negotiating process environmentalists have strongly objected to the government's refusal to release scientific and economic data collected by Exxon, federal and state agencies on the extent of damage suffered by the Sound.

"These data are crucial to evaluating the adequacy of the settlement amount since they represent the measure of the damages to which the public is entitled" said Chasis.

Environmentalists also maintain that the data is needed to inform other important public policy decisions that must assess the benefits and risks of proceeding with oil development and transportation.

Objecting to the settlement amount, environmentalists have pointed out that the long pay-out schedule of eleven years substantially reduces the present value of the settlement money.

- more -

The Congressional Research Service has estimated that the present value of the settlement to the government ranges between \$421 to \$524 million dollars. Moreover, under the terms of the agreement, as little as \$500 million of the \$1.1 billion dollar settlement may be available to repair the environmental damage done to Prince William Sound as a result of the spill, despite reports that damages are in the range of \$3 to \$10 billion dollars.

Another major objection to the proposed settlement is the United State's agreement not to seek criminal charges or civil penalties against Alyeska. Environmentalists have charged that Alyeska contributed to the spill by bungling initial cleanup efforts. According to a Congressional probe, at the time of the spill Alyeska apparently knew it could not implement its own clean-up plan for Prince William Sound and decided to take no corrective action.

"What kind of message does this send to others responsible for oil spill contingency planning and response," said Bob Adler, an attorney with NRDC. "That no matter how grossly negligent they are in implementing their contingency plans and carrying out spill response, they can escape all criminal and civil penalties and liability for natural resource damages?"

The submitted comments also objected to the Memorandum of Agreement (MOA) between the federal and state government, which outlines how the money received from Exxon will be jointly managed by state and federal trustees.

The MOA requires that all decisions relating to the use of the settlement money be made by unanimous agreement between the state and federal trustees. Environmentalists fear that this arrangement will result in innovative but important projects going unfunded. The comments also point out that the MOA shuts out the EPA from the decision making process.

In their comments on the MOA, environmentalists pressed for greater public participation in the restoration process through the establishment of a public advisory group. The advisory group would represent a broad range of those interests adversely effected by the spill and would be responsible for developing and updating an annual restoration plan for the sound. The comments strongly urged that the trustees commit to the advisory group by witting it into the settlement itself.

The environmental groups represented in the comments are Alaska Center for the Environment, Defenders of Wildlife, Greenpeace, National Audubon Society, Natural Resources Defense Council, Northern Alaska Environmental Center, Prince William Sound Conservation Alliance, Sierra Club, and Trustees for Alaska



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National Audubon Society

NATIONAL CAPITAL OFFICE

801 PENNSYLVANIA AVENUE, S.E.

WASHINGTON, D.C. 20003

(202) 547-9009

April 11, 1991

The Honorable H. Russel Holland
U.S. District Judge
c/o Clerk of the Court
Room 261
United States District Court
222 West Seventh Avenue
Anchorage, Alaska 99513

Re: United States v. EXXON Corporation and EXXON Shipping Company
No. A90-015 Criminal

Dear Judge Holland:

The following comments are submitted on behalf of Prince William Sound Conservation Alliance, Alaska Center for the Environment, Defenders of Wildlife, Greenpeace U.S.A., National Audubon Society, Natural Resources Defense Council, Northern Alaska Environmental Center, Sierra Club, and Trustees for Alaska ("the Conservation Groups") in response to the Court's March 22, 1991 Notice inviting public comment on the plea agreement entered into between the parties to the above-captioned proceeding. The Conservation Groups appreciate the opportunity to submit these comments. We are aware that you have offered the public an unusual opportunity to apprise the Court of its views on a criminal matter. But the events that led to the February 1990 ten-count indictment returned by a federal grand jury against EXXON and EXXON Shipping ("defendants") and the resultant consequences of those events for the environment of Prince William Sound and the surrounding area warrant the fullest possible public review of the settlement of the criminal charges against those defendants.

However, this review is hampered by the parties' failure to disclose information in their possession on the impact of the spill on the environment of Prince William Sound, Gulf of Alaska, Cook Inlet, and other affected areas making it difficult to give the Court an informed opinion on the adequacy of the proposed criminal fines.¹ Consequently, we cannot advise the Court with specificity

¹ The recent release by the United States of a 19-page summary of some of the information underlying the proposed settlement agreement does not cure this defect.

on whether the proposed criminal fines will provide restitution for the damage done Prince William Sound and its environs, or are even a "just" punishment for the crimes committed by defendants. This defect taints the entire settlement agreement. We ask the Court to order the release of all relevant information by the parties to the agreement.² Approval by the Court of the criminal plea should await such disclosure, and an opportunity should be given to the public to submit supplemental comments based upon that information.

The Conservation Groups view as central to the settlement of the federal and state governments' claims against defendants the imposition of a substantial criminal sentence. This sentence should reflect the seriousness of the offenses that underlie the federal indictment, provide restitution for damage to the Sound and act to deter future criminal behavior by defendants and other similarly situated businesses. We believe that the proposed agreement will not achieve these goals for the following reasons.

1. The Proposed Criminal Fines Are Insufficient

Based on what is known about the impact of the spill on Prince William Sound and applying basic tenets of criminal sentencing, the Conservation Groups believe the proposed fines are insufficient. We reach this conclusion after examining their correlation to the crimes that have been committed, their projected impact on defendants, and the extent to which they provide restitution for Prince William Sound and the species that depend upon the Sound for their survival.

The proposed criminal fines bear little relationship to the enormity of the crime against the environment committed by the defendants. These crimes are among the most heinous crimes against our environment to date. The crude oil that migrated from the *EXXON VALDEZ* contaminated 1,200 miles of shoreline, four National Wildlife Refuges, two National Parks, one National Monument, and one National Forest. It also destroyed migratory bird habitat, seal and lion haul-out areas, and six salmon hatcheries. According to a summary of natural resource damages from the spill released

Not included are the results of various economic studies. Without this information, the impact of defendants' conduct cannot be quantified.

² At minimum, the Court should order the United States to disclose the information in its possession, because of its special status as a Trustee of public resources.

on April 9, 1991 by the United States,³ several hundred bald eagles and as many as 500,000 birds of various species and several hundred thousand more chicks perished as a result of the spill. As many as 5,500 sea otters and 200 harbor seals may have died. Serious harm was done to at least 26 archaeological sites, and to the hunting and fishing lifestyles of Native villages. Contaminated clams and invertebrates are a continuing source of pollution to sea mammals, and the long-term impacts of the spill on fish and wildlife have yet to be determined.

The proposed criminal fines are significantly lower than those that might have been assessed had the Court elected to apply the Alternatives Fines Act, 18 U.S.C. Sec. 3571(d). Under that law, which the United States implied it would ask this Court to apply, defendants could have been assessed criminal fines at twice the proven pecuniary loss resulting from their criminal conduct.⁴ While such high amounts might not have actually been assessed by this Court, they do provide some measure of the potential seriousness of the crimes.⁵

2. Innovative Sentencing Measures Would Deter Repetitious Behavior

Corporations, particularly ones as large as defendant EXXON,

³ "Summary of Effects of the EXXON VALDEX Oil Spill on Natural Resources," filed with this Court April 8, 1991.

⁴ This would increase defendants' exposure to criminal fines to \$2 billion (twice the amount of civil damages assessed against defendants in the proposed settlement agreement). Depending on the accuracy of recent reports on the results of the State of Alaska's economic studies, this liability could run as high as \$6 billion.

⁵ A substantial criminal fine in this case, however, may deter others in the oil industry from engaging in similar criminal conduct. As there is ample evidence of widespread noncompliance with environmental laws and regulations by this industry, this Court should weigh the broader deterrent effect of high fines in evaluating the adequacy of the proposed fine. See Inland Oil Spills, Stronger Regulation and Enforcement Needed to Avoid Future Incidents (General Accounting Office, February 1989) (GAO/RCED-89-65).

pose particular challenges with respect to imposing sentences.⁶ Fines, even substantial ones, are rarely sufficient to induce behavioral reform.⁷ This fact is clearly illustrated in the instant case where the management of defendant EXXON has not only consistently refused to acknowledge any culpability or remorse for the havoc it wrought on the environment, but views the \$1.1 billion settlement agreement as a "cost of doing business."⁸ This unrepentant attitude makes it unlikely that defendants will take action to avoid a repetition of the events that caused this catastrophe. Therefore, the Court should consider the imposition of supplemental "innovative" sentencing measures to achieve a deterrence objective.⁹

We ask the Court to consider placing defendants on probation. Probation is particularly appropriate in sentencing a corporation where the goal is not to drive it out of business, but to preserve it as a constructive member of society, and where fines alone may not reform corporate behavior. Creative probation conditions can be tailored to each category of offense and to the characteristics of the offender to achieve the rehabilitation of defendants.

In this case, the Court could include as a condition of probation, or as a free-standing measure, a requirement that defendants' facilities be subjected to a periodic environmental audits by a court-appointed independent auditor. Such an audit could be designed to identify specific improvements in defendants'

⁶ Corporations do not go to jail and can absorb fines, because of their sheer wealth -- in no case more true than here -- and their ability to pass them on to customers. See F. Grad, *Treatise on Env't'l Law* at 2-555.

⁷ See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 *Am.Crim L. Rev.* 419, note 20 at 468, 475-76 (1980); Bower, "On the Amoral Organization" in *The Corporate Society*, 178, 197 (R. Marris ed. 1974).

⁸ Chairman of the Board of EXXON Corporation Rawls recently compared the total cost of the settlement to the cost of opening two offshore oil and gas wells.

⁹ See United States Sentencing Commission Proposed Amendments to the Sentencing Guidelines for the United States Courts. 54 Fed. Reg. 47056 (November 8, 1990).

equipment and operating practices to prevent a recurrence of the events that led to their conviction, and of other possible environmental problems as well. Environmental audits, like probation, can be viewed as a tool to "rehabilitate," rather than merely to punish environmental violators; analogous to community service requirements imposed on convicted drunk drivers.

3. Exculpation of Alyeska Pipeline Service Company

Conservation Groups object to the release of Alyeska Pipeline Service Company and its owner companies from any culpability under federal law arising from the events that unfolded after the grounding of the *EXXON VALDEZ*. Alyeska's failure to comply with the oil spill contingency plan in effect on March 24, 1989 significantly compounded the environmental damage that eventually occurred. According to material recently submitted to this Court by Rep. George Miller, Vice Chairman of the Committee on Interior and Insular Affairs, U.S. House of Representatives, Alyeska and its owners had knowledge of Alyeska's inability to respond to an oil spill in Prince William Sound, and failed to take remedial action.¹⁰

In light of this information about Alyeska and its owner companies' conduct, it is clearly not in the public interest for the United States to waive its right to pursue criminal as well as civil and administrative penalties against them. Alyeska and its owner companies gained access to environmentally sensitive lands to build the Trans Alaska Pipeline System, and then set out on a course of deceiving the public about their capacity to comply with the undertakings they had made to gain this privilege. If this portion of the agreement is approved, they will not be held accountable for their misconduct. The Court should strike that part of Paragraph IIIA that exculpates Alyeska and its co-owners.

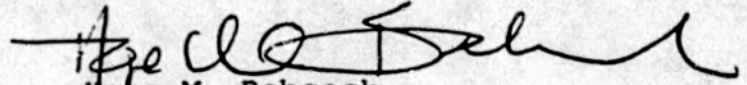
4. Alaska Should Not Be Insulated From Review

The Conservation Groups protest the insulation of Alaska from any administrative or judicial review of its actions under Paragraph IVA. Not only does the public have a right to review those actions and to challenge any that are inconsistent with the agreement, but the United States and this Court should not waive their authority to enforce the provisions of the agreement. Paragraph IVB is unenforceable, and should be struck by the Court.

¹⁰ April 8, 1991 letter from Rep. George Miller to Hon. Russel Holland and Hon. Stanley Sporkin, filed in No. A90-015 CR, A91082 Civil, A91083 Civil, A91081 Civil, 3AN-89-6852 Civil, 91-484 SS Civil.

We appreciate your consideration of these comments and hope that they will be helpful in your evaluation of the plea agreement.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Hope M. Babcock', with a stylized, flowing script.

Hope M. Babcock
General Counsel
National Audubon Society

On behalf of Conservation Groups

SCOMM

77:42

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

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

Prepared by:

Sarah Chasis
Robert Adler
Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

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

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

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

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

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

I. PUBLIC PARTICIPATION IN THE INJURY ASSESSMENT AND RESTORATION PROCESS

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

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

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

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

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

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

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

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

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

II. OTHER COMMENTS ON THE MOA

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

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

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

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

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

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

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

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

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

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

III. INDEPENDENT ENDOWMENT/FOUNDATION

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

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

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

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

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

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

ATTACHMENT 1

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

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

Members

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

The categories we suggest¹:

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

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

Mechanics of Advisory Committee

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

We suggest that:

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

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

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

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

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

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

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

SCOMM

77:43

COMMENTS ON THE PROPOSED SETTLEMENT AGREEMENT CONCERNING
THE EXXON VALDEZ OIL SPILL

April 18, 1991

David van den Berg

I am grateful for the opportunity to submit my comments regarding the pending Exxon civil settlement. I have serious reservations about the proposed settlement. Most importantly, I am alarmed by: 1). the suppression of studies, 2). the trustee system and the questionable competency of the state's designees, 3). Alyeska's release from all but trifling claims under the civil settlement, 4). the apparent lack of funds available for restoration and acquisition in the first two years, and 5). the unwillingness to pursue and establish precedent-setting legal framework to evaluate ecological damage.

First, the studies. We must ask, what could be more important to the state of Alaska than the full release and public availability of studies relating to oil's toxicity, potential for damage, persistence in the environment, and harm to humans and animals? What could be more important than free access to these studies for a public which derives approximately 84% of its revenue from oil? With all the oil-related activities in the state--along the TAPS, the North Slope, on the OCS, etc.--it is malicious malfeasance to conceal the affects of oil on our environment. By suppressing the studies, the state implies its own guilt. By suppressing the studies, the state abrogates the principles upon which our democracy is based.

No one--neither the public nor the legislature--can make an intelligent evaluation of the settlement without benefit of the studies. The release of the federal studies on April 8 will not help

in this respect since they are no more than a summary of the generally acknowledged extent of damage. Released were no economic studies on the natural resource damages to value the losses, or determine what sums may be needed to recover or acquire equivalent resources. Furthermore, the bulk of the suppressed data will be released in the course of litigation--though it could take up to two years. So the argument that the studies' release could weaken or prejudice the state's case simply does not stand up. No situation is unworkable: the state has not pursued every avenue to ease tensions between itself and third party litigants. There is no compelling reason that the state must deny its people the right to access information for which they paid.

The studies' embargo presents other problems. By suppressing the studies, the *state casts doubt and distrust upon itself*, and offends the democratic process. Can or will the state immunize itself from culpability in any event by censoring what reaches the public? Instead of acting responsibly to prevent catastrophe, the state finds it easier to conceal its complicity in the oil spill or any such event. If the state's actions are unassailable, it has nothing to fear by total openness; if its actions are faulty, then the burden of responsibility is great to face the people whose livelihoods it failed to protect. This practice must never become practice for any reason or else the public will lose trust in its government. As for public process, the people are being deprived of their right to information bearing on matters which profoundly affect their lives.

Finally, *the executive session for the legislature on April 17 does not provide sufficient lead-time for the legislature*. What information they get will come as an unmanageable deluge rather than a comprehensible trickle. Again, the issue of doubt crops up. Why should they have been denied even the executive session until this late? The executive session will give them little advantage because they will have less than 15 days to assimilate and apply to the settlement what they learned in two hours. And what they learn in two hours cannot be more than a fraction of an enormously intricate product of two years' study and analysis. Surely they cannot be expected to make a cogent conclusion based on a rushed, incomplete exposure.

Second, the trustee system and the state's designees.

The settlement's trustee system is--by the nature of trusts--not suited to meet the needs of the people. Trustees have a fiduciary duty to act in their client's best interest. Though they are clearly empowered to work independently of the executive branch, it is likely that they will take some direction from those offices. The state and federal governments are the trustee's client. The monies in trust--though intended to recover for the people of affected areas and the areas themselves--must be used first and foremost to satisfy the interests of the governments. And the government's and the people's needs and interests are not often coincident. For example when the people of a region who have thought for years about how they would spend money to recover their area make their request, if their needs and interests do not harmonize with those of the governments, then the trustees will be compelled to enact the government's plan, public input notwithstanding.

Compounding our concerns about the trustee system is the *dubious qualifications* of the state's designees, John Sandor and Harold Heinze. Sandor and Heinze's involvement with extractive industries--Sandor, a former Forest Service employee and Heinze, a former ARCO representative--casts doubt on their willingness or ability to restore and conserve our natural resources. It is uncertain that they are qualified for or properly concerned with conducting sincere restoration and acquisition programs. Again, with their fiduciary duty as trustees compelling them to act directly on behalf of their client, it is unclear that they will act in a manner consistent with the needs and expectations of the affected communities.

Finally, our concerns for the state's constitution are consonant with those of the legislature itself.

Third, Alyeska's release from natural resource damages under the civil settlement. Alyeska's involvement in the Exxon Valdez spill is perhaps the most deserving of scrutiny and action to recover damages. Alyeska is not wholly owned by Exxon and the guilt for the Exxon Valdez spill extends to Alyeska's other owners.

If, under the civil settlement, Alyeska indemnified Exxon, then Exxon would not have to pay twice for the damages, the ruse Exxon employs to justify Alyeska's release from natural resource damage liability.

Fourth, the apparent insufficient availability of monies in the first two years--until the end of August, 1993-- to adequately fund damage assessment studies, and restoration and acquisition programs. Presumably, the first several years will be pivotal in the affected areas' recovery. It is therefore critical that large quantities of money be available to undertake restorative programs. From 1991 to 1992, the trustees will receive from the civil settlement combined proceeds of \$240,000,000 (1991, \$90 million; 1992, \$150 million). But it is not as good as it sounds. From this sum, state and federal governments will begin to deduct expenses incurred for studies and past and present clean-up. It is unclear, but it appears that the payment to governments is front-loaded, the largest payments coming first (1991, \$45 million; 1992, 40M; 1993, 40M; 1994 and 1995, 5M). So, for the first year, only \$45 million available (90M-45M).

In addition, Exxon may credit its clean-up expenses for 1991 and 1992 against the second payment in 1992 of \$150 million. (In 1990, Exxon spent between \$180 and \$200 million on clean-up. Another such clean-up effort could effectively extinguish 1992's installment of \$150 million.)

Even the 1993 payment of \$100 million would be reduced by possibly \$40 million by the above-mentioned repayment schedule, leaving only \$60 million. If the settlement is signed, for the first three years--from 1991 to the end of 1993--the trustees may have at their disposal on behalf of the governments a mere \$105 million, maybe less depending on Exxon's 1991-1992 clean-up costs (\$340M-45M-40M-40M-Exxon's repayment=@ \$105M

It is unlikely that anything short of the full \$340 million will be sufficient to fund the host of studies, restoration, and acquisition projects necessary to initiate a truly salutary recovery effort.

Fifth, a frequent justification for settling out of court is the fact that we are astride a **legal frontier**. There have been no substantial forays into the ambiguities surrounding natural resource damage evaluation--contingent value. In a state so thoroughly under the sway of an oil industry dealing in lethal substances, operating in an accident-prone climate, it is in the long-term best interest of the state and humanity--for the nation and for the world--to penetrate the legal frontier and establish a context to evaluate damages inflicted upon the inanimate and the animate natural world.

Conclusion:

The Alaska Environmental Lobby suggests the following.

1). Release the studies immediately so that the public and the legislature can operate and make decisions in the full light of the studies' information. Immediate release is essential so that the people and the legislature can have enough time to assess the studies.

Extend the May 3 deadline to accommodate the studies' review.

2). Create some mechanism to allow the public a truly meaningful role in the trustees' decision-making process. Require the trustees to submit an annual list of programs that they wish to undertake and establish a means by which the legislature can approve, disapprove, or amend the annual plan.

Consider some means to make the people the trustees' client.

Consider choosing altogether different state designees to the trustee board. Consider appointing a legislator from the affected areas to the trustee board.

3). Provide for some means to hold Alyeska liable for natural resource damage. Consider a provision by which Alyeska would indemnify Exxon for natural resource damages.

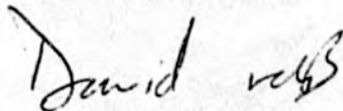
4). Exclude Exxon's remuneration from the monies paid to the trustees. There is no reason why the trustees should be required to pay Exxon with money won as part of natural resource damage recovery.

Avoid possible inadequacy of funds by having the full principal of \$900 million paid up front as a lump sum. Or have the depreciated future value paid up front, the approximate \$732 million.

Avoid possible inadequacy of funds by arranging for the monies to repay the governments to be rear-loaded. The five-year government repayment schedule is acceptable, but have the payment schedule back-loaded so that the larger payments come later, not earlier.

5). By any means necessary, **establish natural resource damage assessment criteria and begin the long process to delimit the frontier of contingent values.**

Sincerely,

A handwritten signature in dark ink, appearing to read "David van den Berg". The signature is fluid and cursive, with a large initial "D" and a stylized "B" at the end.

David van den Berg

cc: Representative Max Gruenberg, House Special Committee Chair
Senator Dick Eliason, Senate Special Committee Chair
Barbara Herman, Attorney General's Office

SCOMM

77:44



UNIVERSITY OF ALASKA FAIRBANKS

INSTITUTE OF ARCTIC BIOLOGY
Fairbanks, Alaska 99775-0180 U.S.A.

(907) 474-7640
FAX: (907) 474-6967

April 15, 1991

Senator Dick Eliason, Chair
Senate Special Committee on the Exxon Valdez
Oil Spill Settlement Claim
Alaska State Senate
Juneau, AK

Dear Senator Eliason:

I was unable to attend the Committee's recent hearings in Fairbanks. However, I would like to bring to the Committee's attention a concern that I share with many other members of the archaeological profession in Alaska. I am concerned because the definition of natural resources in the settlement does not explicitly include archaeological resources. I understand that efforts are under way in the U.S. Justice Department to obtain a ruling that would exclude archaeological resources for the definition as written. If these important resources are excluded from the definition, funding for damage assessment studies and restoration efforts would not be available. I believe there is widespread recognition that Prince William Sounds archaeological resources have been put at risk and deserve careful attention along with the fish, birds, sea otters, and other resources.

I include comments I have written on the settlement to back up my concerns. I ask that these comments be included in the hearing record for your committee.

Thank you for the opportunity to comment.

Sincerely,

Wendy H. Arundale, Ph.D.
Research Associate

Enclosure



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April 15, 1991

Thomas A. Campbell
General Counsel of NOAA
U.S. Department of Commerce
Room 5814
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

and

Barbara Herman
Attorney General's Office
State of Alaska
1030 West 4th Avenue
Anchorage, Alaska 99501

Dear Mr. Campbell and Ms Herman:

I would like to comment on one aspect of the Exxon Valdez oil spill settlement agreement that concerns me greatly. At issue is the definition of natural resources contained in the agreement. Since very soon after the spill occurred, the effects of both the oil and the clean up efforts on archaeological sites and resources have been recognized as an issue that must be addressed. Yet the definition of natural resources, as written in the agreement, does not specifically mention archaeological or cultural resources. I feel strongly that these important resources need to be mentioned explicitly in the definition so that they cannot possibly be left out of future damage assessment and restoration efforts. Let me outline several reasons why.

1. Archaeological resources should be included in the definition of natural resources because:

a.) archaeological sites clearly are made up of natural resources. They are tangible physical resources that include "land" and "biota" such as rocks, shells, pollen grains, animal bones, carbonized seeds, wood, and a host of other natural materials. Further some of the sites consist of petroglyphs, pictographs (sculptures and paintings on rock faces), stone or wood weirs, and submerged stratigraphic layers, all clearly natural resources.

b.) archaeological resources are natural resources in the traditional sense, in that when they are properly studied, they can provide important information about human history that is not documented in any other way.

INSTITUTE OF ARCTIC BIOLOGY

Exxon Valdez Settlement Comments
April 15, 1991

c.) archaeological resources fit the definition of natural resources in that they are tangible, publically-owned resources for which the state of Alaska and the federal government are responsible.

2. Efforts are currently under way by solicitors within the Department of Justice to rule that archaeological resources are not natural resources under the definition used this agreement, which is very similar to the definition in CERCLA. Such a ruling would not only jeopardize the archaeological resources affected by the Exxon Valdez oil spill, including some magnificent resources on Kodiak Island as well as those in Prince William Sound, but could be used as a very negative precedent for future events in other parts of the country in which CERCLA might be invoked.

3. Damage assessment studies have already been significantly delayed. The awarding of the contract for last summer's proposed work was delayed until it was too late in the season to complete all the work, or even to carry out a part of it safely. (August can be extremely stormy in that region, and even under good conditions, great care must be taken to reach remote sites safely.) Has the Department of Justice's efforts to exclude archaeological resources already played a role? It is difficult for someone who is not an insider to know. But is clear that this delay has led to the loss of an entire year's time in obtaining important data.

It is extremely important that the damage assessment work proposed for this summer go forward without further delay. On the present timetable, the award date will leave barely enough time for a responsible contractor to prepare for and carry out the work. If additional damage to sites is to be prevented, a prompt damage assessment is essential. Further arguing over the definition of natural resources could lead to such a delay, and could bring about a significant additional loss of resources that are already endangered.

4. Finally, inclusion of archaeological resources in the definition of natural resources is important because it could make available restoration funds needed to protect sites in the region from looting. One of the spill's most significant impacts was to reveal to many people working on the clean-up the location of sites that had hitherto been protected by their obscurity. These sites are now in much increased danger of being looted. Money for site monitoring, anti-looting education, and ARPA investigations when looting occurs is not readily available from regular agency budgets, but could be made available as a part of

UNIVERSITY OF ALASKA FAIRBANKS

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Exxon Valdez Settlement Comments

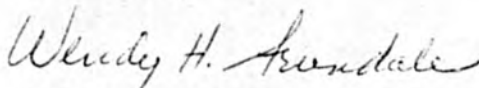
April 15, 1991

restoration efforts. Such funding could play a significant role in preserving archaeological resources in the affected area for the future.

I am a professional archaeologist who has worked in northern regions for nearly 20 years and Alaska for the past 12 years. I have no personal interest whatsoever in any work that might come out of damage assessment or restoration efforts. But I have a great concern for Alaska's magnificent cultural resources. And I have seen the significant losses that take place when adequate funds are not available for preventing further losses to endangered resources. I urge you strongly to amend the settlement's definition of natural resources so archaeological resources are explicitly included.

Thank you for this opportunity to comment.

Sincerely,



Wendy H. Arundale, Ph.D.
Research Associate

cc: Richard Stewart, Assistant Attorney General for Lands and
Natural Resources, Department of Justice
Manuel Lujan, Jr., Secretary, Department of the Interior
James M. Ridenauer, Director, National Park Service
Jerry Rogers, Associate Director, Cultural Resources, NPS
Senator Dick Eliason, Chair, Special Committee on the Exxon
Valdez Oil Spill Settlement Claims, Alaska State Senate
Representative Max Gruenberg, Chair, Special Committee on the
Exxon Valdez Oil Spill Settlement Claims, Alaska State
House

SCOMM

77:45

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

April 12, 1991

APR 13 1991

SUBJECT: Oil and Hazardous Substance Release Response Fund

TO: Senator Jay Kerttula, Co-chair
Senate Finance Committee

FROM: Tamara Brandt Cook *TBC*
Director

You have asked for an explanation of the purposes for which money in the Oil and Hazardous Substance Release Response Fund may be used. As a preliminary matter, let me note that the legislature in the exercise of its constitutional power of the purse may appropriate unencumbered money from the fund for any purpose. However, several statutes have been enacted that set out with particularity the types of expenditures that may be made with money from the fund.

AS 26.23.020(g)(11) and AS 46.08.040(b) permits the governor to use money from the fund to respond to a declared disaster emergency related to an oil or hazardous substance discharge. This money is supposed to be used only if money regularly appropriated to state agencies is not available to meet the need. (AS 26.23.050)

The fund is established under AS 46.08.010 and subsection (c) provides

The fund shall be used for actual expenses incurred under AS 46.08.040. The fund may not be used for capital improvements. ←

The commissioner of environmental conservation is authorized to use money in the fund to "investigate and evaluate the release or threatened release of oil or a hazardous substance, and contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous substance that poses an imminent and substantial threat to the public health or welfare, or to the environment." (AS 46.08.040(a)(1))

The commissioner may use money in the fund for some other designated purpose, but only if the money has been made available from an appropriation to the fund

Senator Jay Kerttula
April 12, 1991
Page 2

specifically for that purpose. (AS 46.08.040(c)) These purposes are set out in AS 46.08.040(a)(2)-(7) as follows:

- (2) pay all costs incurred to
 - (A) establish and maintain the oil and hazardous substance response office;
 - (B) review oil discharge prevention and contingency plans submitted under AS 46.04.030;
 - (C) conduct training, response exercises, inspections, and tests, in order to verify equipment inventories and ability to prevent and respond to oil and hazardous substance release emergencies, and to undertake other activities intended to verify or establish the preparedness of the state, a municipality, or a party required by AS 46.04.030 to have an approved contingency plan to act in accordance with that plan; and
 - (D) verify or establish proof of financial responsibility required by AS 46.04.040;
- (3) pay the expenses incurred by the Alaska division of emergency services for the oil and hazardous substance response corps and the oil and hazardous substance response depots when presented with appropriate documentation by the division;
- (4) provide matching funds for participation in federal oil discharge cleanup activities and under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980);
- (5) recover the cost to the state or to a municipality of a containment and cleanup resulting from the release or the threatened release of oil or a hazardous substance;
- (6) prepare, review, and revise
 - (A) the state's master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.200; and
 - (B) a regional master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.210; and
- (7) restore the environment by addressing the effects of an oil or hazardous substance release.

The commissioner is also required to use money from the fund to reimburse the Legislative Council for expenditures of the Citizens' Oversight Council on Oil and Other Hazardous Substances. (AS 46.08.040(d)) The Department of Law has issued an opinion that this funding mechanism violates the separation of powers doctrine and has advised that the legislature should directly appropriate money from the fund for expenditures of the Oversight Council. A copy of that opinion is attached.

Lastly, let me point out that several sources of money have been specifically identified by statute as sources that the legislature may use for appropriations to the

Senator Jay Kerttula
April 12, 1991
Page 3

fund. (AS 43.55.220, conservation surcharge on oil; AS 46.08.020) The legislature is not required to appropriate money to the fund from these sources, nor, of course, is it prohibited from appropriating money from other sources.

TBC:gc
91-215.glc

Enclosure

MEMORANDUM**State of Alaska****Department of Law**

TO: The Hon. John A. Sandor
Commissioner
Dep't of Environmental
Conservation

DATE:

February 20, 1991

FILE NO.:

663-91-0316

TEL. NO.:

465-3600

SUBJECT:

Funding of the
Citizens' Oversight
Council

FROM: Lawrence Ostrovsky
Assistant Attorney General
Natural Resources Section-Juneau

Introduction

The Sixteenth Alaska Legislature created the Citizens' Oversight Council on Oil and Hazardous Substances (hereafter "Oversight Council"). Sec. 2, ch. 199, SLA 1990. For its funding, AS 24.20.600(e) provides that the Oversight Council is to request money it considers necessary for staff and other expenses from the Legislative Council. The Legislative Council, in turn, is directed by AS 46.08.040(d) to seek reimbursement from the Commissioner of the Department of Environmental Conservation (hereafter "DEC") for expenditures that it makes for the operations of the Oversight Council. AS 46.08.040(d) also provides that the commissioner of DEC use money from the Oil and Hazardous Substance Release Response Fund for that reimbursement.

In your January 28, 1991, memo to Attorney General Cole, you requested an opinion regarding the validity of this funding mechanism and the alternatives that are available if it is not valid.

Short Answer

The funding mechanism for the Oversight Council, as set out in AS 24.20.600(e) and 46.08.040(d), is of questionable legality because it calls for the executive branch to expend funds without a specific appropriation. Additionally, executive branch functions funded by the Hazardous Substance Release Response Fund AS 46.08.010 are potentially affected by the funding requirements of a legislative branch agency. Therefore, this funding mechanism may require an invalid blending of the executive with the legislative functions. This may violate the separation of powers doctrine.

In fact, the Sixteenth Alaska Legislature did not fund the Oversight Council through the mechanism provided in AS 24.20.600(e) and AS 46.08.040(d). Rather, the legislature appropriated from the Hazardous Substance Release Response Fund directly for expenses of the Oversight Council. This is a

The Hon. John A. Sandor, Commissioner
A.G. File No.: 663-91-0316

February 20, 1991
Page 2

preferable method.

If AS 46.08.040(d) were repealed, the legislature could continue to finance the Oversight Council through similar appropriations. This would avoid the constitutional questions that may arise when an executive agency draws funds for the expenses of a legislative branch agency from an account the executive agency administers.

Background

The Oversight Council is an agency of the legislature, with all members appointed by the Legislative Council. It is charged with, among other duties, investigating and making recommendations on the performance of state and federal agencies in preventing oil and hazardous waste discharges. In the course of carrying out its functions, the Oversight Council may expend money upon approval of the Legislative Council.

AS 24.20.600(e) provides:

The oversight council shall make a formal request to the Alaska Legislative Council for money it considers necessary for staff, per diem, travel, and contractual expenses. Money distributed to the oversight council is to be disbursed and accounted for under procedures required by the Legislative Affairs Agency. The chair of the oversight council shall approve all expenditure documents.

Alaska statutes further require that the Legislative Council's expenditures for the Oversight Council be reimbursed by the commissioner of DEC, out of the Oil and Hazardous Substance Release Response Fund.

AS 46.08.040(d) provides:

Upon a request from the Alaska Legislative Council, the commissioner shall use money from the fund to reimburse the Alaska Legislative Council for expenditures that it makes for the operation of the Citizens' Oversight Council on Oil and Other Hazardous Substances, established under AS 24.20.600.

The Hon. John A. Sandoz, Commissioner
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February 20, 1991
Page 3

Since its inception, the Oversight Council has been financed by a specific appropriation. In the 1990 operating budget appropriations Act, the legislature appropriated \$236,000 for operations of the Oversight Council. Sec. 36, ch. 209, SLA 1990. The source of the \$236,000 was the Oil and Hazardous Release Response Fund. As a result, there has been no need, to date, for the Legislative Council to seek reimbursement from the commissioner of DEC under AS 46.08.040(d).

Analysis

A number of scenarios are possible in which the Legislative Council might require reimbursement from the commissioner of DEC. For example, the Oversight Council's expenses might exceed its appropriation, or the legislature might not approve any appropriation for its expenses in a given year.

In any case, the amount that the commissioner of DEC would have to withdraw from the fund is uncertain. Under AS 24.20.600(e), the only limitation on the Oversight Council's expenses is that they be approved by the Legislative Council.

Appropriations enacted by law do not have this inherent uncertainty. Article IX, section 13, of the Alaska Constitution states, in relevant part, "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law". AS 24.08.030 sets out the specific requirements for appropriations bills: "Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner and other related conditions of payment."

As noted above, the Sixteenth Legislature made an appropriation for the activities of the Oversight Council. If the legislature had not made an appropriation and had relied on the method set out under AS 24.20.600(e) and AS 46.08.040(d) to finance the Oversight Council, there would seem to be no restrictions as to the amount the Oversight Council could spend. Additionally, funding could conceivably continue year after year without additional appropriations. Therefore, taken together, AS 24.20.600(e) and AS 46.08.040(d) set out a method of funding that does not meet the requirements of the Alaska Constitution and AS 24.08.030.

An additional consideration of this method of funding is that it poses the potential for an intrusion of the legislative branch into executive branch authority, a violation of the separation of powers doctrine. This doctrine has been recognized in Alaska, Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975), and prohibits the blending of governmental powers in

The Hon. John A. Sandor, Commissioner
A.G. File No.: 663-91-0316

February 20, 1991
Page 4

the absence of an express constitutional provision. Bradner v Hammond, 583 P.2d 1 (Alaska 1976).

Depending on the expenses of the Oversight Council and the subsequent draw on the fund by the Legislative Council, there could, potentially, be no money available for the activities that the commissioner of DEC is charged to carry out under AS 46.08.040. That is, if the commissioner's authority to reimburse the Legislative Council is not discretionary, the Legislative Council alone, merely by approving expenses of the Oversight Council and seeking reimbursement from the fund, may impact the commissioner's discretion to administer the fund for the purposes set out in statute.

Conversely, if the commissioner's authority to administer the fund, with regard to AS 46.08.040(d), is, to some extent, discretionary, then the issue arises as to the propriety of an executive branch officer administering and approving the expenses of a legislative committee.

The above examples point to the problematic nature of this type of funding. A far more preferable method would be direct appropriation from the fund, as was done by the Sixteenth Legislature.

I hope this addresses your questions. Please feel free to contact me if you have additional questions or concerns.

LZO:nml:prm

cc: Head Treadwell

SCOMM

77:46

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Attorneys for Exxon Shipping Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

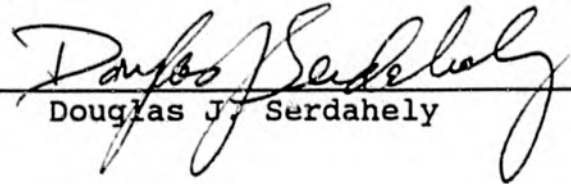
UNITED STATES OF AMERICA,	)	Civil Action No. A91-082 Civ.
	)	
Plaintiff,	)	
	)	
vs.	)	NOTICE OF LODGING BY EXXON
	)	CORPORATION AND EXXON SHIPPING
EXXON CORPORATION, EXXON	)	COMPANY OF SUMMARY REGARDING
SHIPPING COMPANY, ALYFKA	)	NATURAL RESOURCES
PIPELINE SERVICE COMPANY,	)	
AMERADA HESS PIPELINE	)	
CORPORATION, ARCO PIPE LINE	)	
COMPANY, EXXON PIPELINE	)	
COMPANY, MOBIL ALASKA PIPELINE	)	
COMPANY, PHILLIPS ALASKA	)	
PIPELINE CORPORATION, BP ALASKA	)	
PIPELINES, INC., UNOCAL ALASKA	)	
PIPELINE COMPANY, and the T/V	)	
EXXON VALDEZ, <u>in rem</u> ,	)	
	)	
Defendants.	)	
	)	
	)	
AND COUNTERCLAIM	)	
	)	

Please take notice that defendants Exxon Corporation and Exxon Shipping Company are lodging with the Court the attached summary and appended studies regarding natural resource injuries and recovery arising from the Exxon Valdez oil spill.

These materials, which have been publicly available for some time, are lodged to assist the Court in evaluating the pending consent decree and to provide the Court with information which both supplements and contrasts with views contained in the government summary of effects on natural resources filed on April 8, 1991.

DATED this 16th day of April, 1991.

BOGLE & GATES
Attorneys for Exxon Shipping Company

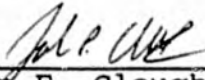
By: 

Douglas J. Serdahely

DATED this 16th day of April, 1991.

JOHN F. CLOUGH, III
CLOUGH & ASSOCIATES

WARREN CHRISTOPHER
PATRICK LYNCH
O'MELVENY & MYERS

By: 

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Attorneys for Exxon Shipping Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	Civil Action No. A91-082 Civ.
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EXXON CORPORATION, EXXON	)	
SHIPPING COMPANY, ALYESKA	)	
PIPELINE SERVICE COMPANY,	)	
AMERADA HESS PIPELINE	)	
CORPORATION, ARCO PIPE LINE	)	
COMPANY, EXXON PIPELINE	)	
COMPANY, MOBIL ALASKA PIPELINE	)	
COMPANY, PHILLIPS ALASKA	)	
PIPELINE CORPORATION, BP ALASKA	)	
PIPELINES, INC., UNOCAL ALASKA	)	
PIPELINE COMPANY, and the T/V	)	
EXXON VALDEZ, <u>in rem</u> ,	)	
	)	
Defendants.	)	
	)	
AND COUNTERCLAIM	)	
	)	

BOGLE & GATES

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