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 iegal 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.

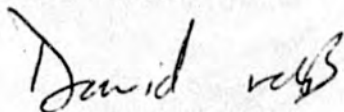
4). Exclude Exxon's remuneration from the monies paid to the trustees. There is no reason why the trustees should be required to pay Exxon with money won as part of natural resource damage recovery.

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,



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