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U. S. Department of Justice

Washington, DC 20530

TESTIMONY

OF

RICHARD B. STEWART
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT & NATURAL RESOURCES DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

OF

HOUSE OF REPRESENTATIVES
STATE OF ALASKA

CONCERNING

PROPOSED SETTLEMENT OF CIVIL AND CRIMINAL LIABILITY
ARISING FROM THE EXXON VALDEZ OIL SPILL

APRIL 17, 1991

Mr. Chairman and Members of the Subcommittees:

Good afternoon. I am Richard B. Stewart, the Assistant Attorney General in charge of the Justice Department's Environment and Natural Resources Division. I am pleased to have this opportunity to appear on behalf of the Department to discuss the proposed settlement of the federal government's claims of civil and criminal liability arising from the Exxon Valdez oil spill.

Background to the Litigation

Mr. Chairman, I am sure that it is unnecessary before this body to recite the events that gave rise to the claims against the Exxon Corporation and the settlement that now is pending. As you know, the tanker vessel Exxon Valdez was outbound from Port Valdez, Alaska on the night of March 23-24, 1989, carrying 50 million gallons of Alaska North Slope crude oil. The tanker, which was owned by an Exxon subsidiary and commanded by Joseph Hazelwood, left the sound's designated shipping lanes and went hard aground on Bligh Reef, a well-known and well-marked navigational hazard.

The grounding pierced the ship's hull, and best estimates are that 11 million gallons of oil spilled into the pristine waters of Prince William Sound and the Gulf of Alaska. The oil fouled those waters and much of the 1100 miles of adjacent shoreline. In the weeks and months following the spill, Exxon began an extensive campaign to clean up the oiled beaches,

which continued through the fall of 1989. In response to public pressure, Exxon resumed cleanup work in the Spring of 1990, and is expected to undertake further cleanup this spring. Exxon reports that so far it has spent more than \$2 billion in cleanup activities.

Both the federal government and the State of Alaska have asserted claims against Exxon. Initially, the Justice Department successfully sought the criminal indictment both of Exxon Shipping, the owner of the Exxon Valdez, and the parent Exxon Corporation. We regard the spill as a classic example of culpable corporate management failure. A ten-count indictment was returned in February 1990, including felony charges for knowing violations of the Ports and Waterways Safety Act and the Dangerous Cargoes Act, and misdemeanor counts under the Clean Water Act, the Refuse Act and the Migratory Bird Treaty Act. The criminal charges were scheduled for trial this month.

The federal government also has a number of civil claims, particularly on behalf of those federal agencies that serve as trustees for natural resource damages under the Clean Water Act and other federal statutes and common law. These claims have been asserted in a complaint that was filed along with the proposed settlement documents last month. The State of Alaska has had civil claims pending since August 1989, when the state filed a complaint in Alaska Superior Court seeking damages under state law.

In support of both the civil and criminal claims, the federal and state governments together have undertaken extensive scientific studies to assess the impact of the spill and the probable damage to natural resources. By June, the two governments will have spent a total of more than \$80 million in such studies. This investigation was necessary because the damage issues lie at the frontiers of scientific knowledge concerning the effect of oil spills on marine and coastal resources.

While the spill presents factual issues that lie on the scientific frontier, the case also presents many issues on what can only be described as a legal frontier. Many if not most of the legal issues that would be litigated against Exxon are issues of first impression in the federal courts. By way of example, the Exxon defendants' exposure to criminal fines could range from \$600 million to a meager \$3 million, depending on whether and how the court were to apply the Alternative Fines Act in this case.

Settlement Objectives

Because of these daunting uncertainties, both the Justice Department and the State of Alaska recognized the desirability of resolving their respective claims that would eliminate the uncertainty and expense of protracted litigation and permit early funding of restoration work for the Sound, but only if Exxon would come to the table ready to recognize its

responsibility for the spill and the magnitude of the damage to natural resources in and around Prince William Sound.

Accordingly, the Justice Department and the federal trustees, together with EPA, concluded from the outset that no settlement would be acceptable without three elements: first, there would have to be sufficient recovery of damages for the trustees to undertake a prompt and thorough restoration program for the Sound; second, any settlement would have to be made public and include an appropriate opportunity for public comment; and third, Exxon would have to acknowledge its criminal conduct and pay a substantial criminal penalty that reflects the seriousness of the offenses that led to the spill.

I am happy to report to the committee that all three of these elements have been met by the proposed civil settlement and the criminal plea. A vital impetus for this favorable settlement was the Justice Department's aggressive prosecution of the criminal charges, and early favorable rulings by the court in the criminal case. These established the seriousness with which the government has regarded Exxon's criminal responsibility for the spill as a binding principle for settlement.

On the civil side of the case, considerable credit must go to Alaska Governor Hickel's initiative, this past January, for talks between the corporation and the state and federal governments. These talks began with direct bargaining among the principals, involving Exxon Chairman Lawrence Rawl, Governor Hickel and Alaska Attorney General Cole, and the heads of the

federal agencies concerned -- the Departments of Agriculture, Interior, and Transportation, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration. NOAA General Counsel Tom Campbell, on behalf of the natural resource trustees, provided crucial leadership in ensuring that these early negotiations forged a suitable framework for an agreement in principle.

Eight weeks of hard bargaining with Exxon resulted, finally, in the settlement proposed last month. Those negotiations were marked by extraordinary cooperation among Governor Hickel and Attorney General Cole of Alaska, Interior Secretary Lujan, NOAA Administrator Knauss and General Counsel Campbell, EPA Administrator Reilly, Transportation Secretary Skinner, and Agriculture General Counsel Raul. Their collective leadership helped shape a settlement that should be regarded as an unprecedented win for the environment.

Settlement Terms

Under the settlement, Exxon will pay \$900 million over ten years to satisfy the state and federal governments' civil damage claims. Exxon also may be liable for an additional \$100 million if the future discloses currently unforeseen damage that was not discovered by the extensive damage survey the two governments have undertaken to date. These amounts will be used both to reimburse the state and the federal government for past expenses and restoration costs, and to fund a thorough program to

restore Prince William Sound's natural resources. These funds also may be used to fund additional cleanup work by Exxon in 1991. The schedule of payments under the settlement agreement is expected generally to coincide with the future funding needs for restoration work now being planned by the federal trustees.

The settlement also includes a number of releases and covenants by the parties not to bring certain claims. Exxon has agreed not to sue the United States for any claims arising from the spill. The United States and Alaska have agreed not to sue Alyeska Pipeline Service Company for natural resource damages, because the settlement satisfies all of those claims and because Alyeska could seek to recover any liability to the United States for such damage from Exxon. This covenant reasonably protects Exxon from having to pay twice, in effect, for the same claims. In turn, Exxon has agreed to indemnify Alaska and the United States for any claims Alyeska might assert against the two governments. The United States has preserved all other claims against Alyeska, including potential claims for civil penalties, that do not involve natural resource damages.

Apart from the civil settlement, the two corporate defendants -- and here I mean Exxon Corporation and Exxon Shipping -- have agreed to plead guilty to four serious criminal charges arising from the spill. Exxon shipping will plead guilty to three counts under the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act, and Exxon Corporation will plead guilty to one count under the Migratory Bird Treaty Act. Exxon

will pay a \$100 million fine, half of which will be remitted, and Exxon will pay of \$50 million as restitution to the State of Alaska for restoration of damaged natural resources.

These sums -- totalling a billion dollars -- represent the largest environmental liability settlements in history. Based on the survey of damage to natural resources undertaken by the natural resource trustees, this recovery should provide sufficient funds to undertake and complete the needed restoration program for the Sound. And Exxon will have to pay up to \$100 million more if future exposure discloses additional damage that cannot be discovered now. More importantly, these funds will be available to the trustees far sooner than would have been possible through protracted and complex litigation that would have taken years. More than seven years of intensive litigation have been necessary to recover for natural resource damage to New Bedford Harbor from PCB contamination. Restoration there is only now getting substantially underway; this case exemplifies the protected nature of litigating large natural resource damage cases.

Standing alone, the criminal fine against Exxon will be the largest ever paid for an environmental crime. This meets our objective of securing a fine that is commensurate with the seriousness of the underlying offenses. When Exxon's past cleanup costs are taken into account, the spill will have cost Exxon considerably more than \$3 billion.

Finally, the committee should know that the agreement with Exxon fully meets our objective of having this be a public settlement, one that affords an opportunity for public comment and participation. For the federal government, public participation has been a paramount concern throughout the process of litigation and restoration planning. The civil settlement is conditioned on court approval following a public comment period. Let me emphasize that this step was not required by law; the concerned federal agencies and the State of Alaska have insisted that the settlement be incorporated into a consent decree that will be subject to a thirty day public comment period in federal court. Judge Holland, who oversees our criminal case against Exxon, is following a similar procedure with respect to the plea agreement. The court has set April 24th as the date it will render its judgment on whether to accept the plea agreement. If the court accepts the plea, sentencing will proceed on the 24th.

The United States and the State will have the right to withdraw from the agreement if the public comment period shows that the settlement is inappropriate or inadequate. The State of Alaska also may withdraw if the Alaska legislature disapproves of the agreement. Exxon does not have a comparable right of withdrawal based on public comment or other information, but may withdraw if the court modifies the agreement.

We have provided the court, the legislature, and the Congressional Subcommittees overseeing the settlement with information concerning natural resource damage and restoration

costs that should remove any doubt that the settlement meets the objectives that I previously set forth. But there remains the possibility that both the state and federal governments might return to full-scale criminal and civil prosecution of their claims against Exxon if the settlement ultimately is rejected by the court or one of the parties. Both the Justice Department and the trustees, therefore, are constrained not to present any information that might tip the government's hand concerning specific evidence it has against Exxon. After the decree is finalized and scientific studies have undergone peer review, disclosure of most of the resulting information will, of course, be possible.

Finally, I think it important for the committee to understand that despite the federal and state governments' success in meeting the federal government's objectives in this settlement, that success has not been achieved at the expense of any of the many other parties who may have lawsuits pending against Exxon. As the committee is aware, the spill has spawned an immense amount of litigation. Private plaintiffs ranging from environmental and Native American groups to commercial fishermen and cannery workers have filed suits for damages and/or injunctive relief.

To ensure that the settlement would not prejudice those claims, the settlement specifically provides that it is not intended to affect legally the claims of third parties against Exxon. Paragraph 13 of the proposed consent decree has even more

explicit protection for Alaska Native villages to recover natural resource damages, as well as protection for those who hold any property interest affected by the spill.

Administering Settlement Monies

The objectives of thorough natural resource restoration and public participation have been protected not only by the Agreement with Exxon but also in the Agreement between the federal government and the State of Alaska that will govern use of the settlement monies. Under the Agreement, expenditures for restoration must be approved unanimously, and must be for natural resource restoration and enhancement. The Agreement specifically provides that its governance structure, which will be further developed by the trustees, must incorporate procedures for meaningful public participation. Of course the trustees already have been true to this spirit of public involvement by submitting their initial restoration plan for public comment; the plan was published in the Federal Register on March 1, 1991. The trustees remain committed to sustaining public participation in the restoration planning process.

I would be happy to answer any questions you may have.

HOUSE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

EXCERPT FROM APRIL 16, 1991 TESTIMONY OF RICHARD STEWART, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Gruenberg: Any comment about Congressman Miller's letter?

Stewart: First of all, it contains a fundamental legal error asserting that there would be a prosecution available under the CWA. These reports on the contingency plans were not required to be filed under the CWA. In fact, there is a very substantial legal question whether any jurisdiction to assert a false reporting claim under the general false reporting claims of title 18 of the code with respect to the spill here because the report was to be filed under the lease agreement with the BLM and the contingency plan went with respect to spills out of the sound, not the spills on federal land. So, there is a real legal issue of whether there is a proper basis for federal prosecution under law and there are other substantial litigation risks in the case about whether any falsehood was knowing....(indecipherable).

I would say that the evidence before Congressman Miller did not really address those problems and I find it rather surprising that a responsible official felt this was important information material to the criminal case -- why this wasn't disclosed to us before. We never heard this information.

Gruenberg: Before passing on to this second letter, is it your testimony that you are not certain that there was, assuming the allegations made in that letter were true -- is it your testimony that there is significant question in your mind whether there is federal law that would make that criminal?

Stewart: yes.

Gruenberg: Have you brought that to the attention of Congress and sought curative legislation?

Stewart: No

Gruenberg: Is it your intent to do so.

Stewart: I want to investigate the facts more closely.

Gruenberg: From a legislative point of view, it's less important whether these particular facts were true than that if the hypothetical -- which certainly could occur -- not in Alaska in 1989, then in other places at other points in time. If that is in fact not criminal, ought it not to be?

Stewart: I think it is a substantial question we will pursue.

NOAA

**TESTIMONY
OF
MR. THOMAS A. CAMPBELL
GENERAL COUNSEL
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE
HOUSE COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT**

APRIL 16, 1991

Mr. Chairman and Members of the Subcommittees:

I appreciate the opportunity to participate in this oversight hearing concerning the Exxon VALDEZ settlement. My name is Tom Campbell, and I am the General Counsel of the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. NOAA is the lead Federal trustee for the Exxon VALDEZ damage assessment, and I am here today on behalf of the other Federal trustees - the Department of the Interior and the Department of Agriculture and on behalf of the EPA who is coordinating the federal side of the restoration effort.

Under the Clean Water Act, NOAA, the Department of the Interior and the Department of Agriculture act as stewards for the Nation's natural resources. An equal grant of authority was granted Alaska for state resources. The spill of 11 million gallons of oil into the pristine environment of the Prince William Sound on a dark night in March 1989, brought our respective trust responsibilities into sharp focus. For the past year and 11 months, Federal and State trustees have done everything in their power to assess injuries to natural resources and determine the economic damage done to the Sound and other areas of Alaska, and to

prepare to present our claim in court.

NOAA first became involved in assessing injuries to marine resources and their habitats with the grounding of the Amoco CADIZ which occurred in 1978. In that case the vessel split in two, spilling 68 million gallons of crude oil on the coast of Brittany, France. Claims arising from this environmental disaster have been in litigation for 13 years. On July 24, 1990, a Federal judge in Chicago order Amoco to pay \$105 million in damages to the French Government. Amoco has appealed, and the litigation process continues.

Litigation is wasteful and protracted. Litigation is like war and litigation like war should be avoided if reasonably possible. Litigation also represents failure -- failure of one party to properly assess his position in a conflict.

In the fall of 1990, NOAA was made the lead Federal trustee on the Exxon VALDEZ spill. Under the leadership of Administrator Knauss we have tried to act as the "honest broker." Our first responsibility was to fully assess the natural resource injuries and prepare for possible litigation. Our second responsibility was to explore the possibility of an equitable out of court settlement.

It is the Federal trustees' belief that the settlement achieved with Exxon represents a fulfillment of our stewardship responsibility. It provides us with money this year to do necessary restoration instead of 5 to 10 years from now.

As the trustees weighed the benefits of settling with Exxon and grappled with the proper range of negotiating values, we

considered a myriad of factors such as the extent of the injury demonstrated thus far, the likelihood of translating those injuries into provable damages, the value of beginning restoration now rather than 5 - 10 years later, and the estimated cost of restoration. The settlement that was announced last month falls well within the range of values estimated by the trustees.

Finally, let us not lose sight of the fact that this represents the largest environmental settlement in the world -- one billion dollars -- ten times that recovered in Amoco CADIZ, a spill that was six times larger. It is a very good deal for Prince William Sound, and it is an outstanding deal for the United States and Alaska. The State of Alaska and the Federal trustees have exercised their trusteeship responsibly and with considerable imagination in bringing these complicated negotiations to fruition.

Mr. Chairman, this concludes my testimony. I would be pleased to answer any questions concerning the settlement.

DEPT.
OF
LAW

CHARLES E. COLE
ATTORNEY GENERAL
STATE OF ALASKA

March 12, 1991

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

Dear Mr. Raymond:

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

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

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

Sincerely,

4-16-91 5:41

Charles Cole
Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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

June 21, 1989

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

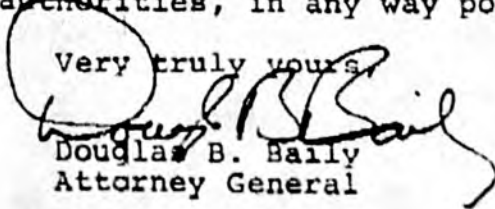
Dear Mr. DiMonaco:

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

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

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

Very truly yours,


Douglas B. Bailly
Attorney General

cc: Mark Davis, Acting U.S. Attorney

PUBLIC
TESTIMONY

The New York Times

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Now, Save Prince William Sound

Exxon's \$1 billion settlement of state and Federal claims stemming from the calamitous Exxon Valdez oil spill is clearly preferable to a long and chancy trial that might have yielded a smaller penalty. But the real test will be whether the money is spent wisely.

The six Federal and state agencies controlling the funds will inevitably lodge competing claims. These claims must not be allowed to shortchange the main victim of one of the worst environmental disasters in American history: Prince William Sound.

Under the settlement, Exxon and a shipping subsidiary will plead guilty to four Federal criminal charges, pay an immediate criminal fine of \$100 million and an additional \$900 million over 10 years to settle civil claims brought by the Federal Government and the state of Alaska.

The agreement wisely includes a "reopener" clause, obligating Exxon to pay an extra \$100 million if damages turn out to be greater than presently anticipated. And while the settlement relieves Exxon of Federal and state liabilities, the company still faces 300 smaller suits brought by fishermen, food processors and other individuals and businesses.

The settlement isn't perfect. The Justice Department might also have pressured Exxon to fork over the entire \$1 billion immediately. True, Exxon has already paid a stiff price for its carelessness — \$2 billion so far in cleanup costs. It's also true, as Justice argues, that the additional \$1 billion can't be spent right away. But that's disingenuous. A one-time payment would begin earning interest immediately; the same amount spread over 10 years will lose value through inflation.

A further question is why Justice chose not to

sue Alyeska, the pipeline consortium composed of Exxon and other companies with drilling interests on the North Slope. Alyeska, which had piously assured the public that it could handle any emergency, thoroughly bungled the Valdez spill. One theory is that the Justice Department feared that Alyeska would countersue the Coast Guard, which also performed miserably. As one Congressman put it: "For Alyeska and the Coast Guard, this agreement may be more shield than sword."

The agreement is unlikely to be changed, so the task now is to make sure it does the most good. Six different agencies — three Federal, three Alaskan — will collaborate in administering the funds. The agreement calls vaguely for the "restoration, rehabilitation or replacement of natural resources" or the acquisition of "equivalent resources." Those words could mean almost anything, from cleaning beaches to land acquisition for wildlife refuges to building recreational parks to encourage tourism.

There will be many good ideas and hard choices. But the first beneficiary of the money should be the sound itself. Eleven million gallons of oil did not, as some feared, turn Prince William into a dead sea. The beaches are now much cleaner and there have been predictions, challenged by some environmentalists, that salmon runs will reach record proportions this year.

But coastal wetlands have suffered grievously, as have colonies of sea birds and the bald eagles, shellfish and other species vital to the food chain and the local economy. Despite the sound's hardy resilience, there's no guarantee that the ecosystem will recover on its own. Exxon devastated that ecosystem; Exxon's money ought to be targeted first and foremost at speeding its renewal.

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Anger greets reported pact on spill fund

Critics: Plan easy on Exxon

By BRIAN S. AKRE
The Associated Press

JUNEAU — Environmentalists, fishermen, lawmakers and other Alaskans reacted with outrage Thursday to published reports that the state may let Exxon Corp. take 10 years to pay a proposed \$1 billion settlement of the Exxon Valdez oil-spill litigation.

The Boston Globe, quoting unnamed sources, said the oil giant's settlement would be tax-deductible. Exxon initially would pay the state \$200 million, followed by payments of \$160 million the second year and \$80 million a year for eight years.

The money would go into a fund that would be used to restore Prince William Sound, the waterway polluted in the nation's largest oil spill.

Harry Gamble, a spokesman for Gov. Walter Hickel, declined to comment on the reports. Exxon and federal officials also declined to comment.

Critics say the installment plan, because of inflation, would net the state far less money in real terms than the \$1 billion reportedly being sought by Hickel.

The installment plan to-



■ **NO DEAL:** Cook Inlet oil companies and a local citizens council failed Thursday to meet a congressional deadline for an agreement on oil-spill planning. E-2

tally shortchanges Alaskans," said Riki Ott, a commercial fisherman and leader of the Oil Reform Alliance, a group formed after the spill to lobby for changes in oil industry practices.

"In real terms it's about half of Hickel's proposed \$1 billion settlement. And we don't even know what we're settling on."

State Rep. Cliff Davidson, D-Kodiak, agreed.

"If you look at the bottom line for that company over this past year, it seems like they could afford a little more," he said.

The proposed tax deduction for Exxon was equally unpopular.

"Exxon was the polluter.

Please see Page E-3, SPILL.

UW has been watched over and analyzed by special-edu- down towns on the sea with him. But the second day, he

SPILL: Anger greets pact

Continued from Page E-1

If they're allowed to deduct their expenses from their immense profits, it doesn't really come out of their hide," said Mike Wenig, an attorney for Trustees for Alaska, an environmental law firm.

Alaska Attorney General Charlie Cole left Washington on Thursday after negotiating with Exxon and federal officials. He was to arrive today in Juneau to brief Hickel and state lawmakers.

Hickel said Wednesday that he expected a settlement within a week. He said details will not be released until he signs the pact.

The governor last month proposed settling the lawsuits and the criminal case for about \$1.2 billion. Much of the money would be used to buy private timberlands that would be part of a marine conservation area in the sound.

The tanker Exxon Valdez spilled nearly 11 million gallons of North Slope crude oil into the sound when it ran aground on March 24, 1989.

The state sued Exxon for unspecified civil damages resulting from the spill. The federal government is prosecuting Exxon on criminal charges, with trial set for April 10 in Anchorage.

Most of the criticism of the settlement talks in Alas-

ka has focused on Hickel.

Ott accused Hickel of rushing to get the litigation settled so he can focus Alaska's attention on several major development projects, including proposed oil drilling in the Arctic National Wildlife Refuge and construction of an \$11 billion natural gas pipeline across the state.

State legislators complained that they were being kept in the dark about the negotiations.

Davidson said he is learning more about the talks from Eastern newspapers than he is from the governor's office.

"I just wonder, are we doing everything we can do to protect the people's interests here?"

Rep. Max Gruenberg, D-Anchorage and vice-chairman of the House Judiciary Committee, unveiled a bill Thursday that would require legislative approval of any spill settlement.

A group of Native leaders who represent villages affected by the spill issued a news release condemning the closed-door talks.

Robert Kvasnikoff, chairman of English Bay Corp., a Native village corporation, said the villages "were victims of Exxon's oil. We won't be victims of Exxon's secret deal. We won't be sold out by the government."

en get class-action voice in court

3 of 6

Exxon reportedly gets years to pay damages

By William P. Coughlin
GLOBE STAFF

The \$1 billion Exxon Valdez oil spill settlement being completed by Exxon Corp., the federal government and Alaska calls for payment over a period of years and the payments will be tax deductible, sources said yesterday.

Because the payments to a Prince William Sound Restoration Fund will be spread out, the present dollar value of the \$1 billion is only \$550 million, the sources said.

The settlement reportedly will also let the oil company deduct costs of all future cleanup from the fund.

Some \$160 million will be deducted from the fund to reimburse federal and state agencies for cleanup costs already incurred.

It also was revealed that the agreement gives Exxon a voice on any panel set up to decide how and where its restoration funds will be spent in Prince William Sound.

In Congress, US Rep. George Miller, a California Democrat and vice chairman of the Interior Affairs Committee, has demanded a "full briefing" from Attorney General Dick Thornburgh, one of the negotiators, before any settlement is made public.

In Alaska, critics condemned the reported settlement, focusing on Gov. Walter Hickel.

Rick Ott, a toxicologist who heads Alaska's Oil Reform Alliance, said: "It's apparent this state did not elect a governor. We elected instead another lobbyist for the oil industry... People are not with him. A settlement like this sells Alaska short."

Michael Wenig of Trustees for Alaska, an environmental law firm, said: "If it is true that they can write this off, it is a total outrage. If the amount of money is such that after you pay for existing bills for damage assessment up to now, and whatever cleanup still needs to be done, and after all that, there is nothing left for restoration, then it is a total tragedy."

Wally Hickel deserves a lot of blame for this."

A spokesman for Hickel said the governor would not comment on the reported deal.

The Exxon payments to the fund would be made in installments: \$200 million the first year, \$160 million the second and \$80 million for the last eight years.

Because it will pay in installments, "Exxon gets to keep most of its money, on which it will accrue interest," one source said. "It's like a company paying a worker only \$10,000 of a \$30,000 salary, then promising X amount-per-year after that."

At Exxon USA headquarters in Texas, spokesman Les Rogers, speaking for vice president C.M. Harrison who has been involved in negotiations, said: "Our instruction is we have no comment to anyone about anything."

In Washington, a Justice Department spokeswoman, Amy Casner, said: "Nothing has changed... We are pressing for an April 10 trial." Exxon was indicted on five criminal charges last winter. The trial is scheduled for April.

Asked if Attorney General Charles Cole of Alaska met yesterday with Thornburgh, Casner said: "I've no response to that."

Neither Cole nor Harrison returned telephone calls yesterday.

Rep. Miller said he is concerned that the Alaskan fishing industry and mayors "may have been excluded" from negotiations, and "the settlement may prejudice their ability to get fair compensation."

He also said his committee will probe charges that Exxon is dumping hazardous waste into the ballast water of ships.

These allegations were made in a letter delivered Tuesday to Thornburgh and William Reilly, administrator of the Environmental Protection Agency, by a shipping broker based in Alexandria, Va., Charles Hamel.

*Boston
Globe
2/14/91*

Lawmakers fault Hickel's negotiating

Exxon deal worth only half
of sum sought, report claims

■ Fishermen, coastal towns grow wary as bigger
players near settlements in Exxon oil spill fight A9

■ Coastal Native villages condemn Hickel spill
negotiations, threaten to block deal A9

By DAVID FUTCH

TIMES WRITER

JUNEAU — Legislators, left out of negotiations to settle Exxon oil spill lawsuits, are heating up their criticism of the governor for not telling them the details of settlement talks.

The Boston Globe and Wall Street Journal quoted unnamed sources citing details of settlement terms this week that legislators have been unable to pry from Gov. Walter J. Hickel and state Attorney General Charles Cole.

Both officials have refused to discuss details of the talks.

"Frankly it makes me angry to see that we learn far more information from the Boston Globe and the Wall Street Journal than we have been able to learn in Alaska," said Sen. Arliss Sturgulewski, R-Anchorage.

Hickel originally proposed that Exxon pay \$1.2 billion to settle state and federal government lawsuits stemming from the March 1989 spill from the Exxon Valdez tanker in Prince William Sound.

But the Journal report published Thursday placed the value of the settlement at less than \$1 billion because Exxon would pay out the money over a period of time rather than in one lump sum.

The newspapers reported payments would span a decade with a \$500 million payment up front to set up a fund to restore the Sound.

The Globe said the payments would be tax deductible, with the initial payment followed by \$180 million the second year and \$80 million a year for eight years.

The \$180 million would cover costs incurred by the state and federal government because of the spill, the Journal story said.

Money would be allocated by three federal trustees and one state trustee, the Journal said. Exxon and federal officials would not comment on the reports.

Critics say the installment plan, because of inflation, would net the state far less money in real terms than the \$1 billion reportedly being sought by Hickel.

"In real terms it's about half of Hickel's proposed \$1 billion settlement. And we don't even know what we're settling on," said Rikl Ott, a com-

See Reports, page A9



Hickel



Sturgulewski

Reports

Continued from page A1

mercial fisherman and leader of the Oil Reform Alliance, a group formed after the spill to lobby for changes in oil industry practices.

Hickel would not discuss specifics of the settlement Thursday, but denied legislators were being left out of talks taking place in Washington, D.C., where Cole is meeting with federal officials.

"They (legislators) are not being left in the dark," Hickel said. "We're doing the best thing we can. We're trying to solve a very difficult problem."

Hickel has proposed settling state civil and federal criminal lawsuits against Exxon for \$1.2 billion. Much of the money would buy private timber area in Prince William Sound and establish a conservation area and marine park there.

At least one lawmaker, Rep. Cliff Davidson, D-Kodiak, said he felt like "a legislative mushroom," in the dark without a clue about the latest direction of settlement talks.

"Nobody knows what's going on. None of us," Davidson said. "If the governor is feeling good about this settlement, I wish he would tell us why because we (legislators) have spent the last two years on this thing and here's a lot of pain."

"I've had my eyes open all along and I haven't seen a piece of information that I can go to the bank of my constituency and say we're being taken care of."

Rep. Max Gruenberg, D-Anchorage, made a move Thursday to bring the process into the pen.

At a House Judiciary Committee meeting Thursday, Gruenberg offered a bill requiring any settlement proposal be given to

the Legislature for review.

The bill would allow lawmakers to prevent a settlement if they decide it is not in the public's best interest.

The bill gives the Legislature opportunity to review a proposed settlement for 60 days.

If necessary, a special session could be called to further study a settlement proposal. Details of a settlement would become public, the bill says.

"I don't want to comment on the settlement until I've seen it," Gruenberg said. "My mind is open."

Gruenberg and the House Judiciary Committee are scheduled to hold a meeting with the attorney general today to discuss the settlement.

Sen. Sturgulewski said Thursday that besides legislators, the people most affected by the spill, including residents and fishermen who live and work near the Sound, have been left out of negotiations.

Sen. Pat Pourchot, D-Anchorage, said there is an inherent danger involved with having only three or four people involved in the negotiations.

The result could be someone forgetting certain aspects that should be included in the final deal, Pourchot said.

"They are not going to bring a full range of views in and structure a deal trying to accommodate all these people," Pourchot said.

Hickel's acting press secretary Harry Gamble said the governor has offered to talk with key legislators at their convenience.

There is a caveat. Gamble said he has no idea how much detail Hickel can give to legislators.

"If we negotiate this in the press or bring in other groups we're likely to be in court for eight or 10 years," Gamble said.

This report includes material from the Associated Press.

informed in the future.

April 10 in Anchorage.

Most of the criticism of the settlement talks in Alaska

won't be victims of Exxon's secret deal. We won't be sold out by the government."

LAWSUITS: Natives, fishermen get class-action voice in court

Continued from Page E-1

fore filing suits in federal court.

Holland has ruled that only people who can show actual physical damage from the 11 million-gallon spill by the tanker Exxon Valdez can sue the oil company. Shortell's decision allows anyone owning a business or proper-

ty affected by the March 1989 spill to sue.

The different approaches taken by the judges suggests that much of the spill litigation may be concentrated in state court.

Attorney Lloyd Miller, who represents the class of Alaska Natives hurt by the spill as well as serving as liaison counsel for all the

plaintiffs, said Shortell's decision also may promote settlement talks.

"It means Exxon and Alyeska and the other defendants must face the full impact of the oil spill by meeting in court all the injured parties, all the Alaska Natives, all the fishermen, not merely those who hire a lawyer and file a lawsuit,"

Miller said.

"It's a tremendous victory and should be a sobering decision (for Exxon)," he said.

"It should encourage, by all logic, settlement negotiations between the parties, because the defendants can be sure they are negotiating with everybody who was injured by the spill."

DENALI NATIONAL PARK AND PRESERVE

A task force of top National Park Service managers will hold meetings next month to gather public opinion concerning access into the Kantishna area of Denali National Park and Preserve. The meetings will focus on three topics:

- The safety and adequacy of the existing park road.
- The current law regarding access rights along the road.
- The feasibility and desirability of alternative access to Kantishna, a large area of privately held mining claims at the west end of the park road.

Members of the task force include Jim Parham, NPS executive assistant to the director; Bob Barbee, superintendent, Yellowstone National Park; Don Castleberry, NPS Midwest regional director; Boyd Eison, NPS Alaska regional director; Paul Heertel, NPS Alaska associate regional director for resource services; Jim Straughen, transportation engineer for the NPS Denver Service Center; and Russ Berry, superintendent of Denali.

The task force is an outgrowth of a fall, 1990, meeting between NPS Director James Fidenour and members of the Alaska Congressional delegation. The group will visit the park again this summer to see the operation of the road and review alternative access routes. By fall, the task force will report their findings to the director of the National Park Service.

After meeting with state of Alaska officials on February 19 in Juneau, the task force will hold the following public meetings:

February 20	Anchorage	6 p.m.	Anchorage Museum of History and Art
February 21	Fairbanks	6 p.m.	Noel Wien Library auditorium
February 22	Healy	5 p.m.	Tri-Valley Community Center



ATTENTION:

Important Public Meeting!

Public Input Needed on Education Questionnaire

A public meeting will be held for the WISE Project "Winning With Stronger Education", on:

Friday, February 15th - 6:30 to 8:30 p.m.
at UAA Consortium Library Building, Room 118

The purpose of the meeting is to solicit public input on a questionnaire that will be mailed this month to 1,000 Anchorage families asking their opinion on a wide-range of education issues. Anyone interested in education is encouraged to attend and express their ideas about what kind of questions should be included in the questionnaire.

This is your chance to have a say on the education of your children. For further information please call Cracian & Associates at 279-3882. For information on the WISE Project, please call Robert Galtstein at 279-3557.

**We're getting smart
about Education!**



Alaskans fear 'sellout' in oil spill settlement

By William P. Coughlin
GLOBE STAFF

Opposition to Alaska's reported settlement with the Exxon Corp. for the Exxon Valdez oil spill continued yesterday, with a growing number of lawmakers and native Alaskans expressing fears that the deal may be what some called a "sellout."

Meanwhile, there were signs that the negotiations were not going entirely smoothly.

Gov. Walter Hickel is scheduled to join the state's key negotiator, Attorney General Charles Cole, tomorrow in Washington to sign the settlement, sources said. But, "things may have started to go sideways. Cole has been recalled to brief the governor ... everyone is surprised Cole's being called back," a source said.

"The meeting where things started to go sour was with NOAA," the source said, referring to the National Oceanic and Atmospheric Administration. He indicated that the federal agency had unresolved environmental concerns about the deal.

Alaska has been completing what is reported to be a \$1 billion settlement to be paid by Exxon in installments over 11 years, and from which the company can deduct millions in cleanup costs already spent. Sources say that the \$1 billion deal amounts to about \$550 million in real dollars over the years.

Hickel, a former Interior secretary, told The Alaska Daily News this week that "it's a

good settlement." However, he declined to reveal details "until after the signing."

The secrecy is worrying Alaskans, whose shores were fouled by the largest spill in American waters. It also has stirred the Legislature, whose members are angered by Hickel's lack of consultation with them.

Rep. Cliff Davidson of Kodiak, chairman of the House Resources Committee, whose native island 1,000 miles from the Valdez spill was damaged, said, "This is going down without the Legislature knowing anything."

"There was total cancellation of livelihoods on my island, and while some have been compensated, a lot of people have fallen through the cracks," he said.

Davidson also said that Alaskans "have not yet completed assessment of damages. ... I wouldn't say the governor is selling us short, but is he getting enough for those hurt and to restore the damage?"

Leaders at the Chenega, English Bay and Point Graham native villages said they will try to block the pact "if we are sold out."

Some village shores are still covered by oil "up to 8 feet thick," said Charles Totemoff of Chenega Corp. "This deal involves our lives and lands, but no one has talked to us. They can't do this deal without us."

Robert Kvassnoff, chairman of English Bay Corp. at Kona Fjord National Park, said, "We were victims of Exxon's oil; we won't be victims of Exxon's secret deal; we won't be sold out by the government."

Access drug

and had lower blood
ould have caused them
AZT.

released yesterday
ZT is often based on
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by researchers at
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J. Wachtel and Dr.
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as published in
al Medicine.

IAL HOLIDAY HOURS SAT. 9-9, SUN. 10-7, MON. 9-9



The New York Times

DATE: 3/13/91

PAGE: A1

\$1.1 Billion Settlement by Exxon Is Said to Include Criminal Fine

Payments Would End Big Claims in Valdez Spill

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, March 12 — The Exxon Corporation is prepared to pay a \$100 million criminal penalty as part of a \$1.1 billion payment over the next 10 years to settle civil and criminal cases arising from North America's largest oil spill, Alaskan and Federal authorities said today.

Federal and state officials have agreed to the arrangement. Although a Federal District Court judge at first seemed to raise another hurdle today when he said he would review the settlement to insure that the rights of 5,000 Alaskan villagers were protected, a state official said early this evening that the final obstacles to a settlement appeared to have been overcome.

Effects Would be Studied

Under the proposed agreement, Exxon would pay \$100 million immediately to settle criminal charges brought by the Department of Justice. That would be one of the largest, if not the largest, criminal fine ever paid for pollution. A trial on the charges had been scheduled for April 10 in District Court in Alaska.

The villagers had filed suit last week, asserting that they had been locked out of negotiations between Exxon, the State of Alaska and the Federal Government. The villagers said they feared that a settlement would prevent them from recovering financial damages caused by the Exxon Valdez oil spill on March 24, 1989.

The proposed settlement, which has

been under negotiations for months, would not end Exxon's legal troubles in Alaska. At last count, 330 separate suits were pending against the company. But the settlement would end the major suits, brought by the State of Alaska and the United States.

In addition, the company would pay \$80 million this year into a fund administered by three Federal agencies and three state agencies. The money would be used for scientific studies of the Prince William Sound region, which suffered great damage, and for projects to continue scrubbing the shoreline of oil left when nearly 11 million gallons spilled from the hull of the

Exxon Valdez after the tanker ran aground in the sound. The tanker's skipper, Capt. Joseph J. Hazelwood, was convicted in April 1990 of the relatively minor charge of negligently discharging oil but acquitted of piloting the vessel while drunk and other charges.

The agreement also called for payments into the fund of \$150 million in September 1992, \$100 million in September 1993, and \$70 million annually from 1994 until 2001. The proposed settlement also calls for Exxon to contribute \$100 million more to the fund if additional damage from the oil spill is discovered.

Economists noted that Exxon would be able to claim tax deductions for every payment except for the \$100 million criminal penalty, to be paid this year.

The agreement would not affect some 300 other lawsuits filed by environmentalists, fishermen and Aleuts asking Exxon to pay for damages these groups say they suffered after the spill.

The proposed settlement was applauded by Gov. Walter J. Hickel of Alaska but strongly criticized by environmental groups and some state officials who said, essentially, that Exxon would be paying too cheap a price in settling the case.

Bottom of the Pockets?

"It seems like a good deal for Exxon," said Eric Jorgenson, a lawyer for the Sierra Club Legal Defense Fund in Juneau, which has a separate suit pending against the company in the aftermath of the spill.

But Governor Hickel said: "I am very happy with the settlement. It allows us to get to the bottom of Exxon's pockets."

Lance Lambertson, a spokesman for Exxon in Irving, Tex., declined today to say whether Exxon would sign the agreement and said the company would make no comment about the situation for the time being.

"If and when things break and we have come together for a proposal to be signed, there will be extensive notification," said Mr. Lambertson.

The settlement contains provisions to make public a wealth of scientific studies conducted after the spill by the Department of the Interior, the Environmental Protection Agency and other Federal agencies. But studies sponsored by the State of Alaska and the United States Coast Guard are to remain private pending the outcome of court cases brought against the state and the Coast Guard.

"Keeping the data secret is a major problem," said Mr. Jorgenson. "All of the data available from the spill should be released. The public paid for it. It's public information."

Although the terms would make the settlement the most expensive ever for damages caused by an environmental disaster, the pact is certain to raise a stir in Alaska and in Washington. The negotiators will open the pact to public comment for 30 days after it is signed. Officials with the state and two Federal agencies said the pact could be altered as a result.

Economists who have studied the spill for the state and Federal governments said today that the \$1.1 billion settlement represents only a portion of the actual value of the damage to fisheries, water, wildlife and land. The economists said the Exxon Valdez disaster will have caused \$2.5 billion to \$5 billion in damages from the time of the



The New York Times
The spill near Valdez fouled much of the Gulf of Alaska.

To some, an offer
to end the Exxon
Valdez affair is
too low.

spill before midnight on March 24, 1989, through 1994.

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Several state officials who asked not to be identified today said they had hoped that Exxon would be required to pay \$1 billion in a one-time payment that could generate permanent income through annual interest payments. Thus, the annual payments, spread out over 10 years, are much less valuable to the state's efforts to clean up and study the effects of the spill.

Senator Frank Murkowski, a Republican from Alaska, said today that Alaska was fortunate to have gained a settlement. The alternative was years

of litigation that would have cost Alaska millions of dollars in legal fees without any assurances of success.

"I think this agreement, if it is resolved, is going to have to stand the light of day by the Legislature, the Governor and Exxon shareholders," said Senator Murkowski. "The alternative is litigation. I certainly am inclined to think a bird in the hand is worth two in the bush. The cost of litigation would be very substantial."

The settlement also calls for an advisory group made up of members of the public to help oversee how money from the settlement is spent. The Department of Justice scheduled a news conference for Wednesday to explain provisions in the settlement.

The last obstacles to the settlement were crossed this afternoon when Judge Stanley Sporkin lifted an order here that prevented the pact from being signed, and a District Judge from Alaska, H. Russell Holland, approved the agreement. Judge Holland was to have presided over the criminal trial next month.

Last week, Judge Sporkin blocked the settlement from being signed until the state and Federal Government assured more than 5,000 Alaskan native villagers that their right to gain financial damages from Exxon would not be harmed by the pact.

Today, Judge Sporkin said he was satisfied that the rights of the native villagers to fully prosecute their suits had not been harmed by any settlement between Exxon, Alaska and the Federal Government and lifted his injunction. But in an order he signed this afternoon, Judge Sporkin said he would review the settlement after it is signed to make sure the rights of the villages are ensured.

"The court shall retain jurisdiction over this matter to ensure that the defendants' representations are carried out so the plaintiffs' rights are protected," Judge Sporkin wrote in the order.

The Washington Post

DATE: 3/13/91

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Exxon Settles Spill For \$1.1 Billion

\$100 Million in Pact for Criminal Fine

By Michael Weiskopf
Washington Post Staff Writer

Exxon Corp. agreed early today to acknowledge criminal responsibility and pay a \$100 million fine as part of a \$1.1 billion agreement with the federal and Alaskan governments to settle civil and criminal charges stemming from the nation's worst oil tanker spill, according to informed sources.

The settlement, by far the largest for environmental damage in the United States, apparently dealt with one of five federal criminal charges filed against the company and its shipping subsidiary, the sources said. Exxon faced two felony and three misdemeanor charges related to the spill.

Trial on the criminal charges was to begin April 10 in U.S. District Court in Anchorage.

Half of the criminal fine and most of the \$1 billion in civil damages to be paid over 10 years would be used to restore the fragile Alaskan shoreline after the ecological havoc caused when the tanker Exxon Valdez ran aground on a marked reef March 24, 1989. Nearly 11 million gallons of crude oil gushed into Prince William Sound, eventually spreading for miles.

Under the settlement signed here, Exxon is obligated to pay another \$100 million if significant environmental problems can be traced to the spill after the 10-year payment period.

Negotiators reached basic terms of the settlement days ago, but U.S. District Court Judge Stanley Sporkin barred final agreement until he heard arguments here Monday by five native Alaskan villages seeking to protect their rights to pursue damages separate from the government agreement.

Yesterday, Sporkin lifted his ban after warning government lawyers not to trample on the villagers' legal rights.

The settlement was signed shortly after midnight at the Justice Department, and details of the agreement are expected to be released at a news conference here today. Spokesmen for the Justice Department and Exxon declined to comment.

Walter J. Hickel (D), who took office as Alaska's governor last December and has been representing the state in negotiations here, said the settlement terms are "in the best interests" of Alaskans.

But environmentalists and some Alaskans criticized the agreement for failing to provide enough money and specifically target its use for environmental restoration. Actual distribution of Exxon's payment would be decided by a board of trustees that is to include representatives of the federal and state governments.

"The worry is that the state of Alaska is going to stretch the definition of restoration and spend the money for marinas and roads," said Doug Wolf, counsel for Alaskan issues at the National Wildlife Federation.

Michael Hausfeld, an attorney who represented the native Alaskan villages in the hearing before Sporkin, said the two governments should have held out for an "open-ended" settlement in which Exxon agreed to pay whatever is necessary to restore ecological damage related to the spill.

Exxon has spent \$2 billion on the cleanup, leaving shorelines almost free of oil. The huge Alaskan fishing industry, badly dislocated by the spill, gradually is returning to normal.

But authorities have barely begun to calculate damage to wildlife as scientific studies continue to find new evidence of long-term damage to certain varieties of sea birds, salmon, trout and other marine life.

According to confidential documents, federal scientists have concluded that some colonies of diving birds have suffered "total failure" to reproduce as result of the spill, while some species of marine life were so affected that they "may not respond" to revival efforts for decades.

Known as the greatest man-made wildlife disaster in the nation's history, the spill resulted in the deaths of more than 36,000 waterfowl, at least 1,016 sea otters and 144 bald eagles along with many other animals.

A federal grand jury in Anchorage indicted Exxon and its subsidiary, Exxon Shipping Co., a year ago after the corporation rejected a plea bargain proposed by the Justice Department. The two felony counts accused Exxon of failing to man its ships with a competent captain and physically and mentally capable crew members.

Joseph J. Hazelwood, the Exxon Valdez captain who witnesses said was drinking ashore before the early morning grounding, left the ship's bridge shortly before it hit the reef and left in command a third mate who lacked Coast Guard certification.

Hazelwood was acquitted last March on state charges of criminal

misconduct, reckless endangerment and piloting a vessel while intoxicated. He was convicted of negligent discharge of oil and sentenced to perform 1,000 hours of community service and pay \$50,000 in partial restitution for spill damage.

Under terms of the agreement, Exxon is to pay \$190 million, including the fine, immediately. Of the first installment, \$40 million is slated for continued evaluation of environmental damage and planning for restoration.

And, \$150 million to be released by October is intended to be used to return Prince William Sound to its pristine state before the spill.

Exxon also agreed to pay \$100 million in fiscal 1993 and \$660 million over the next eight years. It was not immediately known if that is earmarked for a specific purpose.

Cont'd

Although the agreement frees Exxon of further obligations to the state and federal governments, the company faces more than 300 lawsuits by Alaskan residents and business executives claiming large losses caused by the spill.

The Alaskan villages that filed suit here said they feared that the government was bartering away their right to pursue spill-related claims later.

But Sporkin assured lawyers for the villages that "the government, I think, understands that they cannot play fast and loose with your rights." If the settlement later compromises those rights, he said, "Hell hath no fury like a judge scorned. . . . It's not fair, it's not right and it's not American."

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"It seems like a good deal for Exxon," said Eric Jorgenson, a lawyer for the Sierra Club Legal Defense Fund in Juneau, which has a separate suit pending against the company in the aftermath of the spill.

But Governor Hickel said: "I am very happy with the settlement. It allows us to get to the bottom of Exxon's pockets."

Lance Lambertson, a spokesman for Exxon in Irving, Tex., declined today to say whether Exxon would sign the agreement and said the company would make no comment about the situation for the time being.

"If and when things break and we have come together for a proposal to be signed, there will be extensive notification," said Mr. Lambertson.

The settlement contains provisions to make public a wealth of scientific studies conducted after the spill by the Department of the Interior, the Environmental Protection Agency and other Federal agencies. But studies sponsored by the State of Alaska and the United States Coast Guard are to remain private pending the outcome of court cases brought against the state and the Coast Guard.

"Keeping the data secret is a major problem," said Mr. Jorgenson. "All of the data available from the spill should be released. The public paid for it. It's public information."

Although the terms would make the settlement the most expensive ever for damages caused by an environmental disaster, the pact is certain to raise a stir in Alaska and in Washington. The negotiators will open the pact to public comment for 30 days after it is signed. Officials with the state and two Federal agencies said the pact could be altered as a result.

Economists who have studied the spill for the state and Federal governments said today that the \$1.1 billion settlement represents only a portion of the actual value of the damage to fisheries, water, wildlife and land. The economists said the Exxon Valdez disaster will have caused \$2.5 billion to \$5 billion in damages from the time of the



The spill near Valdez fouled much of the Gulf of Alaska.

To some, an offer
to end the Exxon
Valdez affair is
too low.

spill before midnight on March 24, 1989, through 1994.

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Several state officials who asked not to be identified today said they had hoped that Exxon would be required to pay \$1 billion in a one-time payment that could generate permanent income through annual interest payments. Thus, the annual payments, spread out over 10 years, are much less valuable to the state's efforts to clean up and study the effects of the spill.

Senator Frank Murkowski, a Republican from Alaska, said today that Alaska was fortunate to have gained a settlement. The alternative was years

of litigation that would have cost Alaska millions of dollars in legal fees without any assurances of success.

"I think this agreement, if it is resolved, is going to have to stand the light of day by the Legislature, the Governor and Exxon shareholders," said Senator Murkowski. "The alternative is litigation. I certainly am inclined to think a bird in the hand is worth two in the bush. The cost of litigation would be very substantial."

The settlement also calls for an advisory group made up of members of the public to help oversee how money from the settlement is spent. The Department of Justice scheduled a news conference for Wednesday to explain provisions in the settlement.

The last obstacles to the settlement were crossed this afternoon when Judge Stanley Sporkin lifted an order here that prevented the pact from being signed, and a District Judge from Alaska, H. Russell Holland, approved the agreement. Judge Holland was to have presided over the criminal trial next month.

Last week, Judge Sporkin blocked the settlement from being signed until the state and Federal Government assured more than 5,000 Alaskan native villagers that their right to gain financial damages from Exxon would not be harmed by the pact.

Today, Judge Sporkin said he was satisfied that the rights of the native villagers to fully prosecute their suits had not been harmed by any settlement between Exxon, Alaska and the Federal Government and lifted his injunction. But in an order he signed this afternoon, Judge Sporkin said he would review the settlement after it is signed to make sure the rights of the villages are ensured.

"The court shall retain jurisdiction over this matter to ensure that the defendants' representations are carried out so the plaintiffs' rights are protected," Judge Sporkin wrote in the order.

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Government Ready to Sign Settlement Over Exxon Valdez Spill

Eds: UPDATES with settlement near; edits to conform throughout

By LAURIE ASSEO=

Associated Press Writers

WASHINGTON (AP) — The government and Exxon Corp. are poised to sign a \$1.1 billion settlement of claims over the Exxon Valdez oil spill that likely would include a guilty plea to at least one criminal charge, sources said Tuesday.

A source close to the talks said the settlement amount would be \$1.1 billion. However, the source also said Exxon was having some second thoughts about the settlement after a federal judge issued an order Tuesday intended to protect the rights of five Alaska Native villages.

A law enforcement source said Exxon had tentatively agreed to plead guilty to at least one criminal charge as part of the deal.

Exxon initially had refused, but Attorney General Dick Thornburgh insisted that any settlement include such a plea, the law enforcement source said. It was not clear whether the company would plead to a misdemeanor or a felony.

Justice Department sources said a settlement could be announced as early as Wednesday.

U.S. District Judge Stanley Sporkin on Tuesday lifted an order that had barred the federal and Alaska governments from signing a settlement with Exxon. In place of that order, the judge issued one intended to protect the rights of five Native villages to pursue their own damages against Exxon.

Alaska Gov. Walter J. Hickel's spokesman, Eric Rehmann, said, "The governor is extremely happy with the terms that have been reached at this point. The terms are in the best interests of the people of Alaska.

"The judge has given a green light," Rehmann added. "If the two parties agree based on the judge's order, it's a done deal."

State Attorney General Charles Cole said last week the proposed settlement would be for about \$1.2 billion.

The villages said they feared the government was negotiating away their right to seek damages from Exxon without allowing them to participate.

"The government, I think, understands that they cannot play fast and loose with your rights," Sporkin told the villages' attorneys during a hearing. "This may well be a settlement that is outstanding. ... This is not a situation where anybody's going to get out on the cheap."

"I feel much better. I had a sleepless night last night," said Elenore McMullen, chief of the village of Port Graham, one of the plaintiffs. Asked whether she felt confident the villages' rights now would be protected, she said, "I feel pretty sure they will be."

Sporkin issued a stern warning to government attorneys, saying that if a settlement between the government and Exxon did wind up harming the villages' right to sue Exxon, "Hell hath no fury like a judge scorned. ... It's not fair; it's not right, and it's not American."

The judge said he would not require the government and Exxon to enter in court any settlement they reach, but he said he was keeping jurisdiction of the villages' lawsuit.

The villages' attorney, Michael D. Hausfeld, said he was pleased with Sporkin's decision. Hausfeld said it indicates that if any settlement does damage the villages' rights, "I think the federal government and the state of Alaska will have one angry judge on their hands."

Sporkin had ordered the federal and state governments last week not to sign any agreement with Exxon until he determined whether it might harm the Alaska Natives' rights.

Federal law gives the villages the right to "subsist off the natural resources of their ancestral lands," which the lawsuit said includes Prince William Sound, which was fouled by the oil spill.

Nearly 11 million gallons of oil gushed from the tanker Exxon Valdez when it ran aground March 24, 1989. The spill killed countless birds, mammals and fish and disrupted Alaska's lucrative fisheries.

The government said federal law does not give the villages any right to join negotiations for settlement of a government claim. Sporkin agreed, saying, "You cannot negotiate with the world."

The villages — Chenega, Port Graham, English Bay, Larsen Bay and Karluk — have about 3,000 to 5,000 Native residents.

A similar lawsuit was filed by three Alaska Native corporations that will control thousands of acres of land to be turned over to the villages by the government under an unrelated agreement.

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A4 WEDNESDAY, APRIL 10, 1991 ...

THE WASHINGTON POST

Oil Officials Ignored Cleanup Deficiencies, Hill Probe Finds

By John Lancaster
Washington Post Staff Writer

A year before the Exxon Valdez oil spill, oil industry officials—who had long pledged to make their shipping operations “the safest in the world”—knew that their spill-fighting capabilities were inadequate but chose not to invest in recommended improvements, a congressional investigation has found.

Aleyeska Pipeline Service Co., the oil-industry consortium that oversees the shipping of Alaskan oil, concluded in 1988 that “immediate, fast response” to a spill in the center of Prince William Sound was “not possible with present equipment,” according to internal documents obtained by the staff of Rep. George Miller (D-Calif.).

Miller said the documents suggest that approval of last month’s settlement in which Exxon Corp., the tanker operator, agreed to pay \$1.1 billion should be held up because the terms also call for charges against Aleyeska to be dropped.

Contrary to Aleyeska’s safety pledge, consortium operators rejected their staff’s recommendations that they purchase additional spill-fighting equipment, such as a large-capacity oil storage barge, the documents show.

An Aleyeska spokeswoman acknowledged yesterday that the consortium had not been adequately prepared to cope with the Exxon Valdez spill but said Alaska officials

were well aware of the deficiencies and denied any attempt to deceive the public. “The industry and the state did not plan for [a spill of that] magnitude,” said the spokeswoman, Maralee Isaacs.

In a related development, a new assessment by state and federal scientists revealed far greater devastation to some species of marine life and wildlife than previously reported. The latest estimate of deaths to sea otters ranged from 3,500 to 5,500 and seabirds from 250,000 to 500,000.

Last month, the federal government and state of Alaska agreed to drop all criminal claims against Aleyeska as part of a proposed settlement agreement with Exxon, a member of the consortium. The settlement must still be approved by the Alaska legislature and a federal judge in Anchorage, H. Russell Holland.

But in a letter yesterday to Holland, Miller, vice chairman of the House Interior and Insular Affairs Committee, said the settlement “fails to hold Aleyeska accountable to the public for its wrongdoing” and should be reconsidered.

“This was like the Challenger disaster—the system failed,” Miller said in an interview. “These people would tell the state legislature, the government of Alaska, the Alaskan people anything they could to get their way . . . and as a result we had a national tragedy.”

A Justice Department spokeswoman said yesterday that government attorneys were “studying”

Miller’s findings but declined further comment.

Until now, attention has focused largely on Exxon’s role in the March 1989 tanker grounding, which dumped nearly 11 million gallons of crude oil into one of the world’s richest commercial fisheries. But under agreement with state and federal agencies, Aleyeska was to have been the first line of defense against oil spilled by tankers operating out of the port of Valdez. The consortium of seven major oil companies oversees the operation of the trans-Alaska pipeline, which transports oil from Alaska’s North Slope to the pipeline terminus in Valdez.

Aleyeska officials offered repent- ed assurances that oil shipping operations would not endanger the environment. In 1971, for example, an Aleyeska pollution specialist said in testimony before an Interior Department panel that the consortium would use “the best equipment, materials and expertise” to “make operations at Port Valdez and in Prince William Sound the safest in the world.”

Aleyeska’s oil spill “contingency plan,” which was in effect at the time of the spill, promised a “rapid and effective response to any oil spill emergency” using “state-of-the-art spill cleanup technology.” The plan applied to the Port of Valdez and Prince William Sound.

But in April 1988, according to documents obtained by the Interior subcommittee staff, Theo L. Polasek, Aleyeska’s vice president of op-

erations, offered this warning to consortium operators: “Immediate, fast response to mid-point of Prince William Sound not possible with present equipment complement.”

Several months later, another consortium official recommended a series of improvements, including purchase of new equipment “for near shore and beach operations” and an oil-skimming barge with a capacity of 50,000 to 100,000 barrels. But Aleyeska owners apparently rejected the suggestions, deciding instead to scale back Aleyeska’s responsibility for cleaning up spills.

“At the owners committee meeting in Phoenix, it was decided that Aleyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only,” said a document attributed to Stanley Factor, an executive of Arco Marine Inc., one of the owners. “Further efforts in the Prince William Sound would be limited to the use of [chemical] dispersants and any additional effort would be the responsibility of the spiller.”

Isaacs, the Aleyeska spokeswoman, said the spill contingency plan acknowledged the shortcomings in Aleyeska’s cleanup capabilities and that the Alaska Department of Environmental Conservation had approved it anyway. Moreover, she denied Miller’s suggestion that the consortium “secretly” reneged on commitments, asserting that statements attributed to consortium officials were nothing more than proposals to modify the contingency plan when it came up for renewal in

1990. “It’s absolutely incorrect to characterize these discussions as modifying the [existing] plan,” she said.

Larger Environmental Toll Revealed in U.S. Report

In the most comprehensive assessment yet of environmental fallout from the Exxon Valdez spill, the Justice Department filed a report in federal district court in Anchorage that revealed injury to species of wildlife not previously known to have suffered and much higher death rates of better known victims, such as otters and seabirds.

The report also said the pollution was causing lasting effects on such newly identified victims as the river otter, which are said to be accumulating petroleum byproducts in their tissues, losing body weight and moving in more erratic patterns.

Of the hardest-hit seabirds, murres colonies lost up to 70 percent of their breeding birds, with at least 120,000 dead. Bald eagles in Prince William Sound failed nearly twice as often to produce offspring in oily areas than in clean ones, according to the report compiled by several state and federal agencies.

Pacific herring populations spawning in shallow waters at the time of the spill recorded abnormally high numbers of abnormal embryos with a high incidence of eye tumors in larvae found in oily areas, the report said.

—Michael Weiskopf

BUSINESS

April 10, 1990
Los Angeles Times

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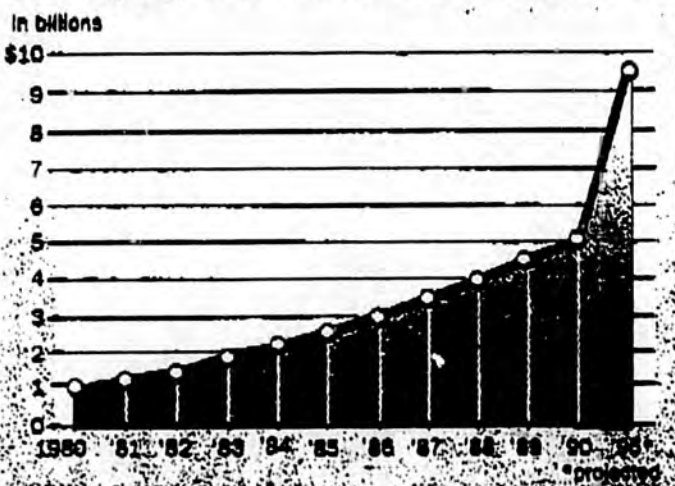
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TV SYNDICATION MARKET SOARS

The TV program syndication market, one of the fastest-growing and most lucrative areas of the television business, is projected to reach \$9.5 billion in 1995—roughly the size of the combined advertising revenues of ABC, CBS and NBC. The syndication market includes everything from the sale of reruns of old network shows (the most profitable segment) and the sale of so-called first-run shows such as "Wheel of Fortune" and "Oprah Winfrey" to local TV stations. In addition, the market now encompasses the sale of programs to cable TV networks and overseas broadcasters.



Note: Figures include combined revenues from program licenses, first-run sale of commercial time retained by distributors, and foreign syndication revenues.

Los Angeles Times

FCC'S NEW FIN/SYN RULES

- **Limitation:** The financial interest and syndication rules are eliminated for all parts of the networks' schedule except prime-time entertainment programming.
- **Outside productions:** A network may acquire a financial interest and rerun syndication rights, both domestic and foreign, in any TV show airing in prime time—provided that the rights are not acquired until 30 days after the network has agreed to a program license fee.
- **In-house productions:** A network may not fill more than 40% of its schedule with "in-house productions," defined as any program that is produced solely by the network, co-produced with a foreign entity or with an outside producer that initiates the deal.
- **Off-network syndication:** A network may earn profits in the syndication market from any outside-produced shows, but those shows must be sold through an independent distributor. A network itself, however, can syndicate its in-house productions internationally and, subject to certain safeguards, domestically.
- **Foreign syndication:** A network may syndicate

Alaska Oil Co-op Accused of Plan to Ignore Spills

■ **Energy:** Rep. George Miller contends that before the Exxon Valdez disaster, the Alyeska pipeline consortium decided against cleaning up slicks. The group denies the charge.

By PATRICK LEE
TIMES STAFF WRITER

A year before the disastrous Exxon Valdez oil spill, a consortium of oil companies secretly decided that it would not respond to spills in Alaska's Prince William Sound as required by a government-approved cleanup plan, according to documents released Tuesday by a leading congressional critic of the oil industry.

Based on an investigation by his subcommittee, Rep. George Miller (D-Martinez) also charged that the consortium—the Alyeska Pipeline Service Co.—knew that it could not respond effectively to such a spill despite previous assurances to the contrary, and that it made little effort to improve its readiness.

"The oil industry betrayed its own promises and deceived the Congress with respect to operations of Alyeska and the Exxon Valdez," Miller wrote in a 12-page letter to federal judges reviewing challenges to the Justice Department's proposed \$1.1-billion agreement with Exxon Corp. to settle litigation arising from the spill.

At Anchorage-based Alyeska, spokeswoman Marnie Isaacs vehemently denied Miller's charges, insisting that Alyeska never intended to evade its responsibility.

Please see SPILL, D3

Greenspan Yields in Spat With Fed

SPILL: Exxon Settlement Being Reviewed

Continued from D1

clean up spills, to mislead regulators or to break the law.

"Congressman Miller's attention is fairly selective," she said. "He is not acknowledging the present. . . . The standards [for spill response] have escalated enormously, and Alyeska has kept up with the heightened responsibility."

Miller, who opposes the proposed settlement with Exxon, objects to any agreement that would preclude further criminal or civil action against the consortium, which operates the trans-Alaska pipeline and the marine terminal at Valdez, Alaska.

"If after making agreements with the state of Alaska and the United States with respect to their ability to clean up an oil spill, . . . the Alyeska Co. then unilaterally and secretly changed its operations . . . that's a major misrepresentation," Miller, chairman of the House Subcommittee on Water, Power and Offshore Energy Resources, said in an interview.

Justice Department officials declined to comment on Miller's charges.

Alyeska is owned by seven oil companies, including Exxon, British Petroleum and Atlantic Richfield Co. Miller based his allegations on internal Alyeska documents obtained during congressional hearings.

The Exxon Valdez spill, the nation's worst, dumped 11 million gallons of crude oil into Alaskan waters on March 24, 1989. It fouled about 700 miles of Alaska coastline in Prince William Sound, killed as many as 580,000 birds and 5,500 sea otters and polluted tidal zones up to depths of 300 feet, according to a summary of 58 federal and state environmental studies filed late Monday in U.S. District Court. Those estimates are worse than previously believed.

Alyeska came under heavy criticism for its handling of the spill. The U.S. Coast Guard eventually assumed control of cleanup operations, for which Exxon paid \$2.2 billion.

On Tuesday, Miller's sharpest accusation concerned an apparently secret 1988 decision by Alyeska's owners not to clean up an oil spill in Prince William Sound, despite their promises to do so in a so-called Oil Spill Contingency

plan, which was approved by regulators as a condition of the permit to operate the 800-mile trans-Alaska pipeline. Alyeska promised that it would assume responsibility for cleaning up spills from tankers operating in Prince William Sound and other areas.

But in a July 6, 1988, telex, Stanley Factor, a vice president at Arco's marine subsidiary, wrote: "At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only. Further efforts in the Prince William Sound would be limited to the use of dispersants, and any additional effort would be the responsibility of the spiller."

Alyeska's Isaacs said the telex referred to ongoing discussions about changes in future oil spill contingency plans, not to the existing one. She denied any intent to evade the law.

"That's absolutely false," she said. "[Miller] is basing that conclusion on conversations between Alyeska and our owner companies . . . [that are] a slice of a very long-term give-and-take between Alyeska and the owners on how to craft, design and manage oil spill responsibilities for the 1990 contingency plan," not the plan in effect at the time.

Daniel Weiss, a spokesman for Miller, said, however, that it was clear from the subcommittee's review of Alyeska documents that Factor's comments were part of a discussion about equipment purchases to satisfy the existing contingency plan. None of the documents refers to an update of that plan, he added.

Miller also alleged that Alyeska knew it was ill-prepared to deal with an oil spill—despite assurances otherwise—and that it did little in the years before the Valdez spill to improve its preparedness.

In a 1984 letter obtained by Miller's subcommittee, former Coast Guard Commander James K. Woodie, then Alyeska's marine superintendent at its Valdez terminal, issued a warning to Alyeska President George M. Nelson: "Serious doubt exists that Alyeska would be able to contain and clean up effectively a medium- or large-size oil spill. . . . Response to any spill beyond the limits of Valdez narrows should not be attempted with present equipment and personnel."

Theo Polasek, Alyeska's vice president of operations, said in a 1988 company briefing document, also obtained by the subcommittee: "Immediate, fast response to [the] midpoint of Prince William Sound [is] not possible with [the] present equipment complement."

Yet Alyeska's Oil Spill Contingency Plan assured regulators that the "estimated time of completion of spill cleanup of a 100,000-barrel spill [in Prince William Sound] would be less than 48 hours."

Among other items, Alyeska said equipment, including a barge, would be in place within five hours of a spill.

In fact, Miller's subcommittee found, when the Exxon Valdez ran aground, fewer than 3,000 barrels were recovered in the first 72 hours. And an equipment barge failed to reach the site for more than 14 hours.

Isaacs said she couldn't comment on the documents, other than to say that some equipment was purchased in the years before the Valdez spill.

Tight budgets contributed to the situation, Woodie said in an interview Tuesday.

"It was a cut, cut, cut operation," said Woodie, who left Alyeska in 1984 in a disagreement over the company's spill preparedness. "The bottom line: It was impossible to maintain readiness."

Woodie said Alyeska asked him to sign letters assuring the state of Alaska that the consortium had sufficient manpower, equipment and readiness to comply with the Oil Spill Contingency Plan. He refused. "When I left, I don't know who signed them," Woodie added.

Isaacs said she did not know whether anyone else at Alyeska signed such letters.

It is unclear what effect Miller's allegations will have on the proposed settlement with Exxon. The settlement, which would require Exxon to pay \$100 million in criminal fines and up to \$1 billion in damages, has drawn criticism from environmentalists and some Alaskans on grounds that it is too easy on the oil company.

Alaska Atty. Gen. Charles Cole said Tuesday that he doubted Miller's concerns would torpedo the settlement.

Cole added that the settlement would preclude further state action against Alyeska only for natural resource damages, not for other damage claims. "And we intend to vigorously continue the prosecution of those claims," he said.

Boeing Parts Center

SEATAC, Wash.—Faced with rising demand for spare parts and highway congestion that is hampering efforts to deliver those parts, Boeing Commercial Airplane Group has broken ground for a \$100-million parts distribution center adjacent to SeaTac International Airport.

When completed, the facility will allow BCAG to consolidate spare parts storage and distribution in one building.

COMPUTER

Continued from D4

it as just another confusing to a crowded alphabet soup.

"A lot of people would like a lifesaver tossed from the ship," said Spencer Leyton, vice president for business development at software development International. "This is either foam or lead, and it landed yet."

Microsoft's new operating system, OS/2 3.0, is its answer to gradual encroachment of Unix the PC turf dominated by software's far less powerful DOS operating system. The new would be able to run all software written for DOS or the Windows enhancement and feature much better networking capabilities and the ability to perform several tasks at once.

By developing a version of Mips chip, which is based on speedy new design concept as reduced instruction set computing (RISC), Microsoft is ending exclusive allegiance to Intel and giving a potentially long-term boost to the Mips Sun, IBM and Hewlett-Packard have powerful RISC-based systems that run versions of Unix are considered by Microsoft Compaq to be long-term competitive threats.

The new ACE-compatible hardware and software is supposed to be ready for shipment to system developers by the end of the year with commercial products coming sometime next year. Other analysts, however, are skeptical that the Microsoft operating system would be ready soon.

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Congressman Urges Revision Of Exxon Pact

Miller Says Oil Firms Agreed
Not to Do Full Cleanup;
Damage Estimate Raised

By ALLANNA SULLIVAN

Staff Reporter of THE WALL STREET JOURNAL
Allegations that oil companies had agreed before the 1969 Valdez spill not to attempt a complete cleanup of spills in Prince William Sound could force revisions in—or even scuttle—Exxon Corp.'s proposed settlement of damages stemming from the giant Alaskan oil spill.

The allegations were contained in a letter to U.S. Judge Russel Holland of Anchorage, Alaska, by Rep. George Miller (D., Calif.), who attacked the settlement in part because it would grant indemnification against natural resource damage claims to Alyeska Pipeline Service Co. Alyeska, which is responsible for cleaning up oil spills in Alaskan waters, is owned by a consortium of oil companies, including Exxon. Mr. Miller heads the House Water, Power and Offshore Energy Resources subcommittee, which has broad jurisdiction over Alaska's natural resources.

In addition, a 19-page report filed by the Justice Department in the Anchorage court Monday indicates that damage caused by the Valdez spill may be more extensive than initially believed. The report is a compilation of 570 million of federal and state studies done in preparation for litigation with Exxon. The filing reflects the first time the federal government has attempted to summarize the past two years' worth of studies.

Although the report doesn't assign a dollar amount to the damage done, it does suggest that the damage is continuing. Crude oil from the spill has contaminated the sediment far below the sound's surface and is continuing to affect marine life, the report says.

In light of the new information regarding Alyeska and damages, Mr. Miller is hoping that the settlement process will be slowed down. "We need an independent review of what the Justice Department did or did not know about Alyeska," he said. "And if damages are greater than we thought, then is \$1 billion sufficient to rectify those damages?"

The settlement is in a public-comment phase, and Judge Holland is to decide by early next month whether to approve it in its present form. The National Wildlife Federation also yesterday urged Judge Holland to strike the Alyeska indemnification clause from the settlement.

Business and Finance

What's News—

World-Wide

Exxon's proposed Valdez settlement is being opposed. Mean-while, a federal report indicates that damage caused by the spill may be more extensive than first believed. (Source: Rep. Miller's letter to Judge Holland.)

According to a document Mr. Miller subpoenaed from Alyeska, the consortium's owners decided at a regular quarterly meeting in 1988 to scrap plans to aggressively fight oil spills in Prince William Sound. The document is a June 30, 1988, telex from Stanley Factor, vice president of chartering and evaluations for Atlantic Richfield Co., a member of the Alyeska consortium.

The telex says in part: "At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only (fjordlike bodies of water which extend about 35 miles out of Valdez Harbor). Further efforts in the Prince William Sound would be limited to the use of dispersants and any additional effort would be the responsibility of the spiller."

An Alyeska spokeswoman contested Mr. Miller's assertions that officials of Alyeska and its member companies were fully aware of Alyeska's lack of readiness. She said that the documents obtained by Mr. Miller were internal memos issued as part of the planning process for updating the oil-spill contingency plan and didn't pertain to how Alyeska would actually handle a spill. An Arco spokesman said company officials couldn't comment until they examined Mr. Miller's letter.

EASTMAN KODAK

WEDNESDAY, APRIL 10, 1991

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THE WALL STREET JOURNAL

Harm to Nature From Valdez Spill Is Now Seen as Far Worse by U.S.

NYT 1-4

By KESTH SCHNEIDER

4/10/91

WASHINGTON, April 9 — In the most comprehensive account yet made public about the damage caused when oil spilled from the Exxon Valdez two years ago, the Government said today that more wildlife had been killed and the environmental damage in Alaska's Prince William Sound would persist much longer than scientists had originally thought.

The Government said that populations of sea otters, harbor seals, bald eagles, murres, sea ducks, cormorants and seals plummeted after the Exxon Valdez ran aground and spilled nearly 11

million gallons of oil into the Sound. And it said it did not expect the animal populations to recover for years.

The Government said that the Sound, catalogued in an 18-page summary of 50 scientific studies, also includes losses of killer whales, extensive reproductive defects in salmon and herring fry, and widespread and lingering damage to sea grasses and other plants in tidal zones along 1,300 miles of the eastern boundary of the Sound and down the coast in the Gulf of Alaska, which were coated by oil for months.

Seal Left Alone

Government scientists also said today that efforts to clean 400 hundreds of miles of the Sound's shoreline with pressurized and heated sea water caused more damage to shellfish, sea grasses and other organisms in the tidal zones than if the shorelines had been left alone.

Thomas A. Campbell, general counsel at the National Oceanic and Atmospheric Administration, said the studies were used as the basis for negotiating the deal the Government and the State of Alaska reached last month with the Exxon Corporation. The \$1.1 billion agreement would settle civil and criminal claims from the spill, which occurred after midnight on March 24, 1989.

Two Federal judges are reviewing the settlement and their rulings are expected next month. Although Government officials said they were releasing

Continued on Page A18, Column 4

the studies to bolster their assertions that the settlement with Exxon was fair, critics say the same information could be used as evidence that the settlement is not adequate.

Government officials said the assessment of the environmental disaster in the Alaskan Sound reached and, in some cases, exceeded what scientists predicted from the earliest days of the Exxon Valdez disaster. Officials said that the detailed report indeed confirmed that the disaster had taken a heavy toll on wildlife and would produce environmental damage that, in some cases, would be permanent.

"Exxon has not had time to study the problem in detail," said Karsten P. Rodvik, a spokesman for Exxon in Anchorage. "We will withhold comment on it until we have had time to do so."

"However," he went on, "we can say that on the basis of our own and published studies and reports that Prince William Sound is in an advanced state of recovery. Little oil remains on the shoreline. The water is clean. Fish are abundant and safe to eat and wildlife is thriving. Everything we are seeing supports the biological community is healthy and thriving."

Shoreline Was Hard Hit

The Government's study said that 300,000 to 500,000 sea birds died after the spill, and that colonies of one of the most abundant species, the common and thick-billed murres, lost 60 to 70 percent of breeding birds. Because the murre colonies live on islands where hydrocarbons and chemicals lingering from the spill are still killing them, and because murres instinctively return to their same breeding sites, scientists fear these colonies could be entirely wiped out.

The habitat most heavily damaged by the oil spill, the study showed, was the shoreline and shallow areas along the western boundaries of Prince William Sound that are affected by the tides. For weeks, tides washed oil in and out of bays and up and down the rocky shore, killing sea grasses, cormorants, collecting bay bottoms and playing havoc with almost all the living creatures in the region.

The spill occurred just weeks before spring, when birds, mammals and fish species are giving birth. Scientists found that Pacific herring, which were spawning in the shallow coasts and along bays at the time of the spill, showed large increases in the number of abnormal embryos and larvae. Larvae collected in oil-coated areas had unusual numbers of eye tumors, said one study.

Mammals found in oiled areas were smaller than mammals in unaffected bays, a study said. Scientists also found cormorants and other shellfish absorbed hydrocarbons from the oil and passed a continuing source of poison to sea otters and other species that forage in the tidal zones. A study also found that pollock, caught 600 miles from Bligh Reef, had elevated levels of hydrocarbons in their bile, evidence that the sea and food supply was affected at great distances from the spill.

Perhaps the most surprising finding was made by the National Oceanic and

Atmospheric Administration, which concluded that spraying beaches with highly pressurized hot sea water, which was widely used in the spill, proved to be more destructive than the blanket of oil. Scientists said the hot water sterilized beaches, killed marine life and changed the character of beaches by washing sand and rocks down the beaches into city sediments in shallow waters.

Scientists with the oceanic administration said today that Exxon came up with the idea of washing beaches with hot sea water and they approved. And the beach washing began within weeks of the spill. In November 1989, the

The damage to Prince William Sound will last many years.

agency received preliminary evidence from an scientist about the damage caused by the practice and three weeks ago notified the Coast Guard that the washings should be discontinued on nearly all beaches.

"At the time it made sense," said Dr. Sylvia Earle, the chief scientist at the oceanic administration. "You had a great desire to do something. People were running around with towels wiping rocks."

Dr. Earle added: "Sometimes the best and ironically the most difficult thing to do in the face of an ecological disaster is to do nothing. As far as Alaska's shoreline is concerned, the environment would have been better off if there had been less aggressive but water treatment and we had let nature take its course."

Mr. Campbell of the oceanic administration, who helped to negotiate the settlement with Exxon, said it was in the Government's interest to allow the public to gain a partial insight at the scientific studies so that they would feel more comfortable about the \$1.1 billion settlement. "We put it out because we wanted the public to know what lay beneath the claims of loss," Mr. Campbell said. "If we felt the settlement was not strong, we wouldn't have put our cards on the table."

May Stir New Concerns

But the new information also could stir new concerns among critics of the settlement, among them Representative George Miller, a California Democrat who is sitting chairman of the House Interior Committee.

Mr. Miller today questioned the terms of the settlement, especially in a letter to Federal District Court judges in Washington and Alaska that the Justice Department had acted improperly in attempting the Alyeska Pipeline Service Company from prosecution and Federal or state damage claims. The protection for Alyeska, which is owned by Exxon and seven other oil companies, was part of the criminal plea agreement that the Justice Department reached with Exxon on March 12.

Mr. Miller said in his letter that his staff had found that 11 months before the Exxon Valdez ran aground, Alyeska's owners met in Bellingham, Wash., and determined that the company was not ready to respond effectively to an oil spill.

But, Mr. Miller told the judges, Alyeska had told the State of Alaska in its oil spill contingency plan that it was ready to respond to any spill with state-of-the-art equipment and techniques. The Coast Guard and other agencies have previously criticized Alyeska's performance.

The Washington Post

DATE: 5/13/91

PAGE: A1

Exxon Settles Spill For \$1.1 Billion

\$100 Million in Pact for Criminal Fine

By Michael Weiskopf
Washington Post Staff Writer

Exxon Corp. agreed early today to acknowledge criminal responsibility and pay a \$100 million fine as part of a \$1.1 billion agreement with the federal and Alaskan governments to settle civil and criminal charges stemming from the nation's worst oil tanker spill, according to informed sources.

The settlement, by far the largest for environmental damage in the United States, apparently dealt with one of five federal criminal charges filed against the company and its shipping subsidiary, the sources said. Exxon faced two felony and three misdemeanor charges related to the spill.

Trial on the criminal charges was to begin April 10 in U.S. District Court in Anchorage.

Half of the criminal fine and most of the \$1 billion in civil damages to be paid over 10 years would be used to restore the fragile Alaskan shoreline after the ecological havoc caused when the tanker Exxon Valdez ran aground on a marked reef March 24, 1989. Nearly 11 million gallons of crude oil gushed into Prince William Sound, eventually spreading for miles.

Under the settlement signed here, Exxon is obligated to pay another \$100 million if significant environmental problems can be traced to the spill after the 10-year payment period.

Negotiators reached basic terms of the settlement days ago, but U.S. District Court Judge Stanley Sporkin barred final agreement until he heard arguments here Monday by five native Alaskan villages seeking to protect their rights to pursue damages separate from the government agreement.

Yesterday, Sporkin lifted his ban after warning government lawyers not to trample on the villagers' legal rights.

The settlement was signed shortly after midnight at the Justice Department, and details of the agreement are expected to be released at a news conference here today. Spokesmen for the Justice Department and Exxon declined to comment.

Walter J. Hickel (D), who took office as Alaska's governor last December and has been representing the state in negotiations here, said the settlement terms are "in the best interests" of Alaskans.

But environmentalists and some Alaskans criticized the agreement for failing to provide enough money and specifically target its use for environmental restoration. Actual distribution of Exxon's payment would be decided by a board of trustees that is to include representatives of the federal and state governments.

"The worry is that the state of Alaska is going to stretch the definition of restoration and spend the money for marinas and roads," said Doug Wolf, counsel for Alaskan issues at the National Wildlife Federation.

Michael Hausfeld, an attorney who represented the native Alaskan villages in the hearing before Sporkin, said the two governments should have held out for an "open-ended" settlement in which Exxon agreed to pay whatever is necessary to restore ecological damage related to the spill.

Exxon has spent \$2 billion on the cleanup, leaving shorelines almost free of oil. The huge Alaskan fishing industry, badly dislocated by the spill, gradually is returning to normal.

But authorities have barely begun to calculate damage to wildlife as scientific studies continue to find new evidence of long-term damage to certain varieties of sea birds, salmon, trout and other marine life.

According to confidential documents, federal scientists have concluded that some colonies of diving birds have suffered "total failure" to reproduce as result of the spill, while some species of marine life were so affected that they "may not respond" to revival efforts for decades.

Known as the greatest man-made wildlife disaster in the nation's history, the spill resulted in the deaths of more than 36,000 waterfowl, at least 1,016 sea otters and 144 bald eagles along with many other animals.

A federal grand jury in Anchorage indicted Exxon and its subsidiary, Exxon Shipping Co., a year ago after the corporation rejected a plea bargain proposed by the Justice Department. The two felony counts accused Exxon of failing to man its ships with a competent captain and physically and mentally capable crew members.

Joseph J. Hazelwood, the Exxon Valdez captain who witnesses said was drinking ashore before the early morning grounding, left the ship's bridge shortly before it hit the reef and left in command a third mate who lacked Coast Guard certification.

Hazelwood was acquitted last March on state charges of criminal

misconduct, reckless endangerment and piloting a vessel while intoxicated. He was convicted of negligent discharge of oil and sentenced to perform 1,000 hours of community service and pay \$50,000 in partial restitution for spill damage.

Under terms of the agreement, Exxon is to pay \$190 million, including the fine, immediately. Of the first installment, \$40 million is slated for continued evaluation of environmental damage and planning for restoration.

And, \$150 million to be released by October is intended to be used to return Prince William Sound to its pristine state before the spill.

Exxon also agreed to pay \$100 million in fiscal 1993 and \$660 million over the next eight years. It was not immediately known if that is earmarked for a specific purpose.

Cont'd

Although the agreement frees Exxon of further obligations to the state and federal governments, the company faces more than 300 lawsuits by Alaskan residents and business executives claiming large losses caused by the spill.

The Alaskan villages that filed suit here said they feared that the government was bartering away their right to pursue spill-related claims later.

But Sporkin assured lawyers for the villages that "the government, I think, understands that they cannot play fast and loose with your rights." If the settlement later compromises those rights, he said, "Hell hath no fury like a judge scorned. . . . It's not fair, it's not right and it's not American."

The New York Times

 DATE: 3/13/91
 PAGE: A1

\$1.1 Billion Settlement by Exxon Is Said to Include Criminal Fine

Payments Would End Big Claims in Valdez Spill

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, March 12 — The Exxon Corporation is prepared to pay a \$100 million criminal penalty as part of a \$1.1 billion payment over the next 10 years to settle civil and criminal cases arising from North America's largest oil spill, Alaskan and Federal authorities said today.

Federal and state officials have agreed to the arrangement. Although a Federal District Court judge at first seemed to raise another hurdle today when he said he would review the settlement to insure that the rights of 5,000 Alaskan villagers were protected, a state official said early this evening that the final obstacles to a settlement appeared to have been overcome.

Effects Would Be Studied

Under the proposed agreement, Exxon would pay \$100 million immediately to settle criminal charges brought by the Department of Justice. That would be one of the largest, if not the largest, criminal fine ever paid for pollution. A trial on the charges had been scheduled for April 10 in District Court in Alaska.

The villagers had filed suit last week, asserting that they had been locked out of negotiations between Exxon, the State of Alaska and the Federal Government. The villagers said they feared that a settlement would prevent them from recovering financial damages caused by the Exxon Valdez oil spill on March 24, 1989.

The proposed settlement, which has

been under negotiations for months, would not end Exxon's legal troubles in Alaska. At last count, 330 separate suits were pending against the company. But the settlement would end the major suits, brought by the State of Alaska and the United States.

In addition, the company would pay \$80 million this year into a fund administered by three Federal agencies and three state agencies. The money would be used for scientific studies of the Prince William Sound region, which suffered great damage, and for projects to continue scrubbing the shoreline of oil left when nearly 11 million gallons spilled from the hull of the

Exxon Valdez after the tanker ran aground in the sound. The tanker's skipper, Capt. Joseph J. Hazelwood, was convicted in April 1990 of the relatively minor charge of negligently discharging oil but acquitted of piloting the vessel while drunk and other charges.

The agreement also called for payments into the fund of \$150 million in September 1992, \$100 million in September 1993, and \$70 million annually from 1994 until 2001. The proposed settlement also calls for Exxon to contribute \$100 million more to the fund if additional damage from the oil spill is discovered.

Economists noted that Exxon would be able to claim tax deductions for every payment except for the \$100 mil-

lion criminal penalty, to be paid this year.

The agreement would not affect some 300 other lawsuits filed by environmentalists, fishermen and Aleuts asking Exxon to pay for damages these groups say they suffered after the spill.

The proposed settlement was applauded by Gov. Walter J. Hickel of Alaska but strongly criticized by environmental groups and some state officials who said, essentially, that Exxon would be paying too cheap a price in settling the case.

Bottom of the Pockets?

"It seems like a good deal for Exxon," said Eric Jorgenson, a lawyer for the Sierra Club Legal Defense Fund in Juneau, which has a separate suit pending against the company in the aftermath of the spill.

But Governor Hickel said: "I am very happy with the settlement. It allows us to get to the bottom of Exxon's pockets."

Lance Lambertson, a spokesman for Exxon in Irving, Tex., declined today to say whether Exxon would sign the agreement and said the company would make no comment about the situation for the time being.

"If and when things break and we have come together for a proposal to be signed, there will be extensive notification," said Mr. Lambertson.

The settlement contains provisions to make public a wealth of scientific studies conducted after the spill by the Department of the Interior, the Environmental Protection Agency and other Federal agencies. But studies sponsored by the State of Alaska and the United States Coast Guard are to remain private pending the outcome of court cases brought against the state and the Coast Guard.

"Keeping the data secret is a major problem," said Mr. Jorgenson. "All of the data available from the spill should be released. The public paid for it. It's public information."

Although the terms would make the settlement the most expensive ever for damages caused by an environmental disaster, the pact is certain to raise a stir in Alaska and in Washington. The negotiators will open the pact to public comment for 30 days after it is signed. Officials with the state and two Federal agencies said the pact could be altered as a result.

Economists who have studied the spill for the state and Federal governments said today that the \$1.1 billion settlement represents only a portion of the actual value of the damage to fisheries, water, wildlife and land. The economists said the Exxon Valdez disaster will have caused \$2.5 billion to \$5 billion in damages from the time of the



The New York Times

The spill near Valdez fouled much of the Gulf of Alaska.

To some, an offer
to end the Exxon
Valdez affair is
too low.

spill before midnight on March 24, 1989, through 1994.

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Cont'd

Several state officials who asked not to be identified today said they had hoped that Exxon would be required to pay \$1 billion in a one-time payment that could generate permanent income through annual interest payments. Thus, the annual payments, spread out over 10 years, are much less valuable to the state's efforts to clean up and study the effects of the spill.

Senator Frank Murkowski, a Republican from Alaska, said today that Alaska was fortunate to have gained a settlement. The alternative was years

of litigation that would have cost Alaska millions of dollars in legal fees without any assurances of success.

"I think this agreement, if it is resolved, is going to have to stand the light of day by the Legislature, the Governor and Exxon shareholders," said Senator Murkowski. "The alternative is litigation. I certainly am inclined to think a bird in the hand is worth two in the bush. The cost of litigation would be very substantial."

The settlement also calls for an advisory group made up of members of the public to help oversee how money from the settlement is spent. The Department of Justice scheduled a news conference for Wednesday to explain provisions in the settlement.

The last obstacles to the settlement were crossed this afternoon when Judge Stanley Sporkin lifted an order here that prevented the pact from being signed, and a District Judge from Alaska, H. Russell Holland, approved the agreement. Judge Holland was to have presided over the criminal trial next month.

Last week, Judge Sporkin blocked the settlement from being signed until the state and Federal Government assured more than 5,000 Alaskan native villagers that their right to gain financial damages from Exxon would not be harmed by the pact.

Today, Judge Sporkin said he was satisfied that the rights of the native villagers to fully prosecute their suits had not been harmed by any settlement between Exxon, Alaska and the Federal Government and lifted his injunction. But in an order he signed this afternoon, Judge Sporkin said he would review the settlement after it is signed to make sure the rights of the villages are ensured.

"The court shall retain jurisdiction over this matter to ensure that the defendants' representations are carried out so the plaintiffs' rights are protected," Judge Sporkin wrote in the order.

ALASKA CONFERENCE OF MAYORS

PRESIDENT 1991

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April 16, 1991

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SECRETARY/TREASURER

Gary L. Davis
Mayor, City of Soldotna
(907) 262-9107

Governor Walter J. Hickel
Pouch A
Juneau, AK 99811-0101

Dear Governor Hickel:

I am writing on behalf of the "Oiled Mayors" of Alaska regarding the pending EXXON VALDEZ oil spill settlement.

First I would like to begin by thanking you and Attorney General Cole for meeting with us during our trip to Juneau in March of this year. As a result of this meeting and the continued dialogue between our staffs I feel progress was made in clarifying our respective positions.

We appreciate the modifications which were made to the EXXON Settlement Agreement which reflected some of the Oiled Mayors concerns. But I feel obligated to bring to your attention several of our continuing concerns.

The legal staff of the Oiled Mayors continue to review the technical aspects and implications of the agreement and will communicate those concerns in a separate letter. Those concerns reflect our desire to clarify how certain sections of the EXXON settlement will impact our own situations.

A major concern that we would like to raise is one that was broached at our February meeting and continues to haunt us. This is the matter of the make up of the Exxon Settlement Trustee Council. The fact is that the 3 federal and 3 state trustees are all representatives of natural resource agencies. A substantial representation of these groups is not inappropriate in light of the fact of the wide spread damage caused by EXXON'S oil on Alaska's environment. But we must continue to ask who is the representative of the "human resources"? Specifically we refer to the cannery worker, businessman, fisherman, subsistence user and landowner affected by the spill.

April 16, 1991
Governor Hickel

It is our contention that these groups can be no better represented than by a member of local government. It was the local governments that stood alone in the early days of the EXXON spill. It was the local governments that stood alone and dealt with the tremendous influx of clean up activities. It was the local governments that still stand alone in dealing with the aftermath of damage now that EXXON is long gone.

Through out this process of dealing with EXXON'S arrogance, VECO'S incompetence, the Federal government's indifference and the state's impotence the Oiled Mayors have steadfastly refused to publicly criticize the Coast Guard or the State's efforts. Rather we have chosen to pursue the role of quiet diplomacy in dealing with our elected officials and administration agencies.

Consequently we feel that the Oiled Mayors have a legitimate basis for requesting that a **seventh** seat be established on the Trustee Council to include a member of local government. I would suggest that the ranks of the Oiled Mayors would provide no better source for such a representative.

I believe that this change would go along way in relieving another concern which is that there still remains a perception that Prince William Sound continues to be the center of the spill universe. No sooner had the announcement of the settlement been made than EPA Secretary Riley made the statement to the effect "now that a settlement has been reached we can now go about the business of rebuilding Prince William Sound".

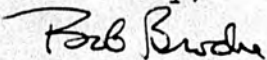
Those of us in Alaska recognize that EXXON'S oil had far reaching effects throughout the Gulf of Alaska and that in all fairness the entire area should be given appropriate consideration in the restoration process. It is through the inclusion of the municipal representative on the Trustee Council that this point can be brought home.

I recognize that this is not a new topic but we feel that now is the time to formally bring forth this reasonable request. We will be espousing this doctrine to a number of agencies, legislators and interested parties in state and federal government.

April 16, 1991
Governor Hickel

I look forward to discussing this further with you during the next visit of the mayors to Juneau April 25 and 26. If you or your staff have any questions please do not hesitate to get in touch with me or our legal council Mr. Matt Jamin.

Sincerely,



Bob Brodie, Mayor
City of Kodiak
President, Alaska State Conference of Mayors
Chairman, Alaska's "Oiled Mayors"

cc:DNR,ADF&G,ATTNY GEN.,AK SENATE & HOUSE MEMBERS, DEPT'S
OF INTERIOR, EPA, TRANSPORTATION, USCG, CONGRESS, MEDIA



Oil Reform Alliance

The Oil Reform Alliance strongly opposes the Exxon Valdez settlement and urges legislators to do the same because

IT SETS BAD PRECEDENT

- * There is much more than money at stake. The settlement should send a strong signal to potential spillers that they will be held to the highest degree of criminal culpability and financial accountability for oil spills.
- * The settlement should modify the behaviour of potential spillers, but the oil industry is lobbying as strongly as ever against increased reform. The industry is actively working to weaken oil spill planning and response standards and financial responsibility (through the 567 draft regulations and introduction of HB196, respectively).
- * The settlement gives away the farm. Instead of building public trust, this settlement shakes the foundation of our trust. It will be very difficult for the ORA to support future oil and gas developments unless the state takes forceful steps to hold spillers accountable and proves itself a regulator capable of balancing responsible development with public concerns and environmental protection.

IT LETS CRIMINALS OFF THE HOOK

- * The total cost to Exxon, after tax, is less than \$425 million in 1991 dollars. The cost to Alyeska is zero. Congressman George Miller discovered that the Alyeska owners decided in June 1988 that Alyeska could not and would not respond to oil spills past Valdez Narrows - contrary to their public promises. Alyeska and responsible officers should be exposed to substantial criminal penalties.
- * The U.S. Justice Dept. waives its rights to pursue criminal charges against Alyeska and its owner companies, AND its rights to pursue civil or administrative penalties against these same parties.
- * The largest U.S. settlement for environmental damages was the Allied Chemical case at \$13 million or 10% of Allied's earnings that year. Exxon's yearly sales are over \$100 billion.

IT IS A BAD DEAL FOR NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION

- * The settlement holds hostage future spill-related scientific studies and restoration projects. Until a settlement is reached, there are no funds available to continue state and federal scientific studies or initiate restoration projects. Legislators should work out a funding mechanism for this type of work immediately, either

through direct appropriations or a state loan. The Oil Pollution Act of 1990 created a billion dollar renewable fund to avoid precisely this dilemma.

- * Continued scientific studies are critical to the public's understanding of spill impacts. Life cycles of some species, such as salmon and herring, are such that full impacts will not even be known for several more years. Scientists at the Woods Hole Oceanographic Institute have studied the West Falmouth oil spill for over twenty years and are still reporting effects to the biota and the environment.
- * Federal summaries of scientific studies show natural resource damages were up to twice as severe as previously estimated and long-term damage may be extensive. Although all economic data are still held secret, leaked estimates range from \$3 to \$10 billion.
- * The settlement must outline in detail how funds can be spent to prevent "an institutional feeding frenzy." Funds should be spent on projects for restoration, rehabilitation or enhancement as stated in the Clean Water Act.
- * The trustee system inspires no public confidence. Two state trustees stated they did not intend to spend much money on land acquisition, despite public support and precedence for this idea. (The recent settlement for the Arther Kill spill included \$5 million for land acquisition.) Another potential trustee is a co-conspirator of the Alyeska owner companies' plan not to clean up spills past Valdez Narrows - a plan that carries criminal liability overtones.
- * Funds for environmental restoration, research and monitoring will dribble out over a ten year period. The payment schedule does not include compounding interest and it is tax deductible. The payment schedule successfully impedes capitol heavy mitigation projects such as land acquisition.
- * Future - and past! - cleanup expenses should be assessed directly to the spiller, not included in the settlement. Natural resources could well be the looser in competition for funds with past and future cleanup projects.

IT IS A BAD DEAL FOR THIRD PARTY VICTIMS (THE PUBLIC!)

- * The settlement drives a wedge between the State and its injured citizens by requiring governments to act in defense of each other if one is sued. Citizens will be forced to sue the State to recover compensation for the State's "percentage of fault" as decided by a jury (AS 9.17.040).

The Oil Reform Alliance also requests a new settlement be worked out and it should start with release of scientific and economic studies and full public participation.

The next spill - and there will be a next spill: it is part of the risk we take for our oil dependency - the public will look back to the voting record on this settlement. We will ask what you did to impress upon spillers that they would be held accountable for oil spills.

THINK AHEAD! VOTE "NO" ON THIS SETTLEMENT!

**TESTIMONY OF
MARILYN LELAND
EXECUTIVE DIRECTOR, CORDOVA DISTRICT FISHERMEN UNITED,
BEFORE THE ALASKA HOUSE SELECT COMMITTEE
ON EXXON VALDEZ SETTLEMENT
APRIL 14, 1991**

My name is Marilyn Leland. I am the Executive Director of Cordova District Fishermen United, also known as CDFU. I have been intimately involved with the Exxon Valdez oil spill since before 7:00 a.m. on March 24, 1989. More than two years later, the oil spill still dominates my life.

Gentlemen, first let me thank you for coming to Cordova to hear our comments on the proposed settlement with Exxon. Although we understand the need for comments at this time, the timing really couldn't be worse for Prince William Sound fishermen. As I am giving this testimony, there are roughly 1,000 herring fishermen, crewmen, tendermen and pilots who are not in town, but are on the fishing grounds. Because of that fact, I want to assure you that the sparse attendance today does not indicate a lack of interest in the settlement. Prince William Sound fishermen are very interested, but the herring are here now is when they must work to make a living.

As I see it, there are several basic problems with the settlement, some of which could have been avoided had the people who had been damaged been allowed to be a part of the process and much of which could still be cured by the release of the damage assessment data.

First, to the value of the settlement--at this time it is impossible for us to determine what the damages are worth or even if an actual damage figure can be determined now. We have not been privy to the state's damage assessment data. However, we have seen Fish & Wildlife's preliminary data this week, which indicates that there may be substantial injury to fishing resources in Prince William Sound, in particular salmon and herring. The report states: "The full extent of short term injury to pink salmon cannot be assessed until after the 1991 run returns to spawn in the summer." That statement, alone, causes us to question whether it is possible to set a value on the damage at this time.

The report also states that: "Preliminary analyses indicate a 70 percent greater mortality of pink salmon eggs laid in the summer of 1989 and a 50 percent greater mortality in the summer of 1990 in oiled streams as compared to control streams. Larvae from heavily oiled streams showed gross morphological abnormalities, including club fins and curved spines."

The report goes on: "Tagging studies have demonstrated that the annual mortality of adult Dolly Varden was 32 percent greater in oiled areas than in unoiled areas." With respect to herring, it was reported that "Study results show a large increase in the percentage of abnormal embryos and larvae in oiled areas of Prince William Sound during the 1989 reproductive season. Larvae also had a greater incidence of eye tumors in oiled areas. These effects continued but at somewhat lower rates in 1990. Results also showed greater egg mortality in oiled areas as compared to unoiled areas. Whether the adult population has been affected by these larval injuries will not be determined until the 1989 and 1990 cohorts return to spawn in 1992 and 1993."

While we agree that it would be good to settle the State's claims and begin to put the oil spill behind us, you cannot make a monetary settlement until the full extent of the damages are known. Exxon made partial settlements with some of the fishermen because of this same issue. Has the State explored that possibility with Exxon?

Further, with respect to the release of the damage assessment data, it is imperative that the information be made public so that reasonable plans for recovery can be made; or if it is determined that recovery is not possible in certain instances, that consideration be given for alternative enhancement projects.

We have been told that the damage assessment data cannot be released until a disposition has been made of all litigation because it could be used against the State. That's a legitimate concern. Except, the individual plaintiffs were not suing the State and did not want to sue the State, but were forced to because of this settlement. The individual plaintiffs even offered to waive all claims against the State, but that offer was declined. The individual plaintiffs asked for an extension of the statute of limitations so that the possibility for waivers could be fully explored. The extension was refused. We then filed against the State.

An argument that has been made for settlement at this time is the tremendous savings in attorneys' fees the State will realize by not having to continue the litigation against Exxon and Alyeska. However, in reality the State has traded those two defendants for thousands of individual plaintiffs. Not only will the State still have attorneys' fees, but they are also now facing exposure for actual payment of damages. The bottom line could be a greater cost to the State.

We would argue that not only is it too soon to determine the value of the injuries sustained, but the settlement figure is no doubt too small to be an incentive for the oil companies to correct deficiencies so that we could have a greater certainty that this sort of disaster will not happen again in Alaska. The total cost to Exxon, after tax, is less than \$425 million according to the federal government. The cost to Alyeska is nothing. Last year, Exxon's revenue was \$117 billion. Based on that figure, even if Exxon were to pay the total settlement in one year, it would total less than .004% of their total revenue. On the other hand, if a fisherman is caught making a set too early or drifting over a line, he is likely to be fined several thousands of dollars, be required to surrender fish he has in his hold and could potentially lose his vessel and his fishing permit, which is as it should be. The cost of the fine and the value of the surrendered fish would be significantly more than .004% of the fisherman's annual revenue and the loss of the boat and permit would most likely constitute a major chunk of his net worth. You can bet that fisherman will make better efforts to know exactly where the line is or have his watch set with Fish and Game's so that he doesn't repeat that mistake.

There are too many unanswered questions about how the settlement money will be spent. With three state and three federal officials, none of whom have been elected by the people, making up the trustees, the people who have been most impacted by the spill are likely to have little input on how those funds are spent. We still alternately hear both suggestions and denials that the funds should be spent to create a world class marine park in Prince William Sound, to complete the Copper River Highway and even to build a deep-water port at Fire Island. Random House Dictionary defines "restore" as "to bring back into existence, use, or the like; reestablish; to bring back to a former, original or normal condition; . . . to bring back to a state of health, soundness, or vigor." Because there has never been a world class marine park in Prince William Sound, the Copper River Highway has never been completed and there has never been a deep water port at Fire Island, none of these projects would fit the definition of "restore."

What is perhaps most frustrating is the fact that when this disaster began, the people most affected in the area tried to infiltrate the bureaucracy that was Exxon and Alyeska only to be told that we weren't needed, that we were amateurs and in Don Cornett's inimitable words that we should trust them and we would be made whole. Well, Exxon did find out that they needed us and we weren't amateurs, but we still haven't been made whole and we are still being treated by Exxon and now the State of Alaska as though the plans for clean up and restoration and the settlement are not any of our concern and that we should just trust you. Well, we've heard that for too long and it just doesn't work anymore.

We ask the legislature to postpone approval of the settlement until it has sufficient information and time to assess whether the settlement provides enough money to fix the long-term damage to the Alaskan environment; provisions are added to give the legislature, and the public, a voice in how the money is spent; and Exxon and Alyeska settle the compensatory and punitive damages claims of the people injured in the spill, or if that cannot be accomplished within 30 days, Exxon and Alyeska agree that they will not put the State on trial in absentia when those damage claims go to trial.

**TESTIMONY OF
MAYOR BOBBY VAN BROCKLIN,
CITY OF CORDOVA,
BEFORE THE ALASKA HOUSE SELECT COMMITTEE
ON EXXON VALDEZ SETTLEMENT
APRIL 14, 1991**

Committee Members, Attorney General Cole, Commissioner Rosier and Commissioner Sandor:

I would like to start my testimony with Cordova's point of view based on a little history.

The people of Cordova have expressed concern about the Trans-Alaska Pipeline System from the time of its conception. After a hard-fought battle, the System was approved by a margin of one vote by the U.S. Senate. During the time of operation until the Exxon Valdez spill, Cordova continued to express its concerns and always were assured that "the best equipment, material and expertise will make operations at Port Valdez and in Prince William sound the safest in the world."

On March 23, 1989, all our concerns plus some we hadn't thought of started to become a reality. Even under good weather conditions, for the first three days, Alyeska or Exxon couldn't live up to their promises. Not even close. Less than 3,000 of the 260,000 barrels were recovered. And, with a weather change, the Exxon Valdez spill would eventually soil over 1,000 miles of Alaska's coastline, inflicting one of the worst wildlife disasters in our nation's history, and disrupting the lives of thousands of Alaskans who depend on the natural resources of this region.

We all know that the Trans-Alaska Pipeline provides 25% of the nation's oil and 80% of the State of Alaska's revenue. Everyone enjoys the benefits of the oil. However, only a few coastal communities share the risk posed by the transportation of this oil along our coast. The risks and benefits are not shared proportionately. Cordova's economy is based almost entirely on Prince William Sound's resources, especially commercial fishing. Through years of efforts, we have tried to enhance these resources through the Prince William Sound Aquaculture Corporation and 1989 was the first year the plan was to be in full production. I remember a conversation I had with a local fisherman a week or two before the spill. The conversation went like this. I was asked, well what do you think the season's going to be like this year? My reply was last year we had great fish prices, but only 10,000,000 fish; this year the price will probably drop some, but the prediction is 40,000,000 fish. Even if half the fish don't return for some crazy reason, it will be better than last year, which wasn't bad. Cordova's expectations were of a good to great fishing season which would mean our economy would be thriving. On March 23, we went from being optimists to pessimists because our world as we knew it started to fall apart. Next started a time of more promises and harsh reality. The mighty resources of Alyeska and Exxon, the State of Alaska and the federal government couldn't put Humpty Dumpty back together. The community tried rage, cooperation, begging and blind faith and again we got more promises. Don Cornett from Exxon made his famous quote in Cordova: "Trust us. We will make you whole." I think Mr. Cornett's definition of "whole" is a little different than the folks of Cordova or the folks from other oil affected areas.

The Vice President, the Governor, and countless Senators, Congressmen, Admirals, cabinet members, State Senators and House members, environmentalists, reporters and lawyers came. Some made promises. Some made statements. Others just listened. But little was ever done to address the impacted people. By law, it's my understanding that

people don't qualify as a resource, so their needs haven't been addressed. If the testimony you hear today seems a little harsh, you will know why. Our mistrust in government and the oil industry is based on the fact that promises are not kept. So please don't ask us to trust you. We would prefer it in writing, backed up by a letter of credit. So much for the history lesson. Let's get to specifics on the proposed settlement.

Since we are to fend for ourselves in recovery of people damages and city governments are closer to the people than the State, I have some statements and questions that the people of Cordova and the municipality would like answers to.

The State is the trustee of all the studies and legal preparation for Exxon Valdez damages, but now the people are being put in the position to sue just to get the information. This doesn't set well when you come to us now and say the federal and state governments will fix or restore the damage if we go along with the settlement. Mr. Attorney General, tell me why I should trust the state or federal government to repair my environment and natural resources? Please give me examples of what the trustees would do and give me a equal number of examples of the trustees will not do?

What about full study of the spill? Will this be completed or curtailed because of settlement?

Why has the State, especially at paragraph 13(c), on page 15 of the agreement and consent decree, not adopted the language that it represented it would to Judge Sporkin? The State in its settlement agreement purports to reserve only the "rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title or interest in land or other property interest affected by the oil spill." What does the word "present" mean in that case? Is the State trying to support Exxon's view that the only recovery available to fishermen and others dependent on natural resources is what they would have recovered in 1989, but that otherwise, the recovery belonged to the State, and that has been compromised through the settlement?

Much the same concern is raised by paragraph 13(b) which purports to preserve certain aspects of Alaska Native claims. Why not just preserve whatever Alaska Native claims which are available? Why has the State tried to give the benefit of certain language to Exxon, to the detriment of certain private plaintiffs?

Why is the State sacrificing some of the availability of the Trans-Alaska Pipeline Liability Fund, by explicitly allowing Exxon to try to recover some of its losses from that fund, to the detriment of the various private plaintiffs, who may have no other source of recovery if Judge Holland is right about Robins Dry Dock?

What do the provisions at paragraphs 24-30 mean? It looks as if Exxon is free to have the governments be responsible for a portion of the fault, but that the governments are not free to bring in Exxon. Paragraph 30.

Did the State have any responsibility to its municipalities and to its citizens (be they fishermen, landowners, kayakers, businessmen, or Alaska Natives) when they are facing a litigant of Exxon's size not to settle its claims alone, but to make more of an attempt to try to get Exxon to the settlement table and compensate the individuals who were really hurt most by the spill?

The State says its settlement does not affect any other parties' rights, but this ignores the realities of litigation. With the State in the case, Exxon recognizes that it is facing a

group of plaintiffs with formidable assets and resources, not otherwise available to private plaintiffs.

Why does the State seem to go out of its way to help support Exxon's legal positions, e.g. (a) representing that only the "Governments" may recover natural resource damages under the Clean Water Act [Par. 4 of the introduction]; (b) defining Natural Resources or Natural Resource Damages broadly to appear to cut off other parties' rights [Par. 6(c),(d)]; or (c) suggesting that the agreement settles "all consequences" of the spill (paragraph 6(g))?

The municipalities were able to get a State grant for an impact analysis to look at effects of the spill on municipal finance and other "people issues." The State should continue to fund this effort both to assist municipalities with their damage case, and to help the State and municipalities plan for future catastrophic disasters. This study was the Oiled Mayors' Study. Mr. Attorney General, have you examined the Oiled Mayors' Study? Do you know why the recommendations in the study funded by a million dollars by the State of Alaska haven't been acted upon?

Can we trust the State or Federal government to be adequate trustees of the environmental claims when they are not just pursuing those claims as trustees, but also alleged to have been a party which has violated the trust through its malfeasance? It is inconceivable that a trustee would be allowed to settle a claim for a beneficiary when it is implicated in the wrongdoing. Mr. Attorney General, last session the oiled communities tried to have the legislature advance raw fish tax claims to municipalities. This was shot down in Senate Finance--Exxon told them they would fix us up. That hasn't happened. Without State studies, can you tell me if Exxon were to agree to settle with us tomorrow, what would be a fair number without knowing the study information?

Can you clarify how municipalities will be asked to prosecute their raw fish tax claims against the defendants for maximum recovery?

Why is the State allowing Alyeska peace on certain issues, when Alyeska is still free to both sue the State (paragraph 20, last sentence), and argue that the State is responsible for most of the damages to private plaintiffs? [Paragraph 22 makes it obvious that this alternative will be open to Alyeska.]

ISSUES OF PARTICULAR CONCERN TO LEGISLATURES LOOKING AT THE SETTLEMENT FROM THE VIEW OF ALL CITIZENS OF THE STATE

1. Don't the people of the State need a much better understanding of the real effect of the money package?
 - (a) The real value of the money being given to the State by Exxon -- this is the whole "present value" idea. Exxon agrees to pay money over time. It is basically paying back a loan of the "Present value" of the money. What interest rate should be used in the real calculation?
 - (b) The real costs which the State and feds have accumulated so far --
 - (1) We need not just the total cleanup cost to the State and feds, but when those costs accumulated, because to the extent the State and feds don't get interest on the amount due, they are being underpaid.
 - (2) We need the same for attorneys fees',
 - (3) We need the same for the trustee and other science costs;
 - (4) We need a realistic estimate of what the rest of the cleanup costs will be for which a commitment has been made to pay Exxon when they do the work from their own money in the form of a credit; do we have any data on what was spent last year for cleanup to use as a guide ?
 - (5) The caps that the State and federal government put on the amount of the trust money which will be allocated to State and federal costs (in Par. 10 of the agreement) are not necessarily the actual value of those costs. To the extent they are not, a subsidy is being given by the people to Exxon.
 - (6) The federal government is not apparently seeking any money for litigation costs. Is that not just a subsidy to Exxon, or is the federal government being reimbursed from some other source?
 - (c) We need to really understand the tax value of this settlement to Exxon, because that affects the federal public fiscally as well. Exxon appears to have gone out of its way to force the State and federal government to spend the "leftover" money for certain projects only. How much of a tax break will that mean for Exxon? Otherwise wouldn't they have to pay taxes on this money since it would be earnings?
 - (d) We need to decide what is really going to be done with what, if any, money is left:
 - (1) Is it going to be used for projects, such as timber purchases, which might hurt local communities, e.g., Seward, more than help them?
 - (2) In what areas is it going to be used? Is there any understanding now of how it should be spent?
 - (3) Who will have control over the trust fund? It appears to be 3 federal and 3 State people, whose choice is left completely to the Governor;

- (4) What controls will there be on the trustees? There appear to be none now.
2. Can a responsible citizen or legislator now assess the appropriateness of the settlement since neither knows:
- (a) The liability case against Exxon, and Alyeska (this is to be found largely in the work product of Preston and the AG);
 - (b) The damages case against Exxon, and Alyeska [this is to be found largely in the science from the trustees, a summary of part of which was first made available a few days ago, but the bulk of which has not been made available];
 - (c) The downside of continuing with the litigation
 - (1) The costs for attorneys? Has any serious analysis been done of the Preston and AG costs: have they been cost effective; what would it cost if a "tight ship" were set up from here on out? Is there any foundation for the representations from the Governor that it would take 10 more years to litigate the case? Is the case that complicated? What would be the real costs that are being forgone through settlement?
 - (2) The impact of not settling on other State projects (e.g., ANWR and other development projects). The assumption is that the State wants to put Exxon, and certain other tax litigation behind it so that development can occur. How valid is this position? Do the people of the State really want that development? Has this issue been really looked at?
 - (d) The case against the State for its own negligence (which for the most part may remain open as a result of the settlement given that there is a significant risk that the State will be exposed to a damage verdict).
 - (e) The effect of a settlement of some of the State claims on those that remain--is the State worse off now in terms of its potential liability to private plaintiffs than it was before? Is there a bigger chance it will have to pay than if it was in the case at a trial against Exxon?
 - (f) Can we trust the State or the Federal government to be adequate trustees of the environmental claims when they are not just pursuing those claims as trustees, but also alleged to have been a party which has violated the trust through its malfeasance? It is inconceivable that a trustee would be allowed to settle a claim for a beneficiary when it is implicated in the wrongdoing.
3. The reopener clause appears to have severe problems:
- (a) The reopener may be used in very limited circumstances, and only if "the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the effective date" of the agreement. Is there any reasonable possibility that this clause is of any value to the State. Why was it even bargained for?
 - (b) The reopener clause invites litigation again. If the State asserts its validity, nothing stops Exxon from fighting its application, and again, "settling" differences with the State. It lacks any objective standards.

(c) There is no scientific evidence presented from which one can make a judgment about the usefulness of the reopener clause.

4. The indemnity provisions seem to put the State in a worse position than it was prior to the settlement with respect to liability and with respect to exposure for attorneys' fees. Whereas the State had not been sued prior to the settlement and probably would not have been sued had it secured the agreement of Exxon that it would not assert that the State was responsible, or had it obtained Exxon's agreement to indemnify the State, it now has been sued by hundreds of parties who did not want to sue the State. The cost of defending the case may well exceed the cost of prosecuting the case. The State is now looking at serious potential exposure for damages, or, alternatively, with the ridiculous notion of fighting its own citizens in a liability battle, and trying to belittle their injuries suffered from the spill.

5. How does the State control billing by Exxon for post agreement spill costs? The language in paragraph 11(b) seems to cover everything in the world; including Exxon's attorneys' expenses [i.e., "other professional expenses."] Is there no control in the agreement for Exxon's accountability to the fund it itself created through a settlement with the State?

6. Why is there the tension between paragraphs 12(a) and (b)? Which is the paragraph which more probably will apply because of what we expect Exxon to actually expend, and what does that paragraph mean?

7. Why is the State allowing Alyeska peace on certain issues, when Alyeska is still free to both sue the State (paragraph 20, last sentence), and argue that the State is responsible for most of the damages to the private plaintiffs? (Paragraph 22 makes it obvious that this alternative will be open to Alyeska)

8. Is there any serious attempt at deterrence through the amount of penalty involved, especially when Chairman Rawls telling the media that the settlement and criminal penalty will have no noticeable effect on Exxon's bottom line? The \$421 million present value which Exxon is paying is just 4/10 of 1% of Exxon's annual revenues of \$95 billion.

9. What deterrent effect is there for Alyeska which avoids any liability for its part in the damage to the environment through this settlement?

10. Should the legislature be concerned with what has appeared to be an intentional withholding of information from the legislature and the citizens of the State by Exxon and the State of the information necessary to make an informed judgment about the settlement?

11. Do the recent revelations of Alyeska's conscious indifference to the need for a realistic contingency plan to deal with large spills make any difference in assessing the settlement?

12. Have the people of the State, who are just now getting an idea of what the settlement document says, and its economic ramifications had enough time to make a Judgment, or to provide you with political input into what should be done?

13. Is it constitutional for the State to enter into a plan committing to trustees, without legislative scrutiny, the discretion to spend what may be large amounts of money?

14. What is the joint conduct agreement described in paragraph 35?

WHAT SHOULD THE LEGISLATURE DO AT THIS JUNCTURE?

The legislature should postpone any approval of the settlement until:

- a. It has sufficient information, and time, to assess whether the settlement provides enough money to fix the long-term damage to the Alaskan environment;
- b. provisions are added to give the oil affected areas, a voice in how the money is spent;
- c. Exxon and Alyeska settle the compensatory and punitive damages claims of the people and entities injured by the spill, or if that cannot be accomplished within 30 days, Exxon and Alyeska agree that they will not put the State on trial in absentia when those damage claims go on trial.

April 18, 1991

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

FROM: Kieran E. Donahue
Scientific Diver, IMS/SFOS (UAF)
5243 A. Broadway
Eielson AFB, Alaska 99702

(ph.) 907-372-3359

SUBJECT: Testimony - Exxon Valdez Oil Spill Claims Settlement

April 18, 1991

To: Representative Max Gruenberg, Chairman, and Members, House
Special Committee on the Exxon Valdez Oil Spill (EVOS) Claims
Settlement

Rm. 216, Capitol

P.O. Box V

Juneau 99811

From: Kieran E. Donahue, Student of Natural Resources
Management, and Scientific Diver for the Institute of Marine
Science, University of Alaska Fairbanks (UAF).

I would like to offer testimony on the proposed Exxon Valdez
Oil Spill Claims Settlement Agreement. It is my opinion that
the state of Alaska should accept the 9.9 million dollars that
Exxon Corporation has agreed to pay. However, in the best
interest of Prince William Sound, I would encourage that part
of the settlement money be used to: (1) Establish a Long-Term
Monitoring program for Prince William Sound and (2) the
publication of all scientific data related to the oil spill.

I offer the perspective of a university research student who
has been involved in different aspects of scientific research,
in both fresh water and marine ecosystems, for over six years.
I was a Field Supervisor/Scientific Diver for the coastal

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habitat assesment project(subtidal) that was performed under a contract with the Institute of Marine Science(IMS)/UAF.

I am not offfering my testimony on behalf of IMS, but I draw upon my experiences and work with other scientists in developing my analysis and recommendations.

PART I LONG TERM MONITORING

The United States is in danger of losing an important national historic and scientific asset.

A.Prince William Sound and South Coastal Alaska are special.

Prince William Sound(PWS) is one of the last intact coastal environments that remains in the world. The Sound is a world class ecological resource, and is one of the most biologically productive and diverse systems of its kind in the world. In order to insure that PWS remains a productive and healthy area, a long term monitoring program should be established.

B.Relationships are complex.

I don't believe enough attention has been given to integrated approaches involving the PWS system as a whole, including terrestrial, intertidal, and subtidal components. At

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the present time, many agencies spend money and time studying the individual resources of PWS. These agencies are responding to their missions and doing what they can individually. But this fragmented effort needs to be consolidated, coordinated, and focused into an integrated approach to long term monitoring. There stands before us now a chance to pull this effort together and fill the gaps by using some of this money from the claims settlement.

C. Good information and insight is needed to make the best management decisions.

For a long term ecological monitoring program to provide useful information, managers and scientists must together define the key information needed to understand and track the health of a system. Sometimes simple measurements can be made at intervals, but it is important to maintain the effort to provide for continuity so that the measurements are meaningful.

Monitoring can be done for a variety of reasons. As an example, some of the key variables I would recommend for monitoring include:

1. Primary Producers
 - a. Kelp
 - b. Laminaria and Agarum
 - c. Plankton

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2. Harvested Species

- a. Salmon
- b. Herring
- c. Halibut

3. Keystone Species or Species of Special Interest

- a. Shellfish (eg. Sea Urchins)
- b. Sea Otters
- c. Orcas

D. The importance of monitoring primary producers as an example of species interrelationships.

Primary producer species such as kelp not only provide food for certain organisms, but they also provide habitat at both large and small scales. Kelp beds are hiding places for small fish such as juvenile salmon. They also provide a place for herring to attach their egg sacs. A healthy marine system requires healthy and abundant Kelp.

The EVOS may have threatened the productivity of PWS in an unexpected way. Kelp beds are heavily grazed by sea urchins. Sea otters, however, eat the urchins and keep their numbers in check. Without otters (killed by the spill) the system will see an increase in the sea urchin population. Sea urchins can now overgraze the kelp beds of PWS causing a drastic decline in the

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kelp population and productivity. The loss of kelp beds will reduce the habitat for spawning herring and cover for small salmon. This in turn may have an adverse effect on the fishing industry by limiting the number of fish that can be harvested, thus adversely affecting the economic balance of the area.

From this example, it is possible to see the integrated relationship of organisms within the system and why it is important to understand whether a system is healthy or not.

To help us make the right decisions in managing PWS we need to "take the pulse" of the system. In order to accomodate the questions and concerns that have been raised, and others like them, base line data needs to be gathered and formulated. The size of the base line data needed can only be obtained through a long term moitoring program.

PART II: PUBLICATION OF BASE LINE DATA

Monitoring can be simple when it is hooked up to a deep understanding.

A. Importance of Base Line data

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- 1.) Managers have a responsibility to base management decisions on a firm understanding of resource conditions and possible human impacts on the public resources they manage.
- 2.) We don't need to study or monitor everything in the sysyem. However, there is so little known about the natural ranges of species within the PWS ecosystem that extensive work needs to be done to establish this information. Only if normal limits of individual species are known can abnormal conditions be readily identified in time to take corrective action.
- 3.) One example of base line data that has proven to be very effective is population dynamics of selected organisms--the ways in which populations change.

Population dynamics accurately reflect ecosystem conditions because organisms integrate the effects of a vast array of ecological factors, including predation, competition, and environmental conditions that are expressed as changes in readily measured population parameters.

Population dynamics permit predictions into the future providing early warning of adverse conditions through

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changes in parameters such as age structure and recruitment.

Population dynamics provide information at the species and population level, which is the level at which most management controls operate. Therefore the monitoring information is directly applicable to management concerns.

B. Existing and Continuing Base Line Data For PWS.

Following the EVOS, an effort of unprecedented magnitude by state and federal governments and Exxon to study the effects of the spill, was set in motion. Among those efforts are state and federal Natural Resource Damage Assessment studies designed to measure injuries to natural resources, including birds, mammals, fish and other wildlife, and marine and terrestrial habitats.

Some of the studies that have been done to date in the terrestrial, intertidal, and subtidal zones of PWS, are the most intensive studies of their kind ever done in the Northern Pacific. But they will be of little value if they remain secret

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and if they are not pulled together and key components continued.

I strongly recommend that all damage assessment base line data be released from secrecy once a settlement agreement is reached. To not allow the scientific community to publish and release the data they have gathered and analyzed in the last two - three years after the spill is absurd. These data are a crucial starting point in formulating a base line of biological information in PWS. The loss of this critical information will have long reaching detrimental effects on establishing a quality monitoring program in PWS. It can not be stated strongly enough, that, only if normal limits of species are known can abnormal conditions be readily identified in time to take corrective action.

In summary, I believe that;

Instead of wasting time and money in court, it is my opinion that the state of Alaska should accept the money being offered in the settlement agreement as long as an adequate sum of that money is set aside in an endowment fund (or something comparable) to put in place, and support, a long term monitoring and study program in PWS.

By establishing what exists in a system we will be better prepared to recognize and adress problems when they arise.

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Monitoring over time can give managers a firm understanding of resource conditions given that all parameters have been given a chance to be explored.

If a long term ecological monitoring program is going to provide useful information, managers and scientists must be allowed to utilize every possible tool at their disposal.

Base line data have been gathered and analyzed. It is now time to release and review that information so that the best possible management decisions can be made.

There will be other problems for PWS, why not make the best of this bad situation by doing something positive and preparing for the future.



Alaska Environmental Lobby, Inc.

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907-463-3366
Fax 907-463-3312

The Alaska Environmental Lobby (AEL) urges the legislature to reject the Exxon Valdez civil settlement.

4/26/91

The Exxon Valdez oil spill profoundly affected thousands of Alaskans. However, the very process to redress these damages excluded those injured parties. By excluding the public, the administration negotiated an unacceptably flawed settlement.

Justice Holland's ruling to reject the criminal settlement sends a message: Exxon's and Alyeska's punishment does not fit their crimes. This same message carries through to the proposed civil settlement--Exxon and Alyeska have not provided suitable recompense for the damages they inflicted upon the environment. To Alaskans, the Exxon Valdez oil spill is the greatest environmental catastrophe to affect our state. The oil spill wiped out livelihoods, converted entire subsistence cultures to cash economies overnight, and inflicted a staggering toll on animal communities. The proposed Exxon civil settlement does not repair all that was lost.

This settlement--

1. Is not a deterrent . . .

This settlement sets a poor example for future offenders. Alyeska failed to fulfill its promise to respond to a spill in Prince William Sound. Not only is Alyeska released from natural resources damage liability, but the financial cost, with a real dollar, amount after taxes of only \$425 million in 1991 dollars, is insignificant to a corporation the size of Exxon.

2. Discounts the value of scientific studies . . .

This settlement permits the suppression of scientific and economic studies. The public cannot make an intelligent and informed decision on the settlement without these studies. The studies' suppression enforces a cruel ignorance on the people. This sets an unjust precedence.

3. Neglects the people . . .

The trustees system fails to include a vehicle for meaningful public input. The trustees have already met--in private. There is no mechanism in place to include the public, the legislature or local governments. Indeed, the formation of such a mechanism is up to the trustees.

4. Does not provide for adequate restoration. . .

This settlement fails to ascertain adequate protection for spill affected areas. In order for these ecosystems to recover, they will need to be adequately protected. This will require acquisition of land and its resources. Local communities need to be involved with the selection and management of these purchases.

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • ALASKA FRIENDS OF THE EARTH
ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY • CLEAN AIR COALITION • DENALI CITIZENS' COUNCIL
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KNIK GROUP SIERRA CLUB • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • NORTHERN ALASKA ENVIRONMENTAL CENTER
PRINCE WILLIAM SOUND CONSERVATION ALLIANCE • SITKA CONSERVATION SOCIETY • SOUTHEAST ALASKA CONSERVATION COUNCIL



UNITED FISHERMEN OF ALASKA

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April 26, 1991

MEMBER ASSOCIATIONS

Alaska Crab Coalition
Alaska Independent Fishermen's
Marketing Association
Alaska Longline Fisherman's
Association
Alaska Trollers Association
Bering Sea Fishermen's Association
Bristol Bay Driftnetters Association
Concerned Area "M" Fishermen
Cook Inlet Aquaculture Association
Copper River Fishermen's Cooperative
Cordova District Fishermen United
Kenai Peninsula Fishermen's Association
North Pacific Fisheries Association
Northern Southeast Regional
Aquaculture Association
Peninsula Marketing Association
Petersburg Vessel Owners Association
Prince William Sound
Aquaculture Association
Prince William Sound Seiners Association
Seafood Producers Cooperative
Southeast Alaska Seiners
Southern Southeast Regional
Aquaculture Association
United Cook Inlet Drift Association
United Southeast Alaska Gillnetters
Western Alaska Cooperative
Marketing Association

Alaska State Legislature
P.O. Box V
Juneau, Alaska 99801

Dear Legislator:

The United Fishermen of Alaska is pleased with Judge H. Russell Holland's decision to reject the proposed criminal settlement in the Exxon Valdez oil spill case.

In addition, our organization is opposed to the proposed civil settlement as it now stands. We and our affected members believe there are items which must be included in a civil settlement offer before it would be acceptable to Alaska's fishers. These include:

- * the release of all spill data which have been financed by public funds;
- * payment for cleanup and restoration should originate from two different funds;
- * settlement funds should be used for restoration, rehabilitation and acquisition of equivalent resources, not for capital construction projects;
- * removal of clause which allows the use of settlement funds outside of Alaska;
- * retain state's right to pursue criminal and civil charges against Alyeska, including claims for natural resource damages; and
- * any monetary funds arising from a settlement should be paid in full or with interest.

This settlement offer, like most first offers, presents the Legislature a good starting point. We hope that future offers will include those items which we feel are currently lacking. In the meantime, the United Fishermen of Alaska remains available if we should be of assistance to you in any further negotiations.

Very truly yours,

Greg Seider mb

Greg Seider
Executive Director

mb



Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

April 24, 1991

Representative Bill Hudson
Alaska State Legislature
P.O. Box V
Juneau, AK 99801

Dear Representative Hudson:

The following comments are submitted on behalf of the Alaska Center for the Environment (ACE) regarding the proposed Exxon Valdez criminal and civil settlement agreements. ACE greatly appreciates the work done by the House and Senate Special Committees on the Exxon Valdez Settlement to provide opportunities to the public to testify before the Legislature regarding the settlement. As stated in verbal testimony, ACE considers the settlement presented to the people of Alaska by Exxon, the Governor, and the federal government to be flawed irreconcilably as currently proposed.

Release of Economic and Scientific Spill Data

ACE finds it ludicrous to be asked to evaluate the adequacy of the settlement without first being given the opportunity to review the biologic and economic study data measuring natural resource damages to Prince William Sound. Public monies paid for that data, and the public has a right to it. Attorney General Cole's argument that the spill data should not be released because it could potentially be used against the state in a lawsuit is horrifying in terms of public policy. If indeed the state was party to events leading to or causing improper response to the Prince William Sound spill (e.g. approval of a faulty spill contingency plan, failure to inspect response equipment, etc.), then the public has a right to know where the flaws were in order to evaluate how to correct them before a future spill occurs.

Review of the spill data is needed not only to evaluate the settlement, but also to help direct efforts towards restoration of Prince William Sound and prevention of future spills. How can we know where restoration is needed most, or what ongoing studies are needed without review of the spill data? Equally as important, little is currently known in "dollar for dollar" terms about the value of preventative measures compared to the costs of spill response and natural resource damages. The data from the Exxon Valdez spill could help provide answers to some of these questions. It would truly be a tragedy if another spill like the Exxon Valdez occurred in Alaska tomorrow because, for example, the arguments for prevention were outweighed by industry resistance to expending the upfront capital needed for a double-hulled tanker, or because the state did not want to pay the costs of maintaining adequate staffing of the Oil Spill Response Office in the Department of Environmental Conservation.

The summary of federal spill data recently released is not enough. Economic analysis is not included in the summary, and the report plainly states that it is "preliminary" and "available data are not fully analyzed and interpreted." The rest of the federal scientific and economic data, in addition to the state studies, must be released in order to be of value.

Public Participation

The public has been given no opportunity to participate in decisions about how settlement monies would be spent, were the settlement approved. The Trustees Council thus far has met behind closed doors, and has made no move towards soliciting public input on this matter. ACE would like to see the money spent on 1) purchase of timber rights along spill-affected coastlines to prevent further damage to these areas, 2) other restoration activities, and 3) ongoing studies of spill impacts in Prince William Sound.

ACE is disturbed to hear the Trustees Council part from the state administration's long stated intention to use the settlement monies to purchase timber tract lands. The statements against purchase of timber rights by members of the Trustees Council came forth despite the clear public support for timber buy-backs expressed in the legislative hearings on the settlement, and is further evidence of the Council's oblivion to public concerns.

Deterrent Value of Settlement

ACE is extremely pleased with Judge Holland's ruling that the \$100 million fine required of Exxon in the proposed criminal settlement is inadequate. A criminal penalty should both reflect the enormity of the crime committed by Exxon and should act to deter further crimes of this sort. The settlement fashioned by Exxon and the state and federal administrations accomplishes neither of these goals.

The entire settlement package clearly fails to send a message to polluters that egregious environmental crimes are unacceptable and will not be tolerated. The message it does send, however, is that polluters can make deals behind closed doors and buy their way out of messy pollution problems-- including the largest oil spill in North America.

Alyeska's Release from Culpability

ACE objects to the release of Alyeska Pipeline Service Company and its owner companies from any criminal charges, civil penalties or administrative penalties in the criminal plea, and release from natural resource damages in the civil settlement. 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 presented by Rep. George Miller, U.S. House of Representatives, in his letter to Judge Holland and Judge Sporkin dated April 8, 1991, Alyeska and its owners had advance knowledge of the company's inability to respond to an oil spill in Prince William Sound, and failed to take action to correct that situation. It is clearly not in the public interest for the state and the federal government to waive their rights to pursue charges against Alyeska for the Exxon Valdez oil spill.

Because of the major flaws inherent in the Exxon Valdez settlement agreement, the Alaska Center for the Environment strongly urges you to reject the settlement. We encourage you to consider these concerns and work to avoid the reemergence of the same problems in any potential future settlement proposals. Thank you for considering these comments.

Sincerely,

Karen Wood
for Sue Libenson
Executive Director

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:

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April 18, 1991

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

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

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

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

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

I. PUBLIC PARTICIPATION IN THE INJURY ASSESSMENT AND RESTORATION PROCESS

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

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

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

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

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

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

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

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

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

II. OTHER COMMENTS ON THE MOA

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

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

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

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

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

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

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

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

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

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

III. INDEPENDENT ENDOWMENT/FOUNDATION

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

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

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

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

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

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

ATTACHMENT 1

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

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

Members

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

The categories we suggest¹:

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

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

Mechanics of Advisory Committee

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

We suggest that:

- the committee have a small, paid staff and these staff members will not be employees of the trustees' respective agencies;
- the committee members will have their expenses paid and will have a per diem;
- the committee will meet bi-monthly and in consultation with their staff and with government agency professionals² will propose an annual workplan/spending plan for the trust; this plan will include a reasonable list of options from which the trustees would choose (trustees would have to choose options only from this list, however);
- the staff should include a public participation expert and a scheme of adequate public participation should be guaranteed;
- the committee would be chaired by a distinguished public citizen (for example, Jay Hammond or Russell Train) and members of the committee would be chosen by the groups/organizations/individuals that make up the specific categories of interests listed above³; private mediators/facilitators could be used to aid in this selection process.

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

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

COMMENTS OF
ALASKA CENTER FOR THE ENVIRONMENT
DEFENDERS OF WILDLIFE
GREENPEACE
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ON THE
PROPOSED SETTLEMENT AGREEMENT
CONCERNING THE EXXON VALDEZ OIL SPILL
BETWEEN THE UNITED STATES, THE STATE OF ALASKA
AND THE EXXON CORP., EXXON SHIPPING CO.
AND THE EXXON PIPELINE CO.

Prepared by:

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Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

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

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

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

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

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

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

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

I. NEED FOR THE DATA

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

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

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

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

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

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

II. INADEQUACY OF SETTLEMENT MONEY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. REOPENER PROVISION

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

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

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

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

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

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

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

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

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

IV. LETTING ALYESKA OFF THE HOOK

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

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

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

V. OTHER MISCELLANEOUS COMMENTS ON THE PROPOSED SETTLEMENT

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

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

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

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

restoration.

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

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

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

VI. CONCLUSION

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

modified to respond to the other concerns raised.

Alaska State Legislators
Pouch V
Juneau, Alaska 99801

Attached is my submitted to [redacted] Judge Holland on the proposed settlement of the federal and state charges against the Exxon Corporation, Exxon Shipping, and Alyeska Services Corporation. I hope you take the opportunity to review these comments and consider either new settlement terms or the pursuit of original and new charges through the court system, both federal and state. These are extremely important issues which, if allowed to be settled in present form, will only reinforce the understanding in Congress and the nation as a whole that Alaskans are willing to sacrifice the environment and the trust of many state residents for a very small monetary deposit in the treasury. Thank you for your time and consideration.

Chip Thoma

TO: Honorable H. Russel Holland

April 10, 1991

United States District Judge
U.S. District Court
222 W. Seventh Avenue, No. 4
Anchorage, Alaska 99513

RE: A 90 - 015 CR

FR: Theodore P. Thoma
#2 Marine Way
Juneau, Alaska 99801

RE: CRIMINAL PLEA BARGAIN PROCEEDINGS
concerning EXXON CORPORATION, EXXON SHIPPING, ALYESKA SERVICES

For the record, I am a self-employed environmental lobbyist and have been closely involved in Alaska resource issues for over 20 years. As such I was a chief proponent for the re-design of the Alyeska pipeline, for an all land route through Canada, and for full environmental safeguards to protect state and national/international waters connected with the eventual marine terminal and tanker route emanating from Valdez. As you are aware, the pipeline and marine route escaped full NEPA court review as a result of Congressional action instigated by the Alaska delegation in 1973. I still believe that NEPA review would have addressed the basic environmental safety and compliance responsibilities that were the root cause of the EXXON VALDEZ disaster, and subsequent inadequate response. My direct comments follow:

- 1) I oppose the agreement to drop the FELONY criminal charges against Exxon Corporation and Exxon Shipping Company (A90-015). I strongly believe that the pursuit of these grand jury charges and probable convictions are the only way to reform the inadequate staffing and competency levels aboard U.S. tankers that service Valdez and the West Coast to Panama. From the week-long live broadcast of the National Transportation Safety Board (NTSB) hearings in the summer of 1989, it was obvious that:
 - A) Mr. Frank Iarossi, former chairman of Exxon Shipping, knowingly cut back the number of crew members aboard the EXXON VALDEZ, compromising safety, stretching the physical ability of crew to competently man this carrier of dangerous, toxic material;
 - B) That Mr. Iarossi, Exxon Shipping, and Mr. Hazelwood, the ship's master, allowed Mr. KAGAN, a known incompetent, to serve aboard the EXXON VALDEZ, against the wishes and counsel of competent crew members who knew of his mental and physical problems, and caused KAGAN to steer the vessel through dangerous, ice-choked waters, resulting in the crash of the EXXON VALDEZ and resultant spillage of 11 million gallons of oil;
 - C) That Mr. Iarossi, Exxon Shipping, and Exxon Corporation knowingly allowed Mr. Hazelwood to operate the EXXON VALDEZ without monitoring his acute alcoholism, and in fact fabricated the small amounts of paperwork in Exxon files relative to Hazelwood's condition. These two reports were without dates or signatures, yet purported to show that monitoring of Hazelwood did occur;

Consequently, I believe that counts IV & V (A90-015) should be reinstated and litigated, and actively pursued by the federal government, as these circumstances were the BASIS of state testimony before the NTSB. The agreement to bring these charges for litigation by the federal government was done in lieu of applicable state laws covering crew safety and competence.

2) Additionally, I strongly believe that the MISDEMEANOR criminal charges against Exxon Corporation and Exxon Shipping Company are being settled far too cheaply for the great, extensive damages to wildlife over a 700 mile region. It is my understanding that the ALLIED CHEMICAL case was the largest, previous U.S. settlement for environmental damages, at \$13 million. However, this was also 10% of Allied's earnings for that year. EXXON's yearly SALES are over \$100 BILLION; their reported net, yearly earnings are \$5 BILLION; and their NYSE traded stock has gone up 13 points in the last two years, at a estimated value of \$1 BILLION per point. This huge corporation is in effect being given a pittance fine by the plea-bargain, and it in no way should be viewed as a properly negotiated fine for either the extent of damages or the worth of the corporation. Also, as you may be aware, Mr. Lawrence Rawl of Exxon has repeatedly stated to the press that the fines and settlement will in no way impair or harm his company, and that all costs will be immediately passed on the consumer in pump prices. Finally, the overall terms of the settlement, payments over ten years, are an affront to Alaskans and the nation as a whole; once Mr. Rawl 'passes on the costs', consumers will in effect be paying over and over for Exxon's corporate liabilities, while the corporation makes token payments for it's environmental assault on the nation's common resources.

3) Finally, I strongly believe that civil and criminal charges, both felony and misdemeanor, against Exxon, Exxon Shipping and ALYESKA should be reinstituted and pursued by the federal and state governments, based on the complicity, culpability and liability of Exxon and the owner companies of Alyeska to secretly plan non-compliance with terms of agreements struck with the federal and state governments to immediately respond and clean up ANY spill in Prince William Sound. The documents obtained and verified by U.S. Congressman George Miller amply demonstrate that collusion on the part of Exxon and Alyeska to ignore the existing contingency plan was commonplace, and an active topic of discussion among the owner companies in 1987-88, even to the point of written, internal memos that materials, personell and marine transport were not on-hand to address but the most minor spills in Port Valdez and Valdez Arm. The June, 1988 owners meeting of Alyeska in Phoenix, Arizona, as referenced by Stanley Factor, Vice-President of Arco Marine, Inc., states clearly the Alyeska HAD NO INTENTION of responding to a spill in Prince William Sound, except with dispersents that were not on hand, with no properly fitted aircraft to utilize them. On March 24, 1989, in the early am hours, one of the first calls made by Mr. Iarossi, upon hearing of the spill in Houston, was to Southern Air Transport of Miami, for a C-5 aircraft, specially fitted for dispersent application, to be airborne, fly to New Mexico to pick up the dispersent ("ADDS PACK") and proceed to Anchorage. As the record shows, dispersent was not on-hand in Alaska, the plane was in Miami. The Valdez personell were not trained or available, the barge was empty, and whatever small booms and skimmers on-hand were buried in snow. I term these circumstances as criminal acts on the part of Alyeska and owner companies who were far more interested in tanker turn-around times and under manning than taking any responsibility for the consequences.

In summary, I trust you take these points into consideration, and I do appreciate the opportunity to comment. The Alaska Legislature is holding daily hearings on these vitally important issues, and I hope you are able to see the wisdom in recommending rejection of these present settlement terms, as a judicial officer responsible for determining the fairness of the settlement for immediate and long-term damage to national resources.

AND PERHAPS
ADEC & USCG
EPA, ETC.

Sincerely,



Theodore P. Thoma

In Exxon Deal, Transportation Chief Wins Another One for the President

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, March 20 — A week ago Tuesday, Lawrence G. Rawl, the chairman of Exxon, flew to Washington. In an informal ceremony in the Justice Department just before midnight he signed a \$1.1 billion settlement that he hoped would put the nation's worst oil spill, and the two years of civil and criminal cases that followed, behind him and his company.

Standing with Mr. Rawl, Gov. Walter J. Hickel of Alaska and the lawyers for the Department of Justice was Transportation Secretary Samuel K. Skinner.

Once again Mr. Skinner had pulled it out for the White House, bringing to a successful conclusion talks that by all accounts could easily have tipped the other way.

"I viewed my job as a facilitator," said Mr. Skinner, a former United States Attorney from Chicago. "You had a huge amount of egos and interests that had to be blended together."

"In my experience I've found that if the principals don't want to settle they look for an opportunity to get out. In this case everybody wanted a deal because they knew the alternatives didn't make sense."

A 52-year-old lawyer and protégé of James R. Thompson, the former Governor of Illinois who at one time was considered as a potential national Republican figure himself, Mr. Skinner has made his career in the capital handling domestic political issues without embarrassing the President. His background as a litigator has helped. So has his instinct for the spotlight and his good feel for the Washington social circuit.

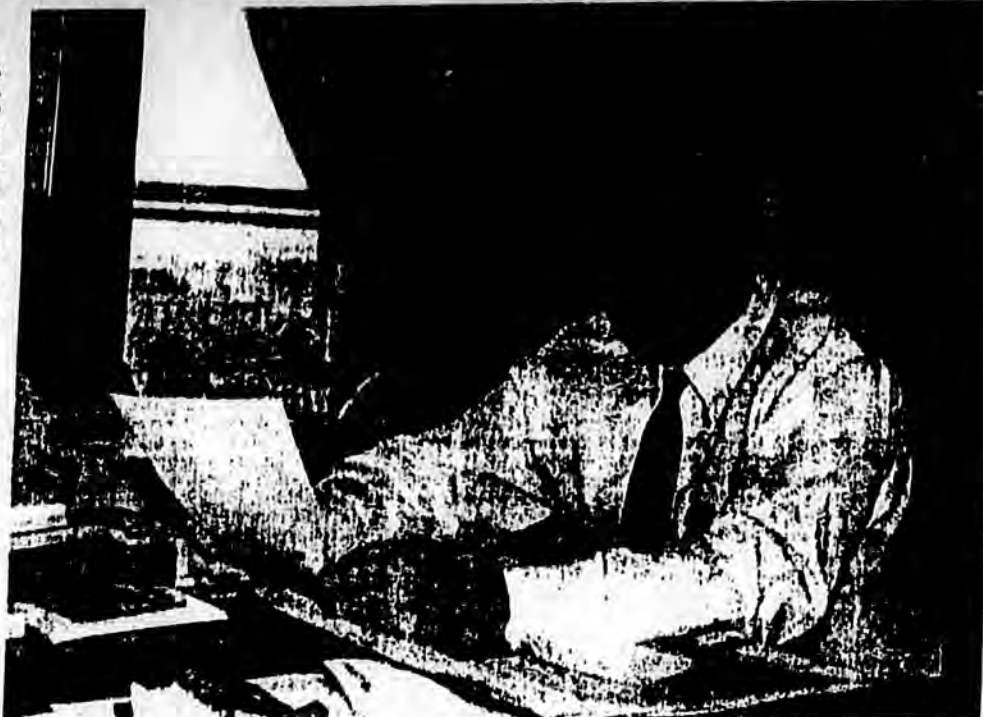
In Response to Disasters

When the tanker Exxon Valdez struck a reef in Prince William Sound in Alaska on March 24, 1989, spilling 11 million gallons of Alaska crude into the sound and turning beaches into a chaos of oil-soaked birds and dying otters, it was Mr. Skinner who was dispatched to supervise the Government's response.

Earlier that month, when machinists at Eastern Airlines went on strike, President Bush tapped Mr. Skinner instead of Elizabeth Dole, then Secretary of Labor, to handle the strike. Mr. Skinner's advice to the President: stay out of the struggle.

In September 1989 Hurricane Hugo swept through the Caribbean and struck the mainland in South Carolina, killing 24 Americans and causing immense property damage. A month later a powerful earthquake hit the San Francisco Bay area, killing 59 people. In both disasters Mr. Skinner was called in.

Now there is the Exxon deal. With his company facing a criminal trial in April and civil litigation afterwards being prepared by the Justice De-



Marty Katz for The New York Times

"I viewed my job as a facilitator," said Transportation Secretary Samuel K. Skinner of Exxon's Justice Department settlement. "You had a huge amount of egos and interests that had to be blended together."

partment, Mr. Rawl had been ready for months to talk. "It's been a burden to us," the Exxon chairman said in a news conference on March 13 in Irving, Tex.

Eager for a Settlement

Governor Hickel, an independent, wanted a consistent source of money to continue recovery work in Prince William Sound, the source of a prosperous fishing and tourism industry.

The Federal Government was eager to settle, too. The civil case against Exxon was expected to take at least five years to litigate, and in the criminal case, scheduled to begin April 10, the Justice Department was going to be testing new applications of environmental law. Nobody knew how a jury would respond.

"The cleanup efforts Exxon had made in the sound made a significant difference," Mr. Skinner said. "Nature had also done a tremendous job there. Scientists were telling everybody this was not a multibillion dollar damage suit."

Mr. Rawl and Lee R. Raymond, Exxon's president, flew to Juneau, Alaska, on Jan. 15 at Governor Hickel's invitation. The state and the Federal Government had agreed three weeks earlier to work together, he told them. Mr. Raymond called Mr.

An experienced litigator finds a way to satisfy everybody.

Skinner and told him that the Governor was seeking an agreement.

Mr. Skinner said he believed that a successful negotiation was possible, but only if it was conducted at the Cabinet level. "I said this case will not be settled by lawyers," Mr. Skinner said. "First of all, they don't know how to settle it. Second, they have a built-in conflict of interest. This could go on for years."

The Chairman Cools His Heels

On Feb. 5 Mr. Rawl and Mr. Raymond were asked to come to Washington for a meeting at the Commerce Department with the Federal and state negotiators. Mr. Skinner, Manuel Lujan Jr., Secretary of the Interior, William K. Reilly, Administrator of the Environmental Protection Agency, John Knauss, Administrator of the National Oceanic and Atmospheric Administration; Gov-

Hickel and Charles E. Cole, the Alaska Attorney General.

Mr. Rawl, a combative executive whose four-year tenure as Exxon's chairman had been marred by the oil spill, was in a sour mood, several negotiators recalled. After being asked to wait outside a conference room for 30 minutes while the government officials finished a meeting, Mr. Rawl became furious.

"I went out twice and asked them to please be patient," said Thomas A. Campbell, general counsel of the National Oceanic and Atmospheric Administration, who organized the meeting. "Rawl said: 'Just tell them they don't need to take much time. What I'm going to say is short and sweet.' He was going to tell them he's had it, he'll see them in court."

Mr. Skinner said that when the Exxon chairman entered the room he was sick and tired of how the company had been treated by the Government, the news media and the people of Alaska. Exxon had spent \$2 billion to help clean up Prince William Sound, Mr. Rawl said, more than had ever been spent by any company for an environmental restoration project, and had received no credit.

Nobody responded until Mr. Skin-

ner disarmed Mr. Rawl, according to participants.

"Look, Larry," said Mr. Skinner, whose department includes the Coast Guard and who has developed a personal relationship with Mr. Rawl in the two years since the spill. "Let's not relive it. If we do, we'll never get past it."

'Reopener Clause' Is a Snag

Over the next 90 minutes, participants say, the broad outline of a settlement of the civil claims was established. Following Mr. Hickel's lead, the state and the Federal Government said they were looking for at least \$1 billion. Mr. Reilly insisted that the settlement include \$300 million more to be put into a special fund if more damage was found, a provision that came to be known as the "reopener clause."

Mr. Rawl and Mr. Raymond said that they wanted the settlement to make Exxon immune to any more state and Federal claims, that they did not want to pay the money in a lump sum and that they hated the reopener clause.

Three more meetings were held in Washington in February and early March before lawyers were dispatched on March 3 to put the agreement into legal language. With Washington gripped by the Persian Gulf war, the group was able to work undistracted by reporters or environmental groups or other interests.

"This had to be handled by the principals only, and it had to be handled in a short period," Mr. Skinner said.

Through February, the talks were never far from collapse. "We knew the longer the discussions went on the harder it would be to put it together," the Secretary said.

Justice Department lawyers and other participants credit Mr. Skinner with keeping Exxon and government officials at the table.

When Mr. Rawl and Mr. Raymond almost walked out because of Mr. Reilly's insistence that the agreement should have a reopener clause, Mr. Skinner told them the E.P.A. administrator's signature on the agreement was vital politically. Without it, the Secretary said, the Bush Administration and Exxon would have a hard time justifying the settlement to environmental groups.

And when Exxon insisted that Mr. Reilly be barred from attending a meeting on Feb. 24, Mr. Skinner assured Mr. Reilly that the Government would not negotiate something the E.P.A. administrator was unable to accept. In the end, Exxon and Mr. Reilly accepted a provision that called for the company to spend up to \$100 million after the year 2001 if more work in the sound was needed.

Mr. Skinner also kept the White House informed. During a meeting at the White House, John H. Sununu, the President's chief of staff, remarked that the \$1.1 billion deal sounded "like

an awful lot of money," Mr. Skinner said. But he assured Mr. Sununu that the agreement between the Government, Alaska and Exxon would be a good deal for everybody.

Exxon and its shipping subsidiary pleaded guilty to four criminal misdemeanor violations of environmental law and agreed to pay a \$100 million fine. It was the largest penalty ever assessed in a pollution case, more than three times higher than the \$29.7 million that the Government collected in 1990 for all environmental crimes. Even more, from the White House point of view, it makes good on Mr. Bush's campaign promise to penalize polluters.

From the state's point of view, the cost of the settlement, \$1.1 billion, will keep Exxon involved in the restoration of Prince William Sound for at least a decade.

Exxon, like any corporation (or person, for that matter), would have preferred not to spend any money. But Mr. Rawl said last week that he thought the settlement was good for the company. Paid out annually over 10 years, the payments reach a maximum of \$190 million this year, and then drop to \$70 million each year from 1994 to 2001.

To a corporation with an annual revenue of \$100 billion, the cost of the settlement each year is roughly the same as drilling two difficult offshore wells. "It will not curtail any of our plans," Mr. Rawl said.



Ashburn-Alanson

Lewis Gordon

276-4331

Attny For
Sandra Cesarini

Sandra Tavanis Cesarini
6621 Fairweather Drive
Anchorage, Alaska 99518
907-344-0519
fax 349-7261

April 17, 1991

Re: PROPOSED EXXON SETTLEMENT

Allow me to introduce myself. My name is Sandra Cesarini. I am co-founder of a large seafood processing company in this state. I am not now, nor have I ever been, "anti-business". I have been an active member in virtually every local and statewide pro-development organization in Alaska. However, as a legitimate victim of the oil spill, I cannot allow the settlement now under consideration to be accepted without voicing my heartfelt opposition.

I believe that Governor Hickel and Attorney General Cole worked diligently and sincerely in what they perceived to be the best interest of the State. I have personally been in negotiations with Exxon and know full well the difficulties involved. I understand the pressures of closed door negotiations. Considering the additional complication of Federal involvement (and agendas) in the negotiations, the Governor and Attorney General should be commended for their good faith efforts.

None-the-less, in reviewing the new information on Alyeska's culpability, as well as the repercussions that the proposed Exxon settlement has on third party (private) plaintiffs, I believe you will agree with me that serious reconsideration of the terms of this settlement is necessary.

The State of Alaska, until now, has stood squarely on the side of its injured citizens, proclaiming the need for responsible development yet seeking to insure the negligent parties bore full responsibility for their actions. Now, in the midst of bitter litigation and in light of the most recent revelations, the settlement proposal seems to put the State of Alaska in bed with the guilty parties. In the eyes of the third party plaintiffs and Congressional leaders who will determine the fate of ANWR, this settlement transforms Alaska from a leading plaintiff into just another defendant.

Page 2 of 4
April 17, 1991
RE: Proposed Exxon Settlement

Over the past two years the State has acted in concert (for the most) with other victims of the spill. The proposed settlement as it presently stands is a radical departure from this policy and leaves the remaining plaintiffs to face not only a corporate giant, but the full force of the State government as well. As a plaintiff, I would alert you to several specific concerns:

A. THE PROPOSED SETTLEMENT UNDERMINES THE LEGITIMATE CLAIMS OF HUNDREDS OF ALASKANS STILL SEEKING REDRESS FROM EXXON.

United, the plaintiffs as a whole were in a much better negotiating position. With the State settling the government's interest, the remaining plaintiffs, businesses and individual citizens, are much weakened. We feel abandoned by the State in our hour of greatest need. It seems the power and leadership of the State is now backing the party responsible for the disaster, and we are left alone to deal with an organization that describes itself as "wealthy and powerful beyond your wildest dreams". It is difficult not to feel betrayed.

B. THE PROPOSED SETTLEMENT ALLOWS EXXON TO SHARE THE BLAME AND LEGAL LIABILITY FOR THE SPILL WITH THE STATE GOVERNMENT.

It has been Exxon's position at every juncture since the day of the grounding of the Exxon Valdez to spread the blame as widely as possible. Fundamental to this policy is the ongoing attempt by Exxon to establish the legal grounds necessary to include the State of Alaska as a responsible party, sharing proportionately in any future financial damage awards. The most recent evidence of this effort to shift the blame comes from the extensive deposition taken last week from fellow Bruce Suzumoto, President of the Prince William Sound Aquaculture Corporation (PWSAC). Exxon, in court, intends to attribute as much blame and accordingly, financial damage liability, to the State of Alaska as it can. The more the blame and damage is attributed to the State, the less will be attributed to Exxon. During this action between Exxon and the third party plaintiffs, the State will be powerless to affect the jury's determination of proportion, or amount of blame that will fall to Alaska. This percentage of blame will set the State's set the State's percentage of direct financial liability in any damage award made to the plaintiffs.

Page 3 of 4
April 17, 1991
RE: Proposed Exxon Settlement

In order to insure the ability of the third parties to collect whatever portion of any such future award the court may decide will be the State's responsibility, the third party plaintiffs have no option but to sue the State as well as Exxon and Alyeska. Legal fees will be astronomical given the fact there will be many lawsuits and the State will be required to defend itself many times.

By settling now, and forcing the third parties to sue the State as well as Exxon, I feel the administration is opening itself to even more enormous court costs. When the settlement's potential for massively increasing the actual direct liability is added to the potential of ongoing legal fees incurred defending against some 300 litigants, it would seem clear that the Governor's goal of saving legal fees is not met with the proposed settlement.

C. THE PROPOSED SETTLEMENT ESTABLISHES THE STATE AS AN ADVERSARY TO THE OTHER PLAINTIFFS.

Where the State has been seen as an ally, the terms of the proposed settlement clearly moves the government into an adversarial position (politically as well as legally) against the hundreds of citizens who need access to the information denied them by the settlement terms. Extensive case law, Alaska's Freedom of Information Statutes and, indeed, the State Constitution all suggest that efforts to hide research done by State officials, State contractors or paid for by State warrants are doomed to fail. Rather than freely transferring information between joint plaintiffs, the parties must now anticipate another round of legal battles to gather the data needed to establish our case against Exxon.

We feel Exxon is well able to hire its own attorneys and fight its own battles if it wants to deny us access to information which chronicles the damage done by Exxon's negligence. Why should the State assist Exxon in this endeavor?

These issues are those of most concern to third party plaintiffs in the Exxon case. However, there are other primarily political and moral concerns that bear consideration as well. I simply cannot believe that the State's acceptance of the proposed settlement, especially in light of the recent revelations regarding Alyeska and its owner companies (including Exxon), is good public policy. From a practical standpoint, Alaska's development would appear to be hindered by the State's seeming compliance in relieving Alyeska of its liability.

Page 4 of 4
April 17, 1991
RE: Proposed Exxon Settlement

Opposition to the settlement is growing within Alaska. Rather than take an increasingly unpopular position siding with the guilty parties, it would seem the Legislature has an opportunity to seize the leadership of a move to revisit the terms of this dubious arrangement. The new light shed on the behind-the-scenes dealings with Alyeska and the owner companies allows ample excuse to re-evaluate the State's position without loss of face. We have been negotiating in good faith.

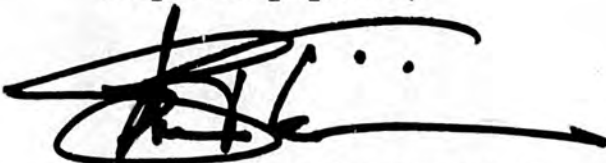
I can assure you that the last thing I or any of the other third party plaintiffs want to do is drag the State of Alaska into court on our way to seeking redress from Exxon and Alyeska. To prevent this I urge the following actions be considered:

1. THE STATE SHOULD SEEK IMMEDIATE AND SUBSTANTIVE RENEGOTIATION OF THE PROPOSED SETTLEMENT.
2. THE STATE SHOULD WITHHOLD ANY SETTLEMENT AGREEMENT UNTIL AND UNLESS EXXON HAS SATISFIED ALL THIRD PARTY PLAINTIFFS.
3. THE STATE SHOULD REQUIRE ANY SETTLEMENT AGREEMENT TO INCLUDE PROVISIONS HOLDING THE STATE BLAMELESS FOR ANY LOSS OR DAMAGE SUFFERED AS A CONSEQUENCE OF THE SPILL AND RELATED ACTIVITIES.

Thank you for your serious consideration of this matter.

Please feel free to contact me if I may be of any further assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Sandra Tavanis Cesarini', with a large, stylized flourish extending from the end of the signature.

Sandra Tavanis Cesarini

DAVIS WRIGHT TREMAINE

LAW OFFICES

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DAVID W. OESTING
(907) 257-5323

April 13, 1991

Via-Facsimile
(907) 235-3140

The Honorable Max F. Gruenberg, Jr.
House Judiciary Co-Chair
State of Alaska
District 11-B
Room 118, Capitol
PO Box V
Juneau, Alaska 99811

Re: The Exxon Valdez Oil Spill

Dear Representative Gruenberg:

At the request of Mr. Robert Cowan I am providing you with the following statement. I do so as one of the two Court appointed Lead Counsel charged with the leadership and coordination of the litigation of all private sector persons and entities with claims for damages arising out of the Exxon Valdez Oil Spill.

The specific topic which Mr. Cowan asked me to address is framed by paragraph 13, subparts b. and c. of the proposed Agreement and Consent Decree intended by the United States, the State of Alaska and the Exxon defendants to settle the Oil Spill litigation pending between them. More specifically, the precise selection of words contained in these subparagraphs,¹ when juxtaposed to the actual nature of the physical damages to natural resources caused by the Oil Spill and the path of transmission of that injury to private plaintiffs dependent upon the physical condition and biological production of those natural resources for their livelihoods, is serious cause for alarm. The

¹ It should be noted that the same terms are exactly and carefully duplicated and reaffirmed at paragraph III, subparts C-2. & 3., of the proposed Memorandum of Agreement and Consent Decree for settling the litigation between the United States and the State concurrently with the tripartite settlement between the governments and the Exxon defendants.

FAX: (907) 257-5399

BELLEVUE, WASHINGTON • LOS ANGELES, CALIFORNIA • PORTLAND, OREGON
RICHLAND, WASHINGTON • SEATTLE, WASHINGTON • WASHINGTON, D.C.

Max F. Gruenberg, Jr.
April 13, 1991
Page 2

selection of the words ". . . any present right, title, or interest in land or other property interest effected by the Oil Spill;" when analyzed under the legal rules pertaining to the assessment of damages illustrates quite clearly that Exxon (now to be joined by the State and the United States) intends to argue that the future biological output in the form of fish, shellfish and other harvestable products dependent upon the cleanliness and productiveness of Alaska's natural resources, is owned and controlled by the governments to the exclusion of the private and commercial harvesters of such resources. Therefore, the latter persons have no standing to claim damages for diminished future harvestable output of the natural resource assets of this State.

My opinion that the foregoing accurately states Exxon's, and the respective governments, position with respect to recovery for future natural resource damages as they affect private citizens has been distilled from numerous communications and discussions with all parties concerned over a substantial period of time in my role as Lead Counsel for private plaintiffs' Oil Spill litigation efforts. Due to constraints on certain dialogue and/or communications in that process, I am not in a position to cite to any documentation or communication supporting this opinion. However, the simple solution to determine whether it is accurate is to ask the state representatives and Exxon representatives whether a commercial fisherman in Prince William Sound or the Kodiak archipelago has a claim for economic losses suffered by reason of diminished salmon production in the future caused by the Oil Spill. If that question is answered in the negative, there can be no doubt as to the intent and objectives of the governments and the Exxon defendants with respect to such claims under their settlement agreements.

I hope the above is responsive to your inquiry as presented to me by Mr. Cowan.

Very truly yours,

DAVIS WRIGHT TREMAINE

David W. Oesting



Working for the Nature of Tomorrow

NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

**COMMENTS OF THE NATIONAL WILDLIFE FEDERATION
ON THE PROPOSED CONSENT DECREE/MEMORANDUM OF AGREEMENT
WHICH CONSTITUTE A SETTLEMENT OF
GOVERNMENTAL CLAIMS FOR NATURAL RESOURCE DAMAGE
AGAINST EXXON AND ALYESKA PIPELINE**

[56 Federal Register 11636, March 19, 1991]

prepared by:

Douglas Wolf
Erik Olson

April 18, 1991

NWF Comments
Consent Decree/MOA

INTRODUCTION

The National Wildlife Federation ("NWF" or "the Federation") welcomes the opportunity to comment on the Agreement and Consent Decree (hereafter "Consent Decree") and Memorandum of Agreement (MOA) proposed by the natural resource Trustees¹ and Exxon² as settlement of governmental claims for natural resource damage claims resulting from the Exxon Valdez oil spill. 56 Federal Register 11636 (March 19, 1991).

The Federation's principal concern is that the public has no meaningful ability to evaluate and comment on the proposed settlement unless scientific and economic data, which address the adequacy of the proposed settlement, are made available. Currently, the Trustees and Exxon have withheld the bulk of this information.

The data contained in studies conducted by the Trustees, including economic studies, belongs to the public since the research analyzes the impacts of the spill on the public resources and was paid for with public funds. Such disclosure also would enhance the ability of outside scientists and the public to assess and comment upon post-spill restoration plans. Moreover, the studies should be released in order to inform the public and scientific community about the impacts of a major spill, and to enhance our understanding of the costs and risks of oil development and oil transport. The truth about the spill must be shared nationally and internationally, to aid in studying the impact of spills which continue to occur in the Persian Gulf, in the Mediterranean and around the globe.

Federal Judge Russel Holland must evaluate the fairness and legality of the proposed settlement and NWF requests the Judge to order all parties -- including Exxon -- to disgorge this critical

¹ Under the scheme set forth in the Clean Water Act and the Superfund statute, Trustees must be appointed to represent injured natural resources. In the case of the Exxon Valdez oil spill, there are both federal and state Trustees (collectively, the "Trustees"). The federal trustees are: Department of Interior, Department of Commerce (through the National Oceanic and Atmospheric Administration, NOAA), and the Department of Agriculture (the "Federal Trustees"). The Alaska state Trustees are: Department of Fish and Game, Department of Environmental Conservation, and Department of Law (the "State Trustees").

² "Exxon" refers to Exxon Corporation, Exxon Shipping, and Exxon Pipeline, collectively.

NWF Comments
Consent Decree/MOA

data. We urge the Court to defer approval of the proposed settlement until the public and the Court have an opportunity to fully evaluate the data.

To assist the Court in this task, the Court could consider appointing a magistrate, special master, or independent counsel to review the data who would also aid the Court in assessing the advisability and fairness of allowing Alyeska Pipeline Service Corporation ("Alyeska" or "Alyeska Pipeline") to avoid all criminal liability and all civil liability for natural resource damages.

NWF also questions the adequacy of the settlement and provisions of the proposed settlement which should be modified and/or interpreted.

NATIONAL WILDLIFE FEDERATION

NWF is the nation's largest private conservation education organization. Founded in 1936, the Federation, its 5.6 million members and supporters, and 51 affiliated organizations, work to educate, empower, and inspire individuals and organizations to conserve fish, wildlife and other natural resources, to protect the environment, and to build a globally sustainable future.

For several years, NWF been involved in oil spill and natural resource damage issues. The Federation is actively working on oil spill issues and is on the forefront in urging safeguards to prevent damages such as those associated with the Exxon Valdez oil spill. NWF, with the Wildlife Federation of Alaska and the Natural Resources Defense Council (NRDC), has filed suit against Exxon and Alyeska Pipeline requesting the court to create a trust fund which would aid in restoring the natural resources damaged by this catastrophe. In addition, the Federation continues to participate in the Valdez spill natural resource damage assessment process via comments submitted in the public record. NWF also strongly supports citizen involvement in government decisions relating to pollution assessment and cleanup.

The Federation welcomes this opportunity to comment on the proposed settlement. This issue is of great importance to NWF and its members and supporters. As one of the principal plaintiffs in the State of Ohio et al. v. Department of the Interior, 880 F.2d 432 (D.C. Cir. 1989) and State of Colorado et al. v. Department of Interior, 880 F.2d 481 (D.C. Cir. 1989) (collectively, "Ohio case"), NWF successfully challenged important aspects of the natural resource damage assessment regulations promulgated under the Comprehensive Environmental

NWF Comments
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Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). The Federation also successfully intervened in and obtained the Court's rejection of an unlawful government-polluter settlement agreement in a precedent-setting natural resource damage case in Massachusetts. In Re Acushnet River and New Bedford Harbor: Proceedings Re Alleged PCB Contamination, 712 F.Supp. 1019 (D. Mass. 1989). In addition, the Federation actively advocates increased prosecution under Superfund to recover funds for restoration of damaged natural resources.

I. WITHOUT FULL DISCLOSURE OF SCIENTIFIC DATA,
THE PUBLIC CANNOT EVALUATE THE SETTLEMENT

The Need For Public Input

It is a cornerstone of American democracy that the public shall participate in government and our governments, federal, state and local, shall be accountable for their actions. This is especially true when government actions involve public resources. In the case of the settlement of the governmental lawsuits concerning the Exxon Valdez oil spill, public involvement is essential.

A. THIS WAS A MAJOR DISASTER

This proposed settlement involves the largest oil spill ever to occur in U. S. waters and one of the world's worst spills -- clearly an issue of great public importance. The spill occurred in Prince William Sound, a largely undeveloped, pristine environment of spectacular beauty and species diversity. The timing of the spill was disastrous: the deadly oil slick swept across the Sound and the Gulf of Alaska at the time of the year when the ecosystem in the area is most biologically active.

The Exxon spill coincided with the beginning of the reproductive cycle for most of the birds, mammals, fish and other species in the Sound and when many migratory species were beginning to arrive in the area. The spill took place just before the seaward migration and spawning of countless salmon and herring -- along with oil, these species are the foundation of the local economy and the traditional way of life pursued in many native villages.

The U. S. and Alaska governments and Exxon have studied the various effects this spill has had on the Prince William Sound/Gulf of Alaska ecosystem for over two years. The grisly immediate impacts, such as body counts and evidence freezers full of dead, oiled animals and rehabilitation centers full of stressed and dying wildlife have been revealed. However, the results of the publicly-funded studies have been hidden from the

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public. Except for Exxon's constant barrage of public relations materials intended to pose as science, little information has been disclosed. Much of what we know was revealed through leaks by concerned scientists; and the information indicates that the spill has had and will continue to cause dramatic, long-term effects on the entire ecosystem.³

If ever the public has had a right to know what its governments are doing and how it affects public resources, this proposed, precedent-setting legal settlement should trigger that right.

B. THE PUBLIC TRUST MAY HAVE BEEN VIOLATED

This settlement proposal implicates the public's right to know because the vast majority of the natural resources that have been so dramatically damaged are public resources and the governments have a duty to properly steward these resources.

Much of the land affected and the resources damaged by the spill, including sea and land animals, water, beaches, and forests, are publicly-owned resources.⁴ Pursuant to the provisions of the Clean Water Act and the Superfund statute that form the backbone of the legal claims for natural resource damages the proposed settlement would resolve, the governments have a legal obligation to the public to protect these resources. This legal duty extends to governmental actions such as this proposed settlement.

³ The value of the recently-released government summaries of some of these studies is extremely limited. As will be discussed below, despite the summaries' descriptions of dramatic damage to birds, mammals, and important segments of the ecosystem, without any of the data collected or study plans and methodologies used in these studies, the public can place little faith in the preliminary conclusions drawn in the document. Further, the governments have categorically refused to release any of the studies of the economic impacts of the spill, and have released no data on the costs of restoring, replacement or acquisition equivalent to the damaged natural resources. Without the results of the governmental economic damage studies, the public does not have nearly enough information with which to assess the proposed deal.

⁴ Sites with great cultural and historical importance to American natives have been damaged, as well. Although native peoples have valid claims to control of many of these sites, some of these sites are under exclusive federal or state control.

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As discussed below, many aspects of this proposed settlement are extremely troubling, tantamount to a violation of the public trust. In order to fulfill the obligation to the public, it is paramount that all information regarding the government actions at issue be made available for review.

C. SIGNIFICANT CONFLICTS OF INTEREST EXIST

Full disclosure is essential because both governments promoting this proposed settlement have significant conflicts of interest.

The history of the Exxon Valdez spill is deplorable. It was an accident waiting to happen and, when it happened, it was an accident completely out of control. Exxon pushed its over-worked, under-staffed tanker crews to travel in inclement weather and with little rest. It also tolerated alcohol and substance abuse, despite the dangers posed to fragile natural resources. While Exxon must accept primary responsibility for this unnecessary and predictable disaster, Exxon's regulators, the State of Alaska and the U. S. Coast Guard are arguably at fault as well, for permitting this dangerous situation to develop.

Once the spill occurred, the nation watched in horror as Alyeska Pipeline Service Corporation, under a legally-binding agreement to prevent and/or clean up any such spill, completely failed to do its job.⁵ Afterward, Exxon took over the cleanup duties once Alyeska's complete failure was apparent, and, directed by the Coast Guard and the State of Alaska, chased the fleeing oil. The oil coated miles of coastline and, soon, thousands were at work rubbing oily rocks with towels. Again, although Alyeska and Exxon must accept primary responsibility for the failed cleanup, Alyeska's regulators, the State of Alaska and the U. S. Coast Guard, are arguably at fault.

After hundreds of injured parties and the governments filed suits against Exxon and Alyeska, it is not surprising that Exxon and Alyeska, seeking to spread the blame, filed claims against

⁵ Documents recently released by California Member of Congress George Miller, as part of a Congressional investigation, reveal that, eleven months before the Valdez ran aground, Alyeska recognized that it could not respond to a major spill in Prince William Sound. Despite its legally-binding promises to the U.S. and Alaska governments to clean up such spills, Alyeska decided it would do nothing to improve its cleanup capability. See Appendix 1, "Comments of the National Wildlife Federation on the 1991 Restoration Work Plan" (April 15, 1991) at Attachment C, and discussion below.

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the State of Alaska and the U. S. Coast Guard. Exxon has filed a counter-claim against the State of Alaska in the State's lawsuit against Exxon, alleging that by refusing to allow Exxon to use toxic chemical dispersants on the slick, the State significantly magnified the damage caused by the spill. Using essentially the same theory as in the counter-claim against the State -- the Coast Guard delayed use of dispersants -- Exxon has also filed an administrative claim against the Coast Guard, seeking payment for cleanup costs.

While the assertion by Exxon and Alyeska that the State and the Coast Guard compounded matters by allegedly failing to approve the use of dispersants are unconvincing, Exxon's lawyers are pursuing it solely because this strategy was successful for Amoco Corporation lawyers in the Amoco Cadiz litigation. Exxon and Alyeska had neither sufficient supplies of dispersant on hand to remedy the spill, nor did they have the manpower to apply dispersant in necessary quantities. Further, there is a strong argument that after the third day, when dispersants may have been available, the weather conditions were not appropriate for using dispersant.

Beyond the claims that Exxon has filed against the governments to date, both governments should have known that during a trial, Exxon's strategy would include an effort to shift blame to the governments. Exxon lawyers could tell the jury a story about the regulators who approved Exxon's reduced crew sizes, high-speed transits in bad weather across Prince William Sound, and lax enforcement against substance-abuse. Exxon lawyers could argue that the Coast Guard should have seen the Valdez heading for Bligh Reef on the Coast Guard radar system and taken action to avert the disaster. Exxon and Alyeska could argue that the State should have known that despite representations made by the Corporation, Alyeska's Contingency Plan blueprint for cleaning up oil spills was designed solely to respond to small spills and only under optimum conditions.

Under these circumstances, it is suspect that the United States and the State of Alaska are eager to cut a deal with Exxon to limit their liability.⁶ If this is the case, it is in the governments' interest to keep information hidden from the public, lest the deal unravel. It follows that the governments will reveal only information which would support the settlement. If

⁶ The fact that the state of Alaska is seeking a covenant not-to-sue from the private plaintiffs before it will release any data confirms this theory.

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the settlement is rejected, the governments' contributory negligence will put them at legal risk once again.

Due to this conflict of interest, the public has a right to be informed of the bases for the proposed settlement.

Very Little Information Has Been Disclosed to the Public

Despite the public right to full disclosure regarding the bases for the settlement agreement, very little information about the agreement has been made public. The recently released summaries concerning damage caused by the spill in Prince William Sound and the Gulf of Alaska do nothing to improve this situation.

A. MUCH INFORMATION HAS BEEN COLLECTED

Soon after the spill occurred, the natural resource Trustees and Exxon commenced substantial scientific research programs to assess the damages caused by the Valdez spill. Over two years after the spill, these programs have collected a huge amount of scientific and economic data.

These scientific programs, for better or for worse⁷, were designed to elicit information that would answer the legal questions which a court of law would ask during a trial for natural resource damages. The Ohio case establishes that natural resource damage recovery must include the following:

- 1) the full cost of restoring, replacing or acquiring the equivalent of the damaged natural resources;
- 2) the cost to the public of losing the use of those resources until they are fully restored;
- 3) the lost "nonuse" value of the resources;; and,
- 4) the reasonable costs of assessing the damages.

To fully restore damaged natural resources, natural resource damage Trustees must employ physical restoration techniques wherever possible.⁸ For example, planting new beach grasses

⁷ See Appendix 1 at 9 (NWF comments argue that litigation emphasis has distorted scientific program).

⁸ Small amounts of money may also be needed to restore native archaeological sites with cultural and/or historic significance. The proposed settlement, which settles state common law as well as federal Clean Water Act claims, could legally pay for such restoration work, although no such restoration should proceed without the consent of the affected

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where oil damage has killed grass and caused erosion is a physical restoration technique planned for Prince William Sound. Resources that cannot be physically restored must be replaced, to the extent feasible. For example, reintroducing species killed by the spill; this example also highlights the inherent limitations of certain restoration activity -- no store stocks the 515,000 live murrelets needed to replace those killed. To the extent that the damaged natural resources cannot be physically restored and/or replaced, equivalent assets must be acquired by the Trustees.

The costs of losing the use of resources and the lost non-use value, the second and third types of damages described above, are calculated using various types of economic valuation techniques. A principal technique for assessing lost use and lost nonuse values as economic damages endorsed by the Ohio court is the contingent valuation method. Using this technique, economists choose study populations representative of those damaged and conduct surveys of these populations.

The scientific programs initiated by the Trustees and by Exxon were designed to determine the cost of restoring or replacing the damaged natural resources. By studying the nature and extent of damage to the ecosystem, scientists and economists can begin to approximate what types of physical restoration, replacement, and/or acquisition projects need to be accomplished and put a price tag on that segment of natural resource damage. The Trustees' scientific damage assessment program includes 75 studies which have been or will be initiated over three field seasons: 1989, 1990 and 1991. The Trustees' program has also included seven economic studies initiated to calculate the interim lost use and/or lost-use and non-use damages.

In various forums, Exxon has made inflated claims about its damage assessment study program. Exxon videos describe Exxon's program as staffed by world-renowned scientists using state-of-the-art equipment and pronounce Exxon's desire to mend the damage to Prince William Sound. However, similar to the Trustees, Exxon's chief motivation is litigation. In view of Exxon's superior resources, Exxon's scientific and economic damage assessment program probably is more extensive than the studies conducted by the Trustees.

B. VERY LITTLE DATA WILL BE RELEASED

The extensive damage assessment programs carried out by the Trustees and Exxon to prepare for trial form the basis for the

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proposed settlement. Yet, it has always been clear that the parties are reluctant to release this critical data.

Exxon has made no effort to release its scientific and economic data (except for selected studies it has released for public relations purposes). The State of Alaska has stated that it will not release any data until: 1) all other parties sign a covenant not-to-sue with them; and/or 2) the State concludes all Exxon Valdez-related litigation (which could take years).⁹ The Federal Trustees alone announced they would make their scientific data available, apparently over the state's objection. However, the Department of Justice asserts that substantial delay is necessary since most data are released because many of these studies require completion of quality control laboratory work and peer review before disclosure¹⁰. Further, the Federal Trustees refuse to release: 1) any Coast Guard studies; or 2) any economic data.

Moreover, it appears that the State is taking steps to end the unfinished damage assessment program conducted by the Trustees so the public will never know if the proposed settlement is adequate. Some reports indicate that the State will not continue its nearly-completed economic studies, which already show extensive damages resulting from the spill (see below); furthermore, the State is arguing that the Trustees should discontinue a significant portion of the scientific studies planned for 1991¹¹.

In contrast to these negative events, on April 8, the Department of Justice deposited with Judge Holland's Court a brief summary of the preliminary results of the Trustees' scientific -- not economic -- damage assessment studies¹².

⁹ Since the proposed settlement was announced, both Exxon and the State have opposed a motion filed in state court by NWF, its co-plaintiffs, and the other plaintiffs which would require all parties to submit all scientific data to a central data repository.

¹⁰ The studies could be released to the public before they have been fully peer reviewed. This would allow the public a chance to analyze some aspects of the data while the peer review process took place. Revised, post-peer review versions of the studies could then be made available.

¹¹ See Appendix 1 at 9, Attachment E.

¹² See Appendix 2 (DOJ Summaries).

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Unfortunately, this document raises far more questions than it answers. For example, the summaries:

- 1) include none of the underlying data or scientific analyses upon which the summaries are based.¹³
- 2) describe the results of the studies in such a conclusory and vague fashion as to create many new uncertainties about the exact nature of the long-term damage the Exxon spill has caused and will continue to cause;
- 3) provide no description of the actual measures or the costs thereof needed to restore, replace or acquire the equivalent of each of the damaged resources;
- 4) contain no information about the working hypotheses, study protocols, or methodologies used in the studies, which is very important to analyzing the credibility of the purported results; and
- 5) contain no information about who are the principal investigators, which would allow the public to examine and assess the areas of expertise, competency, and reputations of the scientists who have done the work;

The Settlement Cannot Be Accepted Without
Full Disclosure of All Scientific and Economic Data

The governments and Exxon ask the public and Judge Holland to accept the proposed settlement, they have denied the public and the Court access to information which would form a reasonable basis for making such a weighty judgment. The governments and Exxon have done nothing to present what the restoration costs may eventually be and what are the economic damages (interim lost-use and/or lost-use and non-use damages)¹⁴. Thus, the public and

¹³ This puts the public in the awkward position of having to trust the very governmental agencies that have a clear conflict of interest regarding the acceptance of the proposed settlement.

¹⁴ In fact, the DOJ Summaries indicate that the information included in the data available to the governments is only "preliminary, as studies are still underway and available data are not fully analyzed and interpreted." Appendix 2 at 4. More surprising still is the statement that "[r]estoration measures will begin in 1991 and are expected to become more comprehensive as the understanding of the effects of the spill improves and as experts and the public provide input on where restoration measures should be concentrated." *Id.* at 15 (emphasis added). These two statements make clear that the governments and Exxon

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the Court have no basis on which to decide whether the proposed settlement could fulfill the statutory measure of damages, or whether the settlement amount is fair, adequate, and in the public interest.

Faced with this impossible situation, the Court should order the release of all information which could form the basis of the proposed settlement and extend the comment period until all the data -- scientific and economic, governmental and Exxon's -- have been released and fully analyzed by the public. The Court should scrutinize whether the statutory measure of damages is met by the proposed settlement.¹⁵

In addition, to ensure that it can independently analyze the proposed settlement, the Court should appoint a magistrate,

have not presented restoration cost figures to the public because they cannot do so -- such data are not yet available and won't be for some time.

¹⁵ It is quite possible that the Trustees ignored the statutory measure of damages in establishing the level of the settlement. The Governor of Alaska talked about seeking an \$1 billion settlement before he would have had access to any of the scientific or economic data. In fact, the Governor and Attorney General Cole have said that the \$1 billion figure came from Hickel's own knowledge of Prince William Sound.

As for the Federal Trustees, on March 20, 1991, Assistant Attorney General Richard Stewart explained to Congress that "[t]he schedule of payments under the settlement agreement is expected generally to coincide with the future funding needs for restoration work now being planned by the federal trustees." R. Stewart, Testimony before the Fisheries and Wildlife Conservation and the Environment, Coast Guard and Navigation, and Oceanography Subcommittees of the House Committee on Merchant Marine & Fisheries 6 (March 20, 1991) (emphasis added). This statement appears to confirm that interim lost-use, as well as lost-use and non-use damages -- critical elements of natural resource damage recovery according to the Ohio court -- are not recovered by the proposed settlement.

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special master, or independent counsel¹⁶ to assist the Court in its own review of the data.¹⁷

II. PRELIMINARY INDICATIONS ARE THAT
THE SETTLEMENT IS INSUFFICIENT

Although the public and the Court need scientific and economic data to fully evaluate the proposed settlement, some information now exists which casts serious doubt on the adequacy of the amount of the proposed settlement.

The Trustees' Restoration Plan And Recent Announcements That Scientific Studies Will Be Terminated Suggest That The Settlement Is Insufficient

The Trustees' March 1, 1991 Restoration Work Plan suggests that the settlement amount will restrict their restoration, replacement, and acquisition options, instead of restoration and other needs dictating the settlement terms. This is directly contrary to Congressional intent to establish restoration, replacement, and acquisition as the fundamental goal for the Trustees. Moreover, recent press accounts (see attachment) suggest that the Trustees likely will not acquire significant habitat by purchasing logging rights. In addition, press accounts also indicate that the Trustees will be terminating the economic studies and many of the scientific injury assessment studies. All these actions lead to one conclusion: the settlement simply will not provide sufficient funds to permit the Trustees to carry out their public trust obligations under applicable statutes and other law.

¹⁶ See Bond, Plea Bargaining and Guilty Pleas § 6.18(c) (court may name special prosecutor in rejecting plea bargain as contrary to public interest); United States v. Cox, 342 F.2d 167, 179 (5th Cir.) (en banc), cert. denied, 381 U.S. 936 (1965) (Judge Griffin Bell and dissenters in part suggesting that where government decision not to prosecute is in bad faith or "irrational," court may be authorized to appoint counsel to prosecute case); United States v. Cowan, 381 F.Supp. 214, 223 & n. 11 (N.D.Tex. 1974), rev'd on other grounds, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (to same effect).

¹⁷ NWF is not suggesting, however, that the Court merely order in camera review of the data. It is critical that both the Court and the public be able to fully assess the proposed settlement.

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Present, After-Tax Value Is Low

The proposed settlement provides for \$1 billion¹⁸ to be paid out over a ten and one half year period. Although this is the largest sum ever recovered for natural resource damages, the Exxon Valdez spill is the worst spill in America's history and one of the worst oil spills to occur, in terms of biological effect. When the length of the payout period is combined with the tax-deductible nature of the bulk of the proposed settlement, at a minimum the actual value of the proposed deal is halved.

The Congressional Research Service has estimated that once the present value of the stream of payments is calculated and the tax-deductibility of these payments is taken into account, the proposed settlement would cost Exxon only \$421 to \$528 million, depending on which discount rate is applied in the calculations.¹⁹

The Associated Press (AP) used another means to calculate the real cost of the proposed settlement to Exxon. They contacted an annuity broker who specializes in buying annuities which will create payment streams sufficient to satisfy various types of judicial awards and private settlements, similar to the proposed Exxon Valdez settlement. The broker took bids on an annuity which would create the payment stream set forth in the proposed settlement. Once a low bid was received, AP took this number and adjusted it to account for the amount of the annuity payment Exxon could deduct from its taxes. The result: the proposed settlement costs Exxon \$486.3 million, less than half the announced \$1 billion figure.²⁰

Both calculations shows that the true impact of the "billion dollar settlement" on Exxon will be far less than advertised. In fact, Exxon may have been expecting to pay a far higher amount. The Wall Street Journal reported that in 1990, Exxon set aside \$1.68 billion to cover all its future Exxon Valdez-related

¹⁸ This consists of \$100 million criminal and \$900 million civil payments.

¹⁹ See Appendix 3 (CRS Valuation). Note that the \$421 million figure is the one associated with the arbitrary 10% discount rate suggested by the Department of Interior's natural resource damage assessment regulations.

²⁰ See Appendix 4 (AP Valuation).

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costs.²¹ This latter figure gives some idea of the value Exxon placed on the dramatic and long-term damage it caused in Prince William Sound and the Gulf of Alaska.

Preliminary Economic Damage Studies Show Significant Damage

As discussed above, an integral component of the measure of natural resource damages is the economic damage caused by the injury to the resources. It is particularly interesting to note that the studies the Trustees and Exxon most fiercely resist disclosing are the economic studies. Perhaps this is because these studies show the greatest amount of damage.

Several newspaper articles leaked information regarding the State of Alaska's economic damage studies, which are nearly complete.²² The Washington Post reported that the studies value the economic damages from the spill at \$3 billion; the Anchorage Daily News subsequently reported that the studies show a range of damages from \$3 to \$8 billion, depending on how conservative is the set of assumptions about the type of survey questions which are most accurate.²³

Of course it is dangerous to rely on leaked and/or incomplete information. This is precisely why the Court needs to order the disclosure of all the scientific and economic data collected by the Trustees and Exxon. Further, if the Court appoints a magistrate, special master, or independent counsel, as suggested above, this individual could help evaluate the validity of these disquieting disclosures.²⁴

²¹ See Wall Street Journal, March 14, 1991.

²² NWF has learned that the Federal economic damage studies were initiated only recently and have now been suspended. As noted above, work on the State economic studies has also been discontinued, perhaps permanently -- even though the studies are nearly complete and preliminary results are already available.

²³ See Appendix 1 at Attachment A.

²⁴ NWF has learned the identities of the principal investigators involved in the Trustees' economic studies. The State of Alaska has retained as expert witnesses Dr. Richard Carson, Assoc. Professor of Economics, University of California at San Diego; Dr. Robert Mitchell, Professor of Sociology, Clark Univ.; Dr. Michael Hanemann, Assoc. Professor of Agricultural & Resource Economics, Univ of Cal.; and Dr. Raymond Kopp, Director, Quality of the Environment Div., Resources for the Future.

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DOJ Summaries Show Extensive, Possibly Permanent Damage

Despite the limitations discussed above, the DOJ Summaries present information that indicate that the Prince William Sound/Gulf of Alaska ecosystem may have sustained permanent damage due to the Exxon Valdez spill.

As soon as the DOJ Summaries were released, public reaction was dramatic. Few Americans were aware of how widespread was the initial devastation caused by the spill. Particularly disturbing to many readers was the information regarding bird deaths resulting from the spill. For example, the summaries indicate that as many as 300,000 murrelets died from direct effects of the oil and that as many as 215,000 murre chicks were not born in 1989-90 alone because of the various physiological and other stresses caused by the oil. Similar, although less dramatic impacts were suffered by many other species.

More troubling to scientists, particularly restoration experts, was the news that, according to the summaries, the Valdez oil continues to have a very significant impact on the inter-tidal zone (essentially the area in which the tide moves in and out) and that significant amounts of oil are trapped in the inter-tidal and sub-tidal zones -- causing continued exposure to oil for many species. In addition, continued oil exposure has been documented not only in near-shore fish and wildlife, but in deep water marine life, such as pollack, hundreds of miles from the spill site. This indicates that the fundamental building blocks of the ecosystem, especially the critical inter-tidal area that many species depend on, have been knocked out of place and the prospects for the future are unclear. Indeed, the Trustees' summary suggests that there are certain long-term effects lasting several decades on certain elements of the affected ecosystem.

While it is difficult to draw conclusions from the condensed and conclusory descriptions of damage found in the DOJ Summaries, the potential that the data would show significant, lasting damage to the entire ecosystem is now less easily discounted.

Directed by Dr. Norman Meade, Chief Economist in the NOAA Damage Assessment Branch, Rockville, MD, the experts retained by the United States are Dr. Alan Randall, Professor of Agricultural Economics, Ohio State; Dr. John Hoehn, Asst. Professor of Agricultural Economics, Michigan State; and Drs. Nancy Bockstael, Kenneth McConnel and Ivar Strand, Professors of Agricultural & Resource Economics at the Univ. of Maryland. NWF urges the Court to subpoena the testimony of these investigators regarding the economic studies.

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The Settlement May Not Provide Sufficient Funds
For Critical Restoration Needs

The Prince William Sound/Gulf of Alaska ecosystem, which was smothered in eleven million gallons of oil, faces another significant threat: extensive clear-cut logging. The fact that the proposed settlement payments (particularly those which would be due in the first few years under the agreement) may be inadequate to allow the Trustees to prevent this additional threat to the ecosystem is discussed in NWF's Comments on the 1991 Restoration Work Plan. Appendix 1 at 2-5, Attachment B. In addition, as structured, the settlement cannot pass the pragmatic test of providing sufficient funds for needed restoration work.

In public testimony before the Alaska Legislature, both Alaska Attorney General Charles Cole and Alaska Fish and Game Commissioner Carl Rosier stated that they have abandoned the State's previous goal of preventing clear-cut logging via timber acquisition. See Anchorage Daily News, April 17, 1991 (Appendix 5). This significant change in the State's position may confirm that the proposed settlement does not provide money sufficient to achieve this important priority objective²⁵.

III. SETTLEMENT LETS ALYESKA OFF THE HOOK

In NWF's comments on United States v. Exxon Shipping and Exxon Corp., No. A90-015 CR. (D. AK March 13, 1991) (the "Plea Agreement"), the Federation argues that the Plea Agreement

²⁵ The environmental community believed that settlement of natural resource damage claims against Exxon and Alyeska would be sufficient to cover immediate needs such as timber acquisition, continued physical restoration (and the requisite scientific work to direct restoration), and continued cleanup. Moreover, NWF believed that such a settlement would include adequate funds so that all the monies would not have to be spent immediately and could form the principal for an environmental trust.

While the proposed settlement was negotiated, the Natural Resources Defense Council and NWF submitted a memorandum to U.S. Assistant Attorney General Richard Stewart and Alaska Attorney General Charles Cole (Appendix 6), that outlines the benefits of an endowed trust and suggests a way in which the trust could be organized. This approach would create a permanent source of funds that could support restoration work necessitated by effects of the Exxon Valdez spill discovered in the future, as well as serve related educational and pollution prevention purposes.

Unfortunately, it does not appear that the proposed settlement envisions the creation of a trust.

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relieves Alyeska Pipeline of criminal liability, despite convincing new evidence that Alyeska wilfully ignored a legally-binding obligation to clean up spills in Prince William Sound, what Congressional investigators suggest that this dereliction is a criminal violation of the Clean Water Act.²⁶

The Consent Decree compounds this mistake by absolving Alyeska of civil liability to the governments for natural resource damages. As with the Plea Agreement, it appears that Alyeska has been released from this substantial potential liability merely because Exxon drove a hard bargain.

As in our comments on the Plea Bargain, NWF urges the Court to strike these unjust provisions and/or to appoint a magistrate, special master, or independent counsel to review Alyeska's outrageous conduct to determine the fairness of permitting the consortium to substantially benefit from this proposed settlement.

IV. PROVISIONS FOR PUBLIC INPUT ARE INSUFFICIENT

The proposed settlement fails to resolve two important related issues. First, the documents do not set forth any categories of restoration projects that may or may not be considered by the Trustees. Second, the MOA does not establish the types of public participation which would be appropriate. The MOA merely states:

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 to advise the Trustees....

56 Fed. Reg. 11644 (March 19, 1991). NWF believes the optimum solution to these omissions is to create a vital public participation process.

While the proposed settlement was being negotiated, NWF and NRDC submitted a memorandum to several of the agencies involved in negotiations discussing an option for public participation (see Appendix 7). Essentially, the memorandum outlines a broad based public committee with an independent staff which would consult with involved governmental agencies. NWF urges the Trustees and/or the Court to revise the MOA to require this type of public advisory group.

²⁶ See Appendix 1 at Attachment C.

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NWF also urges the Court to require that the Trustees parallel the public participation approach contained in provisions of the Superfund statute. The statute and regulations contain guidance regarding public participation planning, technical assistance grants for interested members of the public, and public repositories for important documents which relate to restoration activities. Although the Superfund public participation program is not a paradigm,²⁷ it offers the Trustees an established model, as well as a source of professional staff with pertinent experience.

V. AS A MATTER OF POLICY AND AS A MATTER OF LAW
THE REOPENER IN THE SETTLEMENT IS INADEQUATE
TO PROTECT THE ENVIRONMENT FROM UNEXPECTED FUTURE DAMAGES

The Reopener is Unreasonably Narrow

Paragraphs 17-19 of the agreement include a narrowly drawn "reopener" provision that authorizes the governments to reopen the settlement if unexpected damages are discovered in the future. This clause is subject to a \$100 million cap. The terms of this reopener limit availability of those funds: between September 1, 2002 and September 1, 2006. Moreover:

(a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and

(b) the injury ... could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

Consent Decree at paragraph 17.

Thus, solely in the case of an injury which could not reasonably be anticipated based upon "any information ... reasonably available to any trustee" could the government recover up to \$100 million, and there could be no claim before 2002 or after 2006. Moreover, Exxon would fiercely resist any claim to reopen the agreement under this extraordinarily narrow provision.

²⁷ For example, to obtain technical assistance grants, citizens must comply with onerous accounting requirements, meet unrealistic matching fund requirements, and compete for limited funds.

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Except in an extremely unusual situation, the public -- not the criminally culpable polluter -- bears the risk of unforeseen injuries. This reopener is a mirage.

The Reopener Violates the Law

The federal government's complaint states in paragraph 6, the "United States of America is trustee for the natural resources injured by the spill pursuant to various federal statutes and treaties which include . . . the Clean Water Act, 33 U.S.C. §1251 et seq.; [and] the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 et seq...." CERCLA, the Superfund statute, provides specific requirements for a settlement in which Trustees covenant not to sue a polluter for damages to natural resources. For example, CERCLA requires that except in certain extraordinary circumstances not present here:

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 person concerning future liability resulting from the release or threatened release or threatened release that is the 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. §9622(f)(6)(A).

It has been established in a precedent-setting case in which the United States and the National Wildlife Federation were parties, that a settlement into which the United States enters which contains a covenant not to sue for natural resource damages under CERCLA must include a reopener (as required by section 122(f)(6)(A)). In re Acushnet River and New Bedford Harbor: Proceedings Re: Alleged PCB Pollution, 712 F.Supp. 1019, 1037-38 (D.Mass. 1989). As the Court explained:

The thrust of this subsection is to ensure that the federal government, and thus ultimately the taxpayer, does not bear the costs of future unknown damages. Rather, such costs appropriately should be borne instead by those responsible for the pollution. This is in keeping with Congress' intent to make responsible parties pay for the problems caused by their own pollution..

Id. at 1037. The Court went on to hold that even if the actual specific terms of CERCLA requiring a reopener did not apply to

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the settlement there at issue, the policies underlying Congress' adoption of the reopener provision rang as true for that settlement as they did for CERCLA cleanup settlements. The Court explained that

Admittedly, requiring such a [reopener] provision will make settlements somewhat more difficult to achieve. Beyond peradventure, however, Congress is willing to accept such a trade-off in return for greater security that the settlement will adequately resolve a pollution problem in the cleanup context and no reason is evident why that intent should not apply to the natural resource damages context.

Id. at 1038.

In the case of the Exxon Valdez settlement, the "Governments release and covenant not to sue ... with respect to any and all civil claims, including claims for Natural Resource Damages, ... [and] including, without limitation any and all civil claims under all federal or state statutes...." Agreement paragraph 13 (emphasis added). Thus, it is clear that the United States has granted a covenant not to sue Exxon for natural resource damages under CERCLA.²⁸ In order to do so, the United States must include a reopener as required by CERCLA section 122(f)(6)(A) and the New Bedford Harbor decision. Unfortunately, the reopener as drafted is so narrow as to render it meaningless, and includes a

²⁸While it is arguable that Superfund does not apply to a spill of oil, recent allegations have been made that supertankers in the TAPS trade, including the Exxon Valdez, carry hazardous waste water in addition to crude oil. "Exxon Confirms Waste Water Charges; Move May Impede a Valdez Settlement," Wall Street Journal February 19, 1991 (Appendix 8). If it were true that the Exxon Valdez were carrying hazardous waste or other CERCLA hazardous substances, CERCLA's liability provisions would clearly apply.

In addition, the settlement specifically waives all natural resource damage claims under any federal statute--obviously including CERCLA. Thus, to the extent that the settlement waives CERCLA claims, it must abide by section 122 of CERCLA's limits on settlements, including the reopener provision, and the provision in section 122(j)(2) requiring the polluter to take necessary steps to protect and restore injured resources. See New Bedford, 712 F.Supp. at 1032-38. Finally, it is clear that the policies enunciated by Congress for hazardous substance spills are equally applicable in the context of an oil spill. The polluter, rather than the taxpayer, should bear the risk that there is unknown damage.

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cap that eviscerates the purpose of the provision. The reopener must be revised to allow the government to reopen the agreement for unexpected damages at any time without the \$100 million cap.

Finally, it should be noted that Clean Water Act sections 311(f)(4) and (5) require that the Trustee restore the natural resources injured by the spill. If natural resources are injured by unexpected impacts of the spill, the narrow reopener combined with the inadequate payment schedule for restoration virtually assures that these obligations will be unfulfilled.



Working for the Nature of Tomorrow.

NATIONAL WILDLIFE FEDERATION

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COMMENTS OF THE NATIONAL WILDLIFE FEDERATION
ON THE DRAFT 1991 RESTORATION WORK PLAN
REGARDING
THE EXXON VALDEZ OIL SPILL
[56 Federal Register 8898, March 1, 1991]

Prepared By:

Douglas Wolf
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April 15, 1991

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INTRODUCTION

The National Wildlife Federation ("NWF" or "the Federation") is very concerned about the failure of the Exxon Valdez oil spill 1991 Restoration Work Plan to provide urgently needed protection to wildlife habitat in and around Prince William Sound which is threatened by clear-cut logging (and other threats). The natural resources Trustees must take immediate steps to ensure habitat protection as part of the 1991-92 restoration program for the catastrophic Exxon Valdez spill¹. In order to satisfy this critical need, the Trustees should defer recovery of past costs from the payments pursuant the proposed settlement and/or use their own money and seek compensation from the tail end of the settlement payments. The Trustees should act quickly and ensure that there are adequate funds to restore the stressed environment in the Sound or face a collapse in critical elements of these fragile ecosystems.

NWF is the nation's largest private conservation education organization. Founded in 1936, the Federation, its 5.5 million members and supporters, and 51 affiliated organizations, educate, empower, and inspire individuals and organizations to conserve fish, wildlife and other natural resources, to protect the environment, and to build a globally sustainable future.

For several years, NWF has been involved in oil spill and natural resource damage issues. The Federation is actively working on oil spill issues and is on the forefront in urging safeguards to prevent damages such as those associated with the Exxon Valdez oil spill. NWF, the Wildlife Federation of Alaska and the Natural Resources Defense Council, represented by the Trial Lawyers for Public Justice, have filed suit against Exxon and Alyeska Pipeline requesting the court create a trust fund which would aid in restoring the natural resources damaged by this catastrophe. In addition, the Federation continues to participate in the Valdez spill natural resource damage assessment process via comments submitted in the public record.

¹ Under the scheme set out in the Clean Water Act and the Superfund statute, trustees must be appointed to represent injured natural resources. In the case of the Exxon Valdez oil spill, there are both federal and state trustees (collectively, the "Trustees"). The federal trustees are: Department of the Interior, Department of Commerce (through the National Oceanic and Atmospheric Administration, NOAA), and the Department of Agriculture (the "Federal Trustees"). The Alaska state trustees are: Department of Fish and Game, Department of Environmental Conservation, and Department of Law (the "State Trustees").

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The Federation welcomes this opportunity to provide input on the 1991 Restoration Work Plan for the Exxon Valdez oil spill. This Work Plan is important to NWF, its members and supporters. As one of the principal plaintiffs in the State of Ohio et al. v. Department of the Interior, 880 F.2d 432 (D.C. Cir. 1989) and State of Colorado et al. v. Department of Interior, 880 F.2d 481 (D.C. Cir. 1989) (collectively, "Ohio case"), NWF confirmed that restoration, replacement, and acquisition of the equivalent (hereinafter sometimes referred to simply as "restoration") of damaged natural resources in the paramount goal of governmental Trustees representing those resources. Similarly, in In Re Acushnet River and New Bedford Harbor: Proceedings Re: Alleged PCB Pollution, 712 F.Supp. 1019 (D. Mass 1989), NWF intervened and successfully established the important precedent that natural resource damage settlements must include measures to assure restoration and must include a "reopener" for certain long-term damages.

**IMPLEMENTATION PROJECT 4, ACQUISITION OF HABITAT,
WARRANTS HIGHEST PRIORITY AND IMMEDIATE ACTION**

The Exxon Valdez oil spill was a colossal assault on the Prince William Sound ecosystem². As the eleven million gallons of oil spread through the Sound and into the Gulf of Alaska and other areas, a parallel assault began on the same ecosystem. In various locations across the Sound, logging activities were planned or initiated. Due to the steep slope of the forests surrounding Prince William Sound and the clear-cutting practices employed by loggers, this logging compounds the serious threat posed to the entire ecosystem. Critical components of the area's ecosystem brought to the brink of devastation by the spill could be overcome by the added environmental insults engendered by clearcutting.

Clear-cut logging causes erosion which threatens water quality and thus threatens fish that depend on the streams and

² This assault is more tragic because it was completely avoidable. Investigations concluded that Exxon's negligence in pushing its small crews to high-speed transit and exhaustion in dangerous conditions combined with disregard of Captain Hazelwood's severe alcohol problem contributed to the grounding. Further, documents recently released by California's Representative to Congress, George Miller, conclusively demonstrate that Alyeska Pipeline Service Corporation unilaterally abandoned its legally-binding obligation to fully protect Prince William Sound from spilled oil.

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coastal areas in the Sound. Logging also eliminates or degrades habitat for much of the wildlife hardest hit by the spill, including eagles, seabirds, anadromous fish, and other marine and terrestrial fauna. Summaries of natural resource damage assessment studies conducted by the Trustees and recently released by the Federal Trustees, while conclusory and not accompanied by actual data or studies, suggest the magnitude of impact from the spill and reveal the extent to which these effects are likely to last. These ecosystems are reeling from the effects of an eleven million gallon oil spill compounded by environmental degradation associated with extensive clear-cut logging.

Fortunately, the degradation caused by the logging is completely avoidable. As "Project 4" in the Federal Register notice makes clear, one of the principal restoration options available to the Trustees is acquisition of equivalent resources. 56 Fed. Reg. 8899 (March 1, 1991). As in the case of the Exxon Valdez spill, where damage to the natural resources is so extensive that direct restoration and replacement activities cannot fully put the ecosystem back on its feet, equivalent resources "that provide[] the same or substantially similar services as the injured resources" must be acquired. Id.; see also, Ohio case. And where the cost of direct restoration and replacement activities and acquisition of equivalent resources does not equal the total amount of direct, use and non-use damages caused by the spill³, the damages recovered for lost use and non-use value must be used to compensate the public and the injured ecosystem through additional restoration and acquisition.

One of the Trustee agencies, the Alaska Department of Fish and Game, recognized logging as a threat to the Prince William Sound and persuaded the Governor to request a \$40 million appropriation from the Alaska Legislature to acquire timber rights to the trees most likely to be felled. The Department's goal is to commence acquisition of equivalent resources in order to avoid the deleterious effects of planned logging. As the 1991 Work Plan Federal Register notice correctly explains:

Failure to undertake timely restoration may allow damages initiated by the spill to continue or

³ Recent press reports indicate that the economic use and non-use damages caused by the spill are in the range of \$3-8 billion. See Attachment A. "Non-use" damages, which are recognized by statute and by federal courts, are damages suffered by individuals through interference with their option to visit the injured resources or through destruction of those resources.

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accelerate, as in the case of the loss of stabilizing vegetation on beaches. In other cases, protection of strategic habitats, subject to land-use changes, can reduce cumulative stresses on injured resources and maintain, in the near term, a full range of restoration options. Finally, the importance of a resource for subsistence, commercial, or recreational purposes may justify prompt restoration action.

Id. at 8902.

The Governor's first proposal of this project to the Alaska Legislature, and a December 21, 1990 draft of the Federal Register notice on the 1991 Work Plan obtained by NWF, provided \$40 million for such initial acquisition. There are few differences between the December 21 draft and the final March 1, 1991 Federal Register notice; one critical difference, however, is that this \$40 million price tag for implementation project four, "Protection of Strategic Fish and Wildlife Habitats and Recreation Sites," has been deleted. NWF is deeply concerned that this deletion may signal a retreat from the Trustees' commitment to swift acquisition of critical habitat.

Experts who have analyzed restoration options recognize its importance and conclude that \$40 million could pay for no more than a pilot project. This sum would likely be able to protect only a small fraction of the most threatened habitats; at least \$300 million is needed in the short term just to protect certain Prince William Sound and upper forests from logging⁴.

Thus, the \$40 million price tag could have been deleted from the Federal Register notice because the Trustees recognized that the figure is too low. Unfortunately, it is probable that the number was deleted pending receipt of information regarding the amount of money which will be available from the proposed settlement.

Thus, it appears that the Trustees failed to analyze what measure of restoration is necessary; instead they are tailoring the restoration program to the small amount of funds projected to become available in the short term from the settlement.

⁴ A single study regarding the cost of purchasing timber rights for Prince William Sound and the Upper Kenai Peninsula concludes that \$200-300 million is needed. See Attachment B. N.B. this does not include timber rights for other areas and does not analyze threats to habitat other than logging.

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NWF strongly objects to this backward thinking. Instead of attempting to decide the extent of restoration and acquisition that is possible with the funds recovered through settlement, the Trustees are under an obligation to determine the costs of restoration, replacement, and acquisition necessary to return the ecosystem to full productivity and diversity, plus the lost value of the resources. Then, the next step is to ensure that funds are sought to fulfill these obligations. See, Ohio case.

The Federal Register notice states: "When the full amount of restoration funds that will be recovered has been resolved, final determinations will be made concerning the nature and scope of the remaining phases of restoration." Id. at 8899. Thus, due to the settlement's limitations, under the approach announced in the Federal Register notice, the Trustees may not be able to prevent extensive clear-cut logging from permanently crippling Prince William Sound's ecosystem and recreation values.

Contrary to the appropriate approach, the Federal Register notice also acknowledges that "[w]here the nature of the resource injury is reasonably clear, it may be desirable to begin restoration prior to receipt of funds from the parties responsible for the oil spill." Id. at 8902. NWF strongly urges the Trustees to proceed with a greatly expanded version of project four: the immediate threat of logging to Prince William Sound is clear⁵. This is, at a minimum, the fiduciary obligation of the Trustees.

THE SCIENTIFIC STUDIES OF THE SPILL'S IMPACTS MUST BE
RELEASED TO ALLOW MEANINGFUL PUBLIC PARTICIPATION AND TO
ENSURE PROPER RESTORATION.

One of the most important problems with the restoration plan is the complete failure of the Trustees to release the basic scientific data upon which any restoration plan must be based. Without the scientific analyses and data on the spill's impacts, the public and independent scientists who are not privy to the massive data banks accumulated by the Trustees and Exxon cannot provide meaningful comments on the plans for restoration, replacement, and acquisition. The data and analyses must be released now.

⁵ Logging is the most dramatic threat to the ecosystem. Similar protection should be applied in the context of existing and planned mining and development efforts. These additional threats underscore the insufficiency of the original \$40 million price tag attributable to Project Four.

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The federal government's recent decision to release a brief summary of these data as part of the settlement is a small step in the right direction. However, the information provided in this summary is oversimplified and conclusory, and is not accompanied by the actual basic data or scientific analysis necessary for the public and outside scientists to understand and comment upon the results. Without these data and analyses regarding the extent of the injuries to the important elements of the ecosystem at locations throughout the affected area, the public cannot assess likely past and future impacts of the spill. Therefore, in many cases it is impossible to advise the Trustees regarding the optimum restoration approaches. This is a violation of the legal requirements to provide opportunity for public participation in the restoration planning process pursuant to the Administrative Procedures Act, the National Environmental Policy Act, and the Clean Water Act.

**THE PROPOSED SETTLEMENT SHOULD NOT DISRUPT THE DAMAGE
ASSESSMENT AND RESTORATION PROCESS**

On March 13, 1991, the United States and Alaskan governments announced a proposed settlement agreement reached with Exxon Shipping and Exxon Corporation⁶. The prospect that the settlement may provide money to finance restoration activities should not short-circuit or distort the essential program of scientific studies of the on-going damage to the Prince William Sound caused by the Exxon Valdez. In the absence of this scientific program, comprehensive restoration is impossible. Furthermore, surrendering this program also surrenders the already very limited value of the rigid reopener provision contained in the Consent Decree.

The proposed settlement includes a criminal plea agreement⁷ and a settlement of civil claims memorialized in a Consent Decree and a Memorandum of Agreement. The agreements would allow Exxon to extend its payments, and the governments' proposal for implementing the agreements creates perverse incentives to short-circuit crucial elements of the damage assessment and restoration process.

⁶ Alyeska Pipeline achieves significant benefits from the settlement terms. The Company is relieved of criminal liability, despite recently disclosed evidence of criminal behavior in connection with developing its contingency plan. The Company is also absolved from paying damages pursuant to civil claims by the governments for natural resource damages.

⁷ See Attachment C -- NWF comments on the plea agreement.

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The Settlement Terms

If approved, the criminal plea agreement requires a criminal restitution payment of \$50 million to the State of Alaska. The plea agreement restricts use of the monies to restoration activities⁸. The civil Consent Decree also requires payments of monies which are limited to restoration expenditures⁹. According to the Decree, Exxon must pay \$900 million over a ten and a half year period. Theoretically, an additional \$100 million could be available via a narrowly drawn reopener provision. The governments are authorized to deduct up to \$134 million in costs incurred and paid in the past and most of these deductions would be applied in the first few years of the payout schedule.

The Consent Decree provides that the agreement can be reopened to pay damages discovered after the settlement is lodged with the court (between September 1, 2002 and September 1, 2006).

⁸ The agreement provides that the money is to be used:

exclusively for restoration projects relating to the "EXXON VALDEZ" oil spill. Restoration includes restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills.

Plea Agreement at 8, United States v. Exxon Shipping and Exxon Corp., No. A90-015 CR. (D. AK March 13, 1991) ("Plea Agreement").

⁹ The Consent Decree requires that the settlement money be used:

to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or resource services.

Agreement and Consent Decree at 10-11, United States v. Exxon Corp., Exxon Shipping, Exxon Pipeline, and T/V Exxon Valdez, No. A91082 Civil and State of Alaska v. Exxon Corp., Exxon Shipping, Exxon Pipeline, and T/V Exxon Valdez, No. A91083 Civil (D. AK March 13, 1991) ("Consent Decree").

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If the reopener is exercised, an additional \$100 million is provided to restore "one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the area affected by the Oil Spill." Consent Decree at 17. However, reopener cannot be invoked unless the governments show that the cost of the remediation is not grossly disproportionate to the benefits to be achieved and that the injury "could not reasonably have been known nor ... anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee" at the time the Consent Decree is approved. Consent Decree at 18 (emphasis added).

More Money Is Required For Needed Restoration

This proposed settlement may sound like it provides a lot of money for Prince William Sound, as much as \$1.1 billion, and the terms specifying uses for the money appear to limit the spending to needed restoration projects. However, after closer review a very different picture emerges.

In fact, pursuant to the agreement, only about \$55 million will be available for replacement and acquisition of natural resources from 1991 through most of 1992. Another \$15 million will be available for restoration planning and to initiate restoration projects.¹⁰

Thus, the Trustees have created a dilemma for themselves. The proposed settlement, with its small yearly payments, and the Trustees' apparent decision to recoup their past expenses from the settlement payments in the first few years¹¹, combine to prevent the Trustees from addressing the most critical threat to

¹⁰This amount includes the \$50 million criminal restitution payment, and the \$90 million first payment under the consent decree minus approximately \$45 million in past costs. Of this \$95 million, a NOAA fact sheet (Attachment D) indicates that \$25 million will be used to continue the science program and \$15 million will be used for restoration planning and to initiate restoration pilot projects. This leaves only \$55 million for any replacement or for acquisition of threatened habitat in 1991 through most of 1992 -- if the Trustees are willing to address these critical needs.

¹¹ According to NOAA, the deductions from settlement payments to recoup past costs, totaling \$134 million, will be exacted under the following schedule: 1991, \$45 million; '92, \$40m; '93, \$40m; '94, \$5m; '95, \$5m. (These amounts are approximate.)

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Prince William Sound since Exxon spilled eleven million gallons of oil: the clear-cut logging that threatens the ecosystem and recreation values of the Sound.

Alaska Trustees Want To Dismantle The Science Program

According to recent press reports (Attachment E), the Alaska Trustees are seeking to end the damage assessment and restoration studies so that more funds will be available to pay for restoration implementation. According to press reports, John Sandor, Commissioner of Alaska's Department of Environmental Conservation, and Carl Rosier, Commissioner of Alaska's Department of Fish and Game, argue that most of these studies are "litigation-driven" and must be cut. However, these studies are important. Completion of the studies will reveal information about the full impacts of the spill, enabling the Trustees to invoke the reopener in the settlement, if necessary, and to effectively carry out restoration.

The Science Program Is Essential

Ironically, the greatest threat to the restoration program has been the litigation process. Short-sighted lawyers have dominated the scientific program and prevented scientists from publishing results, prevented public review, and have cut or eliminated necessary studies. The lawyers, generally, have focused the program on counting dead bodies instead of looking at the whole ecosystem -- missing the forest for the trees. It would be tragic if a settlement should somehow create financial incentives to entirely eliminate an already narrowly drawn science program.

Abandoning the science program would be tantamount to abandoning any hope of making use of the narrow reopener provision in the proposed settlement¹². Any proposal to reopen the settlement in 2001 or 2002 has to be based on scientific data that could not have been reasonably anticipated by any Trustee as of the date of the settlement. If the science program is terminated, the narrow conditions of the reopener provision become completely useless. Thus, impacts of the spill which are presently unknown could not be remedied with settlement funds.

The science program must guide restoration planning. It is impossible to restore the ecosystem unless there is knowledge

¹² As is more fully discussed in our comments on the civil settlement, NWF is deeply concerned with the legality and appropriateness of the narrow reopener and the \$100 million cap on it.

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about the nature and extent of injuries¹³. Otherwise, restoration will be inadequate because of the small yearly payments this proposed settlement would provide. The Trustees can ill afford this approach.

The Solution

NWF urges the Trustees to adhere to the science program, and use all other available funds for acquisition of threatened habitat. It is urgent that the Trustees forego collecting previously incurred or paid costs until threatened habitat is protected and spend their own money NOW to protect habitat. The Trustees should postpone reimbursement of these costs until prospective payments are made in later years. Any other approach could doom Prince William Sound's fragile ecosystem.

**UNACCEPTABLE DELAY BY THE STATE CRIPPLES
PUBLIC PARTICIPATION IN DEVELOPING THE WORK PLAN**

On November 19, 1990 the Trustees published a Federal Register notice which announced that on December 28, 1991, there would be another Federal Register notice announcing the 1991 Restoration Work Plan. 55 Fed. Reg. 48160 (November 19, 1990). NWF applauded this November notice as an earnest effort by the Trustees to ensure meaningful public participation and comment on this important document. Unfortunately, this second Federal Register notice did not appear until March 1, 1991 -- two months late.

There is no substantial reason for delay which cripples public efforts to comment on the Work Plan and the Trustees' efforts to carry out critical restoration duties.

NWF has obtained a draft December 21, 1990 of the Federal Register which was planned to be published on December 28. There are few differences between this draft and the final version that appeared over two months later. Clearly, the December 21 draft could have been printed in the Federal Register on December 28 as planned.

¹³ In its state court lawsuit, NWF and its co-plaintiffs have asked the Court, by motion, to order all parties to submit their scientific data into a central, public repository. Attachment F is one of several affidavits which were filed in support of this motion. Paragraphs 3-10 are particularly informative regarding the value of open science and the need for broad, multi-disciplinary ecosystem studies.

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The delay remains unexplained. The result: the public has lost any meaningful opportunity to comment on the Work Plan and the Trustees will lose some of the scarce good weather available for conducting restoration studies and implementation projects suggested by the public¹⁴.

The 1991 Work Plan was not announced in the Federal Register until March 1, and the comments will not reach the Trustees until April 15 -- over a week after the 1991 NRDA Plan was released. The 1991 NRDA Plan contains no new information about restoration planning. The Trustees are currently hoping to publish an additional Federal Register notice regarding restoration plans by May 3, with comments due one month later, the same day as comments for the 1991 NRDA Plan are due. This new schedule will require the Trustees to digest all public comment received on the 1991 Work Plan and prepare a Federal Register notice in less than two weeks.

This skewed schedule places the Trustee agencies in a very difficult position. If they value public comment and their obligation as public servants to listen to public concerns, they risk delaying critical restoration projects. Every day they delay commencing needed restoration studies and implementation projects, is a day of loss to the environment of Prince William Sound.

NWF urges the Trustees to accept public comment regarding a revised restoration plan on an accelerated timetable so that the 1991 field season will not be missed.

ADDITIONAL NWF CONCERNS

The Restoration Program Should Focus on

¹⁴ The first opportunity for public comment on the natural resource damage assessment and restoration planning process occurred in August, 1989. The public "opportunity" was a comment period pertaining to a set of studies that had already been conducted the previous summer. Although the Trustees argue that they had little alternative given their immediate need to commence studies once the spill took place, this argument fails when applied to the 1990 studies; although a draft version of the document describing the studies was completed in the spring of 1990, it was not released for public comment until August -- again, too late for meaningful public comment. Nothing exonerates excluding the public in 1989; the Trustees could have used alternative means to solicit public comment, including holding public meetings and circulating draft documents.

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Species Most Affected By The Spill

The recently released damage assessment summaries suggest that the spill has had and will continue to cause dramatic impacts on several species. Because of the secrecy pervading the scientific damage assessment process, it is impossible for the public to assess the extent of damage and to comment upon the proposed program to restore the resources. However, from the limited summary information available, it appears that the most dramatic impacts are on the murre colonies. The summaries indicate that about 300,000 murrelets died and that at least 215,000 chicks were not born because of the spill's various effects. Prince William Sound eagles were also hit hard, and a very poor breeding season in 1989 will probably have long-term effects on the eagle population.

The summaries also indicate that the oil continues to effect many species including sea and river otters and harbor seals. In addition, work is continuing in terms of analyzing the effects of the spill on the sea lion population, which was already in decline, probably due to multiple development and pollution-related factors. Finally, the summaries describe very significant impacts in the intertidal and, to a lesser degree, the subtidal habitats.

NWF urges the Trustees to devote their energies to developing restoration and acquisition programs to address these significant injuries.

Factors For Evaluating Restoration Alternatives

The Federal Register notice sets forth several factors proposed by the Trustees to evaluate potential restoration alternatives. 56 Fed. Reg. 8899 (March 1, 1991). These factors include "adequacy of natural recovery." Id. However, the exigency of the restoration work is not included as a factor for evaluation.

NWF believes there are substantial difficulties associated with predicting future natural recovery. Therefore, NWF urges the Trustees to limit consideration of natural recovery as one of the routine factors used to determine restoration options. Any use of natural recovery in analyzing restoration alternatives should place a heavy emphasis on the burden of proving, through strong scientific evidence, that natural recovery would occur subsequent to the spill. Uncertainties about future recovery of the ecosystem should be resolved in favor of active restoration programs, such as acquisition of equivalent resources.

NWF urges the Trustees to include an additional key factor: exigency of the restoration work. Some restoration projects are

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more urgent than others due to prospective effects of outside events, such as actual and planned logging in the impacted area. The potential adverse environmental impact of outside events highlights the importance of timing restoration work to enhance benefits to the affected area.

In addition, the Federal Register notice suggests that the Trustees would evaluate the "reasonableness of the cost of the restoration project in light of the value of and ecological significance of the resource" 56 Fed. Reg. at 8899. This criterion may only be applied in accordance with the mandate of the Ohio case, which states that restoration or replacement is required when its cost is "grossly disproportionate to lost values."

CONCLUSION

NWF urges the Trustees act immediately and to ensure the availability of sufficient funding to protect Prince William Sound from the immediate threat of clear-cut logging. The Trustees also must release the scientific studies. Added to the significant insult from the Exxon Valdez oil spill, this logging could be fatal to the Sound's damaged ecosystem. The Trustees bear a special responsibility and have a unique opportunity to avert this additional tragedy. Furthermore, if the settlement is approved, the Trustees should first fulfill their obligation to protect the interests of the environment by deferring until later years recouping previously incurred or paid litigation and investigation costs.

Value of Intangible Losses From Exxon

Valdez Spill Put at \$3 Billion

By John Lancaster
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 studies, conducted for the state of Alaska and the federal government, are an attempt to assign a dollar value to intangible losses said 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 landmark penalty that avoids a costly and uncertain trial while providing immediate cash for cleanup and restoration.

But critics noted that several recent court decisions have upheld the validity of social cost 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, to provide a market signal that if you do damage, this is what it's going to cost you," said an economist familiar with the studies.

In affirming the method two years ago, a three-judge federal appeals court panel ruled that although "the extent of damage to natural resources from releases of oil and hazardous substances varies greatly... it is in the mission of [federal law] to assess the public loss."

Exxon declined to comment on the studies.

William K. Reilly, administrator of the Environmental Protection Agency, said in an interview that while such studies "have their place

... 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 otter."

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

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.

Norman 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 defended 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 economist 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."

Information believed to be in spill studies

By CHARLES WOHLFORTH
Daily News reporter

Studies commissioned by the state and federal government on the Exxon Valdez oil spill reportedly suggest serious, long-term damage to Alaska's coastal environment and an astronomical price tag for that damage.

The governments have spent more than \$70 million on the studies, but their results remain secret. But some information has leaked out, including these points:

- Seaweed beds in Prince William Sound that provide the basic fuel for the ecosystem of sheltered bays were badly damaged;

- Recovery is in doubt for colonies of murre on islands south of the Kenai Peninsula hit hard by the spill because the oil caused long-term disruption to their reproductive process;

- And economic surveys

designed to show the cost of the spill to society as a whole placed the price Exxon could be made to pay at \$3 billion to \$8 billion.

The economic studies used a method called contingent valuation to survey a cross-section of Americans on the value they place on natural resources. A federal court validated the method.

Workers on the studies anonymously told The Washington Post that one of the studies set a damage figure of \$3 billion, the newspaper reported March 20. That figure was partly confirmed when Tom Campbell, general counsel for the National Oceanic and Atmospheric Administration, told a U.S. House committee the study's \$3 billion to \$5 billion finding might be hard to prove in court, said National Wildlife Federation attorney Doug Wolf.

A source working on the case told the Daily News Friday those numbers were low. More recent data indicate damages of \$3 billion to \$8 billion would be defensible in court, the source said.

The information on murre colonies first was reported in a Post article Feb. 21. It cited leaked documents that said murre colonies had suffered a total reproductive failure and might not recover for 70 years. The cause of the failure was said to be a lack of adult birds to defend eggs.

David Nysewander, investigator of the colonies for the U.S. Fish and Wildlife Service, appeared inadvertently to confirm that conclusion when he explained murre reproduction to a reporter last week.

Nysewander said murre's reproductive success depends on synchronized egg laying, which allows them to band together to defend

nesting birds. Laying usually takes place all in one month. But his group has had to change plans, extending its visits to the colonies across several months — and that suggests the egg laying is no longer well-synchronized.

"If there were changes, you have to look at it differently," he said. "But I can't tell you about that."

The information on seaweed in Prince William Sound comes from environmental attorneys.

"It's only just very vaguely being leaked out by the concerned scientists involved," said Bill Rossbach, an attorney representing environmental plaintiffs against Exxon. "There are a number of scientists who are concerned."

"They're finding what the inside people say is very substantial deterioration of that crucial part of the food web," Rossbach said.

ATTACHMENT B

The Coastal Coalition

Box 2424, Cordova, Alaska 99574
907-424-5509 FAX 907-424-5246

Dear Friends,

July 4, 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.

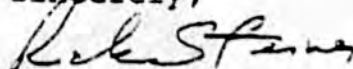
The Coastal Coalition is an informal network of concerned citizens that formed in response to the spill in order to provide a constructive focus for citizen input. Presently, our goal is to help formulate a comprehensive settlement for natural resource damages that is agreeable to all parties. Such a 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 commence immediately. In addition to direct restoration efforts, there is an immediate opportunity to protect, through acquisition, threatened habitat within the region.

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

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
- III. Justifications for Acquisition
 - A. Biological
 - B. Economic
 - C. Psychological
 - D. Socio-Political
- IV. Timber Ownership
 - A. Prince William Sound
 - B. Lower Kenai Peninsula
- V. Additional Considerations

by
Rick Steiner

THE COASTAL COALITION

P.O. Box 2424
Cordova, Alaska 99574

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 represent 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 this 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. And, 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. It's 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 non timber 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 beauty, 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.

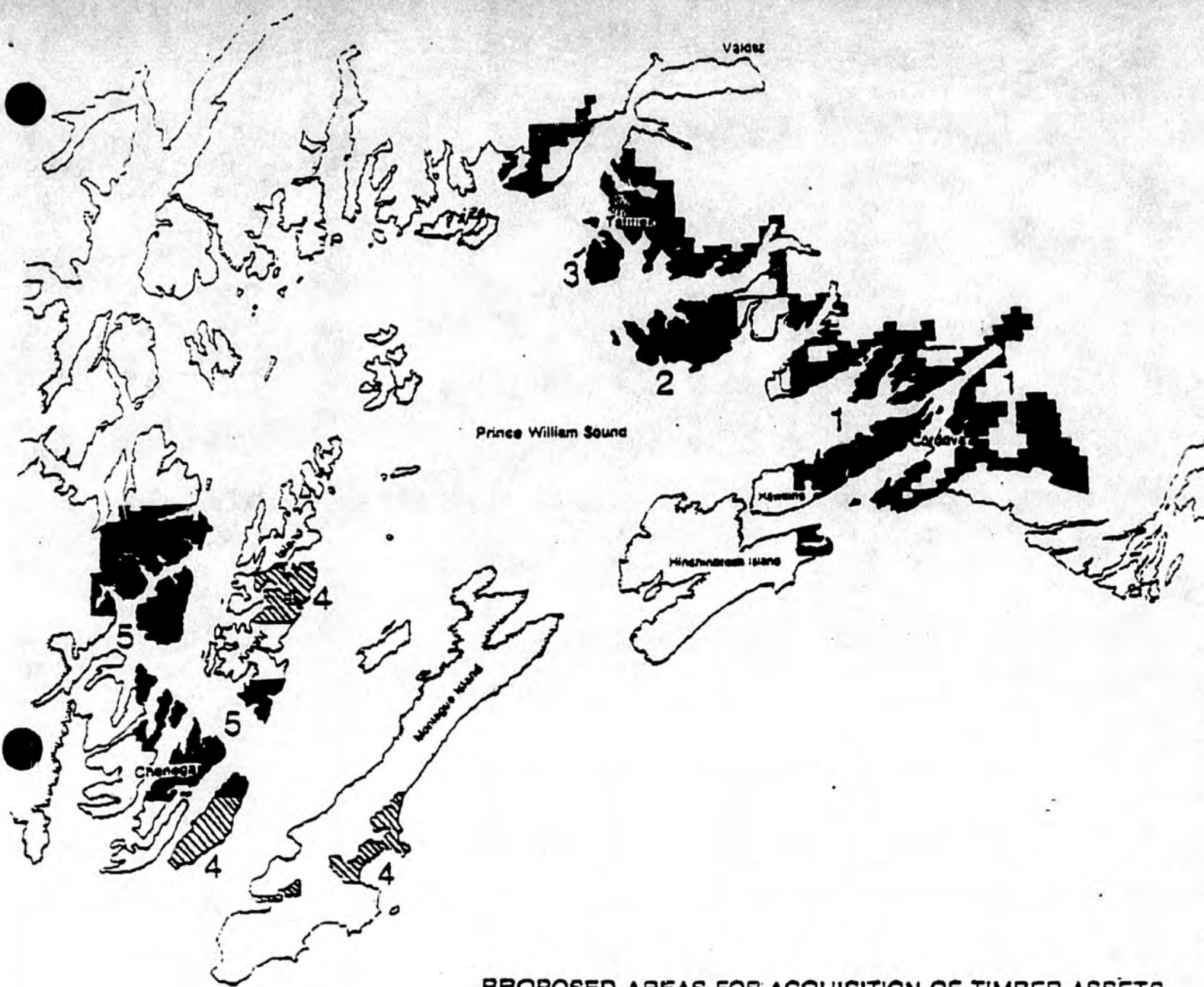
8. Protection of Native Sovereignty

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.

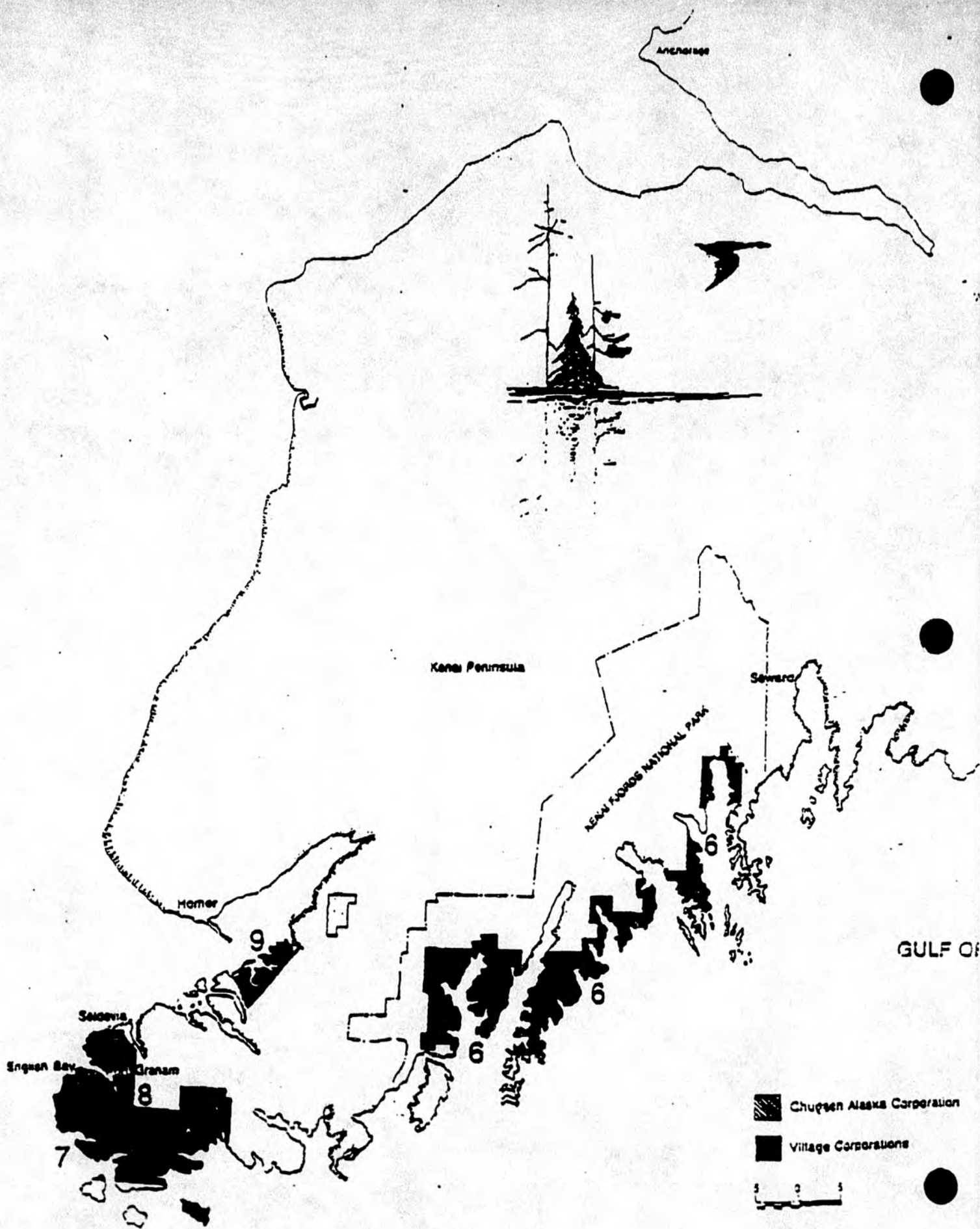
It should be recognized that, before the spill, timber development plans represented sincere and genuine commitment on the part of corporation managers to provide economic opportunity for their shareholders. Acquisitions for Restoration should be presented as a unique opportunity to redirect such development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



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA

vs.

EXXON SHIPPING COMPANY, AND EXXON CORP.

No. A90-015 CR.

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

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

INTRODUCTION

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

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

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

ALYESKA SHOULD NOT BE MADE IMMUNE FROM FUTURE PROSECUTION

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

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

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

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

Documents recently submitted to this Court by the U.S. House Interior and Insular Affairs Committee Vice Chairman George Miller (collectively, "the Alyeska materials") establishes that eleven months before the Exxon Valdez spill, Alyeska knew that it could not adequately respond to a major spill in Prince William Sound.⁴ In fact, these documents show that Alyeska unilaterally decided that it would only respond to spills in the Valdez Arm and Valdez Narrows and that it would rely on dispersants and cleanup efforts by the spiller to attempt to take care of any other spills³. In other words, Alyeska unilaterally abdicated a large part of its responsibility to protect the environment⁴.

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

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

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

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

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

⁶ Id. at 3-6.

investigators suggest that these were willful misstatements and probably were criminal violations of Alyeska's duty under the Clean Water Act and other laws.⁷

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

NWF invites the Court to examine its law books to find a similar example of a third-party, legally separate from the accused, gaining the benefit of the plea bargain without suffering any detriment. The governments appear to have surrendered all criminal charges for Alyeska's incredible conduct because Exxon insisted.⁸ The record before this Court at a minimum suggests that Alyeska likely is an appropriate target of a criminal investigation. The record is completely devoid of any support for the promise not to prosecute Alyeska. This Court, therefore, has insufficient information for it to evaluate, pursuant to its obligations under Federal Rules of Criminal Procedure 11 and 32, whether the plea is in the public interest and whether the sentence fits the crime.⁹ NWF urges the Court to

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

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

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

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

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

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

OTHER CONCERNS

1. Important Scientific Data Must Be Released

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

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

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

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

3. Court Should Impose Prevention Measures

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

4. Public Should Be Able to Challenge Use of Money

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

Respectfully Submitted,

Douglas Wolf, Esq.

Erik D. Olson, Esq.

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

FACT SHEET

EXXON-VALDEZ OILSPILL SETTLEMENT

AGREEMENT HAS BEEN REACHED between Federal and state trustees and Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company for settlement of damages rising from the Exxon Valdez oilspill in Prince William Sound March 24, 1989.

The settlement, totalling \$1 billion, represents the largest environmental damage settlement in history—50 times the size of any other.

Highlights

- EXXON WILL PAY \$190 MILLION IMMEDIATELY, of which \$100 million is a criminal fine. Half of this fine will be remitted to the state of Alaska. Twenty-five million dollars of the first payment will be used to continue the science program, and \$15 million will go to restoration planning and to initiate restoration pilot projects. The balance will be used to begin to reimburse most of the trustees and the Coast Guard for past expenses.
- EXXON WILL PAY \$150 MILLION IN FISCAL YEAR 1992, but this amount and future amounts will be usable beginning in October 1991. The major part of these funds will be used in restoration efforts aimed at returning Prince William Sound to its pre-spill condition.
- EXXON WILL PAY \$660 MILLION OVER A PERIOD OF YEARS beginning in FY 1993.

If significant new injury arises after the 10-year restoration period, which is based on previously unknown information, the trustees may reopen the matter up to a cap of an additional \$100 million.

Interagency Administration

The agreement will be administered by a group of trustees comprising the Administrator of the National Oceanic and Atmospheric Administration (NOAA), the Secretaries of the Departments of the Interior and Agriculture; the Commissioner of the Alaska Department of Fish and Game, and the Commissioner of the Alaska Department of Environmental Conservation, and the State Attorney-General. The U.S. Environmental Protection Agency has been designated by the President to coordinate restoration activities for the U.S.

The trustees will act jointly in the collection and joint use of all damage recoveries. Decisions on use of recovered funds will be made by unanimous agreement; the funds are to be held in a joint trust fund under the supervision of the U.S. District Court for Alaska.

(more)



EXXON VALDEZ FACT SHEET

(cont.)

Cooperative Restoration Efforts

THE GOVERNMENTS WILL CONTINUE TO WORK COOPERATIVELY conducting scientific studies and restoration efforts approved by the trustees for the 1991 field season. Among those under consideration are:

- RESTORATION OF THE BEACH WILDRYE COMMUNITY, to stabilize sites where natural or cultural resources are at risk,
- A PUBLIC INFORMATION AND EDUCATION PROGRAM, to lessen the potential for further human disturbances,
- HABITAT RESTORATION FOR PINK AND CHUM SALMON, using proven fisheries enhancement techniques,
- PROTECTION OF STRATEGIC FISH AND WILDLIFE HABITATS AND RECREATION SITES.

Indian Tribes' Rights Protected

THE AGREEMENT WILL BE ENFORCED by the U.S. District Court for Alaska in conjunction with its supervisory powers over a consent decree entered in the litigation.

The agreement does not affect rights and obligations of third parties with interests in the situation, including those of Indian tribes to act as trustees for asserting claims, or those of any others who are or become successors to any federal or state interest, or holders of present or future rights in land or resources affected by the spill. Also unaffected are U.S. or state rights or obligations relating to Indian tribes.

The memorandum of agreement, and the settlement agreement, will be published in the Federal Register and public comment will be sought for a period of 30 days. Broadly based public participation will be an integral part of the program.

Each government has the right to withdraw its consent to the settlement agreement within 15 days after the close of the public comment period if the comments disclose facts indicating the agreement is not in the public interest.



Deal OK could halt studies

Cole: \$1-billion pact approval
may cut spill damage probes

By DIRK MILLER

TIMES CAPITAL BUREAU

JUNEAU — Attorney General Charlie Cole said Friday state and federal governments could halt some economic-damage studies of the Exxon Valdez oil spill if a proposed settlement is approved.

Cole made the statement after questioning by a House panel reviewing the \$1-billion settlement of state and federal claims against Exxon from the March 24, 1989, oil spill. Lawmakers are considering whether to approve or reject the settlement by a May 3 deadline.

He also said there were concerns about naming Natural Resources Commissioner Harold Heinze to a panel of six federal and state trustees to oversee spending of a \$900 million trust fund created by the settlement.

Heinze is a former ARCO Alaska Inc. president and spent 20 years with the company, which is one of the major producers on Alaska's North Slope.

"That's one of the reasons he's not (on the panel) now," Cole said.

Cole also released confidential details of the \$72 million the state says it has spent on the spill in cleanup, legal and study costs. The state spent \$64.5 million on spill response, of which Exxon paid back \$30 million; \$23.2 million on damage studies, on which it was reimbursed \$5.7 million; and \$19.8 million on litigation.

The state is to be reimbursed the \$72 million over five years as part of the settlement.

The state's studies have been a controversial part of the debate over the agreement. Some lawmakers say Cole should release the state's economic and resource damage data for use by private parties against Exxon, the state and Alaska.

See Studies, page B7

Continued from page B1

The public can comment on the settlement at legislative information offices in Anchorage, Fairbanks, Juneau, Kodiak, Valdez, Soldotna, Homer, Cordova and Seward. Cole also will be at the meeting, which is being conducted in the Senate Finance Committee room in Juneau.

Trustees consider further Exxon spill assessment studies

By DANIEL R. SADDLER
TIMES WRITER

The proposed settlement of state claims for the Exxon Valdez oil spill has prompted state and federal trustees to reconsider spending any of \$35.6 million planned for 1991 spill assessment studies. Fish and Game Commissioner Carl Rosier said Saturday.

State and federal agencies last week unveiled their 1991 plan for studies to determine how much the spill damaged Alaska's environment and resources. The studies, funded by the governments and by Exxon, are aimed at setting a dollar value on the impact if Exxon were found liable for the damage.

But with the possibility of a negotiated settlement, the council of trustees

responsible for overseeing the studies and restoration is wondering whether money for a third year of assessment could not be better spent on restoration, Rosier said.

At a Thursday meeting, the Trustees Council of state and federal land officials overseeing the studies decided to ask for a review of the planned studies.

"The mission in reviewing them is to see if there are projects or programs here that lean more toward damage assessment rather than restoration," Rosier said. "The basis for these studies in many cases was litigation, and now we're looking at the studies and work to be done (as) being more directed toward restoration."

Scientists and agency officials over-

seeing their work must complete their review by May, and make their recommendations to the council for the final decision, Rosier said.

Attorney General Charlie Cole said Saturday that studies of the economic damage of the spill clearly driven by legal concerns might be stopped if the state wins approval of the \$1 billion settlement of its claims against Exxon.

But no decision has been made on the studies, or can be made, until the settlement is either approved or rejected by the May 3 deadline, he said.

Meanwhile, some of the studies have already begun, said Mike Dean, acting director of Fish and Game's division of oil spill impact, assessment and restoration.

The department has begun to hire workers, buy equipment and set up field camps for continuing studies of the oil's impact on herring, trout and salmon, said Dean. Other studies on river otter and mink, and on sea birds are due to start soon.

The schedule lists studies focusing on several areas of biological and environmental concern, including marine and terrestrial mammals, birds, fish, coastal habitat, air and water conditions and archaeological resources.

The studies range from monitoring fish, birds and mammal populations to track recovery, to creating computer models showing the relationship between oil and injury, to measuring levels of oil on cleaned beaches.

About \$2.3 million in studies aimed at finding ways to restore or replace damaged resources already have received tentative approval from the Trustees Council, Dean said.

Dean questioned whether the well-planned science program should be halted in face of a settlement.

"You have to know what was broke before you can fix it, and we're still doing that," he said.

Dean said no studies planned for this year would involve killing sea birds or mammals. The U.S. Fish and Wildlife Service has denied applications to do so after public outcry last year over studies in which researchers killed about 170 sea birds in a test of their ability to survive immersion in oil.

Exxon deal may affect studies

By MATT KOHLMAN
The Associated Press

JUNEAU — The state and federal governments may suspend some of their studies of oil-spill damage to Prince William Sound if the \$1 billion Exxon Valdez settlement is approved, state officials say.

Environmental Commissioner John Sandor made the suggestion at a recent meeting of a federal-state council established after the Exxon Valdez spill in March 1989.

The state and federal governments plan to spend \$35 million next summer for damage assessment and restoration. But some of those studies, particularly on economic effects, were started because of Exxon Corp. claims and may be unnecessary with a settlement, Sandor said Friday.

Sandor said he suggested the agencies identify those projects before the group



meets again in May or June.

"We did not say, 'Hey the settlement has been made, thus we're cutting those out completely,'" he said. "We're keeping our bases covered."

About \$18 million of the summer expenses will go toward restoration, and several million more could be used if the settlement makes some studies unnecessary, he said.

"We want to concentrate on restoration," Sandor said.

Sandor also is one of three state representatives

on the six-member trustee board that would be established to oversee spending the settlement money.

Fish and Game Commissioner Carl Rosier and Attorney General Charlie Cole also will be trustees, Cole told lawmakers Friday.

Representing the federal government will be John Knaus, administrator of the National Oceanic and Atmospheric Administration, Interior Secretary Manuel Lujan and Agricultural Secretary Edward Madigan.

Cole said that if the agreement becomes official, he may be replaced by Harold Heinze, natural resources commissioner and former head of Arco Alaska Inc.

"In the course of time, we would suggest DNR be appropriate because we're dealing primarily with natural resources," Cole said. Heinze has not been involved in the settlement so far because of a conflict of

interest, Cole said.

Cole also gave lawmakers a breakdown on the \$72 million that will be used from the settlement to reimburse the state for unpaid costs.

About \$20 million would go toward litigation costs, \$34.5 million would cover oil-spill response costs through February, and \$17.5 million would be used for damage-assessment expenses.

Legislators have formed special committees to review the spill settlement. The agreement would require Exxon to pay a record \$100 million fine. Exxon also would pay \$900 million over 11 years to settle civil claims, with the money going into a trust to pay for cleanup and restoration of Prince William Sound.

The tanker Exxon Valdez spilled nearly 11 million gallons of crude oil into Prince William Sound when it ran aground.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

EXXON VALDEZ OIL
SPILL LITIGATION

3AN-89-2533 Civil
(Consolidated)

This Document Relates To:
Case No. 3AN-89-6957 Civil
National Wildlife
Federation, et al. v.
Exxon Corporation, et al.

AFFIDAVIT OF DR. JOHN M. TEAL

I, Dr. John M. Teal, after being first duly sworn, state as follows:

Introduction

1. My name is Dr. John M. Teal and I am over the age of twenty-one. I am a biological oceanographer with extensive professional experience in marine ecology, marine pollution and biogeochemistry. I am a senior scientist in the biology department at the Woods Hole Oceanographic Institution. My curriculum vitae is attached as Attachment 1.

2. I have read and endorse Attachment 2, "The Problem of Secrecy: Science Under Wraps In the Wake of the Nation's Largest Oil Spill." This statement represents many of my concerns about the current regime of secrecy imposed by the parties to this lawsuit.

Need For Open Exchange of Data

3. Many examples illustrate my concerns about the effects

Affidavit of Dr.: John M. Teal
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of secrecy on the quality of scientific research on oil spill impacts. One example comes from the investigations of the effects of the tanker "Tsesis" spill in the Baltic. In the affected area the hatching success of herring eggs was drastically reduced. But the oil did not seem to have a large effect on the ratio of normal to malformed herring larvae, indicating no very large direct effect of oil on the eggs, though such a direct effect was the expected result, the logical first hypothesis.

4. Research on other aspects of the affected ecosystem, when combined with the results on herring, suggested the complex pattern of interactions that led to the failure of the herring eggs. A certain type of adult amphipod normally keeps the growth of fungi on herrings eggs low through feeding on the fungi, and thus enhance the survival of the herring eggs. The oil spill virtually wiped out these amphipods which, in turn, allowed fungal growth on the eggs to proceed unchecked. The effects of oil on the adult populations of the amphipod, by preventing their normal interaction with herring eggs, dramatically reduced the survival of herring eggs.

5. Only free interchange of research results and hypotheses by scientists of various disciplines studying the impacts of this spill allowed these scientists to make the necessary logical connection required to understand the cause of the loss of the herring eggs.

6. Without similar opportunities for free interchange of

scientific results, hypotheses and assumptions from research regarding the impacts of the "Exxon Valdez" oil spill (see Attachment 2), many similar complex relationships may never be discerned and the full causal network and/or extent of damage and long-term impacts may never become clear.

Secrecy Hamstrings Other Government Bodies

7. From 1978 to 1990, I have been a member of the Scientific Advisory Board ("Board") to the federal Minerals Management Service ("MMS"). The Board's role is to advise MMS on its scientific studies program. The scientific studies program's purpose is to develop the scientific basis for MMS decisions regarding outer-continental shelf ("OCS") leasing for oil exploration and production.

8. Although the Exxon Valdez spill did not involve OCS oil and did not occur in OCS waters, the Board felt that the results of the spill are very relevant to the decisions MMS makes in regards to the costs and benefits of oil exploration and production.

9. Unfortunately, the secrecy surrounding the Valdez spill effectively prevented the Board, and thus the MMS, from gaining any useful information of this type -- even though it would have been directly relevant to the mission of the MMS.

10. For example, during a meeting of the Board in Juneau, the Board invited representatives of the trustees to attend and discuss the scientific studies being conducted on the "Exxon Valdez" spill. Though the invitees came they were accompanied by

Affidavit of Dr. John M. Teal

Page 3

a government lawyer who sat amongst them and frequently told them not to answer the questions we put to them.

Important Research Opportunities Will Be Lost

11. The Exxon Valdez Spill offers a rare and significant opportunity for marine scientists to answer important questions about marine environments. In essence, the significant deposition of oil, which has components that are relatively long-lived and which will remain relatively toxic over time, in the Prince William Sound ecosystem acts as a marker or tracer which would allow scientists to follow the pattern of movement of various elements of the ecosystem just by following the movement of the oil over time.

12. This would also advance our current knowledge of long-term effects of oil spills. For example, this could allow scientists to expand upon the work that I have done with Dr. John Farrington and Bruce Tripp, also of Woods Hole, into the long-term effects of oil in the West Falmouth Harbor ecosystem. In that study, we have been able to trace the long-term movement of oil throughout an ecosystem which was disturbed by a 1969 oil spill.

13. In the wake of the "Exxon Valdez" spill, I am interested in studying the long-term ability of various sea plants and grasses to transmit oxygen to the sediment layers in which their roots are imbedded. The disturbances created by the oil spill and the way in which these disturbances affected and continue to affect this ecosystem would allow me to better

Affidavit of Dr. John M. Teal

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understand the relationship between these plants and their immediate environment.

14. However, I have not been willing to do this work and many other scientists have been deterred from undertaking similar research which would add to our understanding of marine environments in general, as well as our understanding of the long-term effects of oil spills in particular, because most of the data that has been collected is being kept secret.

15. Because so much of the basic data regarding the oil spill is not currently available, it is much more difficult for outside scientists without access to this data to conduct competent scientific investigation. There are so many ways in which one's hypotheses could be significantly in error, just because basic data upon which these hypotheses need to be built are not available, that I and many scientists like me are not willing to risk wasting our time or damaging our reputations (and, thus, our ability to fund the work we want to do) by conducting this type of speculative research.

16. I am also not interested in doing research if I must be bound by a secrecy agreement. If I were to agree to do this type of work I would not be able to publish my results until after the lawsuit was resolved (though a settlement, by its terms, might prevent any data from ever being published). I depend upon being able to publish my work for many reasons: Not only is it the best means of communicating with my peers and benefiting from their ideas and experience, but publishing allows me to advance

my scientific reputation which allows me to obtain funding for the projects I am interested in and to help support Woods Hole and the other scientists I work with.

17. If I know that I will be publishing the results of my investigations, I always have a stronger incentive to carefully and clearly think through my program of research. This is because I know that my work will be subjected to careful scrutiny by the most qualified reviewers possible.

Secrecy Must End Now

18. The longer this secrecy lasts, the more difficult it will be for outside researchers to commence meaningful studies after the existing data is released for public review. Time is of the essence to research on an environmental impact like the "Exxon Valdez" oil spill. Knowledge of the conditions at the time of the spill, details of the initial effects, and of the areas affected are essential to planning and conducting such research.

19. Knowledge made available only months or years after the event may show how one should have planned and conducted the research into that event, but could be useless for actually doing it. If this data is to have maximum value to outside scientists it must be released as soon as possible.

Conclusions

20. The current secrecy of science in Prince William Sound will keep many interested and qualified scientists from studying the effects of the Exxon Valdez oil spill, despite the fact that

this spill offers an unique opportunity to expand our knowledge of the long-term effects of oil spills as well as the basic rules that govern such marine ecosystems.

21. It is very important that this secrecy end immediately so that outside scientists can review the work already done and take steps to correct errors, limitations, and/or gaps in this work and/or initiate their own research on the effects of the spill.

ANYTHING FURTHER THE AFFIANT SAYETH NOT.

John M. Teal
Dr. John M. Teal

STATE OF MASSACHUSETTS)
COUNTY OF Barnstable) ss.

On this 11th day of September, 1990, the Affiant Dr. John M. Teal personally appeared before me and signed the foregoing Affidavit after first having sworn that the information contained therein is true and correct to the best of his knowledge and belief. Witness my hand and official seal. My commission expires on 26 August 1991.

[SEAL]

James J. Klein
Notary Public

RESUME

JOHN M. TEAL
Senior Scientist
Woods Hole Oceanographic Institution
Woods Hole, MA 02543

1 January 1990

Birth date: November 9, 1929.
Omaha, Nebraska
Nationality: U.S.A.
Social Security 507-32-0538

President: Teal, Ltd., environmental consultants associated with Aubrey Consulting Inc.

EDUCATION

B.A., Harvard University, 1951
M.A., Harvard University, 1952
Ph.D., Harvard University, 1955

ACADEMIC POSITIONS

Assistant Professor, 1955-1959, University of Georgia Marine Institute.
Assistant Professor, 1959-1961, Department of Biology and Institute of Oceanography,
Dalhousie University
Research Associate, 1961-1963; Assistant Scientist, 1963-1965; Associate Scientist, 1965-1971.
Senior Scientist, 1971-present; Chair, Biology Dept., 1982-1985; Seward Johnson Chair
Biology, 1986-1989; Woods Hole Oceanographic Institution.

PROFESSIONAL SOCIETIES

Sigma Xi; Phi Beta Kappa
Ecological Society of America (Certified Senior Ecologist)
American Society of Limnology and Oceanography
American Association for the Advancement of Science
Estuarine Research Federation
Society of Wetland Scientists
International Ecological Society

BOARD & COMMITTEE MEMBERSHIPS

Editorial Board: Ecology, 1960-1963, 1967-1969; Biological Bulletin 1983-1986
Marine Biological Laboratory: Instruction Committee 1968-1971; Instructor, Marine Ecology,
1976-1983; Corporation member 1983-present, Joint Library Committee 1988-present.
Conservation Commission, Town of Falmouth, 1971-1977.
Study Committee, Ecol. Soc. Amer., 1971-1974.
Conservation Law Foundation of New England: Board of Directors, 1978-present; Vice-chairman
of Board, 1980-present.
Scientific Advisory Committee, Outer Continental Shelf program of U.S. Mineral Management
Service, 1979-1981, 1984-1989, Chairman 1987-1989.

Scientific Advisory Subcommittee of Massachusetts DEQE Wetlands/Wildlife Technical Advisory Committee 1987

Lloyd Center Scientific Advisory Committee

Scholarly Studies Review Panel, Smithsonian Institution. 1988-1990

PUBLICATIONS

I am the author and/or co-author of c.125 scientific papers; 3 encyclopedia articles; 6 children's articles on oceanography; 4 trade books: "Portrait of an Island", Atheneum and Univ. Ga. Press, "Life and Death of a Salt Marsh", Atlantic-Little Brown and Ballentine, "Pigeons and People", Atlantic-Little Brown, "The Sargasso Sea", Atlantic-Little Brown and narrative for the film "Salt Marshes"-Jeff Sim Harper Row.

CONSULTING

I have served as a consultant on salt and freshwater wetlands, hydrocarbons, pollution, sewage treatment and pollution, coastal ecology, and groundwater protection to:

Conservation commissions: Towns of Mashpee, Falmouth, Barnstable

Massachusetts Towns: Cohasset, Duxbury, Falmouth, Harwich, Kingston.

Environmental organizations: Science Applications, Inc.; Energy Resources, Inc.; The Parks Council, New York; Hackensack Meadowlands Commission, New Jersey
Natural Resources Defence Council;

U.S. Govt. Agencies: President's Council on Environmental Quality; Mineral Management Service; Bureau of Land Management; National Oceanic and Atmospheric Administration; Environmental Protection Agency; National Research Council
Smithsonian Institution;

Universities: Univ. of Texas, Louisiana State, Univ. North Carolina, Stanford;

Other companies: McAbee Real Estate; The Green Company; Boston Gas; De Matteo Construction Co.; Land Use Associates; Peters-Hartell Corp.; Malcolm Pirnie Inc.; LEA Group Inc.; Weston & Sampson Engineers Inc., Ecological Engineering Associates

EXPERT TESTIMONY

I have been an expert witness in wetlands and pollution cases in state and federal courts including:

CLF vs. US-Dept. Interior (Park Service) re ORV permits on Nat. seashores;

Mass. MacGibbon vs. Duxbury, re wetlands protection;

New York vs. US-Dept. Interior re Mid-Atlantic oil leases;

Corps of Engineers vs. Swan Pond Golf Club, NY, re wetland protection;

U.S. vs. (barge company), U.S. District Court, VA, re oil pollution effects;

I have testified as an expert witness at numerous hearings before:

Mass. Dept. Environ. Qual. Engineering;

Rhode Island Coastal Resource Management Council;

Local conservation commissions, zoning boards, boards of public health, etc.

PROFESSIONAL EXPERTISE

I have scientific expertise in most aspects of coastal ecology and coastal pollution: including wetlands ecology, groundwater pollution, eutrophication, wastewater treatment with wetlands, hydrocarbon pollution, nutrient dynamics, ecology of shallow waters, birds, and coastal and dune vegetation.

I have been an invited participant and speaker at meetings on many aspects of marine science and management including:

Research for the '90's, Prince William Sound and Copper River Delta, Cordova, AK, 1990
West Falmouth Oil Spill, 20 years after, 1989;
Effects of OCS oil and gas activities on submarine canyons, 1989;
NAS panel on use of dispersants on oil spills, 1988;
Third International Wetlands Conference, Rennes, France 1988;
NATO Ocean Dumping Options Conference, Portugal, 1985;
SCOPE Toronto Conference on Nuclear Winter, 1984;
CEQ Conference on Long-term Environmental Research and Development, 1984;
SCOPE meeting on wetlands, Tallin, E.S.S.R., 1983;
SCOPE Musselwatch II, Honolulu, 1983;
NOAA Ocean Dumping, Napa, 1983; Crystal Mt., 1979, Estes Park, 1978;
Conference on Coastal Productivity, Pollution and Protection, Rio Grande do Sol, Brazil, 1982;
NAC Petroleum in the Marine Environment, 1982, 1975;
International Wetlands Conference, New Delhi, India, 1980;
NATO Benthic Boundary Layer, Les Arcs, France, 1975;
Global Ecology Problems: Man in the Living Environment, section on aquatic resources;
NAS report on National Minerals Policy, section on ecological impacts;
California Coastal Zone Management Conference on Wetlands Protection;
Salt Marsh Conference, Univ. Ga, 1954;
Coastal Zone Workshop, steering committee member; "Critical Problems of the Coastal Zone" 1972;
Hackensack Meadowlands Commission meetings on wetland management;
Coastal Recreation in an Urbanizing Environment, U. Mass. Cooperative Extension;

RESEARCH INTERESTS

Wetland and coastal ecology: especially salt and brackish marsh ecosystem structure and function; fish nursery value, nutrient cycling, hydrology, productivity; groundwater influences on waterbodies, groundwater contamination with nutrients; wastewater treatment by wetlands; petroleum pollution and hydrocarbon biogeochemistry; marine birds and over-ocean migration of land birds; coastal marine ecology including dune and beach ecology; physiological ecology of fishes; aquaculture and fisheries.

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U.S. Govt. Agencies: President's Council on Environmental Quality; Mineral Management Service; Bureau of Land Management; National Oceanic and Atmospheric Administration; Environmental Protection Agency; National Research Council; Smithsonian Institution;

Universities: Univ. of Texas, Louisiana State, Univ. North Carolina, Stanford;

Other companies: McAbee Real Estate; The Green Company; Boston Gas; De Matteo Construction Co.; Land Use Associates; Peters-Hartell Corp.; Malcolm Pirnie Inc.; LEA Group Inc.; Weston & Sampson Engineers Inc., Ecological Engineering Associates

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The Problem of Secrecy: Science Under Wraps
In the Wake of the Nation's Largest Oil Spill

Introduction

1. As scientists who have worked in the field of oceanography and have studied in particular the effects of hydrocarbon spills on marine and coastal ecosystems, we are gravely concerned about the secrecy and confidentiality that has surrounded the scientific study of the impact of the Exxon Valdez oil spill on the ecosystem of Prince William Sound.
2. Scientific analysis of the short and long-term impacts of an environmental disaster in a marine, near-shore and coastal environment such as Prince William Sound is exceedingly difficult, involving multiple ecological systems and complex interrelated ecosystem effects. As such, it necessarily requires both short and long-term multi-disciplinary study.
3. Full data sharing, and open discussion of scientific data regarding spill impacts with scientific experts from all relevant disciplines is fundamentally important and critical to assuring that scientific investigators and those analyzing the data get a full picture of the impacts and do not overlook important potential impacts or gaps in the data. Without open data sharing and discussion, subtle potential impacts may not be recognized and new investigations of key ecological perturbations may not be commenced. In addition, ongoing studies may be terminated before ecological injuries are documented due to a lack of a full understanding of the complexities of the ecological response to the catastrophic addition of oil to the ecosystem.

Need for Initial Data

4. After a massive oil spill such as this, the greatest amount of gross ecosystem impact occurs during the initial period. In this spill, significant direct damage to flora and fauna was immediately caused by the massive introduction of foreign and toxic material into the ecosystem and food web.
5. Because of this, all data collected which records the initial damage to flora and fauna and the movement and evolution of the hydrocarbons into the ecosystem is crucially important to both short and long-term evaluation and analysis. The data collected during the acute phase of massive injury to flora and fauna is the starting point for all other analysis.

6. Without complete and detailed information about this initial acute phase, it is difficult to predict or analyze the future impact the spill may have.

Importance of Peer Review

7. If these data are not made public immediately, the ultimate assessment of damage will be hindered and the amount of damage inadequately assessed.
8. Science works well and most effectively when it is conducted in open dialogue, among scientists within a given discipline and among scientists of multiple disciplines. This is particularly so where questions require complicated ecosystem analysis and evaluation, such as is required by a massive spill like the Exxon Valdez oil spill.
9. The conclusions of science are deemed credible only when there is independent and open review through a peer review process. Scientific literature based upon data and research not subjected to peer review is suspect. A study or one person's analysis of data will not be widely accepted in science until the study and analysis have been exposed to criticism and the concerns raised by the critics have been addressed. The entire system of scientific research depends upon the checks and balances provided by discussion and criticism of important ongoing work.
10. Without early feedback, open discussion, and integration of results and ideas from different disciplines, individual scientists or scientists working in one or two disciplines may well miss key parts of the entire picture. Scientists studying some portion of an ecosystem have misunderstood entirely the significance of the data they were collecting until practitioners of another discipline had been brought in to consult.
11. When scientists are talking to each other about their research they can integrate the information, note the type of sampling that is being done and be able to work with comparable data. A shotgun, unintegrated approach which is detached from the findings of others studying a similar subject will ultimately lead to greater cost and less reliability. Unless complete information about all studies is shared and integrated, there may be a tendency for "mindless measurement" while the larger picture is missed. Studies may be redundant or there may be gaps. It would clearly be more cost effective to share from the outset.

Peer Review of Initial Data is Critical

12. It is important to have open and frank discussion among scientists about the data gathered from the earliest impacts of the spill. Given the fact that the initial stages of

this type of disaster involved the greatest and most rapid change, it is clearly detrimental to the scientific investigation of the spill to wait until all the data are gathered before engaging in open dialogue and multiple disciplinary review. The situation is changing quickly in space and time while these studies are ongoing. Open dialogue and communication should be concurrent with the studies, not subsequent to them.

13. Science is enriched by constant feedback and refinement. Scientists never know what they may find when they first start looking. The first protocols used may be inadequate. The methodology or the detection limits may not be appropriate. It may well be that the questions need reframing, or methodologies need to be changed, based upon the initial results.

These Critical Data Should Be Public

14. Due to the passage of time since the spill, the important initial data regarding the Alaska spill are not available now except from those who actually collected data at the critical times. Thus, the data cannot be reproduced or gathered from any source other than those who actually collected it and who have the knowledge that has come from the data. We cannot state strongly enough that these data should be available for scientific and public review.
15. In addition, it is essential to know the following: What questions were the scientists asking when they did the studies? What procedures were they using to answer those questions? How did those procedures change or how did the questions change during the time that the initial data was coming in? Was there any feedback or modification in the study done during the course of the study?

Conclusion

16. Humankind, and in particular scientists working on environmental and ecosystem problems, need to know the effects of the Exxon Valdez oil spill on the environment. The effects cannot be known adequately without making the data available to everyone with the interest and the expertise to evaluate what it means and what it portends for the future.

FILED

APR 08 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Re _____ Deputy

RICHARD B. STEWART
Assistant Attorney General
Environment & Natural Resources
Division

STUART M. GERSON
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

JOSEPH W. BOTTINI
Assistant United States Attorney
222 W. Seventh St.
Anchorage, Alaska 99513
(907) 271-5071

RECEIVED

APR 15 1991

PRESIDENT

Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION

NO. A91-082

Exxon Corporation, Exxon Shipping
Company, Alyaska 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), in rem,

Defendants.

NOTICE OF LODGING OF UNITED STATES' SUMMARY OF
EFFECTS OF EXXON VALDEZ OIL SPILL ON NATURAL RESOURCES

PLEASE TAKE NOTICE that the United States is lodging

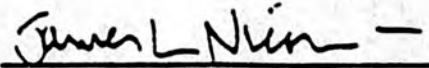
NOTICE OF LODGING OF SUMMARY OF EFFECTS - 1

with the Court the attached Summary of Effects of the EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources (the "Summary"). The United States is lodging the Summary to assist the Court in evaluating the proposed Consent Decree lodged with the Court on March 13, 1991. The Summary is based on scientific studies conducted by the Departments of Agriculture and the Interior, the National Oceanic and Atmospheric Administration, and the Environmental Protection Agency to assess the injury to natural resources resulting from the oil spill.

The Summary is being lodged in advance of a motion to enter the proposed Consent Decree in order to give the Court additional time to consider the nature of injury to natural resources resulting from the oil spill.

Dated: April 8, 1991

JOSEPH W. BOTTINI
Assistant United States Attorney
222 W. Seventh St.
Anchorage, Alaska 99513
(907) 271-5071


JAMES L. NICOLL, JR.
U.S. Department of Justice
Environmental Enforcement Section
NOAA GC-DOJ DARC BIN C15700
7600 Sand Point Way NE
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(206) 526-6604

SUMMARY OF EFFECTS OF THE EXXON VALDEZ OIL SPILL
ON NATURAL RESOURCES AND ARCHAEOLOGICAL RESOURCES
March 1991

INTRODUCTION

The T/V Exxon Valdez ran aground on Bligh Reef in Prince William Sound on the night of March 23-24, 1989, spilling approximately 11 million gallons of North Slope crude oil, making this the largest oil spill in United States history. The oil spread through Prince William Sound, the Gulf of Alaska, and lower Cook Inlet. More than 1,200 miles of coastline were oiled, including portions of the Chugach National Forest, Alaska Maritime, Kodiak, and Alaska Peninsula/Becharof National Wildlife Refuges, Kenai Fjords National Park, Katmai National Park and Preserve, and Aniakchak National Monument and Preserve. Oil from the T/V Exxon Valdez impacted shorelines nearly 600 miles from Bligh Reef.

The magnitude of efforts of the state and federal governments, the public, and Exxon to contain and clean up the spill, rescue wildlife, and study the effects of the spill is unprecedented. Among those efforts are the state/federal natural resource damage assessment studies designed to measure injuries to natural resources including birds, mammals, fish and other wildlife, and marine and terrestrial habitats. These studies are intended to provide the information necessary for the Trustee agencies to manage and restore injured resources appropriately and to provide necessary documentation to enable the governments to present a claim for damages to the responsible parties. This summary briefly describes the area affected by the spill, the chronology of the spill, and the process developed to implement and manage the injury assessment studies. It focuses, however, on what has been learned over the past two years about the effects of this oil spill on natural resources.

DESCRIPTION OF THE AREA AFFECTED BY THE SPILL

Prince William Sound lies near the top of the Gulf of Alaska (see map), an 850 mile arc extending from the Aleutian Islands on the west to the islands of southeast Alaska. The gulf coast is remote, rugged, and scenic. Its maritime climate nourishes a lush, green landscape in the summer. The area is snow covered in the winter. Bears, whales, bald eagles, puffins, seals, sea lions, and sea otters are among the abundant wildlife of the area. Storms that cross the Gulf drop as much as 300 inches of rain and snow annually in the high coastal mountains. Glaciers descend from permanent ice fields capping these coastal mountain ranges, continuing to carve intricate fjords and send icebergs floating out to sea. These are the largest glaciers outside Antarctica and Greenland.

Prince William Sound is one of the largest relatively undeveloped marine ecosystems in the United States. It has one of the continent's largest tidal estuary systems. Prince William Sound has rich commercial herring and salmon fisheries. The open water of the Sound is about the size of Chesapeake Bay. Its many islands, bays, and fjords give it

more than 2,000 miles of shoreline. Prince William Sound is surrounded by land, most of which is part of Chugach National Forest.

To the southwest of Prince William Sound is the Kenai Peninsula, home of the Kenai Fjords National Park, various units of the Alaska Maritime National Wildlife Refuge, and, among others, the cities of Homer and Seward. Numerous seabird colonies are located along the coast of the Kenai Peninsula, including those most frequently visited by tourists in Alaska. Both Prince William Sound and the Kenai Peninsula are accessible by air, boat, and on a limited basis, by automobile from nearby Anchorage, Alaska's major population center. State ferries that run among the larger communities and many charter boats make it easy for people to visit the heart of the Gulf coast. In recent years, there has been a steady increase in the number of wilderness seekers, kayakers, cruise ship passengers, and other tourists visiting the area.

The Kenai Peninsula points southwest to Shelikof Strait and Kodiak Island. Shelikof Strait lies between Kodiak Island, on the south and the Alaska Peninsula on the north. Shelikof Strait is the source of a very productive commercial pollock fishery. The Kodiak National Wildlife Refuge is located on the Kodiak Archipelago and Katmai National Park and Preserve, Alaska Peninsula/Becharof National Wildlife Refuge, and Aniakchak National Monument and Preserve are located along the coast of the Alaska Peninsula. The Alaska Peninsula tapers, then scatters into the islands of the Aleutian chain.

CHRONOLOGY OF THE EXXON VALDEZ OIL SPILL

For the first three days of the spill, the weather was calm and the slick lengthened and widened amoeba-like and generally stayed in the vicinity of the grounded tanker and off the beaches. Even with these seemingly ideal circumstances for oil recovery, the amount of oil in the water completely overwhelmed efforts to contain and recover the oil. A major windstorm on March 27, 1989, pushed the oil in a southwesterly direction and oiled beaches on Little Smith, Naked, and Knight Islands. The oil continued to spread, contaminating islands, beaches, and bays in Prince William Sound. Four days into the spill, oil began to enter the Gulf of Alaska. The leading edge of the slick reached the Chiswell Islands off the coast of the Kenai Peninsula on April 2, 1989, and the major seabird nesting colonies on the Barren Islands on April 11, 1989, nineteen days into the spill. By May 18, 1989, oil had moved some 470 miles and had fouled shorelines of Prince William Sound, the Kenai Peninsula, the Kodiak Archipelago, and the Alaska Peninsula. Oil subsequently reached shorelines on the Alaska Peninsula nearly 600 miles from Bligh Reef.

During 1989, the response to contain and cleanup the spill and rescue oiled wildlife involved a massive effort. Skimmer ships were sent throughout the spill zone to vacuum oil from the water surface. Booms were positioned to keep oil from reaching important commercial salmon hatcheries in Prince William Sound. A fleet of fishing vessels, known as the "Mosquito Fleet," played an important role in protecting these hatcheries, in corralling oil to assist the skimmer ships, and in capturing oiled wildlife and

transporting these animals to rehabilitation centers. After oil contaminated shorelines, a beach cleanup program was activated. Various local committees, with community and government agency participation, provided recommendations to the U.S. Coast Guard about areas that should receive priority for cleanup. An army of workers cleaned shorelines, using techniques ranging from cleaning rocks by hand to high pressure hot water washing. Fertilizers, sometimes in a chemical base, were applied to some oiled shorelines to increase the activity of oil-metabolizing bacteria, in an experimental procedure known as bioremediation. When deteriorating weather brought an end to cleanup work in the fall of 1989, a great amount of oil remained on the shorelines. Although winter storms proved extremely effective in cleaning many beaches, spring shoreline surveys indicated that much work remained to be done in 1990. Crews operating from boats and helicopters cleaned oiled shorelines in Prince William Sound, along the Kenai and Alaska Peninsulas, and on the Kodiak Archipelago. Manual pick up of remaining oil was the principal method used during 1990, but bioremediation and relocation of oiled berms to the active surf zone were also used in some areas.¹ Another shoreline survey will be conducted during May 1991, to determine the need for additional cleanup work.

INJURY ASSESSMENT PROCESS

The Exxon Valdez oil spill occurred just prior to the most biologically active season of the year in southcentral Alaska. During the two month period after the spill, seaward migrations of salmon fry, major migrations of birds, and the primary reproductive period for most species of birds, mammals, fish, and marine invertebrate species took place. The organisms involved in these critical periods of their life cycles encountered the most concentrated, volatile, and potentially damaging forms of the spilled oil. As will be discussed in this summary, the oil affected different species differently. Whereas, for example, it directly killed large numbers of birds and sea otters that encountered oil on the water surface, it did not prohibit in and out migration and spawning of large schools of salmon and herring.

The state and federal Trustee agencies were forced to mobilize field studies rapidly with little time for planning. Through intensive efforts, studies were designed, administrative processes were accelerated, and 58 field studies were carried out. Additionally, technical services programs were organized to provide hydrocarbon analysis, histopathology, and mapping support for the field studies. Initial decisions on the types and scope of studies conducted were made by agency experts familiar with the resources and the environment. Even with the rapid deployment of studies, however, some opportunities to gather injury data were irretrievably lost during the early weeks of the spill.

A legal framework was subsequently established and studies were reviewed and modified according to their likelihood to document resource injury. Expert peer reviewers were retained and study plans used during 1989 underwent scientific review for possible

¹Exxon has represented that it has paid over \$2.0 billion to conduct cleanup activities during 1989 and 1990.

modification in 1990. Some studies were discontinued or modified if they were unable to further document resource injury, and some new studies were initiated to fill identified information needs. Status reports prepared in January 1990, were used to guide the development of plans for the second year of studies. Thirty-nine studies and three technical services programs were continued in 1990. Scientific review was again used to plan for the upcoming 1991 field season, during which 29 studies and two technical services programs will be conducted.

This summary of the effects of the Exxon Valdez oil spill on natural resources is preliminary, as studies are still underway and available data are not fully analyzed and interpreted. However, the injuries to natural resources that have been documented to date are summarized herein. This summary also addresses studies that were discontinued. It should be noted that studies were discontinued for a variety of reasons, such as the determination that field work had been completed, that there was no practicable way to measure injury, or that no injury was documented. Even though some studies failed to identify injury and were discontinued, this does not necessarily mean that the resources were not affected by the spill. Certain injuries (if present), such as possible latent or sublethal effects on reproductive or other systems in animals, might not become fully evident for a number of years after the spill. At present there is no significant indication of long-term injury to resources other than those specifically noted below. Although studies indicate that there are continuing injuries to certain resources, natural recovery may also have begun. As petroleum hydrocarbons are broken down in the ecosystem, plant and animal communities begin to reestablish themselves. This recolonization has already been observed in some of the more lightly oiled areas. In the more heavily oiled areas, this natural recovery process is expected to take longer. As this natural recovery occurs, many of the birds and mammals that feed in these areas are expected to begin recovering.

MARINE MAMMALS

Following the spill, studies of humpback whales, Stellers sea lions, sea otters, harbor seals, and killer whales were started. The humpback whale and Stellers sea lion studies were discontinued following the 1990 field season. Humpback whale investigations were limited to photo identification of whales, estimations of reproductive success, and possible relocations of whales. It was not possible to take tissue samples for petroleum hydrocarbon analysis to document exposure. The study did not show direct oil spill mortalities or reproductive failures.

The sea lion study is being completed following the 1990 pup counts. Some tissue samples were analyzed for petroleum hydrocarbon concentrations, and although there was some indication of exposure to oil, it was difficult to determine what populations were affected because of the sea lions' active seasonal movements. Because of an ongoing pre-spill population decline and premature pupping of sea lions, it was not possible to distinguish post- from pre-spill population effects clearly.

Studies of killer whales, based on observations only (because tissue sampling was not an

option), have indicated that killer whales are missing from at least one and possibly two pods in Prince William Sound. Injuries to harbor seals and sea otters have been clearly indicated and studies of these species are continuing.

Sea Otters: The population of sea otters in Prince William Sound before the spill was estimated to have been as high as 10,000. The total sea otter population of the Gulf of Alaska was estimated to be at least 20,000. Statewide, the sea otter population is estimated at 150,000. Sea otters were particularly vulnerable to the spill. As the oil moved through Prince William Sound and the Gulf of Alaska, it covered areas used by large numbers of otters. When sea otters become contaminated by oil, their fur loses its insulating capabilities, leading to death from hypothermia. Sea otters also died as a result of ingestion of oil and perhaps inhalation of toxic aromatic compounds that evaporated from the slick shortly after the spill. The effects of oil were documented by surveys of wild populations; analysis of tissues for petroleum hydrocarbons and indicators of reduced health; by tracking sea otters outfitted with radio transmitters (including those released from rehabilitation centers); and estimating total mortality from the number of sea otters found on beaches. These studies concentrated on developing an estimate of sea otter mortality in Prince William Sound and along the Kenai Peninsula, the population most affected by the spill. During 1989, a total of 1,011 sea otter carcasses were recovered in the spill area, cataloged, and stored in evidence trailers. Of these, 876 were recovered dead from the field and 135 died in rehabilitation centers or other facilities. The total number of sea otters estimated to have been killed directly by the spill ranges from 3,500 to 5,500 animals throughout the spill area.

Initial results indicate significant differences in hematology and blood chemistry parameters between sea otters in oiled and unoiled areas. Greater variation was observed in DNA content of blood lymphocytes of sea otters from oiled areas, but sperm and testicular cells showed no indication of DNA damage resulting from oil exposure. It cannot yet be determined whether these differences affect sea otter health or survival. There are indications that sea otters continue to be exposed to petroleum hydrocarbons in oiled areas. Analysis of blood and fat samples collected from animals during 1990 found elevated concentrations of certain aromatic compounds in sea otters from heavily oiled areas and elevated concentrations of petroleum hydrocarbons continue to be documented in food items eaten by sea otters in oiled areas. Additionally, other damage assessment studies have documented a decreased abundance of mussels in oiled areas, a key prey species for sea otters.

Studies have documented continuing injury to sea otters. Normally, very few prime age sea otters (animals between 2 and 8 years old) die each year and most mortality occurs among very young and old age classes. The high number of prime age sea otter carcasses found during 1990 indicates that the pattern of sea otter mortality in heavily oiled areas continues to be abnormal. Results of boat surveys indicated continued declines in sea otter abundance within oiled habitats in Prince William Sound. Preliminary results indicate that pupping rates in oiled and unoiled areas are not significantly different. However, the first information available for the spring of 1991 shows higher yearling mortality rates in oiled areas than in unoiled areas. Studies of the survival and reproductive success of sea otters released from rehabilitation

centers indicate a high level of mortality of adult animals and significantly lower pupping rates than the pre-spill mortality and pupping rates in Prince William Sound. Of the 193 sea otters released from rehabilitation centers, 45 were fitted with radio transmitters. Sixteen of these animals are still alive, 13 are known to be dead, and 15 are missing. One radio transmitter is known to have failed.

Harbor Seals: There has been no census of harbor seals in Prince William Sound since the mid-1970s when the population was estimated at 3,000 to 5,000 animals. Since that time, the harbor seal population in Prince William Sound and the Gulf of Alaska has declined substantially. A population census of Prince William Sound is planned for the summer of 1991.

Two hundred harbor seals are estimated to have been killed by the spill. Only 19 seal carcasses were recovered following the spill, since seals sink when they die. Population changes were documented by summer and fall aerial surveys of known haulout areas. Toxicological and histopathological analyses were conducted to assess petroleum hydrocarbon accumulation and persistence and to determine toxic injuries to tissues.

Population surveys, which are reliable indicators of population trends, conducted in 1984 and 1988 indicated that harbor seal populations in Prince William Sound had declined prior to the spill, with similar declines in what were subsequently oiled and unoled areas. From 1988 to 1990, however, the decline at oiled sites (35 percent) was significantly greater than at unoled sites (13 percent).

Severe debilitating lesions were found in the thalamus of the brain of a heavily oiled seal collected in Herring Bay 36 days after the spill. Similar but milder lesions were found in five other seals collected three or more months after the spill. During 1989, oiled harbor seals behaved abnormally, being lethargic or unwary. Petroleum hydrocarbon concentrations in bile were 5 to 6 times higher in seals from oiled areas one year after the spill. This indicates that seals were still encountering oil in the environment, were metabolizing stored fat reserves that had elevated levels of petroleum hydrocarbons, or both.²

Killer Whales: Approximately 182 killer whales forming nine distinct family units or "pods" resided in Prince William Sound before the spill. This count is based on pre-spill documentation. These whales were studied intensively before the spill and their group composition and dynamics are well known. Damage assessment studies of killer whales involved extensive boat-based surveys in Prince William Sound and adjacent waters. Whales were photographed and the photographs were compared to the Alaskan

²Harbor seals are taken in some Alaska villages for subsistence. The State of Alaska conducted a program, separate from the damage assessment program, to test subsistence foods potentially affected by the spill to insure that they were safe for human consumption. The State of Alaska determined that harbor seals in the affected area were safe for people to eat (Oil Spill Health Task Force, July-August 1990 Report and September-October 1990 Report. Alaska Department of Fish and Game, Division of Subsistence).

killer whale photographic database for the years 1977 to 1989 to determine changes in whale abundance, seasonal distribution, pod integrity, and mortality and natality rates.

The AB pod of 36 individual whales was sighted intact in September of 1988. When sighted on March 31, 1989, seven days after the spill, seven individuals were missing. These whales remain absent and six additional whales were missing from the AB pod in 1990. Several of the missing whales are females who left behind calves. It is unprecedented for females to abandon calves, therefore their prolonged absence implies that these adult females are dead. In addition, nine individuals from AT pod were missing in 1990. Explanations for the possible causes of death of these missing whales, including explanations apart from the effects of the spill, are being explored. Killer whale surveys will continue in 1991.

TERRESTRIAL MAMMALS

Studies were conducted on terrestrial mammals that may have been exposed to oil through foraging in intertidal habitats. These species included brown bear, mink, black bear, Sitka black-tailed deer, and river otters.

Brown bears are long-lived animals and forage seasonally in the intertidal and supratidal areas of the Alaska Peninsula and the Kodiak Archipelago. Preliminary analysis of brown bear fecal samples and some tissues show that some brown bears were exposed to petroleum hydrocarbons, but no conclusive injury has been documented. Radio-collared brown bears along the Katmai coast and at a control site on the Alaska Peninsula will continue to be monitored while the transmitters remain active.

Mink and other small mammals that are known to feed and spend part or all of their time in the intertidal zone are difficult to study. They are known to crawl off into burrows or the brush if sick or injured and carcasses are unlikely to be found. Also, information on pre-spill populations of these animals is minimal. Scientists developed a laboratory study to test reproductive effects of oil on ranch-bred mink, in which they were fed food mixed with small, non-lethal amounts of weathered oil. Although changes in reproductive rates or success were not documented, it was found that oil-contaminated food moved through the intestines of the animals at a more rapid rate than did clean food, possibly providing less nutrition to the animals. No field studies were carried out for black bear due to the difficulty of finding, collaring, or otherwise investigating these animals in the dense underbrush in which they reside. However, a literature search confirmed that these animals do forage in the intertidal zone in the spill area.

The deer study found no evidence of injury based on intensive searches of beaches that revealed no mortality attributable to the spill. However, deer taken for purposes of testing for safety for human consumption (not part of the damage assessment process) found slightly elevated petroleum hydrocarbons in some tissues in deer (which feed on kelp in intertidal areas) but it was determined that the deer were safe to eat.

River Otters: A few river otter carcasses were found by cleanup workers. River otters forage in streams and shallow coastal habitats that were contaminated by the spill. Analysis of river otter bile indicated that petroleum hydrocarbons are being accumulated by this species. Studies of radio tagged animals in Prince William Sound showed that home ranges are larger, movements more erratic, and body weights are lower in oiled habitat. Field work is continuing in 1991 to further assess the status of this species, including analysis of blood samples to measure the health of these animals.

BIRDS

Among the most conspicuous effects of the Exxon Valdez oil spill was the injury to birds. Seabirds are particularly vulnerable to oil as they spend much of their time on the sea surface while foraging. Oiled plumage insulates poorly and loses buoyancy and birds die from hypothermia or drowning. Birds surviving initial acute exposure may then ingest oil by preening. Approximately 36,000 dead birds were recovered after the spill; at least 31,000 of these deaths were attributed to the effects of oil. In addition to the large number of murres, sea ducks, and bald eagles, carcasses of loons, cormorants, pigeon guillemots, grebes, murrelets, and other species were also recovered (see attached comprehensive list of bird carcasses logged into evidence trailers by September 25, 1989). Only a small proportion of the total number of birds estimated to have been killed were recovered, as many undoubtedly floated out to sea, sank, were scavenged, were trapped and hidden in masses of oil and were not visible, were buried under sand and gravel by wave actions, decomposed, or simply beached in an area where they were not found. Additionally, it is known that, in a number of cases, carcasses found shortly after the spill were not turned in to receiving stations. Preliminary analyses provided by computer models that account for some of these variables estimate that the total number of birds killed by the spill ranges from 260,000 to 580,000 with the best approximation that between 350,000 and 390,000 birds died. Following peer review, the model will be run again to provide a more refined estimate of total mortality.

Common and Thick-billed Murres: Murres are the third most abundant seabird in Alaska (after tufted puffins and black-legged kittiwakes). A total of approximately 1,400,000 murres reside in the Gulf of Alaska (Unimak Pass to the Canadian border in southeastern Alaska). The total population of murres in Alaska is approximately 12,000,000. The murre colonies on the Chiswell Islands are the most visited by tourists in Alaska. In 1989 and 1990 murres were the most heavily affected bird species. Murre colonies impacted by the spill lost 60 to 70 percent of breeding birds. Oil in Prince William Sound affected major wintering areas of murres and other species. As oil moved out of Prince William Sound and along the Kenai Peninsula and the Alaska Peninsula, it hit major seabird nesting areas such as the Chiswell and Barren Islands, as well as numerous smaller colonies. The oil hit these areas outside Prince William Sound at the same time that adult murres were congregating on the water near colonies in anticipation of the nesting season. Approximately 22,000 murre carcasses were recovered following the spill. Colony surveys indicate that an estimated minimum of 120,000 to 140,000 breeding adult murres in the major colonies that were surveyed were killed by the spill. Extrapolating this information to other known murre colonies hit by

the spill (but not specifically studied), the mortality of breeding adult murres is estimated to have been 172,000 to 198,000. However, area-wide, including wintering and non-breeding birds, the total mortality of murres is estimated to be about 300,000. Murres exhibit strong fidelity to traditional breeding sites and infrequently immigrate to new colonies.

Normally, murres breed in densely packed colonies on cliff faces. Each murre colony initiates egg laying almost simultaneously. This synchronized breeding behavior helps the birds repel predators such as gulls and ravens. In oiled areas, murre colonies have exhibited a much lower populations than before the spill, breeding is later than normal, and breeding synchrony has been disrupted. These structural and behavioral changes in colonies have caused complete reproductive failure during 1989 and 1990, and thus lost production of at least 215,000 chicks. Murre colonies in unoiled areas displayed none of these injuries and had normal productivity. Monitoring of reproductive success of the colonies will continue in 1991.

Bald Eagles: Of the estimated Alaskan bald eagle population of 30,000 birds (20,000 adults and 10,000 fledglings), an estimated 2,200 reside in Prince William Sound. One hundred forty-four (144) dead bald eagles were found following the spill. Although there is considerable uncertainty regarding the total mortality of bald eagles, it is estimated that several times this amount may have been killed by the initial spill. Approximately 90 percent of radio-tagged bald eagles that died during subsequent studies were not found on the beach but in the brush back from the beachfront. This suggests that most of the eagles that died in the spill would not have been found by surveys typically restricted to beach areas. To assess injuries to bald eagles, helicopter and fixed-wing surveys were flown to estimate populations and productivity. Radio transmitters were attached to bald eagles to estimate survival, distribution, and exposure to oiled areas. Bald eagles in Prince William Sound were most intensively studied. Productivity surveys in 1989 indicate a failure rate of approximately 85 percent for nests on moderately or heavily oiled beaches compared to 55 percent on unoiled or lightly oiled beaches. Bald eagles have a delayed sexual maturity and have a relatively long life span under normal circumstances. Consequently, although reproduction apparently rebounded to more normal levels in 1990, population impacts as a result of poor productivity of nestlings and the death of hundreds of adult eagles in 1989 may not be readily apparent for several years. Fewer bald eagles were sighted in 1990 than in 1989, however this change was within the expected error of the survey method. An additional survey will be conducted in 1991 to see if there is a downward population trend.

Sea Ducks: More than 2,000 sea duck carcasses were recovered after the spill, including more than 200 harlequin ducks. Studies concentrated on harlequins, goldeneyes, and scoters, species that use the intertidal and shallow subtidal habitats most heavily affected by the spill. Harlequins were most affected, consistent with the fact that they feed in the shallow water area of the intertidal zone. This is the only species of sea duck studied that both nests in the spill area and feeds in the shallow intertidal zone. All of these species feed on invertebrates such as mussels and are likely to continue to be exposed to petroleum hydrocarbons through their food. About 33 percent of the harlequins collected in the spill area had poor body condition and about 40 percent had

tissues contaminated with petroleum hydrocarbons. Preliminary surveys also indicate harlequins may have failed to reproduce in the spill zone in Prince William Sound during 1990. These injuries will be investigated further during 1991.

Other Birds: Surveys and studies indicate reduced numbers of black oystercatchers, pigeon guillemots, and marbled murrelets in oiled areas. Black oystercatchers and pigeon guillemots use inshore and intertidal areas for feeding and nesting. Reduced breeding success of black oystercatchers was documented in oiled areas, largely as a result of loss of chicks along oiled beaches. It is estimated that between 1,500 and 3,000 pigeon guillemots were killed by the spill, representing as much as 10 percent of the catalogued population in the Gulf of Alaska. This species is susceptible to continued exposure to petroleum hydrocarbons because it uses intertidal rocks and waters within 200 meters of shore. Petroleum hydrocarbons were found in eggs and tissue in 1989.

Marbled and Kittlitz's murrelets represented a high proportion of the dead birds recovered in oiled areas of Prince William Sound. The reduction in the number of murrelets observed in oiled areas during cleanup in 1989 and the return of many of these birds in 1990 suggest disturbance associated with cleanup activities affected these birds. The extent of injury to certain species, including loons, cormorants, and gulls will probably never be known because pre-spill information on numbers of these birds in the spill area are not available. Data on bird distribution and abundance data gathered during aerial and boat surveys remain to be fully analyzed and interpreted. Boat surveys will continue during 1991. Studies did not document injury to certain bird species such as Peale's peregrine falcons or songbirds.

FISH/SHELLFISH

No massive die-offs of adult fish were found following the spill, and adult salmon, for example, were evidently able to migrate to spawning areas after the spill. However, fish are most vulnerable to oil contamination during the early stages of their life cycles. Accordingly, most fish studies initially focused on this phase of fish life history. During 1991, scientists will begin to be able to assess affects on adult fish such as salmon that would have been exposed to oil as eggs or larvae. Species most often affected by the spill were those that inhabit and spawn in the intertidal zone (salmon) or in the shallow areas next to shore (herring and Dolly Varden).³ Less than ten dead rockfish were found during the spill and their deaths were attributed to oil. Several species of coastal and offshore fish (pollock, halibut, sablefish, cod, yellowfin and flathead sole, and rockfish) show evidence over a large geographic area of continuing exposure to petroleum hydrocarbons in areas affected by the spill, but significant injury has not yet been documented. Exposure to petroleum hydrocarbons does not necessarily lead to

³The State of Alaska imposed the highest possible standards for commercial fishery openings and for processing plant inspections to insure that all commercially harvested salmon were free from contamination. Salmon subject to commercial harvest in the spill area were rigorously tested to insure that the catch was safe for human consumption.

injury, since many animals have the capability to physiologically "manage" the exposure with no resulting harm. In particular, salmon and other fish can metabolize petroleum hydrocarbons so that these contaminants are unlikely to be found in edible fish tissues. Indicators of exposure among fish include bile metabolites and mixed function oxidases. Since injuries from chronic exposure to oil may not manifest themselves for a number of years, it is premature to conclude that coastal and offshore species were not injured; therefore certain studies are continuing.

Pink Salmon: The full extent of short term injury to pink salmon cannot be assessed until after the 1991 run returns to spawn in the summer. Although the overall catch of pink salmon in Prince William Sound during 1990 was an all-time record (as predicted before the spill), this was primarily due to strong runs of hatchery-produced salmon. Salmon survival associated with the Armin F. Koerning hatchery, located in the middle of a heavily oiled area of the spill zone, was half that of Ester Hatchery, located outside the area of the spill. Wild production of pink salmon did not mirror the record production of hatchery fish.

Seventy-five percent of wild pink salmon spawn in the intertidal portion of streams in Prince William Sound. Wild stock salmon did not shift spawning habitat following the spill and deposited eggs in intertidal areas of oiled streams. Preliminary analyses indicate a 70 percent greater mortality of pink salmon eggs laid in the summer of 1989 and a 50 percent greater mortality in the summer of 1990 in oiled streams as compared to control streams. Larvae from heavily oiled streams showed gross morphological abnormalities, including club fins and curved spines. The pink salmon that returned to Prince William Sound in the summer of 1990 were exposed to oil as larvae as they swam under the slick, but not as eggs which were more directly exposed to oil than the larvae. Fish returning in 1991 will be the first that were exposed to oil as eggs. Eggs and larvae of wild populations continue to be exposed to oil in intertidal gravel in oiled areas.

Sockeye Salmon: Commercial harvest of sockeye salmon was curtailed in portions of Cook Inlet, Chignik, and Kodiak in 1989 because of the spill, resulting in an unusually high number of adults migrating to spawn in certain lake spawning systems (returning adults that arrive at the spawning areas are referred to as the "escapement"). Overly large spawning escapements may result in poor returns in future years by producing more juvenile salmon than can be supported by the nursery lake's productivity. Preliminary data indicate that overescapement degraded rearing habitat in lakes and that sockeye salmon survival and growth rates are lower than usual. Further study is needed before the extent of these injuries can be determined.

Dolly Varden and Cutthroat Trout: Prince William Sound is the northern extreme of the range of cutthroat trout. Both cutthroat trout and Dolly Varden use nearshore and estuarine habitat for feeding throughout their lives (in contrast to salmon which migrate out to sea). The highest concentrations of bile petroleum hydrocarbon metabolites in all fish sampled were found in Dolly Varden. Tagging studies have demonstrated that the annual mortality of adult Dolly Varden was 32 percent greater in oiled areas than in unoiled areas. The larger cutthroat trout showed similar levels of mortality in oiled and unoiled areas. Additionally, cutthroat trout growth rates were reduced in oiled areas.

Studies are continuing to measure impacts on populations of these popular sport fish species.

Pacific Herring: Populations of Pacific herring were spawning in shallow eelgrass and algal beds at the time of the spill. The effects of oil on egg survival, hatching success, larval development, and recruitment to the spawning population were studied. Study results show a large increase in the percentage of abnormal embryos and larvae in oiled areas of Prince William Sound during the 1989 reproductive season. Larvae in oiled areas also had a greater incidence of eye tumors. These effects continued but at somewhat lower rates in 1990. Results also showed greater egg mortality in oiled areas as compared to unoiled areas. Whether the adult population has been affected by these larval injuries will not be determined until the 1989 and 1990 cohorts return to spawn in 1992 and 1993.

COASTAL HABITAT

The coastal tidal zone, commonly known as the "intertidal zone," was the most severely contaminated habitat. Intertidal habitats are highly productive and biologically rich. They are particularly vulnerable to the grounding of oil, its persistence, and effects of associated clean-up activities. An interdisciplinary team with expertise in plant and systems ecology, marine biology, and statistical analysis, was established to conduct field studies to assess the effects of oil on intertidal ecosystems.

Supratidal: Results of studies in the Kodiak/Alaska Peninsula area suggest that oil in the supratidal habitat and beach cleanup disturbance decreased the productivity of grasses and other vegetation including beach rye grass, that help stabilize beach berms. In one instance, cleanup activities completely removed the vegetation. Increased production of supratidal vegetation was found in Prince William Sound in 1989. This finding corresponds with information from other oil spills. It is not known whether this increased production was a result of decreased browsing by terrestrial mammals or a fertilizer effect of the oil.

Intertidal: Natural populations of intertidal organisms were significantly reduced along heavily oiled shorelines such as Herring Bay. Densities of intertidal algae (*Eucus*), barnacles, limpets, amphipods, isopods, and marine worms were decreased. Although there were increased densities of mussels in oiled areas, they were significantly smaller than mussels in the unoiled areas and the total biomass of mussels was significantly lower. Intertidal organisms continue to be exposed to hydrocarbons from the more heavily oiled sediments. Petroleum hydrocarbon accumulation in filter feeding mussels experimentally placed in oiled areas indicate that oil remains available for uptake by other organisms. Initial findings also indicate that oiled surfaces retarded settlement by juvenile barnacles when compared to unoiled sites. In addition to direct mortality, the reproductive cycle of mussels at oiled sites in the lower Cook Inlet/Kenai Peninsula and Kodiak/Alaska Peninsula regions was delayed by several months.

Intertidal fishes were less abundant in oiled areas than in unoiled areas. In addition, gill

parasitism and respiration rates were significantly higher in fish from oiled sites compared to unoiled sites.

Fucus, the dominant intertidal plant, was severely affected by the oil and subsequent cleanup activities. The percentage of intertidal areas covered by Fucus was reduced following the spill and opportunistic plant species which characteristically flourish in disturbed areas were increased. The average size of Fucus was reduced, the number of reproductive sized plants greatly decreased, and the remaining plants of reproductive size decreased in reproductive potential due to fewer fertile receptacles per plant. There was also reduced recruitment of Fucus at oiled sites.

SUBTIDAL HABITATS

Spilled oil in some areas has migrated to and contaminated the seafloor at depths of up to 100 meters as contaminated sediments moved off beaches during winter storms and cleanup activities. There is evidence that petroleum hydrocarbons have been taken up by animals feeding on the ocean bottom. Petroleum hydrocarbon metabolites have been found in the bile of yellowfin sole, rock sole, rockfish, and pollock. Concentrations of petroleum hydrocarbon metabolites in the bile of yellowfin sole have not declined from 1989 to 1990. This contrasts with Dolly Varden which feed close to shore and where petroleum hydrocarbon metabolites in bile decreased in the same period. The effects of this exposure are still being studied. Many subtidal and intertidal species, particularly fish, have the capability of metabolizing and eliminating petroleum hydrocarbons from their bodies. Clams metabolize hydrocarbons very slowly and consequently accumulated them in high concentrations.

Contaminated clams and other invertebrates are a potential continuing source of petroleum hydrocarbons for sea otters and otherspecies that forage in the shallow subtidal zone. Samples from pollock, which feed in the water column, taken as far away as 500 mile from the wreck site on Bligh Reef, showed elevated petroleum hydrocarbon metabolite concentrations in their bile. This indicates that the water column or food supply was affected at great distances from the spill. Initial 1990 study results show a significant effect on benthic organisms associated with eelgrass beds. These are known to be highly productive habitats. The composition of benthic animal communities on soft-bottom habitats as deep as 40 meters were also significantly altered in oiled areas.

ARCHAEOLOGICAL AND SUBSISTENCE RESOURCES

The spill directly impacted archaeological sites and subsistence resources. Cleanup activities and the associated significant increases in human activity throughout the spill zone resulted in additional injuries to these resources.

Archaeological Resources: Archaeological sites along the shoreline were injured by the

spill. Review of spill response data revealed injuries from oil to a minimum of 26 archaeological sites. Among these are burial sites and home sites. Twenty-one (21) of these sites are on federally-owned land, with the remaining five on State of Alaska and private lands. Of the 21 sites on federal land, 10 are on national parks, six on national wildlife refuges, four within Chugach National Forest, and one on Bureau of Land Management land. While injury to these 26 sites was documented during cleanup, a spill-wide assessment of injuries to archaeological resources has yet to be completed. In addition to oil contamination, increased knowledge of the location of archaeological sites may put them at risk from looting. Loss of rye grass cover may threaten some sites. A comprehensive survey of injuries to archaeological resources on public lands throughout the spill zone will be conducted during 1991.

A study was conducted to determine impacts caused by oil contamination on radiocarbon dating of archaeological resources and to investigate the potential for cleaning artifacts and materials to allow such dating. Preliminary results indicate significant injury to the ability to contextually date artifacts and materials by Carbon 14 analysis. It also appears that these materials cannot be successfully "cleaned" to allow accurate dating.

Subsistence Resources: Surveys undertaken by state researchers before the spill and in 1990 indicated that subsistence harvesters in the area affected by the oil spill significantly reduced their use of subsistence resources after the spill, primarily because of their concerns about possible contamination of these resources. The oil spill disrupted the subsistence lifestyle of some communities that have historically relied upon these resources. Some communities virtually or entirely ceased subsistence harvests in 1989 and have only gradually begun to resume harvests, while other communities continued some reduced level of subsistence harvest in 1989 and thereafter. The attached report (Subsistence Use of Fish and Wildlife in 15 Alutiiq Villages after the Exxon Valdez Oil Spill) details these studies. Warnings were issued by the state in 1989 for people to avoid consumption of intertidal invertebrates (such as mussels and clams, which bioaccumulate petroleum hydrocarbons) found along shorelines contaminated by oil. After the spill, an oil spill health task force was formed, including the state and federal governments, subsistence users, and Exxon. This group helped oversee studies conducted by the state and others in conjunction with FDA and NOAA in 1989 and 1990, on subsistence food resources such as seals, deer, salmon, ducks, clams, and bottomfish. Based upon the test results these resources, with the exception of clams and mussels in certain oiled areas such as Windy Bay, were determined to be safe for human consumption.

CONCLUSION

The federal and state Trustee agencies have now concluded two field seasons of study and are currently preparing to begin a third year of studies to assess injuries to natural resources resulting from the Exxon Valdez oil spill. The information contained in this

summary is based upon the field work and data analysis conducted to date, and is preliminary. Many studies will likely need to continue for additional years before a full understanding of injuries is developed. For example, long-lived species such as bald eagles, murres, and sea otters, may not manifest some effects until a number of years have passed. For other species, such as herring and salmon that return to spawn years after hatching, it is necessary to wait for these key life history events to occur before one can determine the extent to which or if they have been injured. At present there is no indication of long-term injury for species other than those noted in this summary. Although two field seasons of study are complete, only a portion of the data gathered has been fully analyzed and interpreted. As studies and data analysis are completed, some of the information contained in this summary may need to be modified.

For the reasons given above, injury assessment studies will continue in 1991, and thereafter until the process is complete. The need to continue to understand the long-term effects of the spill will be accomplished through monitoring projects that will measure the natural recovery of resources injured by the spill as well as the effectiveness of restoration measures implemented by the Trustee agencies. The information gathered by the injury assessment studies, the restoration monitoring studies, and other studies will be used to develop and implement a restoration program that will accelerate the recovery of injured resources.

Restoration measures will begin in 1991 and are expected to become more comprehensive as the understanding of the effects of the spill improves and as experts and the public provide input on where restoration measures should be concentrated. Wherever possible, restoration will focus on those projects that will provide ecosystem-wide benefits, thereby benefitting a variety of species. These projects may include various initiatives to protect habitat; in other cases it may be necessary to conduct restoration programs that will primarily benefit a particular resource injured by the spill.

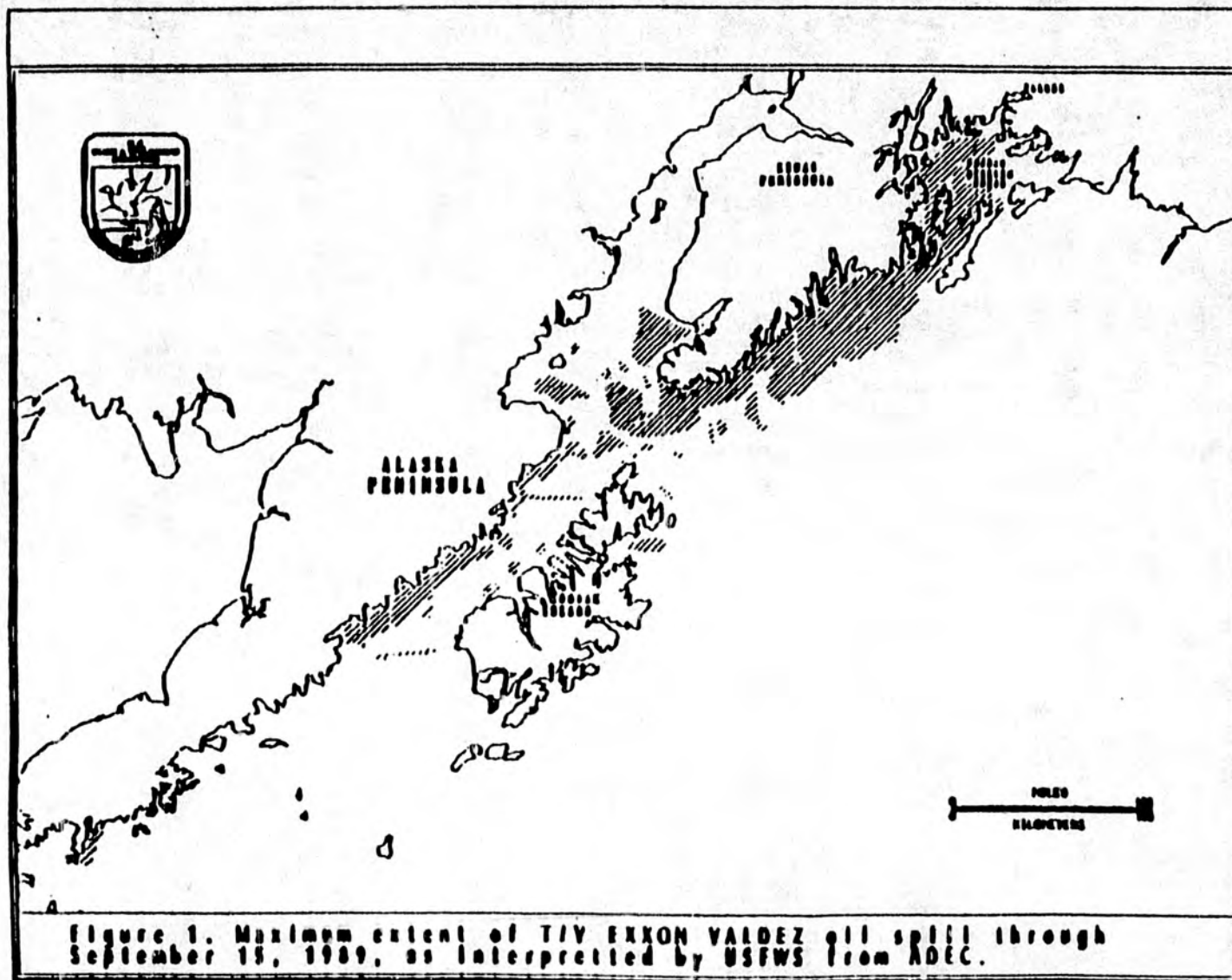


Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989.

Species	Total	Valdez	Seward	Homer	Kodiak
Total	35,279	3,360	3,503	5,778	22,638
Unidentified bird	2,927	476	414	916	1,121
Unidentified loon	69	27	6	25	11
Common Loon	216	142	23	32	19
Yellow-billed Loon	87	72	5	3	7
Pacific Loon	18	8	5	0	5
Red-throated Loon	5	3	1	1	0
Unidentified grabe	65	27	8	11	19
Red-necked Grabe	120	79	22	12	7
Horned Grabe	277	233	15	22	7
Northern Fulmar	426	0	22	12	115
Unidentified shearwater	579	5	22	14	538
Sooty Shearwater	360	4	80	34	242
Short-tailed Shearwater	2,460	1	84	4	2,371
Unidentified petrel	69	2	24	14	29
Fork-tailed Storm-petrel	363	1	50	19	293
Leach's Storm-petrel	12	0	9	0	3
Unidentified cormorant	219	76	27	56	60
Double-crested Cormorant	38	19	10	0	9
Pelagic Cormorant	418	277	63	29	47
Red-faced Cormorant	161	90	29	9	33
Great Blue Heron	1	1	0	0	0
Unidentified swan	3	0	2	1	0
Emperor Goose	2	0	0	0	2
Canada Goose	1	0	0	1	0
Brant	3	0	1	2	0
Unidentified duck	30	4	6	20	0
Unidentified seaduck	112	63	2	11	36
Mallard	11	2	4	1	4
Northern Pintail	4	0	3	1	0
Green-winged Teal	5	0	5	0	0
Unidentified Scaup	4	1	3	0	0
Greater Scaup	27	2	21	4	0
Lesser Scaup	2	0	2	0	0
Unidentified Goldeneye	25	8	2	14	1
Common Goldeneye	6	3	0	2	1
Barrow's Goldeneye	33	19	9	4	1
Bufflehead	21	17	1	0	3
Oldsquaw	185	131	43	6	5

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

Species	Total	Valdez	Seward	Homer	Kodiak
Unidentified alcid	173	24	0	15	134
Unidentified murre	8,851	21	775	2,101	5,954
Common Murre	10,428	399	523	1,353	8,153
Thick-billed Murre	669	16	142	73	438
Pigeon Guillemot	614	136	109	155	214
Unidentified murrelet	413	21	37	121	234
Marbled Murrelet	612	289	97	82	144
Kittlitz's Murrelet	67	23	19	21	4
Ancient Murrelet	311	3	40	73	195
Cassin's Auklet	48	0	36	2	10
Least Auklet	5	0	0	1	4
Parakeet Auklet	31	1	2	1	27
Rhinoceros Auklet	141	0	31	31	79
Unidentified puffin	46	0	7	4	35
Horned Puffin	139	0	32	13	94
Tufted Puffin	361	0	29	15	317
Bald Eagle	125	31	20	15	59
Unidentified raptor	7	1	3	2	1
Peregrine Falcon	2	0	0	0	2
Willow Ptarmigan	1	0	0	0	1
Unidentified owl	1	0	0	1	0
Great-horned Owl	3	0	0	3	0
Unidentified woodpecker	1	0	0	1	0
Cliff Swallow	3	0	3	0	0
Violet-green Swallow	1	0	1	0	0
Unidentified passerine	9	1	7	1	0
Stellar's Jay	1	1	0	0	0
Magpie	7	1	0	0	6
Common Raven	18	1	4	0	13
Northwestern Crow	34	6	3	3	22
American Robin	2	0	2	0	0
Varied Thrush	1	0	0	0	1
Hermit Thrush	1	0	1	0	0
Unidentified warbler	1	0	0	0	1
Yellow Warbler	3	0	3	0	0
Pine Grosbeak	1	0	0	0	1
Unidentified sparrow	15	0	10	2	3
Savannah Sparrow	1	0	1	0	0
Golden-crowned Sparrow	4	0	3	0	1
White-winged Crossbill	8	0	0	6	2

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

Species	Total	Valdez	Seward	Homer	Kodiak
Harlequin Duck	213	148	10	35	20
Unidentified Eider	3	0	0	3	0
Stellar's Eider	4	4	0	0	0
Common Eider	17	5	0	2	10
King Eider	9	0	0	0	9
Unidentified Scoter	162	23	17	51	71
White-winged Scoter	342	164	13	137	23
Surf Scoter	175	45	28	9	6
Black Scoter	132	112	4	8	8
Ruddy Duck	1	0	1	0	0
Unidentified merganser	3	1	0	0	2
Common Merganser	2	2	0	0	0
Red-breasted Merganser	33	30	1	1	1
Sandhill Crane	2	1	1	0	0
Black Oystercatcher	9	2	2	0	5
Golden Plover	1	0	0	1	0
Unidentified sandpiper	11	1	5	1	4
Unidentified turnstone	1	0	0	0	1
Common Snipe	1	0	0	1	0
Semipalmated Sandpiper	1	0	1	0	0
Lesser Yellowlegs	2	0	0	2	0
Western Sandpiper	5	0	0	5	0
Baird's Sandpiper	1	0	0	0	1
Least Sandpiper	4	0	2	0	2
Surfbird	3	3	0	0	0
Short-billed Dowitcher	1	0	0	0	1
Red Phalarope	2	0	0	2	0
Red-necked Phalarope	7	1	3	0	3
Long-tailed Jaeger	1	0	0	0	1
Unidentified gull	99	6	34	39	20
Glaucous-winged Gull	555	33	188	28	213
Herring Gull	8	3	5	0	0
Mew Gull	33	0	3	3	27
Black-legged Kittiwake	1,225	8	214	74	929
Arctic Tern	3	1	1	0	1
Aleutian Tern	1	0	0	0	1

CACI FILMED

CERTIFICATE OF SERVICE

I certify that I caused to be served by mail the attached Notice of Lodging of United States' Summary of Effects of EXXON VALDEZ Oil Spill on Natural Resources and attached Summary of Effects of EXXON VALDEZ Oil Spill on Natural Resources and Archaeological Resources on

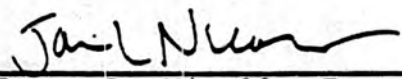
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Charles P. Flynn
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Anchorage, Alaska 99501

on April 8, 1991.


James L. Nicoll, Jr.



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. Gelb
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 1989, pp. 441-464 for a discussion of the methods used to derive this number.

(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.

Billion-dollar deal may cost Exxon only half that much

By MICHAEL J. SNIFFEN

ASSOCIATED PRESS

WASHINGTON — Exxon's agreement to pay \$1 billion to settle government claims and charges for the nation's largest oil spill could actually cost the company less than half that amount, an Associated Press analysis shows.

The company's cost would be reduced if it chose to purchase an annuity that would guarantee the 10 future annual payments called for under the settlement in the Exxon Valdez case—a growing business practice. Exxon's cost would be cut further because most of the payments are tax deductible.

The AP calculations, based on actual market quotation for an annuity, show it could cost

Exxon as little as \$486.3 million to meet its obligations to repair the damage caused when the supertanker ran aground and spilled 11 million gallons of crude oil in Prince William Sound in March 1989.

In Houston, Exxon spokesman Bill Smith had no comment on the calculations or the current value of the settlement.

Last week, Attorney General Dick Thornburgh proudly announced a \$1 billion settlement by Exxon that included record criminal fines and civil damages.

But the settlement drew skepticism at a congressional hearing Wednesday. "In essence, a lot of taxpayers' money is going back into this to pay Exxon's share," Rep. George J. Hochbrueckner, D-N.Y., said at a House mer-

chant marine committee session.

The Congressional Research Service, using three different estimates of how much investments might earn over the next 10 years, calculated Exxon's costs at between \$421 million and \$524 million in material prepared for the hearing.

At the request of The Associated Press, JMW Settlements Inc., of Washington, a national company that specializes in writing deferred payment settlements of law suits, calculated that it would charge Exxon \$527.3 million for an annuity that would make \$785 million in deferred payments. These payments begin next year and continue through 2001.

"I would be authorized to place that contract today," said

James P. Klappes, vice president of JMW. Klappes said the figure includes a profit for his company and two large insurance company underwriters.

An annuity, most often sold by insurance companies, is used to set deferred payments. It costs less to buy than the payments it provides, because the underwriter invests the original amount and uses the interest to meet the payments and make a profit.

In fact, Exxon could essentially save the amount of that profit by financing its own annuity internally.

Klappes said his industry has seen growing use of annuities in environmental cases to protect plaintiffs against the bankruptcy of a polluting company, but those

cases have involved much smaller companies than Exxon.

In addition to the \$527.3 million for the annuity, Exxon this year would have to spend \$50 million to pay a federal criminal fine, \$50 million in restitution to Alaska, and an estimated \$115 million on the first installment.

The settlement provides that next year's \$150 million payment will be reduced by whatever Exxon spends this year and next. For the calculation, the AP assumed the \$25 million estimated by the government source would all be spent this year. This assumption might overstate Exxon's actual outlay by about \$2 million if the company spread \$25 million in cleanup over the full two years.

The payments would bring

Exxon's outlay to \$742.3 million, but that figure could be reduced by tax deductions of up to \$256 million, for a net outlay of \$486.3 million. The AP calculated that by applying Exxon's federal and state deduction rate of 37 percent to all but \$50 million of \$742.3 million payment.

Internal Revenue Service spokesman Don Roberts said the \$50 million criminal fine is not tax deductible but damages generally are. Roberts said there is a chance the \$50 million restitution to Alaska may be tax deductible as well, because language in the settlement distinguishes it from any criminal, civil or administrative penalty.

Exxon chairman Lawrence G. Rawl has said the damage payments are tax deductible.

Anchorage Daily News
4/17/91

State backs off timber buyout

By DAVID POSTMAN
Daily News reporter

JUNEAU — State officials who will decide how to spend Exxon Valdez settlement money, said Tuesday they do not support buying large tracts of timber land around Prince William Sound — a plan Gov. Wally Hickel pushed for months while trying to win support for the settlement.

"That was in the beginning. Things change," said Attorney General Charlie Cole, the state's chief negotiator on the settlement and one of three state officials who, along with an equal number of federal officials, will choose the projects to be funded from the proposed \$1 billion settlement.

But a spokesman for Hickel said the governor hasn't changed his mind.

"The governor is neither no more or no less committed to buying that timber," said James Rockwell, Hickel's special assistant for special projects. "He envisioned



■ **BACK IN COURT:** Native villagers seek to modify a \$1 billion spill-cleanup settlement they say undermines their claims for compensation. C-4

■ **FITTING PUNISHMENT:** Federal prosecutors and Exxon attorneys countered criticism of a proposed plea bargain of criminal charges. C-4

insuring that those trees wouldn't be logged, but he didn't say that was exactly what he was going to do."

Also Tuesday, Rep. Gene Kubina, D-Valdez, suggested the settlement be postponed so Exxon could try to settle some of the hundreds of private suits filed against it. But top federal officials told

Please see Page C-2, TIMBER

By David Postman, Anchorage Daily News

TIMBER: State backs off

Continued from Page C-1

lawmakers that any delay or change in the agreement would likely kill it.

Environmentalists and Cordova residents say the administration used the timber buyout as a ploy to ease local opposition to dropping the state suit against Exxon.

"I feel betrayed," said environmentalist and fisheries biologist Rick Steiner, one of the earliest supporters of Hickel's proposed settlement. "I was operating under the premise that these people were honorable individuals with noble intentions and that they meant what they were saying."

"I hope I wasn't being used."

Steiner liked the timber buyout idea because it would protect lands around the Sound that have been marked for commercial harvest. He and other environmentalists say large-scale timber operations could hurt the Sound.

Word that the administration was backing off the plan first came Sunday at a legislative hearing on the proposed settlement in Cordova. In response to a question from Cordova Mayor Bob Van Brocklin on what the settlement money would be spent on, Cole said he would not "go out and buy wholesale tracts of timber."

Fish and Game Commissioner Carl Rosier also said he didn't think that was a good idea. "At this point I'm not willing to commit to any course of action," he said Tuesday.

Environmental Conservation Commissioner John Sandor said Tuesday that settlement money would be better spent on restoring land directly damaged by the spill. He said he supports designating the federal land around the Sound a recreation area, which would allow timber cutting "and protect as many jobs as possible" while still offering some protection.

Rockwell said the state

trustees are not disputing what Hickel said earlier. Instead, they are just trying to move slowly.

"There has been so much pounding on these guys they are weary and a little gun-shy about what they say they are going to do and what they are not going to do," Rockwell said. "What they are going to do is enhance and restore Prince William Sound."

Van Brocklin said Tuesday his constituents are unhappy with the administration's shift. But he was not surprised.

"I know from previous experience not to trust what they tell me," he said. "I prefer it in writing with a letter of credit."

Steiner, who had urged the legislature to approve the settlement, said Tuesday he now thinks it should be rejected.

"The only urgency was taking care of the victim, the environment," he said. "Now the money is going to go to agencies to balloon the bureaucracy, it is going to go to studies. Studying the situation does nothing for restoration."

Also Tuesday:

• An attorney representing cities suing Exxon over the spill said the state should release confidential scientific and economic damage studies. Matt Jamin disputed Cole's argument that the state needs to keep the information secret because it could be used against the state in court.

Jamin said Cole and other state officials have a responsibility to see that the Sound is restored and should not be so concerned about the state's financial position. He accused state officials of "self-dealing to cover the backside a little bit."

• The House special committee asked Cole to formally invite Exxon executives to testify on the settlement. So far, lawmakers have heard from state and federal officials and Alaskan residents.



Natural Resources
Defense Council

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MEMORANDUM
via facsimile

To: Dick Stewart, Charles Cole

From: John Adams, Executive Director, Natural
Resources Defense Council

Date: February 28, 1991

Re: Creation of Independent Foundation as Part of
Potential Exxon Settlement

As part of any settlement, the environmental community has sought the creation of an independent not-for-profit foundation with a board of eminent and respected individuals to oversee the expenditure of funds received from Exxon. See, for example, February 8, 1991 letter to Thornburgh, et. al. from Adams, Hair and Sutherland. We have pressed this idea in the belief that such a foundation would ensure that decisions about how the Exxon money was spent would be made by individuals with the best credentials and expertise, 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.

From our understanding of the settlement discussions with Exxon, it appears that much of the civil settlement money would be controlled by government trustees based on recommendations from an Advisory Council. Even if this is the case, we still believe that there is a place for an independent foundation into which a substantial portion of the civil settlement money could go.

1. Because the foundation would be a permanent fund, it could provide benefits extending far into the future, beyond the time when the government-administered fund is used up. Its purpose would be to assure that over the long term, the highest calibre research, restoration and acquisition work was performed to benefit Prince William Sound.

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February 28, 1991
Page 2

2. 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.

3. We strongly believe that the civil settlement money should be spent for restoration or replacement of damaged resources and for acquisition of equivalent resources. Thus, the principal purposes of the foundation should be consistent with these goals. However, to the extent that these goals can be met and there is additional money available, the purpose of the foundation could include the broader goals outlined in the attached document describing the Alaska Forever Conservation Trust Fund. (This document was provided to you last fall as you may recall.) These purposes further the objectives of the Clean Water Act and Alaska statutes upon which the government claims are based and in no way violate such statutes. See Sierra Club v. Electronic Controls Design, 909 F. 2nd 1350, 1355 (9th Circuit 1990).

4. 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, or \$100 million, of the settlement 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 a 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

SETTLEMENT DOCUMENT
PROPOSAL FOR CREATION OF TRUST FUND
IN SETTLEMENT OF NATURAL RESOURCE DAMAGE CLAIMS
IN EXXON VALDEZ CASE

Work Product of: NATIONAL WILDLIFE FEDERATION, NATURAL
RESOURCES DEFENSE COUNCIL, WILDLIFE
FEDERATION OF ALASKA and their attorneys, TRIAL
LAWYERS FOR PUBLIC JUSTICE

This document proposes a framework for the settlement of the Exxon Valdez natural resource damage case through the creation of a trust fund funded by the defendants. What follows is a proposed statement of purposes and a review of potential uses of the trust fund.

Purposes of Alaska Forever Conservation Trust Fund.

The Alaska Forever Conservation Trust will be created to protect in perpetuity the integrity and vitality of the ecosystems and species of Alaska for the benefit of current generations and those yet to be born. The trust is created for public rather than private benefit and shall protect resources that spend all or part of their life cycle in the state.

The first priority for the trust shall be to study the short and long-term impacts of the Exxon Valdez spill, and to pay for the restoration, replacement, and acquisition of natural resources equivalent to resources injured or destroyed as a result of the spill. The trust also shall promote the protection of Alaska's ecosystems and natural resources from future anthropogenic environmental insults that may destabilize or interfere with the full and rapid recovery or health of Alaskan species and ecosystems, with special emphasis placed on those affected by the Exxon Valdez spill.

The trust shall promote environmental protection in Alaska by encouraging: the adoption of measures to avert pollution or other forms of ecological destruction of Alaskan ecosystems; research on the Alaskan ecosystems; environmental education in Alaska; and citizen-based environmental protection institution building in the state. Finally, the trust will, to the extent deemed feasible by the trustees, seek to mitigate the impacts of its acquisition of timber rights on native or other communities by providing and promoting environmentally sound alternatives to such timber harvesting.

PROJECTS TO BE FUNDED

The Alaska Forever trust instrument will specifically name certain high-priority projects to be funded, and then will establish categories of authorized expenditures for the remaining funds. It will be made clear in the instrument what the funding priorities are after the named projects are

Purposes of Conservation Trust

1/31/91

Page 2

funded. Among the categories of projects the trust will consider funding are:

A. ACQUISITION OF EQUIVALENT RESOURCES

1. Timber rights acquisition;
2. Outright purchase of pupping areas, staging areas, and other habitat, with emphasis placed upon those areas threatened by potential development;
3. Conservation easements for habitat and for areas whose development or degradation may destabilize or harm the affected ecosystems;
4. Fishing rights acquisition--both near shore and drift net or other far offshore;
5. Other harvesting rights acquisition;
6. Acquisition of land or easements distant from the spill but in areas used by migratory populations of wildlife affected by the spill (e.g. threatened over-wintering or staging areas in the lower 48 for Pacific flyway migratory waterfowl).

B. RESTORATION AND REPLACEMENT

The instrument will provide that restoration and replacement are top priority projects, although there will only be a limited number of possible effective restoration projects, such as planting certain sea grasses in some affected areas, and the reintroduction of certain species (e.g. otters) into the cleaned-up environment.

C. RESEARCH AND OBSERVATION.

Research on the short and long-term impacts of the spill should also be funded. This research should be driven by ecological principles rather than by litigation strategy. Of somewhat lesser priority but still important is more basic research on the overall health and nature of the affected ecosystems, and of Alaskan ecosystems not affected by the spill.

D. EDUCATION

The trust also will fund environmental education projects in Alaska to promote long-term ecological concern and protection among and by Alaskans.

E. VISION FOR ALASKA

Alaska Forever will fund projects that would encourage the eventual transition of the state's economy from oil and extraction of non-renewable resources to more sustained and environmentally sound economic development.

F. DEVELOPMENT OF BETTER ENVIRONMENTAL INSTITUTIONS

Alaska Forever will assist in the development of strong community and local citizen environmental protection organizations, regional natural resource centers, information and educational centers, and natural resources law centers.

For example, the trust will fund citizen efforts to assure that special measures are taken and implemented to prevent another ecological disaster like the Exxon Valdez. Thus, Alaska Forever might fund citizen efforts to advocate and to assure the implementation of special protections such as expert tanker loading crews, and vessel and navigation requirements for Prince William Sound and Valdez. Other funding possibilities might include grants to citizen watchdogs to assure that the Trans-Alaska Pipeline System and North Slope Development are carefully overseen, and that the industry and the government deploy and have readily accessible the best available oil spill containment and cleanup equipment and experts, and that these experts conduct regular test drills.

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.

Wall Street Journal 2/19/91

Exxon Confirms Waste Water Charges; Move May Impede a Valdez Settlement

By ALLANNA SULLIVAN

Staff Reporter of THE WALL STREET JOURNAL

Exxon Corp. acknowledged that it has shipped tanker waste water to Alaska.

While the company said the shipments and subsequent tanker-to-tanker transfers of so-called tank washings were within federal guidelines, such a disclosure could further entangle attempts to settle litigation stemming from the Exxon Valdez oil spill two years ago. Exxon, Alaska and the federal government have been engaged in talks for several weeks in efforts that could settle the state's civil case and possibly the federal government's criminal case. The allegations, which have drawn Environmental Protection Agency scrutiny, raise "the possibility of further complicating the settlement," said Jay Kertula, chairman of Alaska's Senate Finance Committee.

The parties were on the verge of settlement late last week, but pressure from some state officials and environmentalists unhappy with the terms of the possible settlement may be slowing the process. Indeed, some Alaskan lawmakers are considering legislation that would preclude a settlement until state legislators scrutinize the agreement. Gov. Walter J. Hickel had proposed that Exxon pay \$1.2 billion to settle; it appears the company has asked to provide payments over a period of years that would devalue the amount.

Allegations regarding waste water specifically focus on the transfer of so-called tank washings from the Exxon Galveston, a lightering tanker, to the supertanker Exxon Valdez on Aug. 4, 1988. The washings were then transported up to Valdez, Alaska, where they were treated in the ballast water-treatment plant owned by Alyeska Pipeline Services Co.

The charges were contained in a letter sent last week by former oil-tanker broker Charles Hamel to EPA head William Reilly and U.S. Attorney General Richard Thornburgh. In the letter, Mr. Hamel says that before any settlement is concluded, Exxon should be asked to stop such shipping practices. Mr. Hamel, who is engaged in a dispute over mutual business arrangements he has with Exxon and other oil companies, claims that Exxon insiders told

him of the wrongdoing.

Beyond hearsay, however, a document turned up by Alaskan attorneys in preparation for the state's civil case against Exxon makes reference to the transfer. The handwritten document is a set of instructions from the second mate to another second mate who was boarding the vessel to relieve him. It says specifically that the Exxon Valdez will unload its crude oil to the Exxon Galveston but not until "after we take 50,000 barrels of tank washings from the Exxon Galveston."

Pressed for a response to the charges, Jim Pitts, a spokesman for Exxon, said that "yes, there was a transfer ... all wash water returned to the Exxon Valdez as ballast and returned for treatment to the ballast water treatment plant in Alaska were in compliance with permits from EPA."

Exxon declined to identify what type of cleaning agent was being used to clean the oil storage tanks of the vessels other than to say that the tanks were cleaned with hot water and a very small amount of detergent. The oil company also declined to say what materials were contained in the tank washings following the cleaning.

But the company did say that the practice of transferring tank washings to tankers en route to Alaska "wasn't uncommon" and that all such transfers involved washings of ships handling Alaskan crude oil. Indeed, individuals familiar with the transport of crude oil said that other oil companies engage in the same practice and that it's still continuing.

But EPA officials said such moves are violations of federal law.

The EPA permit that authorizes operation of Alyeska's ballast water treatment plant in Valdez allows small amounts of cleaning agents to be present in the ballast water injected into the plant by arriving supertankers. But EPA officials presumed that such tank washings would be the result of cleanings of the supertankers themselves, which en route to Alaska aren't permitted to eject the waste water.

"But deliberately stopping a supertanker and putting the washings into its ballast; there's no way the permit authorizes that kind of discharge," says Harold Geren, chief of water permits for EPA in Seattle, which has jurisdiction over the Alyeska plant.

Mr. Geren says that EPA has already started to look into what is contained in those cleaning wastes. Mr. Geren says that Alyeska has volunteered to scan the ballast water at the treatment plant for toxic pollutants. "We need to know what is in the waste water," he said, adding that tank washings can contain toxic wastes, such as heavy metals.

Experts say that any damage to the port of Valdez depends on the amount and constituency of the chemicals going into the water. The ballast water treatment plant was designed to separate oil from water and then eject the treated water back into Valdez Harbor. Individuals familiar with the design of the plant say that any unanticipated substances, such as certain heavy metals, could travel through the plant and into Valdez Harbor undetected.

Riki Ott, a sediment toxicologist who is also heading up a coalition of Alaskans seeking reform of oil industry practices, said that the Port of Valdez was recently declared environmentally "impaired." Its degeneration is from long-term abuse unrelated to the Exxon Valdez spill that never fouled the harbor's waters, she says. To be sure, Valdez is in better shape than many commercial harbors in the U.S., but "we've had the first warning sign that something has gone wrong," she says.

SENATE
COMMITTEE

REPORT OF THE SENATE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT
TO THE ALASKA STATE SENATE

April 23, 1991

The Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement met 12 times during the last month to review the proposed settlement. The Special Committee met with Legislative Affairs Agency attorneys, the State Attorney General, two State Assistant Attorneys General, the Commissioners of the Alaska Departments of Fish and Game and Environmental Conservation, top-level attorneys for the U.S. Department of Justice and National Oceanographic and Atmospheric Administration, and members of the public. Two of the meetings were statewide teleconferences which provided a forum for members of the public to express their views on the settlement and to ask questions of the Special Committee and the State Attorney General. During those two hearings, the Special Committee heard over eight hours of teleconferenced public testimony. The Special Committee has reviewed the Consent Decree and Memorandum of Agreement, numerous analyses of those documents, and written comments submitted to the Committee. All documents reviewed by the Committee have been distributed to the full Senate.

The decision before the Legislature, of whether or not to approve the proposed settlement, is not a simple one. No one seems to be completely satisfied with this settlement. The Legislature must try to determine which is the "lesser of two evils" -- to sign off on an agreement which raises serious concerns, or to face years of expensive litigation with an unknown outcome.

The Senate Special Committee has decided to introduce a resolution approving the settlement, to be voted up or down by the Senate. The Committee plans to introduce the approval resolution in two forms: a concurrent resolution and a simple resolution. Regardless of whether the concurrent resolution is acted upon by both the House and Senate, a vote on the Senate's simple resolution can express the approval or disapproval of the Senate.

To aid the Senate in its deliberations, the Special Committee submits the following summary of the main issues that were raised during the committee hearing process, and expressed in public comment, regarding the settlement.

ADVANTAGES OF THE SETTLEMENT:

1. The settlement would bring finality to the State and federal claims for natural resource damages.
2. The State would avoid some of the future litigation arising from the oil spill and would probably save millions of dollars in legal fees and on damage assessment studies each year for several years.
3. The settlement would provide a definite monetary amount and thus preclude the possibility of recovering less. Damages in this case may be very difficult to quantify.
4. Most of the money recovered would be required to be used to restore, replace, enhance, rehabilitate, or otherwise acquire the equivalent of natural resources or natural resource services injured as a result of the oil spill. Testimony indicated that the amount of money recovered would be sufficient to complete whatever restoration work would be reasonable and feasible.
5. A portion of the money would be available for restoration work immediately, rather than after lengthy litigation.
6. The settlement would not preclude suits by, or affect the legal rights of, third party litigants.

CONCERNS:

1. Since the settlement money would be paid over a ten-year period, the actual value is estimated at approximately \$500 - \$700 million.
2. While the settlement would recover for damages to natural resources, the State in turn would dismiss, without compensation, its claims against Exxon for economic damages (except for the municipal portion of the raw fish tax), and its claims against Alyeska for natural resource damages. The dismissed claims are worth an undetermined, and potentially substantial, amount. (However, the State's claims for economic losses against Alyeska would not be affected. Therefore, the State may be able to recover from Alyeska a portion of the amount it could have recovered from Exxon had the economic loss claims been pursued against Exxon).
3. Without access to damage assessment studies and time to have a thorough independent analysis conducted, the Legislature cannot know whether the dollar amount of the settlement is adequate compensation for the natural resource damage claims being settled and the other claims being dismissed in this settlement. The Attorney General has refused to release the economic studies. Even if the studies had been

released, there was not time to conduct the necessary analysis between the time the settlement was referred to the Legislature and the deadline for approval. Furthermore, even with complete data and analysis of it, it would be difficult to judge the many contingencies and determine the adequacy of the settlement.

4. Under the settlement, the State would not be indemnified by Exxon against claims by third parties and would give up its right to seek indemnification from Exxon. As a result, (1) the State would have to continue to litigate with third parties and pay for that litigation; (2) the State would be exposed to an unknown amount of liability to third parties; and (3) the State would find itself more aligned as a co-defendant with Exxon than as a co-plaintiff with injured Alaskans.

5. The State's influence with regard to the use of most of the money would be in the hands of the three Trustees appointed by the Governor. This raises several concerns:

- a) No provision is made for the Legislature to participate in determining who those Trustees will be, how the money will be spent, or how meetings will be conducted. Nor are there provisions to ensure public accountability. These concerns are magnified by the fact that the Trust will continue for at least 16 years.
- (b) Because the settlement would recover under the Clean Water Act, use of the money would be restricted to restoration. However, definitions under the Act are so vague that we have little idea of the types of things on which the money will be spent. Since it is possible that only time and nature can do much of the actual restoration, the question remains whether the money can or will be put to its best use if bound by the restrictions imposed by the Clean Water Act and the interpretation and judgment of the Trustees.
- (c) There is concern that spending decisions by the three federal and three State Trustees must be unanimous. Without unanimity, decisions will be made by a federal judge. Criteria upon which a judge would base spending decisions are no more defined than they are for the Trustees.

6. The language of the settlement's "re-opener clause" is so restrictive that it is unlikely that Exxon would have to pay any of that \$100 million.

7. The State Constitution makes the Legislature responsible for appropriation of State funds. This raises several concerns with the settlement:

- (a) Money recovered through settlement is in exchange for the money the State would have recovered through the lawsuits which we now give up. Those claims are a "state asset." Therefore, the recovery under the settlement, even though it technically never enters the state general fund, and it is jointly owned by the Federal Government, is a state asset too. The question then arises as to whether the Legislature must make an appropriation of that asset in order for it to be legally spent on anything, including deposit into the Trust Fund. (The Special Committee believes that legislation could be passed to address this aspect of the problem).
- (b) As the Memorandum of Agreement is written, the Trustees, rather than the Legislature, will decide how the Trust money will be spent, again raising constitutional questions.
(Note, however, that if the settlement were approved and a court later found that the Memorandum of Agreement violated the appropriations provisions of the State Constitution (1) the Memorandum of Agreement would terminate and the disposition of the money could be renegotiated; and (2) it is unlikely that the agreement with Exxon would be affected).
- (c) The settlement may also raise constitutional "dedicated funds" questions, both because allowed uses of the money are predetermined by the parameters of the Clean Water Act, and because even if the Legislature officially appropriated the money to the Trust Fund this year, it may not be able to commit future legislatures to appropriating the annual payments that are to go into the Trust over the next nine years.

7-LS1211A
Cook
4/12/91

SENATE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:
Referred:

A RESOLUTION

1 Approving the proposed Exxon Valdez oil spill claims settlement.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the legislature's failure to approve the proposed settlement or disapproval of it will
8 not automatically terminate the proposal, but is, essentially, advisory to the executive branch of state
9 government and to the United States Department of Justice; and

10 WHEREAS the provisions of the proposed settlement do not appear to be negotiable; and

11 WHEREAS settlement of this major case is more desirable than years of litigation; and

12 WHEREAS if the case is settled, money that would otherwise be tied up in protracted litigation
13 will be immediately available to begin restoration of areas damaged by the oil spill; and

14 WHEREAS because of these considerations the legislature believes it is in the best interest of
15 the state to approve the proposed settlement despite the fact that members of the legislature do not
16 wholeheartedly support all of the provisions of the proposal;

WORK DRAFT

WORK DRAFT

WORK DRAFT

- 1 **BE IT RESOLVED** by the Alaska State Legislature that it approves the Agreement and Consent
- 2 Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al., United
- 3 States District Court, District of Alaska, Civil Action No. A91-083; and be it
- 4 **FURTHER RESOLVED** that the Governor is respectfully requested to inform the United States
- 5 Department of Justice that the legislature has approved the proposed settlement.

7-LS1211ND

Cook

4/15/91

SENATE CONCURRENT RESOLUTION NO.**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE SENATE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT**

Introduced:

Referred:

A RESOLUTION**1 Approving the proposed Exxon Valdez oil spill claims settlement.****2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the Attorney General has stated in a public meeting that if the legislature fails to
8 approve the proposed settlement the state will take action to terminate the proposal;

9 BE IT RESOLVED by the Alaska State Legislature that it approves the Agreement and Consent
10 Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al., United
11 States District Court, District of Alaska, Civil Action No. A91-083; and be it

12 FURTHER RESOLVED that the Governor is respectfully requested to inform the United States
13 Department of Justice that the legislature has approved the proposed settlement.

7-LS1136A

Cook

3/29/91

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act making special appropriations to a joint trust fund of proceeds from the
2 settlement of certain claims arising from the Exxon Valdez oil spill; and providing for an
3 effective date."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. State interests in money paid by defendants during fiscal years 1991 and 1992 under the
6 Agreement and Consent Decree that settles State v. Exxon Corporation, et al., United States District
7 Court, District of Alaska, Civil Action No. A91-083 that is to be deposited into a joint trust fund under
8 the Memorandum of Agreement and Consent Decree filed in United States v. State, United States
9 District Court, District of Alaska, Civil Action No. A91-081, is appropriated to the joint trust fund
10 established under the Memorandum of Agreement and Consent Decree to be used in accordance with
11 the Memorandum of Agreement and Consent Decree.

12 * Sec. 2. State interests in money paid by defendants after fiscal year 1992 under the Agreement and
13 Consent Decree that settles State v. Exxon Corporation, et al., United States District Court, District of
14 Alaska, Civil Action No. A91-083 that is to be deposited into a joint trust fund under the Memorandum

WORK DRAFT

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WORK DRAFT

1 of Agreement and Consent Decree filed in United States v. State, United States District Court, District
2 of Alaska, Civil Action No. A91-081, is appropriated to the joint trust fund established under the
3 Memorandum of Agreement and Consent Decree to be used in accordance with the Memorandum of
4 Agreement and Consent Decree.
5 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

7-LS1135A

Cook

3/29/91

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act granting authority to the attorney general to dispose of certain claims arising
2 from the Exxon Valdez oil spill, approving an agreement and consent decree involving
3 claims arising from the oil spill; and providing for an effective date."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. The attorney general is authorized to enter into an agreement and consent decree to settle
6 State v. Exxon Corporation, et al., United States District Court, District of Alaska, Civil Action No. A91-
7 083. Under the settlement the attorney general is authorized to

8 (1) establish a joint trust fund with the federal government for the collection and joint
9 use by the state and federal governments of money received under the settlement agreement;

10 (2) dismiss or otherwise terminate State v. Exxon Corporation, et al., Superior Court for
11 the State of Alaska, Third Judicial District, Civil No. 3AN-89-6852 and other Civil claims of the state
12 arising from the Exxon Valdez oil spill.

13 * Sec. 2. The legislature approves the Agreement and Consent Decree signed March 12, 1991,
14 relating to the settlement of State v. Exxon Corporation, et al., United States District Court, District of

WORK DRAFT

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WORK DRAFT

1 Alaska, Civil Action No. A91-083.

2 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

(This revised version of the March 29 list has been prepared for the committee's April 11 meeting with the Attorney General. In this version, the questions to which the AG responded at the previous meeting have simply been deleted).

SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

SECOND LIST OF QUESTIONS FOR THE ATTORNEY GENERAL
(Submitted March 29, 1991)

General Settlement Questions:

7. The State gives up its right in the settlement to ever go after Exxon for the State's lost revenue from lost oil and gas taxes and royalties, corporate taxes, State's portion of salmon enhancement taxes, etc. How much did the State figure those to be worth (as it had already sued for all of those under the State suit it now gives up), and what were our chances of proving and recovering those? Will these particular claims be pursued against Alyeska? *yes*
8. What was the State's potential recovery/claim under the "dollars per gallon" state law (AS 46.03.758-759)? Please provide a copy of the letter from the State to Exxon, dated approximately April of 1989, requesting early settlement of that claim. *coming*
9. Please provide a copy of the reimbursement contract signed by Exxon with the State after the spill.
10. What will the Department of Law be seeking in appropriations to defend against third party lawsuits for FY 92 through FY 95? Please estimate and compare legal fees that will have to be paid by the State with and without the settlement. *\$12-15 mil/YR*
11. What are specific examples of types of things that might be eligible for funding under the re-opener clause? How likely is it that anything would ever trigger the receipt of that money? *- same AS BASIC RESTOR. OF damage
?? UNKNOWN*

Questions regarding third party lawsuits:

13. What third party suits have been filed? (Please provide list of them). What is the total estimated dollar amount of the third party claims against the State resulting from the oil spill and clean-up? Are any of the plaintiffs seeking punitive damages?
14. Since the \$72 million is recovered under the CWA it can

only be reimbursement for funds already expended, and the \$50 million must be spent for restoration. With the remainder of the settlement money going to the Trust, there is no money to help the State pay for any third party liability or legal fees. Won't there ultimately be a net loss of millions of dollars to the State treasury?

15. Paragraphs 29 and 30 on page 23 of the Decree, do not appear to be specifically limited to lawsuits related to the oil spill. Was this a drafting error? If not changed, how likely is a court to interpret these paragraphs as applying only to lawsuits related to this spill?
16. How are third party suits affected by this settlement? Does the State have a responsibility to protect interests of groups of Alaskan citizens? If third parties need the State's help wouldn't they be affected by the Decree, even though the Decree says it does not affect third parties?
17. The MOA also prevents any of the three parties involved from ever challenging the authority of the others to enter into this agreement. If the Legislature disapproved of the Decree, and the Governor chose to go ahead with it anyway, would the Legislature as a part of "the State" be precluded from ever challenging the authority of the parties to enter into the agreement? Are the claims of municipalities, which are political subdivisions of the State, barred by the State's release of its claims?

Questions about how money can be spent:

TRUST FUND PORTION:

24. Please provide a list of specific examples of the kinds of expenditures that would be possible and likely with the use of the Trust Fund.
25. Could federal employees already working in Alaska (or elsewhere) and currently being paid out of the regular federal budget, end up being paid instead out of this fund?
26. What are "natural resource services"? (one of the things that fund money can be spent on). Please give specific examples of things that would qualify.
27. If assets are purchased or built with trust fund money, who will own them? How would those properties or facilities be administered, etc.?
28. Will all operating costs, travel, staff, per diem, etc. of the Trustees and the Trust come out of the Trust?

29. What mechanism will ensure public accountability? There appears to be no required budget review, annual oversight by elected officials, appropriation process, or audits of the trustees' expenditures.
30. Is there a limit on how much can be spent to reimburse Exxon for whatever clean-up work they do between the effective date of the Consent Decree and the date of final approval of the Consent Decree?

\$72 MILLION PORTION:

31. If the \$72 million to be paid to the State is over a five-year period, when does that start? Will the five payments be of equal amounts? Any interest charged on payments to bring the total up to a real level of \$72 million in today's dollars? Is there any requirement that the 470 Fund specifically be reimbursed?



Alaska State Legislature

SENATOR RICHARD I. ELIASON

President of the Senate

P.O. Box V
Juneau, Alaska 99811
(907) 465-3755

QUESTIONS FOR ATTORNEY GENERAL CHARLES COLE
FROM THE SENATE SPECIAL COMMITTEE ON THE EXXON SETTLEMENT

APRIL 10, 1991

1. There has been some concern expressed over the State's filing of a claim against the oil spill liability fund established under the Trans-Alaska Pipeline Authorization Act, as our claim will reduce the amount that other claimants will be able to receive under this fund. Evidently Judge Holland had asked that the state and federal governments not file TAPL fund claims since they had other recourse. The press reported that the federal government has agreed to withdraw its claim if the proposed Exxon settlement is approved and if the fund promises to drop its claims against the government.

Why did you choose to file this claim on behalf of the state, and would you withdraw the state's claim if the settlement is approved or under any other conditions?

2. You mentioned in a House hearing that if the settlement is not approved and the state litigates under state law, the expenditure of money recovered might be dedicated to restoration work under the "public trust doctrine."

Would you please elaborate on that?

3. What affect, if any, do you believe the release of the scientific report by the federal government to the federal court will have? Does the release of that report make any difference in your willingness to release any of the state's data?

4. What is your response to the letter from Congressman George Miller to the federal court which states that Alyeska is being "let off the hook" by the settlement? Governor Hickel has issued a press release which states that the State will still pursue civil charges against Alyeska, but Miller's letter speaks to the criminal charges that he feels should be pursued. Please explain why criminal charges will not be pursued against Alyeska.

CONSTITUTIONALITY

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

April 8, 1991

SUBJECT: State Constitutional Issues Related to the Exxon Valdez Settlement

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

FROM: Pamela Finley *Pam Finley*
Assistant Revisor of Statutes

QUESTION PRESENTED. You have asked if there are any state constitutional issues raised by the Exxon Valdez settlement.

SHORT ANSWER. There are certainly constitutional issues raised by the settlement documents. Unfortunately, there are no cases in Alaska clearly deciding these issues, and therefore I cannot state for certain that the settlement does or does not violate the state constitution. With that warning, what follows is my opinion on the issues raised.

1. The requirement in the consent decree and the MOA that a certain part of the recovery from Exxon be used for certain purposes may violate the prohibition against dedication of funds, art. IX, sec. 7, Constitution of the State of Alaska. However, there is a reasonable argument to be made that the dedication falls within the "federal program" exception of art. IX, sec. 7.

2. While there is case law from other jurisdictions on both sides of the issue, in my opinion the provision of the MOA under which the three federal and three state trustees are to spend roughly \$700 million without appropriation by the legislature violates art. II, sec. 1, or art. IX, sec. 13.

3. There is a remote possibility that the dedication in the plea agreement would preclude the state from accepting the money, but I believe that the chances of a court making such a decision are extremely slim.

4. The legislature could cure the appropriation problem by a yearly appropriation. A one-time appropriation of the proceeds to be received in the future might violate the dedicated funds provision. While an appropriation for the required purposes would allow the money appropriated to be spent for those purposes, it would not cure any dedication problem in the agreement.

DISCUSSION.

I. The Settlement Documents. There are two documents related to the Exxon Valdez settlement---the consent decree (which settles the case between the state and Exxon and the federal government and Exxon)^{1/} and the memorandum of agreement and consent decree, hereinafter "MOA" (which settles the case between the state and federal governments concerning the proceeds to be received by both governments from Exxon.)^{2/} In addition, the plea agreement in a criminal case brought by the U.S. against Exxon^{3/} requires Exxon to pay money as restitution to the state, and therefore is also discussed here.

A. The Consent Decree. Under paragraph 8 of the consent decree, Exxon is to pay to the governments \$900 million (less certain cleanup costs incurred by Exxon) over a period of eleven years. In paragraph 10 of the consent decree the two governments agree (without participation by Exxon) that the \$900 million (less certain of Exxon's cleanup costs) will be paid as follows:

(1) up to \$72 million will be paid to the state to reimburse it for its past cleanup, response, assessment, and litigation costs;

(2) up to \$62 million will be paid to the U.S. to reimburse it for its past cleanup, response, and assessment costs;

(3) the state and federal governments will be reimbursed for cleanup costs incurred by either of them after December 31, 1990; and

(4) the remainder (referred to herein as "the trust fund money" or "natural resource damage recovery"), which will probably be in the neighborhood of \$700 million depending on future cleanup costs, will be spent for future assessment, rehabilitation, restoration, or replacement of the natural resources or services injured by the oil spill, or the acquisition of equivalent resources or services.

^{1/} This is filed in federal district court in Anchorage, case no. A-91-083 Civ.

^{2/} This is filed in federal district court in Anchorage, case no. A-91-081 Civ.

^{3/} This is filed in federal district court in Anchorage, case no. A-90-015-1 Cr. and A-90-015-2 Cr.

Finally, in paragraph 10, the governments "represent" that the money received under the consent decree will be held, allocated, and spent in accordance with the MOA.

The money that the state will receive under (1) and (3) above does not raise any issues under the state constitution if, as appears to be the case, that money will go to the state treasury and be available for appropriation without any restrictions on its use.^{4/} However, because the money received under (4) above must be spent for certain purposes, that provision may violate the prohibition on dedicated funds found in art. IX, sec. 7 of the state constitution.^{5/} In addition, to the extent that the representation concerning the MOA incorporates the MOA in the consent decree,^{6/} the consent decree may violate those sections of the constitution relating to the legislature's appropriation power, which are discussed below in relation to the MOA.

B. The MOA. Paragraph IVA2 of the MOA requires the two governments to establish a trust fund into which trust fund money will be deposited. The trust fund will be in the court registry unless the parties and the court agree otherwise. The money will be spent by 3 federal trustees (designated by the President) and 3 state trustees (designated by the Governor) acting jointly. It is to be spent for the purposes of restoring, replacing, enhancing, rehabilitating, or otherwise acquiring the equivalent of the natural resources injured as a result of the oil spill, and the lost services provided by those resources. In addition to the dedication of funds problem mentioned above, the MOA raises the question of whether the agreement to let the trustees establish a trust fund and spend the money without requiring an appropriation violates art. II, sec. 1 of the state constitution (vesting the legislative power, including the appropriation power, in the legislature), or art. IX, sec. 13 of the state constitution (requiring an appropriation before money can be withdrawn from the state treasury and requiring authorization for any obligation for the payment of money.)

C. The Plea Agreement. Under the plea agreement entered into by Exxon and the federal government, Exxon is to pay the state \$50 million in restitution. According to the plea agreement this money can be spent only for restoration, replacement, and

^{4/} The attorney general has taken the position that reimbursement money will be unrestricted, and I agree.

^{5/} In addition, AS 46.08.020(a)(2) states that the legislature may appropriate to the oil and hazardous substance release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance." In his April 2, 1991 opinion, at pages 26-27 the Attorney General states that this statute is limited to money reimbursed for cleanup expenses. However, the literal terms of AS 46.08.020(a)(2), unlike those of AS 46.04.010, suggest that all money recovered from a responsible party is to be general fund money subject to appropriation. It is possible therefore that the agreement may violate AS 46.08.020.

^{6/} A "representation" may not necessarily be the same as an agreement.

enhancement of resources affected by the oil spill, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup, and amelioration of oil spills. The requirement also raises the question of whether the legislature can accept the money, with restrictions on its use, given the prohibition on the dedication of funds in art. IX, sec. 7 of the state constitution.

II. The Prohibition Against the Dedication of Funds.

Art. IX, sec. 7, Constitution of the State of Alaska, reads as follows:

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

A. Dedication in the Consent Decree and MOA. Despite the fact that this section appears to restrict the dedication^{7/} of the proceeds of a "state tax or license," Alaska's Supreme Court has held that it applies to "the sources of any public revenues." State v. Alex, 646 P.2d 203, 210 (Alaska 1982). In Alex, the state Supreme Court relied on the history of the state constitutional convention, as discussed in an opinion of the Alaska Attorney General, which opinion concluded that revenues from the lease or sale of state natural resources could not be dedicated. 1975 Alaska Op. Atty. Gen. No. 9 (May 2). It seems highly likely that "revenues" would include money due the state under either a judgment for, or settlement of, the state's claims for damages to its natural resources. A settlement is, after all, very much an exchange of one state asset (the state's legal claims) for another (money). If the state had continued to pursue its state claims in state court, any recovery would certainly be "revenue" of the state. Even under the Clean Water Act, the trustee must be an authorized "representative" of the state. 33 U.S.C. 1321(f)(5). See 42 U.S.C. 9607(f)(2)(B) (state trustee must be "state official.") State recoveries under the Clean Water Act may be deposited in a special account in the state treasury. 43 CFR 11.92(a)(2). It seems likely that money exchanged for the extinguishment of the state's legal claim would be state revenue for the purposes of art IX, sec. 7 of the state constitution. Therefore, the question is whether the recovery from Exxon is subject to an exception to the dedicated funds provision.

^{7/} Although in the normal course of events this section will have the greatest effect on the legislative branch, by its terms it appears to apply to all state officials.

Based on the history of the state constitutional convention, the Attorney General has suggested that there may be certain "implied exceptions" to this provision, i.e., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, certain contributions from local governments, and tax receipts collected by the state on behalf of local governments. 1982 Op. Atty. Gen. No. 13, p. 11 (November 30). None of these include recoveries from a third party for damages to state natural resources. Moreover, to "imply" an exception for dedications that the attorney general establishes in a settlement, would give the attorney general unfettered discretion to circumvent this section of the state constitution by including in any settlement a "trust" requirement that the money be spent for a particular purpose. It may be that the court would imply an exception for money offered to the state as a gift, with conditions imposed by the donor, because in that case (1) no state official has participated in the dedication, and (2) the money is not being exchanged for a state asset. In the Exxon settlement however, the dedication applies (1) because of the Attorney General's decision to sue and settle under the Clean Water Act, and (2) to money exchanged for the state's legal claims against Exxon.

However, section 7 itself has several explicit exceptions, namely the Permanent Fund in art. IX, sec. 15, dedicated funds that existed at the time the sec. 7 was ratified, and those dedications "required by the federal government for participation in federal programs." Only the latter seems relevant.

To qualify under the "federal program" exception, (1) the dedication must be required; and (2) the state must be attempting to "participate in a federal program." The applicable provision of the federal Clean Water Act, 33 U.S.C. 1321(f)(5), requires that any damages received by the state under that section be used "to restore, rehabilitate, or acquire the equivalent of" the injured natural resources. Clearly, a recovery under the applicable provision of the Clean Water Act must be dedicated. However, it is not entirely clear that the full amount that will be dedicated to the trust fund is in fact required to be dedicated under the Clean Water Act. 33 U.S.C. 1321(f)(1)-(3) contain dollars per barrel limitations on recovery, except in cases of willful negligence or willful misconduct, and it is not clear whether the state's recovery under 33 U.S.C. 1321(f)(4) and (5) is similarly limited.^{8/} If it is so limited, and there was no evidence to support willful negligence or willful misconduct then the vast majority of the money that will be deposited in the trust could not be received under the terms of the Clean Water Act because it would exceed those dollar limitations. Therefore, it should not be subject to the dedication requirements of the Clean Water Act, and is not "required" to be dedicated under federal law.

^{8/} At the end of the April 3, 1991 hearing of the House Special Committee on the Exxon Valdez Settlement, the Attorney General indicated that he thought the dollars per barrel limitation would apply to the state's recovery, but that Exxon had waived the limitation.

Assuming that federal law does require the dedication of all of the roughly \$700 million, it is also not clear that suing under the Clean Water Act is "participation in a federal program" within the meaning of the dedicated funds provision. The delegates to the state constitutional convention adopted the "federal program" exception because they realized that without dedication, the state could not receive federal funding for certain programs e.g., fish and wildlife programs. 1975 Op. Atty. Gen. No.9 pp. 3-4 (May 2). If Alaska's Supreme Court were to take a strict view of the "federal program" exception, it could hold that the exception applies only to programs under which a dedication is required in order for the state to receive money from the federal government since that was the type of program envisioned by the drafters of the state constitution.

Even taking a slightly less restrictive view, the state Supreme Court could nevertheless hold that the exception did not apply where the state has the choice of receiving money under federal law with a required dedication of funds or of receiving it under state law without a dedication. The rationale for this interpretation would be that Alaska's Constitution establishes a strong policy against dedicated funds, and exceptions to it should be construed to allow dedication only when it is truly necessary for the state to receive some benefit. This less restrictive view would still bar the attorney general from settling under the Clean Water Act because that Act does not preempt state law, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), and therefore the state could simply pursue the claims under state law that it has already filed in state court. Under either of these two interpretations of the "federal program" exception, the court would essentially be saying that the attorney general could not take advantage of a federal law (that did not preempt state law) if the provisions of that federal law required a violation of the dedicated funds provision of state constitution. See McDowell v. State, 785 P.2d 1, 10 n. 3 (Alaska 1989) (Despite federal law that allowed state to manage federal land only if state recognized rural preference, state could not grant rural preference in violation of state constitution.)^{9/}

However, the Alaska Supreme Court might well interpret the "federal program" exception to include litigation under federal law, even though state remedies were

^{9/} The Attorney General has suggested in his April 2, 1991 opinion, at page 28, that state law that would effectively prohibit the state from suing under the Clean Water Act would be preempted, and therefore unenforceable, because it would serve as an obstacle to the Clean Water Act's purposes. However, since the Clean Water Act does not prevent a state from enacting its own remedies for spills covered by the Clean Water Act, In re Allied Towing Corp., 478 F. Supp. 398, 402 (E.D. Va. 1979), this seems unlikely. In addition, the Clean Water Act expressly states that it does not preempt a state from imposing liability for oil spills, and that it does not affect any state law not in conflict with the section. 33 U.S.C. 1321(o)(2) and (3). Since the Clean Water Act contemplates that the state may establish its own remedies, it obviously does not require the state to sue under the Clean Water Act.

available. The rationale would be that the attorney general should not be limited in choosing available remedies because there may be tactical advantages to suing under federal law that are not available under state law. See Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975) (Dicta; the exercise, within constitutional limits, of the Attorney General's discretion in disposing of state litigation is not subject to review.) If the attorney general chooses to litigate under federal law, and federal law requires dedication of recoveries, then the basic purpose of the exception (to allow the state to take advantage of federal law despite a federal dedication requirement) has been met. Given the lack of case law on the "federal program" exception, it is difficult to predict how the state Supreme Court would interpret this provision. Either of the three possible approaches outlined above is plausible and reasonable.

B. Dedication in the Plea Agreement. Generally, the discussion above concerning dedication of funds in the consent decree and MOA would apply to the plea agreement. I am considerably more confident that the state may accept the \$50 million from the plea agreement than I am about the constitutionality of the dedication in the consent decree and MOA. The reason for this is that the money to come to the state in the plea agreement is not being exchanged for the state's claims for civil damages, nor has the state participated in the dedication. Rather the money will come to the state as a result of the federal government's agreement with Exxon.

First, the state Supreme Court may determine that money received by the state as a gift, to which the state has no legal claim, is not "revenue" subject to the dedicated funds provision. This would allow the state to accept gifts given with restrictions on their use. (Note that if the state accepts a gift with restrictions on its use, the state is bound by those restrictions. Patrick v. Blake, 19 N.W.2d 220 (S.D. 1945).) This interpretation would also appear not to violate the policy underlying the dedicated funds provision, since the dedication was not created by any action of a state official, but rather entirely by the donor. Since the dedicated funds provision is a limit on the state's taking action that creates a dedicated fund, it should not be applicable at all where the dedication is imposed by a donor without any action by the state government.

Even if the dedicated funds provision applies, the "federal program" exception appears applicable to the \$50 million, even if it is not applicable to money received in settlement of the state's claims. Assuming the court took a strict view of the "federal program" exception, it is likely that this would be viewed as money received from the federal government (like federal money for fish and wildlife programs or highways.) It is true that Exxon will be paying the money, but only because the federal government required it to do so as part of the plea agreement. At any rate, it is money that the federal government could have kept for itself, as part of a fine,

but chose to have paid to the state in restitution. It is not money that the state is exchanging for its own civil claims.

If the court took the "middle" position concerning the federal program exception, the state should also be allowed to accept the money, with restrictions on its use. The state does not have the opportunity to receive this money without restrictions, because it is available only as part of an agreement between the federal government and Exxon. The state has no right to prosecute Exxon for violations of federal criminal laws.

Therefore, while there is some possibility that the state Supreme Court might hold that the state cannot accept the \$50 million in restitution, because its use is restricted, that possibility is very remote. The dedication in the plea agreement is not created by the choice or agreement of a state official, and the state is not giving up anything of value in exchange for the restitutionary payment.

III. Encroachment on Legislative Power.

A. The Consent Decree. Except for the reference to the MOA in paragraph 10 of the consent decree, the consent decree does not address the mechanism by which the settlement proceeds are to be spent. Therefore its terms (with the possible exception of the reference to the MOA) do not raise the separation of powers problems inherent in the MOA. However, because the consent decree is based on the Clean Water Act, there is a latent question as to whether the Clean Water Act itself requires a spending mechanism that may violate art. II, sec. 1 or art. IX, sec. 13 of Alaska's constitution.

The answer appears to be "no". 33 U.S.C. 1321(f)(5) requires money recovered by the state to be used for certain purposes, but does not establish a mechanism for spending that money. 40 CFR 300.605 requires the state trustee to act on behalf of the public as trustee for state resources, but does not address the mechanism for spending a recovery. 40 CFR 300.615(a) directs the trustees to coordinate their efforts and cooperate, but does not require a joint trusteeship, let alone the spending of money without legislative authorization. 40 CFR 300.615(c)(4) requires the state trustee to devise and implement the restoration plan, but again this procedure does not appear to require that the trustee do so without legislative participation.

Regulations enacted pursuant to 42 U.S.C. 9651(c) also may affect the state trustee's power. These regulations were remanded in Ohio v. U.S., 880 F.2d 432 (D.C. Cir. 1989), so it is possible that they do not apply. However, even if they do apply, they appear to allow for the legislature's appropriation role, and may even mitigate against the joint trusteeship proposed in the MOA. 43 CFR 11.92(a) requires the federal

recovery to be placed in the federal treasury,^{10/} and the state recovery to be placed in either a separate account in the state treasury or in an interest bearing account payable in trust to the state agency acting as trustee. The state trustee is required to prepare a restoration plan (which may be modified) and the money must be spent for actions described in the restoration plan. 43 CFR 11.92(c) and 11.93. These provisions do not explicitly prevent the legislature from appropriating the money to projects described in the restoration plan, and there seems no practical need to engraft such a restriction on to the regulations. Typically the executive branch devises specific plans (within statutory law) and the legislature appropriates money for them. There seems no reason why the legislature could not participate in the process here by establishing statutory authority necessary for state agencies to participate in the restoration plan if that authority did not already exist, and appropriating the money for the programs proposed by the trustee. Moreover, the fact that 43 CFR 11.92(a)(2) allows the state recovery to be deposited in an account in the state treasury suggests that under the Clean Water Act the legislature is to be allowed to exercise the appropriation power over money that the trustee uses to implement the plan. However, if the Clean Water Act itself, or regulations adopted under it, were to be interpreted to prevent the legislature from appropriating money recovered under that Act, then the same constitutional questions that are discussed under the MOA would apply.

B. The MOA.

The MOA requires the state and federal natural resource damage recovery to be deposited in a joint trust account, either in the court registry or in another account agreed to by the parties and approved by the court. Six trustees, three federal and three state, are then to spend the money. This procedure raises two questions: (1) Does the legislature need to establish the fund into which the recovery is deposited; and (2) Does the power of the six trustees to spend the money violate the state legislature's appropriation power?

1. The Establishment of the Trust Fund. So long as the money remains in the court registry, there may be no constitutional requirement that the legislature authorize the deposit of the proceeds, though it would do no harm to do so. It is standard judicial procedure to deposit funds into the court registry when there are two litigants who claim a right to all or part of those funds, pending the court's decision on ownership. However, it is clear from the MOA that the deposit is not made pending judicial decision, but rather that the money will remain in the fund until it is spent by the trustee. Because of this "wrinkle," it may be necessary for the

^{10/} 33 U.S.C. 1321(k) also requires any money recovered by the federal government under that section to be placed in a fund in the U.S. treasury. Since the federal recovery is being placed in the court registry, there is a question as to whether the MOA complies with 33 U.S.C. 1321(k).

legislature to authorize the creation of the fund and the deposit of money into it. If the parties attempt to set up a separate fund, it becomes somewhat more likely that legislative authorization is needed because the state could no longer shelter under the notion that the fund is a normal deposit into the court registry.

Generally, special funds for state money must be established by law, *i.e.*, by the legislature. Town of Manchester v. Dept. of Environmental Quality Engineering, 409 N.E. 2d 176 (Mass. 1980). (Trial court ordered fine to be paid for project enhancing natural resources; Supreme Court holds money is subject to appropriation and that it cannot be considered a trust fund because only the legislature can establish a trust fund); State v. West, 145 P. 15 (Wash. 1914). The possible argument against the need for legislative authorization is that the court itself has the power to establish a trust fund. It is not clear, however, that this power can be exercised in derogation of a state's constitutional requirement that money in the fund be appropriated. Moreover, because the fund would be established by the court under the state's attorney general's agreement, it is not really the court's power to establish a trust fund that is at issue, but rather the authority of the executive branch to establish a trust fund by agreement.

2. The Appropriation Power. Article II, sec. 1 of the state constitution vests the legislative power in the legislature. Article IX, sec. 13 of the state constitution reads as follows:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Because the latter section refers to money in the state treasury, one could argue that this section does not apply to money before it reaches the state treasury. However, when dealing with constitutional questions involving public funds, courts have generally held that constitutional provisions apply if the money is subject to deposit in the treasury, even if the actual deposit has not occurred. State v. Nelson, 7 N.W.2d 735 (N.D. 1943)(Money due the state under state law must be deposited in the treasury and be subject to appropriation; it cannot be withheld by a local government to recoup money admittedly owed by the state to the local government); Texas Pharmaceutical Ass'n. v. Dooley, 90 S.W.2d 328,330 (Tex. Ct. Civ. App. 1936)(Money due the state under state law is public money, "whether deposited in the state treasury or not," for the purposes of a constitutional prohibition against gifts to private persons). The real question is whether the trust fund money is subject to appropriation and whether the state trustees have the authority to obligate the expenditure of the trust fund money without legislative authorization.

Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the court held that a statute allowing the governor to withhold or reduce appropriations when anticipated revenues would not cover appropriations was an unconstitutional delegation of the legislature's appropriation power. In Public Employees' Local 71 v. State, 775 P.2d 1062 (Alaska 1989), the court noted that the state's collective bargaining agreements were subject to approval by the legislature because the funding of such an agreement was relegated to the legislature by art. IX, sec. 13 of the state constitution. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court held that a provision of an initiative requiring the university to transfer property to the community college system established by the initiative, was an appropriation, which could not constitutionally be accomplished by initiative. The court noted that the reason for prohibiting appropriation by initiative was "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine v. University of Alaska, 762 P.2d 81 at 88 (Alaska 1988) (emphasis in original). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (Initiative requiring transfer of state land to private persons was attempted appropriation of state asset). Alaska Conservative Political Action Cmtee. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (sale of utility worth over \$32 million in exchange for \$1 is appropriation prohibited by initiative). McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983) (claim for money damages is asset). Superior Court Judge Thomas Stewart has ruled that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., 1st Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978). However, since the state Supreme Court has not decided a case similar to one involving the Exxon settlement, further discussion is needed.

The attorney general appears to take the position that the legislature's power of appropriating money and authorizing expenditures is not implicated because the money never becomes the property of the state; the federal government and members of the executive branch of the state spend the money without ever deciding how much is owned by the state and how much is owned by the federal government. There are several problems with this argument.

First, if a court were to decide that the attorney general could authorize money to be spent (without legislative authorization or appropriation) whenever the money was subject to the competing claim of another person or entity, it would set a rather dangerous precedent. Unfortunately, such a rationale could not be based on the Clean Water Act, because neither the Clean Water Act nor regulations enacted under it require joint use of the natural resource damage recovery from Exxon. On the contrary, 43 CFR 11.92(a) contemplates that the state and federal recoveries will be deposited and administered separately, although of course the state and federal trustees could cooperate in spending their respective recoveries. Therefore, if a court

were to find no violation of the appropriation or authorization requirements on the ground that no part of the Exxon settlement ever became state money, (because the trustees spent it all before deciding what belonged to whom) the same rationale could be applied to any case in which the attorney general agreed with an opposing party that they should jointly spend disputed money. A court may be very reluctant to make such a decision, especially given the decisions in the Fairbanks North Star Borough and McAlpine cases.

Second, if no part of the natural resource damage recovery from Exxon is state money, then elementary logic compels the conclusion that the state got nothing for the damage to its natural resources; the money from Exxon cannot at the same time be a state asset and not be a state asset. Under this rationale, the state has given up one asset (its claim for damages to its natural resources) without receiving anything (money) in exchange. The argument assumes that the attorney general has given away the state's claims against Exxon for immense damage to the state's natural resources and the state has received nothing in return. If this is indeed what the attorney general maintains, then there is a substantial question as to whether the governor, through the attorney general, has faithfully executed the law, as required by art. III, sec. 16, Constitution of the State of Alaska.^{11/}

However, the documents themselves belie the notion that the state has not recovered for damages to its natural resources. The consent decree clearly reflects that the state, as trustee, is recovering (jointly with the federal government) for damage to natural resources. The MOA recites that the "state" is a trustee for the damaged natural resources: MOA, p.2. The fact that the recovery is joint does not make it (or at least part of it) any less the recovery of the state. Nor does the state and federal governments' agreement to spend the money without deciding to whom it belongs, obliterate the fact that it is (at least in part) a recovery of the state. Finally, the fact that the trustees intend to use state employees and agencies for their projects, see 56 Fed Reg. No. 41, p. 8898 (1991), is a clear indication that the "trust" is not entirely separate from the state government.

In my opinion, the better view is that the trust fund recovery does include state money, albeit of undetermined amount, and albeit imposed with a trust. However the question still remains as to whether that state money imposed with a trust is subject to appropriation.

^{11/} Interestingly enough, the U. S. Supreme Court has held that a state legislature violates its public trust in disposing of certain public lands in certain circumstances, and that in such cases, the disposal is void. Ill. Central R. Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). While a court is almost certainly not going to prevent an attorney general from dismissing claims as a general matter, it might do so if the harm to the public interest were sufficiently egregious.

Different jurisdictions have taken divergent positions on what money is subject to appropriation. E.g., Kittredge v. Boyd, 18 P.2d 563 (Kan. 1933)(Taxes paid under protest are not subject to appropriation); Oesterle v. Lavik, 52 N.W.2d 297 (N.D. 1952)(Taxes paid under protest are subject to appropriation.) Some states hold that money coming from a non-state source (usually the federal government) that the source designates for a particular purpose, are not subject to the appropriation process. Opinion of the Justices, 378 N.E.2d 433 (Mass 1978)(federal trust fund money); Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Ariz. 1974)(funds from a purely federal source to be disbursed to Indian Tribe and two cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(Federal and private funds given to state university are not subject to appropriation.)

The resolution of this issue in Colorado has changed somewhat over time. In MacManus v. Love, 499 P.2d 609 (Colo. 1972), the court held that federal funds that are not connected to state appropriations are not subject to appropriation. In Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985), the court held that money received by the state from a settlement between a federal agency and a private entity (without participation by the state) was not subject to appropriation. However, in Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987), the court held that federal funds that required state matching money, or that could be transferred among block grants, were subject to appropriation.

At least two states with provisions similar to art. IX, sec. 13 of Alaska's constitution have held that all federal funds must be appropriated before they can be spent. In Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981), the court held that federal funds must be appropriated, even though their use is severely limited by federal law, in order to restrain the executive from overspending, to maintain the balance of power between the executive and legislative branches, and to ensure accountability in government. In Shapp v. Sloan, 391 A. 2d 595 (Pa. 1978), appeal dismissed sub nom Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630 (1979), the court came to the same conclusion. The court noted that the Advisory Commission on Intergovernmental Relations, established by Congress, had urged state legislatures to assume greater control over federal funds coming to state governments.

Given the divergent decisions on this issue in other jurisdictions, it is impossible to state with certainty what Alaska's Supreme Court would decide. However, in my opinion, allowing the trustees to spend money recovered from Exxon without an appropriation would violate art. II, sec. 1, or art. IX, sec. 13, of the state constitution. This conclusion is based on five considerations.

First, the Alaska cases in this area are based on the premise that control over state assets and finances is vested in the legislature and only the legislature. The court was unwilling to "bend" that principle, even in the face of the fiscal emergency in the Fairbanks North Star Borough case. It has also refused, in the McAlpine case, to

limit the appropriation power to cover only money. Finally, it applied the principle in the Public Employees Local 71 case even though that case involved a contract already negotiated by the governor with public employees. Finally, a highly respected Superior Court judge has found that custodial and trust funds are subject to appropriation in Alaska. Kelley v. Hammond, 1st Jud. Dist. at Juneau, case No. 77-4 (May 30, 1978). There seems little reason for the court to depart from the principle when the state is recovering money for damage to natural resources of the state.

Second, the possibility that other parts of the state budget would be affected by spending the money---the consideration behind the shift in the Colorado cases---may well apply here. If trust fund money is to be spent on certain environmental or fish and game programs, that fact may affect other programs of the state departments of environmental conservation and fish and game. If trust fund money is spent on programs that use state employees, that may also affect the state budget. While the attorney general has taken the position that no part of the recovery is "state" money, the restoration plan clearly anticipates that the trustees will use state employees in the trust's projects. See 56 Fed. Reg. No. 41, p. 8898 (1991). The use of these employees, and liability for their acts will certainly affect the state budget. Time taken by the state trustees for their duties in administering the trust may also affect staffing decisions in the state budget. Finally if the trustees acquire land to be owned, or partially owned, by the state, that may also affect the long-term fiscal obligations of the state.

Third, the cases in this area have primarily dealt with funds received from the federal government, and the practice in Alaska has been to appropriate federal funds. AS 37.20.020 states that all federal grants of money are to be deposited in a special account in the general fund (which would then be subject to appropriation.) In addition, AS 46.08.020(a)(2) authorizes the legislature to appropriate to the oil and hazardous release response fund "money recovered or otherwise received from parties responsible for the containment and cleanup of oil or a hazardous substance at a specific site." Since the money will be received from an entity (Exxon) that matches the statutory description, the statute indicates the legislature's intent that such money be deposited in the general fund for appropriation. While these statutes do not settle the constitutional issue, they do reflect the legislature's interpretation of its powers.

Fourth, some of the cases holding that money is not subject to appropriation are based on the fact that the money is being held by the state in trust for another entity authorized to spend it. E.g., Navajo Tribe v. Arizona Dept. of Admin., 528 P.2d 623 (Ariz. 1974)(Tribe and cities); State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)(University.) The money received for natural resource damages from Exxon, however, is not being "passed through" to another entity that can spend it. Rather, the state trustees recover the money "on behalf of the public as trustee of the natural resources." 33 U.S.C. 1321(f)(5). The natural resources cannot spend the money,

nor can the public. Therefore the "pass through" rationale underlying these cases does not seem to apply to the money recovered from Exxon. The state is doing more than "holding" the money for another; it is, through its trustees, deciding how to allocate the money, which is primarily a legislative function.

Finally, in all the cases discussed above in which money was held not subject to appropriation, the money was coming to the state as a gift or grant from either the federal government or a third party. (This is true even of the money received from a settlement between the federal government and Chevron in Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo 1985) because it does not appear that the state was a litigant or released any of its claims in the settlement.) No one could seriously maintain that money paid by Exxon under the consent decree is a "gift" from Exxon to the state. As is clearly evident from the terms of the consent decree, Exxon is to pay the money in exchange for the state and federal governments extinguishing their claims for damages. This fact distinguishes this situation from those in which the court viewed money as outside the appropriation process because it was "non-state funds." E.g., State ex rel Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974). Money received in exchange for a state asset can hardly be "non-state funds."

IV. Effect of Unconstitutionality; Cure; Continuing Appropriations.

A. Effect of Unconstitutionality. In general, of course, the attorney general has absolute discretion in settling lawsuits, including the power to dismiss cases without recovery by the state. Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (1975). But courts have indicated that this discretion is not absolute. Public Defender Agency v. Superior Court, Third Judicial District, supra, 534 P.2d at 950 (discretion only within constitutional bounds; dicta); Smith v. Meese, 821 F. 2d 1484 (11th Cir. 1987) (Dept. of Justice's policy on prosecution of voting rights cases subject to judicial review); NAACP v. Levi, 418 F. Supp. 1109 (D.C. Cir. 1976) (Dept. of Justice's policy of deferring to state investigation of civil rights violations is subject to judicial review); Boyd v. U.S., 345 F. Supp. 790 (E.D.N.Y. 1972) (Prosecutorial discretion does not protect attorney general's conduct from review on charge of bad faith, fraud, or illegality; dicta). As the court stated in Nader v. Saxbe, 497 F.2d 676, 679-80, n. 19 (D.C. Cir 1974):

The Executive's constitutional duty to "take Care that the Laws be faithfully executed," Art. II, sec. 3, applies to all laws, not merely to criminal statutes. (Citations omitted). It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review. (Citations omitted). The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits of that authority. (Citations omitted.) Judicial review

of the latter sort is normally available unless Congress has expressly withdrawn it. (Citations omitted). The decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. (Citations omitted).

If the attorney general has agreed to provisions that violate the state constitution, those provisions are invalid. See White Construction Co., Inc. v. Commonwealth, 418 N.E. 2d 357 (Mass. Ct. App. 1981), aff'd, 432 N.E. 2d 104 (1982) (State officials have authority to bind the state only to the extent allowed by state law.) This true even if those unconstitutional provisions are authorized by the federal Clean Water Act. Federal law does not require the state to sue under the Clean Water Act. Therefore the situation is similar to that in McDowell v. State, 785 P.2d 1, 10, n. 20 (Alaska 1989), wherein the court held that the state could not grant a subsistence preference to rural residents, even though federal law allowed the state to manage federal land only if it granted a rural subsistence preference on federal land. The issue then is whether the Exxon settlement documents do violate the state constitution.

Because several documents and legal issues are raised, I will try to summarize the possibilities:

1. If the dedication required by the Clean Water Act is not allowed under art. IX, sec. 7 of the state constitution, the trust fund provisions in both the consent decree and the MOA are invalid, since they both contain that dedication.
2. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, and the Clean Water Act is interpreted to require that procedure, then both the MOA and the consent decree would be invalid because the attorney general would not be authorized to sue or settle under the Clean Water Act.
3. If the provision of the MOA allowing the trustees to spend the trust fund money without appropriation is invalid under the state constitution, but those provisions are not required under the Clean Water Act (nor incorporated by implication into the consent decree), then the MOA would be invalid, but the consent decree would not violate the appropriations provisions of the state constitution.
4. If the money due the state under the plea agreement violates the dedicated funds provision (which seems unlikely), then the state cannot accept the money.

B. Cure. If the plea agreement, MOA, or consent decree violate the dedicated funds prohibition, then the dedication is invalid. The legislature cannot "cure" a dedication problem because the prohibition on dedicated funds applies to the legislature as well as the executive branch. However, for those years in which the legislature actually

appropriated the money for the required purposes, the money could be spent for those purposes pursuant to the appropriation (not pursuant to the dedication.)

The appropriation problem could be cured in several ways, assuming of course that the Clean Water Act does not require trust money to be spent without appropriation. First, the court or the parties could amend the MOA to require annual appropriation of that portion of Exxon's payment that is a state asset. The court may, in fact, imply an appropriation requirement. Alternately, the legislature could take it upon itself to authorize the trust and the deposit of money into it, and to appropriate each year the state's interest in Exxon's payment to the fund.

It might be possible for the current legislature to appropriate to the trust fund all of the natural resource damage recovery to be received from Exxon under the consent decree over the years. However such a "continuing appropriation" may itself violate the dedication of funds prohibition. A state superior court has held that a continuing appropriation violates the dedicated funds provision. Trustees of Alaska v. State, Super. Ct., 3rd Jud. Dist., at Anchorage, case No. 3-AN-84-12053 (Aug. 30, 1985.) Apparently the theory was that the legislature making the continuing appropriation is attempting to tie the hands of future legislatures who would, in order to negate the continuing appropriation, have to repeal it. The Trustees case was not appealed, so it is not clear whether continuing appropriations do violate the dedicated funds provision. However, in Public Employees' Local 71 v. State, 775 P.2d 1062, 1064 (Alaska 1989), the State Supreme Court did state that the monetary terms of a collective bargaining agreement are subject to independent legislative approval by appropriation "each year" that the contract is in effect. Even if continuing appropriations do violate the dedicated funds provision as a general matter, it still might be possible to defend a continuing appropriation as required for participation in a federal program, although such an argument would be subject to the objections discussed above in connection with the dedication in the MOA and consent decree, and the additional argument that a continuing appropriation was not required by the Clean Water Act, the consent decree, or the MOA. Finally, of course, as a practical matter subsequent legislatures could repeal the continuing appropriation at any time.

V. Summary.

The Attorney General stated in his April 2, 1991 memo at p. 10 that the "real" issue is whether he and the Governor had the power to settle the Exxon Valdez litigation. Unfortunately, I cannot agree. There is no doubt that the Attorney General has the authority to settle the state's litigation in good faith. However, his authority, like the authority of any state official acting in his or her official capacity, is limited by the Constitution of the State of Alaska.

Therefore the first question is whether the Attorney General can release the state's claim in exchange for money that must be used for certain purposes under the Clean

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Water Act, 33 U.S.C. 1321(f)(5). If the court were to interpret art. IX, sec. 7, Constitution of the State of Alaska, strictly, the dedication might well be invalid. However, if the court interpreted the "federal program" exception less strictly (which in my view it could reasonably do), and if in fact all the money dedicated to the trust were actually recoverable under the Clean Water Act, then the agreement would not violate art. IX, sec. 7 of the state constitution.

The second question is whether the Attorney General, having recovered money as the authorized representative of the state, has the constitutional authority to allow the state and federal trustees to spend that money without appropriation by the state legislature. (It should be noted that the Clean Water Act and regulations adopted pursuant to it do not expressly prohibit the legislature from appropriating the state's recovery nor require or expressly authorize a joint trust.) Essentially the Attorney General has decided that, rather than litigate with the federal government over who owns how much of the trust money, he will agree that the state and federal trustees may spend the money. However well-intentioned that decision may be, I believe the agreement violates art. II, sec. 1 or art. IX, sec. 13, Constitution of the State of Alaska. The Attorney General certainly has the authority to determine the value of the state's claim by a good faith settlement, but only the state legislature has the power to authorize its expenditure. While it is possible that I am wrong, I doubt that a court will agree with the position that the state never received anything because the trustees spent the money without deciding who owned how much of it.

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MEMORANDUM

March 11, 1991

SUBJECT: Trust Fund for Proceeds of Exxon Valdez Settlement
(W.O. 7LS0912)

TO: Representative Niilo Koponen

FROM: Pam Finley *Pam Finley*
Assistant Revisor

QUESTION PRESENTED: You have asked whether the governor could put money received from a settlement with Exxon for the Exxon Valdez oil spill into a fund such that the legislature would have no power over the use of the money.

SHORT ANSWER: If such a settlement requires money recovered by the state under the federal Clean Water Act to be spent without appropriation by the state legislature, it is probably a violation of the state constitution and therefore it would be beyond the power of the attorney general to agree to such a settlement.

DISCUSSION: The Attorney General has suggested in hearings that a trust fund for the proceeds of an Exxon settlement would be based on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq. In general, CERCLA does not apply to spills of crude oil. The act contains many provisions governing "hazardous substances," but the definition of this term explicitly excludes crude oil. 42 U.S.C. 9601(14). However, a section of CERCLA, 42 U.S.C. 9651(c), authorizes the promulgation of regulations for the assessment of damages "resulting from a release of oil or a hazardous substance for the purposes of this Act (CERCLA) and section 311(f)(4) and (5) of the Federal Water Pollution Control Act..."

The water control act referred to, commonly known as the Clean Water Act (CWA), does cover releases of crude oil. 33 U.S.C. 1321(f)(4) and (5) allow a state to recover, as "trustee of the natural resources" damaged by an oil spill, the costs of replacing or restoring those natural resources. The Clean Water Act does not appear to cover economic losses. See, *Piccolini v Simon's Wrecking*, 686 F. Supp. 1063 (M.D. Pa. 1988) (Damage recoverable for response and remedial actions under

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CERCLA did not include lost income.) The actual costs incurred by the state for the restoration or replacement of its resources, as distinguished from similar costs incurred by the federal government on the state's behalf, may be recovered only by the state. In re Allied Towing Corp., 478 F. Supp. 398,402 (E.D. Va. 1979). Any damages recovered by the state under 33 U.S.C. 1321(f)(5) must be used to "restore, rehabilitate, or acquire the equivalent of such natural resources." The state's remedy under the Clean Water Act is not exclusive; it does not preempt state laws that provide for recovery of damages caused by oil spills. Allied Towing, supra.

The state trustee who can recover these damages under federal law is appointed by the governor. 42 U.S.C. 9607(f)(2)(B). I do not know if the Governor of Alaska has appointed such a person, or if so, who he or she may be. The trustee so appointed has various powers, including devising and carrying out a plan for the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. 40 C.F.R. 300.615(c)(4). Under regulations adopted under CERCLA, but applicable to the Clean Water Act, the money recovered by the state may be placed either in a separate account in the state treasury, or in an interest bearing account payable in trust to the state agency acting as the trustee. 43 C.F.R. 11.92(a)(2). The trustee is required to prepare an authorization plan describing how money recovered under the Clean Water Act will be used and to address what restoration, replacement, or acquisition of the equivalent resources will occur. 43 C.F.R. 11.93(a). This regulation has been upheld against a challenge that it exceeds the authority granted in the federal statute, and that it usurps the state sovereign powers by "micromanaging" state accounting and planning procedures. State of Ohio v. U.S. Dept. of the Interior, 880 F.2d 432, 473-474 (D.C. Cir. 1989).

However, while the regulation does require the state trustee to establish the plan, it does not on its face say that the plan, or expenditures under it, shall be accomplished without legislation or appropriation by the state legislature. In fact, the regulation allowing deposit of the money in a special account in the state treasury suggests legislative action would be allowed. If the regulation were interpreted to do away with a requirement of state legislative action, it would probably be beyond the executive's power to enter into an agreement under the regulation.

In my memo to Senator Cotten, which was distributed to all legislators at his request, I discussed both the appropriation power and the dedicated funds provision in Alaska's constitution; please refer to that memo for a fuller discussion of relevant cases. The gist of the memo was that (1) a state asset (money received in settlement of the state's claims) must be appropriated by the legislature before it can be spent, and (2) neither the executive nor the legislature can "dedicate" a revenue stream to a particular purpose. The latter is especially important if money is to be received over several years since this legislature, even if it "appropriated" whatever was received from the settlement to a trust fund, could not bind the actions of a future legislature with regard to money received in the future.

The existence of the federal regulations, however, requires a bit more elaboration. First, because the state is not required to sue under the Clean Water Act (and in fact, Alaska has sued in state court asserting claims based on state law), this is not a case of federal law (the regulation) being supreme over Alaska's constitutional provision vesting the law-making power (including the appropriation power) in the legislature. In this respect, the situation would be similar to the subsistence issue. Although federal law required a preference for rural residents on federal land and allowed the state to manage federal land only if that preference were honored, Alaska was not allowed to violate its constitutional provisions that prohibited a preference for rural residents. McDowell v. State, 785 P.2d 1 (Alaska 1989). As the court pointed out, the federal law did not require the state to manage federal land. McDowell, supra, 785 P.2d at 10, n. 20. Similarly, if federal law requires the proceeds of a lawsuit or settlement under federal law to be spent without legislation or appropriation in violation of the state constitution, then the state cannot sue or settle under federal law. There is certainly no requirement that it do so, and in fact the state has chosen to sue under state law. A settlement under the CWA/CERCLA regulations that allowed for the expenditure of state money without appropriation by the legislature, or established programs that were not authorized by state law would be unconstitutional. Therefore the governor would not have the authority to agree to it.

The second issue raised by the existence of the federal regulations is whether the federal regulations would allow the state to avoid the dedicated funds prohibition of art. IX, sec. 7, Constitution of the State of Alaska. That provision allows a dedicated fund "when required by the federal government for state participation in federal programs." Federal highway money is one example of this exception. The provisions vesting the law-making and appropriation power in the legislature, of course, have no such exception, and so this second issue is most important if the settlement provides for legislative appropriation and action and this legislature makes the necessary appropriations and law, and those appropriations purport to bind how money received in future years can be spent. Quite frankly, I do not know whether the court would find the trust fund to be a "federal program" since it consists of money paid by Exxon in settlement of claims by the state. It gets even harder to justify the trust fund as a "federal program" when one realizes that the money could have been recovered under state law (or settlement of claims under state law) without a required dedication. However, it is conceivable that the court would find the exception applicable.

Since we do not have a draft settlement or even a complaint based on federal claims before us, it is difficult to predict exactly what statute or regulation the Attorney General will assert is the basis for the settlement and the trust fund. Lacking the settlement and the Attorney General's explanation of why he believes it is constitutional, I can only guess about the applicable statute and regulations. Until I see a copy of the settlement itself, and hear the Attorney General's opinion as to why he

Representative Niilo Koponen

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believes it is constitutional, I cannot give an opinion on its constitutionality. However, as a general matter a settlement of the state's CWA claims under the regulations at 43 C.F.R. 11.92 and 11.93 would violate the state constitution if it purported to divest the legislature of the power to appropriate the proceeds.

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SCIENTIFIC DATA

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Department of Law

APR 15 1991

5:30, 10:11, 12:12, 2:23, 3:30



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

NATIONAL OCEAN SERVICE
OFFICE OF OCEANOGRAPHY AND MARINE ASSESSMENT
OCEAN ASSESSMENTS DIVISION
ROCKVILLE, MARYLAND 20852

8 April 1991

MEMORANDUM FOR: NOAA/GC Thomas A. Campbell
Washington Policy Group
Trustee Council

FROM:

Douglas A. Wolfe
Robert B. Spies
Donald C. Malins

SUBJECT:

**RECOMMENDATIONS RELATED TO REVIEW AND
RELEASE OF NRDA DATA AND TO PUBLICATION OF
EXXON VALDEZ ASSESSMENT RESULTS**

We want to share with you our collective concerns about recent efforts and activities to place for public access all available, quality-assured NRDA data into the Oil Spill Public Information Center in Anchorage as soon as possible. Our view is that the release of "data" (whether quality-assured or not) without accompanying interpretive reports will raise a series of conflicting interpretations and claims from various interested parties. The controversy ensuing from such claims and counterclaims would be regrettable and could erode public support for the NRDA process. In addition, we believe that the first publicly available interpretations and analyses of the NRDA data should be performed by the NRDA Project Managers, and that the resulting reports and manuscripts should undergo peer review prior to formal publication.

The release of the NRDA planning documents (detailed study plans and interim project reports) should not, in most cases, be a problem as long as they are clearly identified as interim planning documents that: a) are based on incomplete data; b) have not undergone peer review; and c) contain interpretations subject to revision. The raw data that were available to the Project Managers and taken into consideration at the time they drafted those reports could also be appended and made available with the same caveats. Additional data generated more recently, however, should NOT be archived in the repository for public access until such time as the Project Managers have had the opportunity to review, analyze and interpret those data. This concern applies very strongly to the hydrocarbon analytical data collected under project Technical Services No. 2. Large amounts of these data have become available only after the last



interim reports were written, and in many cases, the Project Managers have not yet had an opportunity to review the data, much less develop interpretive reports. In most cases, the Project Managers are still waiting for additional data before they can reasonably undertake their detailed data analyses and interpretations.

We are also concerned that without coordinated direction, the very large base of information (both scientific and economic) developed about the EXXON VALDEZ spill (easily the best-studied spill in human history to date) might be released and published in a haphazard and diffuse manner, resulting in a product not easily accessible either to the scientific community or to the interested public. The current push for release of available data to the Public Information Center could stimulate Project Managers to rush incomplete results towards publication in the most accessible publication outlets. While our principal investigators should definitely be encouraged to publish their results as early as possible in peer-reviewed scientific journals, this process should be driven by the maturation and analysis of logical units of data and the development of significant interpretations and conclusions.

An attractive mechanism for public release of information would be for the Trustees (perhaps in cooperation with Exxon) to sponsor a major symposium for the presentation of EVOS results, and to publish, in one place, a comprehensive collection of scientific papers related to the spill. The sponsors could install an acceptable mechanism for peer review of all papers. The proceedings could be published through an existing scientific journal, or could take the form of a separate, high quality volume (such as that published by the French *Centre National pour l'Exploitation des Oceans* for the *Amoco Cadiz* spill). This approach would motivate the investigators to analyze and publish their results on a rigorous schedule, ensure that a large block of EVOS information (from all possible sources) becomes accessible in one place, and provide a uniform standard for quality control on the publication. A logical and practical time frame for this symposium would be during spring of 1992 (providing ample time for analysis of Oil-Year 3 results). The team of Wolfe, Spies, and Malins possesses considerable experience in the organization and conduct of such symposia and the publication of high quality proceedings. With NOAA's support, we could undertake this activity, working through the existing structure of the Management Team to notify the Project Managers and request their participation. Planning must start very soon, however, if this approach and schedule are to be implemented.

cc: C.N. Ehler

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MEMORANDUM

April 9, 1991

SUBJECT: Disclosure of scientific data relating to Exxon Valdez litigation
(Work Order No. 7LS1171)

TO: Representative Max Gruenberg, Jr.
Attn: Andy Hemenway

FROM: John B. Gaguine *JBG*
Legislative Counsel

You have asked whether the attorney general may keep confidential scientific data relating to the Exxon Valdez oil spill, or whether the information is public under AS 09.25.110-09.25.125. If the recent proposed settlement terminated all Exxon Valdez litigation, then I would say that the information probably could not be kept confidential, based on a recent Alaska Supreme Court decision. However, since there is litigation ongoing naming the state as a defendant, I think that the attorney general is probably acting within his authority. The law, though, is not completely clear on either of these points.

First, it seems that the scientific data, absent litigation considerations, clearly would be subject to public disclosure under AS 09.25.110 - 09.25.125. The definition of public records in AS 09.25.220(6) is extremely broad:

(6) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.

I think that the data plainly falls under this definition.

In Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), the court ruled that a public agency may not circumvent the public records statutes

(AS 09.25.110 - 09.25.125) by agreeing to keep the terms of a lawsuit settlement agreement confidential. Despite the importance of the issue, the court dealt with it quite briefly, thus indicating (in my opinion) that the court found the answer clear:

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

Alaska's public records disclosure statutes apply to records maintained by municipalities. In general, they provide broad public access to municipal "books, records, papers, files, accounts, writings and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the record should not be disclosed. Exceptions to the statutory disclosure requirements are narrowly construed. Doubtful cases are resolved by permitting public inspection.

We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Id. at 1192-93 (citations and footnotes omitted; emphasis in original).

If all Exxon Valdez litigation was concluded, I do not think that the "work product" exception to discovery would have any relevance to post-settlement disclosure of the

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Page 3

data. That exception is intended to prevent a litigant from obtaining access during litigation to documents prepared by his or her adversary for the litigation. While, as discussed below, it may override the public records statutes as long as litigation is ongoing, the exception would seem to have no applicability once the litigation is over.

My thinking on the work product question is based in part on the legislature's enactment of AS 09.25.122 as part of the 1990 overhaul of the public records laws. That statute, which codifies the substance of 6 AAC 95.150 (a section of Governor Hammond's freedom-of-information regulations), provides:

Sec. 09.25.122. LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

I read this statute as implying that when a person is not involved in litigation with the state, which is everyone after the litigation has been settled, the normal rules of disclosure, i.e., the public records laws, apply, and not the court rules. Since "work product" is a creature of the court rules, it would not seem to apply after a settlement.

A recent Florida case, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985), supports my conclusion. In that case the court held that communications between the members of a city council and the city's attorney relating to litigation were not exempt from disclosure under the broad Florida public records law. The court held that the law did not incorporate such non-statutory exceptions as attorney-client privilege and attorney work product.^{1/} However, the language of the Florida public records law is different from the Alaska law, so that North Miami might not be persuasive to an Alaska court.

It is clear that under federal law the Exxon Valdez scientific data would not be disclosable to the public, even after all litigation is settled. The federal Freedom of Information Act, 5 U.S.C. 552, contains a provision, subsection (b)(5), that exempts from FOIA disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." In Federal

^{1/} The court did note, however, that a specific Florida statute authorized the city to withhold disclosure while the litigation was ongoing.

Trade Commission v. Grolier Incorporated, 462 U.S. 19, 76 L.Ed.2d 387 (1983) (copy attached), the U.S. Supreme Court ruled that the (b)(5) exemption applied even when the litigation for which the requested documents had been generated was over.

I think that an Alaska court would not be likely to follow Grolier, both because of the strong presumption of public access to public records (expressed in Anchorage School District, *supra*), and because of the absence of any language in AS 09.25.110 - 09.25.125 similar to (b)(5).^{2/} I think that this absence is especially significant because, as noted, the Alaska public records statutes were overhauled in 1990, and a special section, AS 09.25.122 (quoted above), dealt specifically with litigation, without including (b)(5)-type language. Thus, as noted, I believe that an Alaska court would be more inclined to follow North Miami than Grolier. However, both the majority and the concurring opinions in Grolier set out strong policy arguments for exempting "work product" from FOIA disclosure, and an Alaska court might thus choose to follow Grolier notwithstanding the presumption of public access and the absence of (b)(5)-type language in the Alaska statutes.

At any rate, there is litigation ongoing, and so the question of whether an exemption to disclosure applies in the absence of litigation is premature. I believe that the existence of this litigation in my opinion would support the attorney general's non-disclosure decision.

First, I believe that the scientific data constitutes "work product" that is generally not available for discovery under Civil Rule 26(b)(3) - it is my understanding that the data was produced "in anticipation of litigation or for trial", and that the production was coordinated by the attorney general's office.^{3/} Although the state was primarily producing the data for its litigation against Exxon, it seems obvious that the state was also anticipating use of the data in the suits naming it as a defendant, if those suits were not settled or dismissed. Even if the suits were not filed at the time that the data was produced (and I believe some were; I recall that some suits were filed against Exxon, the state and the federal government almost immediately), it seems that the "work product" exception to discovery would still apply, especially in light of the "anticipation of litigation" language of Rule 26(b)(3). I think it would be impossible to dispute an assertion by the state that it was gathering data not only for

^{2/} Some states, such as Maryland and Rhode Island, have adopted language in their public records statutes essentially identical to that in (b)(5). Others have included language that the courts have read as incorporating the (b)(5) principle. See, e.g., Denver Post Corp. v. University of Colorado, 739 P.2d 874, 880 (Colo. App. 1987) (use of term "privileged information" in Colorado public records statute authorizes non-disclosure of attorney litigation work product).

^{3/} If I am wrong, and the data was produced by the agencies in their normal course of business not specifically for use in litigation, then AS 09.25.122 would clearly make the data public.

Representative Max Gruenberg, Jr.

April 9, 1991

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litigation then pending, but also for litigation that might be subsequently brought against it.

In Grolier, the Court, interpreting Fed.R.Civ.P. 26(b)(3) (from which the Alaska rule derives), held that the language of the rule "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." 76 L.Ed.2d at 393 (emphasis in original). I see no reason why an Alaska court would not follow Grolier in interpreting Alaska Rule 26(b)(3).

Thus it seems clear that the state may refuse to disclose the data to litigants against it. But what about those plaintiffs who have sued only Exxon, and not the state, or those members of the public who have no interest in any litigation? The answer here is not entirely clear. AS 09.25.122 suggests that such persons would be entitled to inspect the data, as only litigants are bound by the court rules.^{4/} But such an interpretation would effectively remove the work product protections for public litigants. I am inclined to think that a court would not support such a reading of the statutes.

As noted, the Florida Supreme Court in North Miami, supra, held, based on a specific statute, that there is no right of public access to a public litigant's work product during the pendency of the litigation.^{5/} I am inclined to think that an Alaska court would, as a matter of policy, read the same limitation of access into Alaska law even though no specific statutory limitation exists. However, it is certainly possible that an Alaska court would read the absence of a specific limitation in statute as precluding a court from creating such a limitation, notwithstanding the powerful policy arguments in favor of it. At any rate, it seems clear that, no matter how the courts might finally rule on this question, the attorney general can assert reasonable justifications for his policy; he is not acting in contravention of clearly stated law.

I hope that this memorandum has been of assistance to you. Please feel free to let me know if I can be of further assistance.

JBG:pl:mi
91-239.plm

^{4/} However, if such a person were seeking to obtain the data so that he or she could transfer it to a litigant, then the person would be "involved in litigation" within the meaning of AS 09.25.122.

^{5/} Note that North Miami, unlike many public access/work product cases (such as Grolier), involved a request by a news organization, rather than by a former litigant.

[462 US 19]
FEDERAL TRADE COMMISSION, et al., Petitioners

v

GROLIER INCORPORATED

462 US 19, 76 L Ed 2d 387, 103 S Ct 2209

[No. 82-372]

Argued March 29, 1983. Decided June 6, 1983.

Decision: Agency attorney work product held exempt from mandatory FOIA disclosure without regard to status of litigation for which it was prepared.

SUMMARY

A corporation filed a request with the Federal Trade Commission for disclosure of documents concerning the investigation of a subsidiary corporation. The Commission had investigated the subsidiary in connection with a civil penalty action but the suit had been dismissed with prejudice. The Commission refused to release some documents on the basis that they were exempt from mandatory disclosure under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency. The United States District Court for the District of Columbia held that all the requested documents were exempt from disclosure under Exemption 5. The United States Court of Appeals for the District of Columbia Circuit held that four documents could not be withheld unless the Commission could show that litigation related to the terminated action existed or potentially existed (671 F2d 553).

On certiorari, the United States Supreme Court reversed. In an opinion by WHITE, J., joined by BURGER, Ch. J., and MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., it was held that attorney work product is exempt under Exemption 5 of the Freedom of Information Act from mandatory disclosure without regard to the status of the litigation for which it was prepared.

BRENNAN, J., joined by BLACKMUN, J., concurring in part and concurring

Briefs of Counsel, p 865, *infra*.

in the judgment, expressed the view that the holding should rest exclusively on a construction of Rule 26(b)(3) of the Federal Rules of Civil Procedure.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Administrative Law § 64 — FOIA — attorney work product exemption 1a-1d. Under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

2 Am Jur 2d, Administrative Law § 232; 66 Am Jur 2d, Records and Recording Laws § 39

15 Federal Procedure, L Ed, Freedom of Information §§ 38:90 et seq.

1 Federal Procedural Forms, L Ed, Administrative Procedure §§ 2:53.3, 2:175, 2:175.5, 2:192

1 Am Jur Pl & Pr Forms (Rev), Administrative Law, Form 54.1

2 Am Jur Trials 409, Locating Public Records

5 USCS § 552

US L Ed Digest, Administrative Law § 64

L Ed Index to Aunos, Freedom of Information Act

ALR Quick Index, Freedom of Information Acts

Federal Quick Index, Freedom of Information Act; Work Product Doctrine

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Freedom of Information Act exemption (5 USCS § 552(b)(5)) for interagency and intraagency memorandums or letters as applicable to communications to or from attorneys for the government. 54 ALR Fed 280.

Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation. 41 ALR Fed 123.

What are interagency or intraagency memorandums or letters exempt from disclosure under the Freedom of Information Act (5 USCS § 552(b)(5)). 7 ALR Fed 855.

Development, since *Hickman v Taylor*, of attorney's "work product" doctrine. 35 ALR3d 412.

FTC v GROlier INC.

462 US 19, 76 L Ed 2d 387, 103 S Ct 2209

**Depositions and Discovery § 36 —
work product — immunity**

2. Rule 26(b)(3) of the Federal Rules of Civil Procedure protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation.

**Administrative Law § 64 — FOIA —
attorney work product exemption**

3. The test under Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, is whether the docu-

ments would be routinely or normally disclosed upon a showing of relevance.

**Administrative Law § 64; Depositions
and Discovery § 36 — FOIA —
attorney work product exemption**

4. Exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)), which exempts from disclosure interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context.

SYLLABUS BY REPORTER OF DECISIONS

Exemption 5 of the Freedom of Information Act (FOIA) exempts from disclosure under the Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Petitioner Federal Trade Commission (FTC) conducted an investigation of a subsidiary of respondent in connection with a civil penalty action against the subsidiary in Federal District Court filed by the Department of Justice. The action was later dismissed with prejudice when the Government declined to comply with a discovery order. Thereafter, respondent filed a request with the FTC for disclosure of certain documents concerning the investigation of the subsidiary, but the FTC denied the request on the ground that the documents were exempt from disclosure under Exemption 5. Respondent then brought suit in Federal District Court to compel release of the documents. The District Court held that the documents were exempt from disclosure under Exemption 5 as, inter alia, attorney work product. The Court of Appeals held that the documents generated during the action against the subsidiary could not be withheld on the basis of the work-product rule unless the FTC could show that "litigation related to the terminated action exists or potentially exists." The court reasoned that the work-product rule encompassed by Exemption 5 was coextensive with the

work-product privilege under the Federal Rules of Civil Procedure, and that a requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation best comported with the fact that the work-product privilege is a qualified one.

Held: Under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation with the agency. Under a literal reading of Federal Rule of Civil Procedure 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and thus would fall within the scope of Exemption 5. But regardless of how Rule 26(b)(3) is construed, the Court of Appeals erred in construing Exemption 5 to protect work-product material only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. The Court of Appeals' determination that its rule concerning related litigation best comported with the qualified nature of the work-product rule is irrelevant in the FOIA context. Whether its

immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure. Work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt

information, implements the FOIA's purpose to provide "workable" rules.

217 US App DC 47, 671 F2d 553, reversed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Marshall, Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Brennan, J., filed an opinion concurring in part and concurring in the judgment, in which Blackmun, J., joined.

APPEARANCES OF COUNSEL

Kenneth S. Geller argued the cause for petitioners.

Daniel S. Mason argued the cause for respondent.

Briefs of Counsel, p 865, *infra*.

OPINION OF THE COURT

[462 US 20]

Justice White delivered the opinion of the Court.

[1a] The Freedom of Information Act (FOIA), 5 USC § 552 [5 USCS § 552], mandates that the Government make its records available to the public. Section 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It is well established that this exemption was intended to encompass the attorney work-product rule. The question presented in this case is the extent, if any, to which the work-product component of Exemption 5 applies when the litigation for which the requested docu-

ments were generated has been terminated.

[462 US 21]

In 1972, the Federal Trade Commission undertook an investigation of Americana Corp., a subsidiary of respondent Grolier Inc. The investigation was conducted in connection with a civil penalty action filed by the Department of Justice.¹ In 1976, the suit against Americana was dismissed with prejudice when the Government declined to comply with a District Court discovery order. In 1978, respondent filed a request with the Commission for disclosure of documents concerning the investigation of Americana.² The Commission initially denied the entire request, stat-

1. United States v Americana Corp., Civ No. 388-72 (NJ). Americana was charged with violation of a 1948 cease-and-desist order in making misrepresentations regarding its encyclopedia advertisements and door-to-door sales.

2. By letter to the Commission, respondent requested the following:

"1) All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid; and

"2) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any of the following companies: [listing 14 companies, including respondent and Americana Corporation].

"3) All records and documents which refer or relate to any covert investigation, made by any employee of the Federal Trade Commission, of any person, company or other entity." App 15-16.

"Covert investigation" was defined by respondent to be "any investigation of which the subject entity was not notified in advance and

ing that it did not have any information responsive to some of the items and that the remaining portion of the request was not specific enough to permit the Commission to locate the information without searching millions of documents contained in investigatory files. The Commission refused to release the few items that were responsive to the request on the basis

[462 US 22]

that they were exempt from mandatory disclosure under § 552(b)(5).³

Pursuant to the Commission's Rules, respondent appealed to the agency's General Counsel. Following review of respondent's request, and after a considerable process of give and take, the dispute finally centered on seven documents.⁴ Following in camera inspection, the District Court determined that all the requested documents were exempt from disclosure under § 552(b)(5), either as attorney work product, as confidential attorney-client communications, or as internal predecisional agency material. On appeal, the Court of Appeals held that four documents generated during the Americana litigation could not be withheld on the basis of the work-

product rule unless the Commission could show that "litigation related to the terminated action exists or potentially exists."⁵ 217 US App DC 47, 50, 671 F2d 553, 556 (1982).

The Court of Appeals reasoned that the work-product rule encompassed by § 552(b)(5) was coextensive with the work-product privilege under the Federal Rules of Civil Procedure.

[462 US 23]

A requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation, in the Court of Appeals' view, best comported with the fact that the work-product privilege is a qualified one. We granted the Commission's petition for certiorari, 459 US 986, 74 L Ed 2d 381, 103 S Ct 339 (1982). Because we find that the Court of Appeals erred in its construction of Exemption 5, we reverse.

Section 552(b) lists nine exemptions from the mandatory disclosure requirements that "represent[t] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." EPA v Mink, 410 US 73, 80, 35 L Ed 2d 119, 93 S Ct 827 (1973).

prior to acts taken pursuant to such investigation." Id., at 16. Respondent later abandoned its requests for any documents other than those related to the Americana investigation, defined in the first category of its request.

3. The requested documents are subject to mandatory disclosure as "identifiable records" under § 552(a)(3), unless covered by a specific exemption. In this case, the Commission claims exemption only under § 552(b)(5), which provides:

"This section does not apply to matters that are—

"(5) inter-agency or intra-agency memorandums or letters which would not be available

by law to a party other than an agency in litigation with the agency"

4. The Commission released a number of documents after respondent filed this suit. Respondent abandoned its claim for many others. See n 2, supra.

5. Respondent withdrew its claim for disclosure of one of the seven documents. The Court of Appeals affirmed the District Court's judgment that another was exempt as an attorney-client communication, 217 US App DC, at 48, n 3, 671 F2d, at 554, n 3, and held that still another was clearly a predecisional document not subject to disclosure under Exemption 5, id., at 51, 671 F2d, at 557. These rulings are not at issue here.

The primary purpose of one of these, Exemption 5, was to enable the Government to benefit from "frank discussion of legal or policy matters." S Rep No. 813, 89th Cong, 1st Sess, 9 (1965). See HR Rep No. 1497, 89th Cong, 2d Sess, 10 (1966). In keeping with the Act's policy of "the fullest responsible disclosure," S Rep No. 813, at 3, Congress intended Exemption 5 to be "as narrow as [is] consistent with efficient Government operation." *Id.*, at 9. See HR Rep No. 1497, at 10.

Both the District Court and the Court of Appeals found that the documents at issue were properly classified as "work product" materials, and there is no serious argument about the correctness of this classification.⁶ "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5," the privilege being that enjoyed in the context of discovery in civil litigation. *NLRB v Sears, Roebuck & Co.*, 421 US 132, 154-155, 44 L Ed 2d 29, 95 S Ct 1504 (1975); HR Rep No. 1497, at 10; S Rep No. 813, at 2.

[462 US 24]

In *Hickman v Taylor*, 329 US 495, 510, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947), the Court recognized a qualified immunity from discovery for the "work product of

the lawyer"; such material could only be discovered upon a substantial showing of "necessity or justification." An exemption from discovery was necessary because, as the *Hickman* Court stated:

"Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395.

The attorney's work-product immunity is a basic rule in the litigation context, but like many other rules, it is not self-defining and has been the subject of extensive litigation.

Prior to 1970, few District Courts had addressed the question whether the work-product immunity extended beyond the litigation for which the documents at issue were prepared. Those courts considering the issue reached varying results.⁷ By 1970, only one Court of Appeals had addressed the issue. In *Republic*

6. Respondent makes some assertions concerning the ethical conduct of the Commission in continuing its investigations after the *Americana* suit had been instituted and claims that the work-product rule would not apply to documents containing evidence of unethical conduct. Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it.

7. See *Honeywell, Inc. v Piper Aircraft Corp.*, 50 FRD 117 (MD Pa 1970); *Bourget v Government Employees Ins. Co.*, 48 FRD 29 (Conn 1969); *Stix Products, Inc. v United*

Merchants & Mfrs., Inc., 47 FRD 334 (SDNY 1969); *LaRocca v State Farm Mutual Automobile Ins. Co.*, 47 FRD 278 (WD Pa 1969); *Kirkland v Morton Salt Co.*, 46 FRD 28 (ND Ga 1968); *Chitty v State Farm Mutual Automobile Ins. Co.*, 36 FRD 37 (EDSC 1964); *Insurance Co. of North America v Union Carbide Corp.*, 35 FRD 520 (Colo 1964); *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 207 F Supp 407 (MD Pa 1962); *Thompson v Hoitama*, 19 FRD 112 (NJ 1956); *Tobacco and Allied Stocks, Inc. v Transamerica Corp.*, 16 FRD 534 (Del 1954).

Gear Co. v Borg-Warner Corp., 381 F2d 551, 557 (CA2 1967), the Court of Appeals held that documents prepared in connection with litigation that was on

[462 US 25]

appeal were not subject to discovery in a related case. The court also noted that there was potential for further related litigation. Thus, at the time FOIA was enacted in 1966, other than the general understanding that work-product materials were subject to discovery only upon a showing of need, no consensus one way or the other had developed with respect to the temporal scope of the work-product privilege.

[1b, 2] In 1970, the Federal Rules of Civil Procedure were amended to clarify the extent to which trial preparation materials are discoverable in federal courts. Rule 26(b)(3) provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Rule 26(b)(3) does not in so many

words address the temporal scope of the work-product immunity and a review of the Advisory Committee's comments reveals no express concern for that issue. Notes of Advisory Committee on 1970 Amendments, 28 USC App, pp 441-442. But the literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. See 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, p 201 (1970). Whatever problems such a construction of Rule 26(b)(3) may engender in the civil discovery area, see *id.*, at 201-202, it provides a satisfactory resolution to the question whether

[462 US 28]

work-product documents are exempt under the FOIA. By its own terms, Exemption 5 requires reference to whether discovery would normally be required during litigation *with the agency*. Under a literal reading of Rule 26(b)(3), the work product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and would thus fall within the scope of Exemption 5.

[3, 4] We need not rely exclusively on any particular construction of Rule 26(b)(3), however, because we find independently that the Court of Appeals erred in construing Exemption 5 to protect work-product materials only if related litigation exists or potentially exists. The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. *NLRB v Sears, Roebuck & Co.* 421 US, at 148-149, 44 L Ed 2d 29, 95 S Ct 1504. At the time this case came to the Court of Appeals, all of the courts of appeals that

had decided the issue under Rule 26(b)(3) had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated.⁸ In addition, an overwhelming majority of the Federal District Courts reporting decisions on the issue under Rule 26(b)(3) were in accord with that view.⁹ "Exemption 5 incorporates

[462 US 27]

the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v Grumman Aircraft Engineering Corp.*, 421 US 168, 184, 44 L Ed 2d 57, 95 S Ct 1491 (1975) (emphasis added). Under this state of the work-product rule it cannot fairly be said that work-product materials are "routinely" available in subsequent litigation.

The Court of Appeals' determination that a related-litigation test best comported with the qualified nature of the work-product rule in civil discovery—a proposition with which we do not necessarily agree—is irrelevant in the FOIA context. It makes little difference whether a

privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure.

[1c] Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt information, implements the congressional intent to provide "workable" rules. See S Rep No. 813, at 5; HR Rep No. 1497, at 2.

Respondent urges that the meaning of the statutory language is "plain" and that, at least in this case, the requested

[462 US 28]

documents must be disclosed because the same documents were ordered disclosed during discovery in previous litigation. It does not follow, however, from an

8. See *In re Murphy*, 560 F2d 326, 334 (CA8 1977); *United States v Leggett & Platt, Inc.*, 542 F2d 655 (CA6 1976) cert denied, 430 US 945, 51 L Ed 2d 792 97 S Ct 1579 (1977); *Duplan Corp. v Moulinsage et Retorderie de Chavanoz*, 487 F2d 480, 483-384 (CA4 1973). See also *In re Grand Jury Proceedings*, 604 F2d 798, 803 (CA3 1979) (work-product privilege continues at least when subsequent litigation is related). Cf. *Kent Corp. v NLRB*, 530 F2d 612 (CA5) (work-product privilege does not turn on whether litigation actually ensued), cert denied, 429 US 920, 50 L Ed 2d 287, 97 S Ct 316 (1976).

9. See *In re Federal Copper of Tennessee, Inc.*, 19 BR 177 (Bkrtcy MD Tenn 1982); *In re International Systems & Controls Corp. Secu-*

rities Litigation, 91 FRD 552 (SD Tex 1981); *United States v Capitol Service, Inc.* 89 FRD 578 (ED Wis 1981); *In re LTV Securities Litigation*, 89 FRD 595 (ND Tex 1981); *First Wisconsin Mortgage Trust v First Wisconsin Corp.*, 86 FRD 160 (ED Wis 1980); *Panter v Marshall Field & Co.* 80 FRD 718 (ND Ill 1978); *United States v O. K. Tire & Rubber Co.* 71 FRD 465 (Idaho 1976); *SCM Corp. v Xerox Corp.* 70 FRD 508 (Conn), appeal dismissed, 534 F2d 1031 (1976); *Burlington Industries v Exxon Corp.* 65 FRD 26 (Md 1974). See also *Hercules, Inc. v Exxon Corp.* 434 F Supp 136 (Del 1977) (protected when cases are closely related in parties or subject matter); *Ohio-Sealy Mattress Mfg. Co. v Sealy, Inc.*, 90 FRD 45 (ND Ill 1981) (protected in later related litigation).

ordered disclosure based on a showing of need that such documents are routinely available to litigants. The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis. In *NLRB v Sears, Roebuck & Co.*, supra, we construed Exemption 5 to "exempt those documents, and only those documents, normally privileged in the civil discovery context." 421 US, at 149, 44 L Ed 2d 29, 95 S Ct 1504. (Emphasis added.) It is not difficult to imagine litigation in which one party's need for otherwise privileged

documents would be sufficient to override the privilege but that does not remove the documents from the category of the normally privileged. See id., at 149, n 16, 44 L Ed 2d 29, 95 S Ct 1504.

[1d] Accordingly, we hold that under Exemption 5, attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered. The judgment of the Court of Appeals is reversed.

It is so ordered.

SEPARATE OPINION

Justice Brennan, with whom Justice Blackmun joins, concurring in part and concurring in the judgment.

The Court rests its judgment on two alternative holdings: one a construction of Federal Rule of Civil Procedure 26(b)(3), ante, at 26, 76 L Ed 2d, at 393; the other a more limited holding under Exemption 5 of the Freedom of Information Act (FOIA), 5 USC § 552(b)(5) [5 USCS § 552(b)(5)], ante, at 26, 76 L Ed 2d, at 393. I find the latter holding unpersuasive and accordingly would rest exclusively on the former.

[462 US 29]

I

I agree wholeheartedly with the Court that Rule 26(b)(3) itself does not incorporate any requirement that there be actual or potential related litigation before the protection of the work-product doctrine applies. As the Court notes, "the

literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." Ante, at 25, 76 L Ed 2d, at 393. A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect. We described the reasons for protecting work product from discovery in *Hickman v Taylor*, 329 US 495, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947):

"In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless

interference This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 510-511, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395.

[482 US 30]

The Court of Appeals is doubtless correct in its view that the need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress; but it does not follow that the need for protection disappears once that litigation (and any "related" litigation) is over. The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later rather than sooner. More concretely, disclosure of work product connected to

prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved. Many Government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. Few of these cases will be "related" to each other in the sense of involving the same private parties or arising out of the same set of historical facts; yet large classes of them may present recurring, parallel factual settings and identical legal and policy considerations.¹ It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate "on wits borrowed from the adversary."

[482 US 31]

Id., at 516, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (Jackson, J., concurring). Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled. Nor is the problem limited to Government agencies. Any litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer

1. It is possible, I suppose, that such suits might be considered "related" in a very broad reading of the Court of Appeals' "related litigation" test; the courts adopting the test have not had occasion to explore its outer boundaries. But this possibility merely reveals a dilemma: If the test is read so broadly as to classify similar but factually unrelated suits as "related," it is virtually no limitation on

the work-product doctrine at all, since almost any work-product document otherwise discoverable under Rule 26(b)(1) will have originated in "related" litigation. But to the extent that the "related" test is read any more narrowly than that, it threatens to cause the harm discussed in text. Hence, the test is either harmful or toothless.

products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an “unrelated” opponent against him and his client. Counsel for less litigious clients as well might have cause for concern in particular cases; fear of even one future “unrelated” but similar suit might instill an undesirable caution, and neither client nor counsel can always be entirely sure what might lie over the horizon. This is precisely the danger of “[i]nefficiency, unfairness[,] . . . sharp practices” and demoralization that Hickman warned against.²

[462 US 32]

I do not understand the Court's holding on this point to be limited to

2. See generally, e. g., *In re Murphy*, 560 F2d 326, 333-335 (CA8 1977); *United States v Leggett & Platt, Inc.*, 542 F2d 655, 659-660 (CA6 1976); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 509 F2d 730 (CA4 1974); *Duplan Corp. v Moulinage et Retorderie de Chavanoz*, 487 F2d 480 (CA4 1973).

The Court of Appeals reasoned that “[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute.” 217 US App DC 47, 50, 671 F2d, 553, 556 (1982) (footnote omitted). In my view, this mistakes by 180 degrees the significance of the qualified nature of the privilege. As another Court of Appeals has explained:

“Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery. . . .” *Leggett & Platt*, *supra*, at 660.

the FOIA context. The Court itself quite accurately characterizes its first holding as a “particular construction of Rule 26(b)(3).” *Ante*, at 26, 76 L Ed 2d, at 393. Indeed, it could hardly do otherwise, since the plain meaning of Exemption 5 is that the scope of the Exemption is coextensive with the scope of the discovery privileges it incorporates. “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v Sears, Roebuck & Co.*, 421 US 132, 149, 44 L Ed 2d 29, 95 S Ct 1504 (1975) (footnote omitted). See also *id.*, at 154-155, 44 L Ed 2d 29, 95 S Ct 1504; *Federal Open Market Committee v Merrill*, 443 US 340, 353, 61 L Ed 2d 587, 99 S Ct 2800 (1979); *Renegotiation Board v Grumman Aircraft Corp.*, 421 US 168, 184, 44 L Ed 2d 57, 95 S Ct 1491 (1975); *EPA v Mink*, 410 US 73, 85-86, 91, 35 L Ed 2d 119, 93 S Ct 827 (1973).³ Thus, nothing in either FOIA or our decisions construing it authorizes us to

Indeed, to the extent that the need for protection of work product does decrease after the end of a suit, that fact might in some cases lower the threshold for overcoming the work-product barrier. A party seeking discovery of work product must show that “he is unable without undue hardship to obtain the substantial equivalent of the materials by other means,” Rule 26(b)(3). What hardship is “undue” depends on both the alternative means available and the need for continuing protection from discovery. See 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, p 202 (1970).

3. But see *Federal Open Market Committee v Merrill*, 443 US, at 354, 61 L Ed 2d 587, 99 S Ct 2800: “[I]t is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery.” Of course, it is settled that the Exemption does incorporate the work-product doctrine. *NLRB v Sears, Roebuck & Co.*, 421 US, at 154-155, 44 L Ed 2d 29, 95 S Ct 1504.

define the coverage of the work-product doctrine under Exemption 5 differently from the definition of its coverage that would obtain under Rule 26(b)(3) in an ordinary lawsuit. If a document is work product under the Rule, and if it is an "inter-agency or intra-agency memorandum or letter" under the Exemption, it is absolutely exempt.⁴

[462 US 33]

II

Since the Court rejects the "related litigation" test under Rule 26(b)(3), and since that holding necessarily governs the application of the work-product doctrine under Exemption 5, it need go no further. The Court proceeds, however, to put forward a second holding directly under FOIA. It reasons that work product generated in connection with a prior, unrelated litigation would not be "routinely" available in subsequent litigation," ante, at 27, 76 L Ed 2d, at 394, because at the time of the Court of Appeals' decision in this case a majority of federal courts that had decided the

issue had rejected the "related litigation" test. Ante, at 26-27, 76 L Ed 2d, at 393-394. This holding apparently would preclude disclosure under FOIA even in a district or circuit where the precedents under Rule 26(b)(3) do incorporate the "related litigation" test, since the "majority view" does not depend on the location of the library in which one reads the cases.⁵ I grant that uniformity of statutory interpretation is a good thing as a general matter, but I cannot see taking it this far.

I confess that the source from which the Court draws its reasoning is a mystery to me. I know of no other statutory context in which the test of discoverability (or anything else) is not what the *correct* view of the law is, but what the *current* [462 US 34]

majority view is.⁶ Certainly the plain language of the statute is to the contrary; it directs a court to exempt material "which would not be available by law to a party . . . in litigation with the agency." 5 USC § 552(b)(5) [5 USCS § 552(b)(5)] (emphasis added). "By law" presumably means "by the law as correctly con-

4. We held in *Sears* that Exemption-5 does not apply to "final opinions" explaining agency actions already taken or agency decisions already made. *Id.*, at 150-154, 44 L Ed 2d 29, 95 S Ct 1504. The gist of our holding was that such documents are not within any privilege incorporated into Exemption 5—specifically, that they are not covered by the Government's executive privilege. *Ibid.* The same would be true of the work-product doctrine; it is difficult to imagine how a final decision could be "prepared in anticipation of litigation or for trial," Rule 26(b)(3). It is also questionable whether such decisions would constitute "inter-agency or intra-agency memorandums or letters," 5 USC § 552(b)(5) [5 USCS § 552(b)(5)].

5. Presumably, this principle would work in reverse as well. That is, if the settled law of a particular district under Rule 26(b)(3) were that a particular type of document (some sort

of investigative report, say) is within the work-product doctrine, but a majority of other courts disagreed, the district court entertaining a FOIA suit would be obliged to follow the majority view and grant disclosure, even though the same document would not be "routinely" disclosed in an ordinary lawsuit in that district.

6. One might posit a different sort of incorporation of case law—one in which the relevant law was that in existence in 1966, when FOIA was enacted. The Court wisely declines to adopt this reading. There is nothing in FOIA that indicates that it intended to "freeze" the law that existed in 1966; the phrase "available by law" certainly seems to refer to the law at any given time. Indeed, this reading would preclude recognition of subsequent changes in statutory law, such as the adoption of Rule 26(b)(3) in 1970.

strued by the court deciding the case at hand," not "by the law as construed (whether correctly or incorrectly) by a majority of other federal courts." The Court draws the words "routinely" and "normally" from *Sears*, supra, at 149, and n 16, 44 L Ed 2d 29, 95 S Ct 1504. But as a quick perusal of that case reveals, all we were saying there was that once a privilege is held to apply under Exemption 5, it applies absolutely, without regard to whether a party in ordinary discovery might be able to overcome the privilege by some showing of need (an understanding the Court itself embraces, ante, at 28, 76 L Ed 2d, at 395). Alternatively, the Court cites our statement in *Grumman Aircraft*, supra, at 184, 44 L Ed 2d 57, 95 S Ct 1491, that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Ante, at 26-27, 76 L Ed 2d, at 394 (emphasis by the Court). Again, however, the context of the quoted passage makes clear that it refers simply to the extent to which the correct state of the law with regard to a privilege may be embodied in cases interpreting a statute or erecting a nonstatu-

tory privilege. The scope of the work-product doctrine on a particular disputed point, for example, may be laid out in some binding precedent of the district court entertaining a given FOIA suit, of the court of appeals for that circuit, or of this Court. Absent a controlling [462 US 35]

precedent, of course, the district court would ordinarily look to the decisions of other courts to inform its own construction of Rule 26(b)(3). But nothing in Exemption 5, *Sears*, *Grumman Aircraft*, or anything else of which I am aware authorizes or directs that district court to do anything other than to determine what the legally correct interpretation of the doctrine is, and then to apply it—even if the interpretation it reaches is contrary to that of a majority of other courts. Under the Court's reading of the word "routinely," however, it appears that the district court would be obliged to adhere to the majority view even if there were unmistakable precedent in its circuit construing Rule 26(b)(3) to the contrary. I see no warrant for this astonishing principle. Hence, although I agree with the Court's construction of Rule 26(b)(3), I join only its judgment.

To: House + Senate members

DIVISION OF LEGAL SERVICES

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MEMORANDUM

March 14, 1991

SUBJECT: Disclosure of Exxon Valdez litigation documents
(W.O. 7LS0985)

TO: Representative Kay Brown

FROM: John B. Gaguine *JB*
Legislative Counsel

You have asked whether the governor may agree, as part of an Exxon Valdez settlement, to keep certain documents confidential that would otherwise be public under state law, especially resource damage assessments. I believe that a recent Alaska Supreme Court decision would prohibit the governor from doing this.

In Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), the court ruled that a public agency may not circumvent the public records statutes (AS 09.25.110 - 09.25.125) by agreeing to keep the terms of a lawsuit settlement agreement confidential. Despite the importance of the issue, the court dealt with it quite briefly, thus indicating (in my opinion) that the court found the answer quite clear:

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

Alaska's public records disclosure statutes apply to records maintained by municipalities. In general, they provide broad public access to municipal "books, records, papers, files, accounts, writings and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the

record should not be disclosed. Exceptions to the statutory disclosure requirements are narrowly construed. Doubtful cases are resolved by permitting public inspection.

We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Id. at 1192-93 (citations and footnotes omitted; emphasis in original).

I do not think that the "work product" exception to discovery has any relevance here, at least not after a settlement. That exception is intended to prevent a litigant from obtaining access during litigation to documents prepared by his or her adversary for the litigation. While it probably overrides the public records statutes as long as litigation is ongoing, the exception would seem to have no applicability once the litigation is over.

My thinking on the work product question is based in part on the legislature's enactment of AS 09.25.122 as part of the 1990 overhaul of the public records laws. That statute, which codifies the substance of 6 AAC 95.150 (a section of Governor Hammond's freedom-of-information regulations), provides:

Sec. 09.25.122. LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

Representative Kay Brown
March 14, 1991
Page 3

I read this statute as implying that when a person is not involved in litigation with the state, which is everyone after the litigation has been settled, the normal rules of disclosure, i.e., the public records laws, apply, and not the court rules. Since "work product" is a creature of the court rules, it would not apply after a settlement.

It also seems clear that the resource damage assessments would be subject to public disclosure under AS 09.25.110 - 09.25.125. The definition of public records in AS 09.25.220(6) is extremely broad:

(6) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.

I do not see how resource damages assessments would not fall under this definition.

I understand that the attorney general is concerned that some of the litigation-related material, if released, might be used in subsequent litigation against the state. I do not think that this matters. There is nothing in the public records law that provides an exception for records that might be detrimental to the state's interests.^{1/} If the state is already in litigation as a defendant, it might be able to withhold information from a plaintiff under AS 09.25.122 (assuming that the court decided that the "work product" was prepared for all litigation, and not just that where the state was a plaintiff). But if no litigation has yet been brought, I do not think that the state can avail itself of this protection. (Of course, since it is almost two years since the Exxon Valdez grounding, the statute of limitations for tort suits against the state arising from the grounding will likely run soon.)

If I may be of further assistance, please advise.

JBG:pl
91-155.plm

^{1/} In Anchorage School District the court rejected an argument that the settlement could be sealed because the Open Meetings Act, AS 44.62.310 - 44.62.312, allowed executive session for matters which would clearly have an adverse effect upon a government unit's finances. 779 P.2d at 1193 n.5. The court observed, "The people have not delegated to their representatives the power to decide what the public may or may not know."

NTSB

M E M O R A N D U M

TO: Special House Committee on
Exxon Valdez Settlement

FROM: Chip Thoma

DATE: April 16, 1991

RE: Federal Felony Charges proposed to be dropped
under settlement

Here is some background on helmsman KAGAN and violations of vessel manning standards aboard the Exxon Valdez, which eventually were the basis of federal grand jury indictments against Exxon.

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

In the Matter of the Investigation of the
Accident Involving the Grounding of the
Tankership EXXON VALDEZ in Prince William
Sound, Alaska, on March 24, 1989

:
:
: Docket No.
DCA 89 MM 040

**PROPOSED PROBABLE CAUSE, FINDINGS
AND RECOMMENDATIONS OF THE STATE OF ALASKA**

Comments with respect to this document should be addressed to:

Robert E. LeResche
Oil Spill Coordinator
STATE OF ALASKA
124 West 5th Street
Juneau, Alaska 99811
(907) 465-2062

July 17, 1989

an average knowledge of ship handling characteristics. In a somewhat later review (for the period December 11, 1987 through January 12, 1988), Cousins was rated by Hazelwood as having excellent navigational skills and only an average knowledge of ship handling characteristics. Id.

C. Robert M. Kagan - AB

Robert M. Kagan is 46 years old and has been employed by the Exxon Shipping Company for thirteen years. ESC produced nine "Employee Evaluation and Development" forms for Kagan, each covering one- to two-month periods from February 1986 through February 1989. The evaluation forms uniformly characterize Kagan as capable of satisfactorily performing more menial shipboard tasks (tank cleaning, painting), but as having difficulty in executing seaman-related jobs which call for a higher degree of technical knowledge. Kagan Service Records, Exh. 5D. Kagan consistently required a good deal of supervision. Kagan was reported as having a short attention span and tending to easily get bogged down in trivial matters, even to the point of compromising safety. The last evaluation of Kagan's performance (for the period January 20, 1989 through February 14, 1989) stated that even though Kagan was sailing as an AB, he needed to improve his overall performance and he "lacks the necessary skills to do the AB's job." This evaluation also noted that Kagan required too much supervision to be a productive crew member. Despite this negative evaluation, ESC permitted Kagan to continue to serve as an AB. Consequently, on March 24, Kagan was

on watch as helmsman while the EXXON VALDEZ was in the ice-laden and confined waters, even though Kagan was "nervous" at the prospect of being the helmsman in Prince William Sound. LeCain Tr. 775-776.

D. Maureen C. Jones - AB

Maureen Jones is 24 years old and has been employed by the Exxon Shipping Company since September 1987. She is a graduate of the Maine Maritime Academy. ESC produced eight evaluations of Jones which uniformly rate her as a capable and competent AB who generally exceeds the requirements of the position. Jones Service Records, Exh. 5E. From the evaluations provided, it appears Jones was an energetic member of the crew who was interested in advancing to Mate and higher. In her effort to achieve advancement, Jones was eager to take on overtime tasks. It appears that Jones' interest in a career at sea and in advancing to higher positions strongly influenced those officers who evaluated her.

Other EXXON VALDEZ officers possessed various licenses as set forth in Exhibit 2B. This Exhibit indicates that the Board investigators would be reviewing Coast Guard and Merchant Mariners' documents to assess the level of experience of the ABs. As of the date of this submission, the State has not received any such further NTSB analysis.

Alyeska did not perform its duties consistent with the plan on the morning of the grounding. This failure of performance was not the result of any weakness in the State approved plan. Mr. Kelso testified that, with the benefit of hindsight, no changes to the Contingency Plan would have rectified the mistakes made by Alyeska in its negligent performance under the plan. Kelso Tr. 1169.

VIII. VESSEL MANNING STANDARDS

A. Coast Guard Manning Level Statutes and Requirements

One of the significant issues raised by the grounding of the EXXON VALDEZ concerns the manning levels of tanker vessels. The EXXON VALDEZ had issued to it a U. S. Coast Guard Certificate of Inspection which required a minimum of fourteen officers and crew (fifteen if a radioman was required by FCC regulation),^{47/} excluding stewards. The EXXON VALDEZ was required to and did carry a radioman. In addition, two stewards and two oilers were on the journey from Valdez on March 23, 1989, for a crew of twenty.

Section 3309 of Title 46 of the United States Code requires the Coast Guard to issue tank vessels Certificates of Inspection, the terms and conditions of which must be observed by the ship operators. Among the limitations to be placed in the Certificate of Inspection are minimum manning levels. 46 U.S.C. § 8101-8105; 46 C.F.R. § 15.101-15.915. The Coast Guard regula-

^{47/} The FCC requires a licensed radioman when the vessel is over 300 gross tons.

tions do not specify, and the Coast Guard has not established, standards of manning levels for merchant ships. 46 C.F.R. § 15.501-525; § 15.801-915; Grady/Barton/Steen Interview, Exh. 10E, p. 1. According to the Coast Guard, the manning levels established for each ship are determined on a case-by-case basis. The "minimum crew level" specified in the Certificate of Inspection is defined by the Coast Guard as the crew complement that cannot be further reduced and still provide for the safe operation of the vessel. Id.

The specific job-by-job manning level guidelines are set forth in 46 C.F.R. § 15.801 et seq. A vessel the size and displacement of the EXXON VALDEZ is required to have one master, §15.805, three licensed mates, §15.810(a)(1) and a chief engineer, §15.820(a)(1). The Coast Guard determines the overall manning requirements by setting the number of assistant engineers and able seamen, based on (1) the size and type of vessel, (2) the installed equipment, (3) the proposed routes of operation, (4) the cargo carried, (5) the type of service of the vessel, (6) the degree of automation, (7) the use of labor saving devices, and (8) the organizational structure of the vessel. 46 C.F.R. § 15.501(b), § 15.825, § 15.840. Additionally, the FCC requires vessels over 300 gross tons, such as the EXXON VALDEZ, to have a licensed radio operator. 47 U.S.C. § 353, 47 C.F.R. 80.159(b).

Any deviation from the manning levels set forth in a vessel's Certificate of Inspection renders the vessel without legal authorization to operate. 46 U.S.C. § 8101(d), 46 C.F.R.

§ 15.515(a). To effect a change in the manning level, requests must be made by the master or agent of the vessel to the Coast Guard pursuant to 46 C.F.R. § 15.505, and such changes, once approved, must be endorsed on the Certificate of Inspection by the Coast Guard. 46 C.F.R. § 31.15-1(a).

B. Establishment of Manning Levels for
the EXXON VALDEZ

Exhibit 10G contains a series of correspondence and memoranda relating to the ESC request to the Coast Guard to reduce the manning levels for both the EXXON VALDEZ and its sister ship the EXXON LONG BEACH. The culmination of this correspondence is a copy of a USCG letter dated May 27, 1988, to Paul Myers of ESC, issuing amended Certificates of Inspection authorizing reduced manning levels and the operation of unattended engine rooms. Reduced Manning Correspondence, Exh. 10G, p. 21-22. The authorizing letter also approves Exxon's proposal to implement a Maintenance Department on both vessels. Although this Coast Guard approval is granted by letter dated May 27, 1988, the Certificate of Inspection for the EXXON VALDEZ reproduced in Exhibit 3A is dated November 18, 1988. It cannot be determined from the record what, if any other, manning level changes were made to the Certificates of Inspection in the period from May to November. The Certificates of Inspection set out in Exhibit 3A reflect the operation of a Maintenance Department, although, according to the Third Mate, the Maintenance Department had been disbanded for approximately one year prior to the grounding. Cousins Tr. 25. ESC's failure to adhere to its Cer-

tificate of Inspection is a violation of 46 U.S.C. § 3309.

The Coast Guard's approval of reduced manning levels for the EXXON VALDEZ was the product of bureaucratic misdirection. It appears from Exhibit 10G that the Coast Guard inadvertently issued to the EXXON VALDEZ a reduced manning Certificate of Inspection without first having properly completed the standard Coast Guard review process. The process requires approval of the local Coast Guard field office (Officer in Charge of Marine Inspection (OCMI)) and the Coast Guard Merchant Vessel Personnel Branch (MVP). Grady/Barton/Steen Interview, Exh. 10E, p. 2; Flyntz Tr. 1025. In the case of the EXXON VALDEZ, the MVP was never initially asked to review the decision of the OCMI to reduce the EXXON VALDEZ manning levels, which had been inadvertently authorized by the OCMI. Vessel Manning Correspondence, Exh. 10G, p. 13. Consequently, the Coast Guard, which was in the process of evaluating ESC's request to reduce the manning level of the EXXON LONG BEACH, advised Exxon that its determination on the EXXON LONG BEACH would control both vessels. Id. ESC apparently agreed with this approach and submitted additional documents supporting its request for reduced manning levels of the EXXON VALDEZ and EXXON LONG BEACH, Id., pp. 15-18. This additional data appeared to satisfy the Coast Guard, which ultimately issued amended Certificates of Inspection to both vessels. Id.

C. The Exxon Shipping Company Approach
to Manning Levels

The reduction in the manning levels of the EXXON VALDEZ is consistent with the policy of ESC to reduce manning on all its major vessels to minimum levels and to utilize its licensed and unlicensed crew in as flexible a manner as possible and as a cost savings device. Iarossi Tr. 892-894.

In a paper titled "Surrendering the Memories" dated June 1988, Mr. Iarossi stated that it is ESC's policy to reduce by the year 1990 its standard crew complement to sixteen on its fully automated diesel powered vessels (such as the EXXON VALDEZ), down from twenty in 1984.^{48/} While Iarossi notes that other ships, mostly foreign flag ships, have successfully operated at such low crew levels, the paper makes little mention of considerations of ship safety or crew fatigue. By focusing the crew manning debate solely on the issue of economics, ESC does a disservice to the public.

The lengths to which ESC has gone in pursuit of its economic goal of crew reduction are recorded in several other manning-related documents. These documents reflect the fact that Exxon pursued a demanning and crew flexibility strategy designed to maximize cost savings. It as well appears that the decisional criteria employed by the Coast Guard in analyzing demanning re-

^{48/} The State of Alaska requested this and other manning-related documents accompany the record in this investigation. See letter of Robert E. LeResche to L. A. Colucciello dated June 9, 1989, copies (with enclosures) of which were served on all parties.

quests does not include crew fatigue, except for a cursory analysis of crew overtime records. Grady/Barton/Steen Interview, Exh. 10E, p. 1.

ESC was apparently all too aware of the weight the Coast Guard placed on ship overtime levels. As a result, ESC, by internal direction, instructed its masters to manipulate overtime levels to reduce them to "zero" so as to better justify to the Coast Guard the elimination of all unlicensed crew from the Engine Department.

Three internal Exxon memoranda, all from S. W. McRobbie to various ESC ship masters, orders the masters to purposefully reduce overtime in order to satisfy Coast Guard overtime concerns. In one memo, McRobbie states:

When the Engine Department shifts to day work, it is imperative that Engine Department unlicensed overtime be essentially nonexistent. . . .

because:

. . .the UMS [unmanned engine room status] diesel ships have already had their initial demanning requests denied due to the volume of unlicensed engine room overtime, regardless of type.

ESC Memoranda from S. W. McRobbie, undated.

In another memo, McRobbie states:

Yet in order to establish the type of overtime pattern which will demonstrate to the U.S.C.G. that the vessel can be safely operated without the QMED ratings, you must strive to control the amount and type of overtime used by these routings.

ESC Memorandum from S. W. McRobbie to Captain/EXXON BAYTOWN, October 25, 1988. In yet another memo, McRobbie states:

Whereas your vessel is earmarked for. . . UMS approvals. . . and QMED demanning when the UMS is achieved, we need to immediately begin closely allocating and managing all Engine Department overtime.

The goal is to closely control all operational overtime and extra manpower which will have a direct bearing on how the Coast Guard will assess manpower requirements for safely operating as a UMS vessel.

This heavy-handed attempt to manipulate the facts regarding manning levels is indicative of ESC's cavalier approach to manning levels.

ESC's deliberate manipulation of overtime records for the purpose of gaining Coast Guard approval has fortunately been counteracted. According to the senior staff of the Coast Guard Office of Vessel Manning, it has gone to the extraordinary lengths of requiring ESC masters and chief engineers to warrant to the Coast Guard that overtime records submitted as demanning justification are, in fact, "representative" of normal overtime activity and not an artificially low level as ordered by management. Grady/Barton/Steen Interview, Exh. 10E, p. 4. The NTSB should recommend that the Coast Guard review any decisions authorizing lower manning levels or unmanned engine room status to insure the data supplied by ESC was not manipulated solely to gain Coast Guard approval of its cost-savings requests.

Other serious allegations have recently been pressed by Exxon's Seamen's Union regarding both Exxon demanning strategies and Coast Guard approval procedures as reflected in Union documents which Alaska by its letter dated June 7, 1989 requested accompany the record. While Alaska has no desire to inject it-

self or the Board into any industrial dispute, the Union's letter dated March 7, 1989, raises issues the NTSB has wisely agreed to address in the interest of safe shipping.

The NTSB Interviews of John Hillman and John Spencer, two of the six members of the Board of Governors of the Exxon's Seamans Union, raise a host of manning and safety issues. For example, Hillman makes a strong case that Exxon manipulated overtime records solely to justify the ESC's demanning requests. Hillman Tr. 14-19. Hillman and Spencer also explain that, by making officers part of management, Exxon has made officer overtime impossible to document, and that work previously performed by unlicensed personnel (often on overtime) is now being accomplished by officers with no overtime being recorded. Hillman Tr. 12-13; Spencer Tr. 10. Hillman notes also that, in addition to the almost daily overtime Exxon's crews are asked to work, ESC has extended their tour of duty from 60 days to 90 and 100 days, thereby further exacerbating the crew fatigue factor. Hillman Tr. 22,39. Hillman testified that ESC has refused to come to terms with the Union because of its insistence that the Union agree to demanning levels the Union believes are inherently unsafe. Hillman Tr. 40-41. Hillman also raised a new issue involving a recent change in ESC procedure, which requires that while in port or during lightering operations a minimum crew of eight--four officers and four unlicensed (two of which must be ABs)--must remain onboard the vessel in case of emergency. With a reduced compliment of AB's, an given routine watch standing

requirements, this new ESC directive requires the AB's be on board or on watch, thereby further compounding the crew fatigue factor. Hillman suggests, with considerable logic, that this new directive is indicative of the need for increased manning levels. Hillman Tr. 48-49.

Alaska believes it to be in the public interest and the national interest that the U. S. tanker fleet be properly crewed and that manning levels not be based solely on owner/operator cost or competitive considerations, as Exxon approaches the issue.

D. The Relationship Between Manning Levels and Safety

The question of crew manning level is not just an economic issue. It is obviously inextricably interrelated with the core concept of shipping safety. If manning levels are pushed to unreasonably low levels, then crew workloads increase, as does crew fatigue. Inattentive or exhausted crew members do not work at peak efficiency. The Coast Guard, recognizing this fact, has underwritten a study of safety and its relationship to reduced manning levels. The Study is titled "Shipboard Crew, Fatigue, Safety and Reduced Manning." Grady/Barton/Steen Interview, Exh. 10E, p. 4. The interview summary stated that the findings of this and another study titled "Effect of Smaller Crews on Maritime Safety" will be incorporated in the Coast Guard reduced manning decision process "in the future." *Id.* In other words, at least up until now, the decisional criteria used by the Coast Guard to approve reduced manning requests placed more emphasis on

the availability of automation and labor-saving devices (46 CFR § 15.501(b); § 15.825 and § 15.840) than on basic safety considerations.

E. Crew Duty Time Limitations

Although they appear to be mainly honored by ESC in the breach, the Congress has established limits on the time officers and crew can continuously be on duty or at work. As these rules relate to the EXXON VALDEZ, they provide that:

- (A) An owner, operator or master may not permit an officer to take charge of the deck watch on a vessel when leaving or immediately after leaving port if the officer has not been off duty for at least six hours within twelve hours immediately before the time of leaving.
- (B) A licensed individual or a seaman may not be required to work more than eight hours in one day except when needed for
 - (1) maneuvering, shifting the berth of, mooring or unmooring the vessel;
 - (2) performing work necessary for the safety of the vessel, its crew or cargo;
 - (3) saving life on board another vessel in jeopardy;
 - (4) performing fire, lifeboat, or other drills in port or at sea

Captain Deppe was asked how ESC insured adherence to the law requiring at least six hours of rest for watch officers within the twelve hours prior to getting underway. Incredibly he responded that "We [ESC] don't have any program to give six hours of rest to any deck officer before we get underway." Deppe Tr. 1096. Yet, Mr. Flyntz, Assistant Chief of Merchant Vessel Personnel for the Coast Guard, testified that the Coast Guard relies

on the statutory rest provision to insure that crews are not fatigued prior to the vessel getting underway. Flyntz Tr. 1066. There is no evidence in the record concerning the systems or programs Exxon has in place regarding the other statutory crew duty limits. It is difficult for the State to understand how ESC can dispatch its tanker fleet with so little regard for the law or for the alertness and readiness of its crews.

The crew of the EXXON VALDEZ who were interviewed during the field investigation or questioned at the hearing regarding their work schedules provide some insight into the ineffectiveness of Exxon's management of the crew duty time statutes. Appendix D is Alaska's reconstruction of the length of time the critical deck crew were at work or at rest during the 24-hour period prior to the grounding. This analysis reveals that Cousins had only three and a half hours rest in the twelve hours prior to departing Valdez in contravention of 46 U.S.C. § 8104(a). Cousins may also have had less rest than he testified to at the hearing. Accordingly to John Spencer, Cousins was observed by one of the EXXON VALDEZ pumpmen as having "pounded the deck" all afternoon on March 23 thereby contradicting Cousins' claim that he was resting in his quarters from 1330 to 1700. Spencer Tr. 7-10. Of the other crew members, Kagan, the 0000-0400 helmsman, worked ten and a half hours on March 23. Jones, the 0000-0400 lookout, put in an over eleven-hour day of work on March 23 and Chief Mate Kunkel worked nine hours and forty-five minutes on March 23 before turning in at 2200.

Unfortunately, the record does not permit Alaska to determine the work schedule of the crew prior to the arrival in Valdez. However, from the information available to the State, it appears that Exxon paid little, if any, attention to the issue of crew fatigue and alertness, all to the detriment of the citizens of the State of Alaska.

F. ESC Proposed Revisions to Federal Law
Regulating Minimum Manning Levels

ESC has been in the forefront of an effort to amend various crew-manning level statutes, which, if adopted, would authorize reduced manning levels and loosen crew scheduling rules. On January 20, 1988, Frank Iarossi co-signed and circulated a paper containing proposed major modifications to the statutes controlling vessel manning requirements.^{49/} Among the proposals was the repeal of Congressionally imposed rules limiting

- (a) crossover between deck and maintenance departments
- (b) licensing of dual purpose officers
- (c) officer rest periods prior to departure from port.

In addition, Iarossi suggested the repeal of all requirements for a minimum number of licensed officers based on the vessel's gross tonnage.

The justification offered for these changes in manning was the need for improved efficiency and to insure that ESC is

^{49/} This document is within the package of documents the State by its letter dated June 9, 1989 requested the NTSB include in the record and permit the parties to refer to in their respective submissions.

competitive with foreign flag vessels. No recognition is given in this paper to safety concerns or to the link between safety and crew size. This ESC cosponsored document is consistent with the Company's several attempts to reduce shipboard manning levels in the name of competition, even though ECS's tankers in the Valdez trade are statutorily protected from foreign flag competition. 46 U.S.C. § 883.^{50/} ESC's advocacy for these statutory changes is consistent with its apparent disregard for the consequences of a catastrophic event such as the grounding of a heavily laden tanker vessel.

IX. THE UNITED STATES COAST GUARD VESSEL TRAFFIC SERVICE

The Vessel Traffic Service (VTS), operated by the U. S. Coast Guard, is a vessel movement system established by the Ports and Waterways Safety Act of 1972. 33 U.S.C. §§ 1221-1236. The Trans-Alaska Pipeline Authorization Act 43, U.S.C. § 1651-1655, amended the Ports and Waterways Safety Act to require the Coast Guard to establish and operate a vessel traffic service in Prince William Sound. The requirement for such a system was created by the need to move North Slope crude oil from Valdez to the lower 48 states by tank vessels transporting on an average daily basis 2 million barrels (84,000,000 gallons) of crude oil through ecologically sensitive Prince William Sound. The Congress wisely wished to insure that the movement of such large quantities of oil would be safely conducted. VTS Factual Report, Exh 2C, p. 3.

^{50/} Pursuant to Jones Act exemptions, a small number of foreign flag vessels, averaging one per week, call on Valdez. McCall Tr. 1291.

FEDERAL REGISTER

federal register

**Tuesday
March 19, 1991**

Part III

Department of Commerce

**National Oceanic and Atmospheric
Administration**

**Settlement Agreement Concerning Exxon
Valdez Oil Spill and Memorandum of
Agreement Between the United States
and the State of Alaska and Exxon
Corp., et al.; Notice of 30 Day Comment
Period**

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Settlement Agreement Concerning the Exxon Valdez Oil Spill Between the United States, the State of Alaska and the Exxon Corp., Exxon Shipping Co. and Exxon Pipeline Co.

AGENCIES: National Oceanic and Atmospheric Administration, Department of Agriculture, Department of the Interior, Department of Justice, Department of Transportation, the Environmental Protection Agency and the Department of Law, State of Alaska.

ACTION: Notice of 30 day comment period.

SUMMARY: Notice is given that officials representing the State of Alaska and the United States reached agreement on March 12, 1991, with Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company (Exxon) on a settlement resolving all civil claims of the respective governments arising from the March 24, 1989 Exxon Valdez oil spill. Comment is sought concerning the proposed civil settlement, which is published together with this Notice. Comments must be received no later than April 18, 1991.

ADDRESSES: Written comments concerning the proposed Settlement Agreement are to be submitted to Thomas A. Campbell, General Counsel of NOAA, U.S. Department of Commerce, room 5816, 14th Street and Constitution Avenue, NW., Washington, DC, 20230, who is receiving comments on behalf of the Administrator of NOAA, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Transportation, the Administrator of the Environmental Protection Agency and the United States Attorney General. A copy of the comments must also be sent to Barbara Herman, Attorney General's Office, State of Alaska, 1031 West 4th Avenue, suite 200, Anchorage, Alaska 99501, who is receiving the comments on behalf of the State of Alaska.

FOR FURTHER INFORMATION CONTACT: Daniel Addison, Office of General Counsel, NOAA, Department of Commerce, Washington, DC 20230, telephone (202) 377-1400.

SUPPLEMENTARY INFORMATION: The grounding on the night of March 23-24, 1989 of the tanker Exxon Valdez resulted in the discharge of approximately 11 million gallons of North Slope crude oil into Alaska's Prince William Sound. The Exxon Valdez Oil Spill affected the

environment and natural resources in the Sound and along the coasts of Kodiak Island, Lower Cook Inlet, the Kenai Peninsula and the Alaska Peninsula.

The State of Alaska has filed an action, *State of Alaska v. Exxon Corporation, et al.*, Civil No. 3AN-89-6852, and Exxon has asserted counterclaims against the State. The U.S. Government filed a civil claim against Exxon on March 13, 1991 and at the same time, together with the state, lodged an Agreement and Consent Decree resolving both the U.S. and Alaska civil claims. This agreement represents the largest natural resource damage settlement in U.S. history and is designed to provide for the restoration of the natural resources affected by the spill. The Agreement also addresses full recovery of past and necessary future costs incurred by the State of Alaska and the United States to complete the clean-up activities and to determine the breadth of injury, loss or destruction of natural resources. When completed, the restoration of areas affected by the spill will be the largest commitment of resources to restore the environment in U.S. history.

The Settlement Agreement provides that \$900 million will be paid to the United States and the State over an 11 year period. These funds will be used to design, implement and monitor restoration activities; to continue the necessary scientific studies deemed necessary to determine the full extent of natural resource injury, loss or destruction due to the spill; to conduct any further cleanup activities deemed necessary by the United States Coast Guard or by the State; and to recover past costs incurred during the natural resource damage assessment process. To address the possibility of currently unknown injuries to the environment, the Settlement Agreement also contains a reopener clause committing Exxon to pay up to an additional \$100 million for restoration projects for natural resources and habitats that are later discovered to be injured as a result of the spill.

A separate Memorandum of Agreement (MOA) between Alaska and the Federal Government was also executed at the same time. The MOA will govern the relationship between the governments in administering the fund created with this settlement. This MOA also provides that the public will be given meaningful opportunities to participate in the restoration process. This State/Federal MOA will be published in a separate Federal Register notice.

Comment is sought from the public concerning the proposed Settlement Agreement. The Agreement provides that the governments can withdraw from the Settlement Agreement within 15 days of the close of the comment period if the comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate, or if, before the end of the 15th day following the close of the comment period, the Alaska State Legislature has not approved the Agreement as written.

Dated: March 14, 1991.
Grayson R. Cecil,

Special Counsel for Natural Resources.

Proposed Consent Decree and Settlement Agreement

Richard B. Stewart, Assistant Attorney General, Environment & Natural Resources Division.

Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, DC 20530—Attorneys for Plaintiff, United States of America.

Charles E. Cole, Attorney General, State of Alaska, Pouch K, Juneau, Alaska 99811—Attorney for Plaintiff, State of Alaska.

United States District Court, District of Alaska

United States of America, Plaintiff, v. Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company, in personam, and the T/V Exxon Valdez, in rem, Defendants. Civil Action No.

The State of Alaska, Plaintiff, v. Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company, in personam, and the T/V Exxon Valdez, in rem, Defendants. Civil Action No.

Agreement and Consent Decree

This agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V Exxon Valdez, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

Introduction

On the night of March 23-24, 1989, the T/V Exxon Valdez, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation

spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as *State of Alaska v. Exxon Corporation, et al.*, Civil No. 3AN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On or before the lodging of this Agreement with the Court, the United States and the State will each have filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted or will assert counterclaims against the United States and the State in their responses to the Federal Court Complaints. Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command—Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under section 311(f) of the Clean Water Act, 33 U.S.C. 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the Federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

Now, Therefore, The Parties agree, and it is hereby Ordered, adjudged, and decreed As follows:

Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities, 28 U.S.C. 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. 1321(f).

This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V Exxon Valdez, Official Number 682906 (now the T/V Exxon Mediterranean).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) *Alyeska* means Alyeska Pipeline Service Company, a Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) *The TAPL Fund* means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) *Natural Resources* means land, fish, wildlife, biota, etc. water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 et seq.) and/or the State.

(d) *Natural Resources Damages* means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1601, et seq., or any federal or state statute or maritime or common law relating to the

environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) *Party or Parties* means Exxon, Exxon Pipeline, the United States, and the state, or any of them.

(f) *Trustees* means the Secretaries of the U.S. Departments of Agriculture and Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Alaska Attorney General.

(g) *The Oil Spill* means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) *Effective Date* shall mean the earliest date on which all Parties have signed this Agreement.

(i) *Final Approval* shall mean the earliest date on which all of the following have occurred: (1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired; (3) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where "X" equals Exxon's expenditures for work done from January 1, 1991 to the Effective Date, in preparation for and conduct of clean-up of the Oil Spill in accordance with directions of the Federal On-Scene Coordinator, up to a maximum of \$4,000,000, plus Expenditures made by Exxon for clean-up work after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993 \$100,000,000
 September 1, 1994 \$70,000,000
 September 1, 1995 \$70,000,000
 September 1, 1996 \$70,000,000
 September 1, 1997 \$70,000,000
 September 1, 1998 \$70,000,000
 September 1, 1999 \$70,000,000
 September 1, 2000 \$70,000,000
 September 1, 2001 \$70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent"). The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal

to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) The United States or the State withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of

them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential

conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraphs 37 or 38 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) If total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both—

(1) That based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) That a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above; or

(b) If total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against which Exxon is

seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided, however, that nothing in this Agreement shall affect or impair the following:

(a) Claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) The rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages;

(c) The rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

(d) Claims by the State for tax revenues which would have been or would be collected under existing AS 43.75 (Fisheries Business Tax) but for the Oil Spill, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the

judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the

State, in the State Court Action will be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this paragraph.

Reopener For Unknown Injury

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

(a) The cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and

(b) The injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Release and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based on or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either

of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline by the TAPL Fund, Exxon agrees to indemnify and hold the Governments harmless from any liability that they have to the TAPL Fund based on such claims. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Alyeska by the TAPL Fund, Exxon agrees to indemnify the Governments for 20.34% of any such liability that either Government has to the TAPL Fund based on such claims.

Provisions Pertaining to Alyeska

22. Effective upon Final Approval, the Governments release and covenant not to use Alyeska with respect to all claims for Natural Resource Damages and with respect to all other claims for damages for injury to Natural Resources, whether asserted or not, that either may have against Alyeska relating to or arising from the Oil Spill. If Alyeska asserts claims against the Governments, or either of them, that are based upon third party contribution or subrogation rights, or any other theory of recovery over against the Governments, or either of them, arising from any liability of or settlement payment by Alyeska to Exxon or Exxon Pipeline for any claims, including without limitation Natural Resource Damages and cleanup costs, relating to or arising from the Oil Spill, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to Alyeska based on such claims.

23. In order to resolve as completely as practicable all civil claims of the Governments arising from the Oil Spill

against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

Third Party Litigation

26. If any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the Sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party.

However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or thereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the

Governments for interest on the overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. 3717(a) (1) & (2). Interest on an overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. Attn: DOJ #90-5-1-1-3343.
Chief, Admiralty and Aviation Branch, Civil Division, U.S. Department of Justice, 601 D Street, NW., Washington, DC 20530.
General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, 14th & Constitution Avenue, NW., Washington, DC 20230.

As to the State of Alaska:

Attorney General, State of Alaska, Pouch K, Juneau, Alaska 99811.
Supervising Attorney, Oil Spill Litigation Section, Department of Law, 1031 W. Fourth Street, Suite 200, Anchorage, Alaska 99501.

As to Exxon:

Office of the Secretary, Exxon Corporation, 225 E. John W. Carpenter Fwy, Irving, Texas 75062-2298.
General Counsel, Exxon Corporation, 225 E. John W. Carpenter Fwy, Irving, Texas 75062-2298.
Mr. A. Elmer, President, Exxon Shipping Company, P.O. Box 1512, Houston, Texas 77251-1512.

As to Exxon Pipeline:

Mr. D. G. Warner, President, Exxon Pipeline Company, P.O. Box 2220, Houston, Texas 77252-2220.

Process for Entry of Agreement

37. Notice of this Agreement shall be published in the *Federal Register*, and the Agreement shall be subject to public comment for a period of thirty (30) days after such publication. Each Government reserves the right to withdraw its consent to the Agreement, within fifteen (15) days following the close of the public comment period, if comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate or if, before the end of that 15 day period, the Alaska State Legislature has not approved the Agreement as written. If the United States or the State withdraws its consent to the Agreement in accordance with this Paragraph, the Agreement shall be deemed terminated as of the date of the notice of withdrawal of consent.

38. Any Party may elect to terminate this Agreement if: (1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in *United States v. Exxon Shipping Co.*, No. A90-015 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the

preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile, or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph and Paragraph 37, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

Retention of Jurisdiction

39. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

Miscellaneous

40. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

41. Each undersigned representative of the Parties to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

The foregoing Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby approved and entered this ____ day of _____, 1991.

Honorable H. Russel Holland,
United States District Judge, District of Alaska.

[FR Doc. 91-6814 Filed 3-15-91; 1:17 pm]
BILLING CODE 3510-12-01

DEPARTMENT OF COMMERCE

Memorandum of Agreement Between the United States and the State of Alaska Concerning the Exxon Valdez Oil Spill

AGENCIES: National Oceanic and Atmospheric Administration, Department of Agriculture, Department of the Interior, the Environmental

Protection Agency and the Department of Law, State of Alaska.

ACTION: Notice of 30 day comment period.

SUMMARY: Notice is given that officials representing the State of Alaska, the United States and Exxon Corporation have reached agreement on a settlement resolving all civil and criminal claims of the respective governments arising from the March 24, 1989 Exxon Valdez oil spill. In addition the United States and the State of Alaska have entered into a Memorandum of Agreement (MOA) implementing certain terms of the settlement agreement. Comment is sought concerning the MOA, which is published together with this Notice. Comments must be received no later than [April 18, 1991.]

ADDRESSES: Written comments concerning the proposed Settlement Agreement are to be submitted to Thomas A. Campbell, General Counsel of NOAA, U.S. Department of Commerce, room 5816, 14th Street and Constitution Avenue, NW., Washington, DC 20230, who is receiving comments on behalf of the Administrator of NOAA, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Transportation, the Administrator of the Environmental Protection Agency and the United States Attorney General. A copy of the comments must also be sent to Barbara Herman, Attorney General's Office, State of Alaska, 1031 West 4th Avenue, suite 200, Anchorage, Alaska 99501, who is receiving the comments on behalf of the State of Alaska.

FOR FURTHER INFORMATION CONTACT: Daniel Addison, Office of General Counsel, NOAA, Department of Commerce, Washington, DC 20230, telephone (202) 377-1400.

SUPPLEMENTARY INFORMATION: The March 23-24, 1989, grounding of the tanker Exxon Valdez resulted in the discharge of approximately 11 million gallons of North Slope crude oil into Alaska's Prince William Sound. The Exxon Valdez Oil Spill affected the environment and natural resources in the Sound and along the coasts of Kodiak, Kenai Peninsula and the Alaska Peninsula.

As indicated in a separate FR notice, representatives of the State of Alaska, United States and Exxon Corporation have entered into a settlement agreement resolving all civil claims between the parties. The settlement provided for Exxon to provide funds to be used to conduct response actions, scientific studies and implement restoration activities for the restoration

of the environment. This proposed MOA resolves claims of the State of Alaska and the United States concerning natural resource recoveries regarding the oil spill and outlines how certain terms of the Settlement Agreement will be implemented by the State of Alaska and the United States. This MOA also provides that the public will be given meaningful opportunities to participate in the restoration process. Public comment is invited regarding the nature and extent of appropriate public involvement in the restoration process.

In summary, the MOA establishes that all monies received through the proposed Settlement Agreement and Consent Decree will be managed jointly by Federal and State natural resource trustees except for certain allowed expenses identified in the MOA. The Federal and State natural resource trustees shall act as cotrustees of the affected environment. As such, all decisions concerning the use of damage recoveries will be made by unanimous agreement of the State and Federal natural resource trustees.

The MOA is not intended to affect or impair the rights and obligations of persons or entities not parties to the MOA.

Dated: March 14, 1991.

Grayson R. Cecil

Proposed MOA Between State of Alaska and the United States

Richard B. Stewart, Assistant Attorney General, Environment & Natural Resources, Division.

Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, DC 20530.

Attorneys for Plaintiff United States of America

Charles E. Cole, Attorney General, State of Alaska, Pouch K, State Capitol, Juneau, Alaska 99801.

Attorney for Plaintiff State of Alaska

United States District Court District of Alaska

United States of America, Plaintiff v. State of Alaska, Defendant.

Civil Action No.

The State of Alaska, Plaintiff v. United States of America, Defendant.

Civil Action No.

Memorandum of Agreement and Consent Decree

This Memorandum of Agreement and Consent Decree (the MOA) is made and entered into by the United States of America (United States) and the State of

Alaska (State) (collectively referred to as the Governments).

Introduction

Whereas, Section 311 of the Clean Water Act, 33 U.S.C. 1321, establishes liability to the United States and to States for injury, loss or destruction to natural resources resulting from the discharge of oil or the release of hazardous substances or both;

Whereas, The United States and the State are trustees and/or co-trustees for natural resources injured, lost or destroyed as a result of the Exxon Valdez Oil Spill;

Whereas, Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607, the National Contingency Plan, 40 CFR 300.615(a), and the Natural Resource Damage Assessment Regulations, 43 CFR 11.32(a)(1)(ii), provide a framework for and encourage the state and federal trustees to cooperate with each other in carrying out their responsibilities for natural resources;

Whereas, The Secretaries of the United States Departments of the Interior and Agriculture and the Administrator of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce, have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. 1321, and CERCLA, 42 U.S.C. 9607, and otherwise have statutory responsibilities related to the natural resources injured, lost or destroyed as a result of the Oil Spill, and the United States Environmental Protection Agency (EPA) has been designated by the President of the United States to coordinate restoration activities on behalf of the United States;

Whereas, The Commissioners of the State Departments of Fish and Game and Environmental Conservation and the Attorney General of the State of Alaska have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. 1321, and CERCLA, 42 U.S.C. 9607, and otherwise have statutory responsibilities relating to the natural resources injured, lost or destroyed as a result of the Oil Spill;

Whereas, The United States Coast Guard, an agency of the United States Department of Transportation, is the pre-designated Federal On-Scene Coordinator (FOSC) to direct response efforts and to coordinate all other efforts at the scene of the Oil Spill, pursuant to the Clean Water Act, 33 U.S.C. 1321, and the National Contingency Plan, 40 CFR 300, and is coordinating its efforts with the Federal Trustees in accordance with the National Contingency Plan;

Whereas, The State Department of Environmental Conservation is the State On-Scene Coordinator (SOSC) to direct containment and cleanup of discharged oil pursuant to AS 46.04.020;

Whereas, The United States Department of Justice (Justice) and the Department of Law for the State of Alaska (Law) have constitutional and statutory responsibilities for litigation management and specifically for prosecuting claims for damages for injury, loss or destruction to the natural resources affected by the Oil Spill;

Whereas, All of the above state and federal entities have determined that it is in furtherance of their statutory and trust responsibilities to assure that all injuries, loss or destruction to state and federal natural resources are fully compensated and to assure that such compensation is used in accordance with law;

Whereas, The United States and the State have entered into an Agreement and Consent Decree ("Agreement and Consent Decree") with Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company (collectively referred to as Exxon) which provides for the recovery of compensation for damages resulting from the Oil Spill, including natural resource damages;

Whereas, The United States and the State have claims against one another with respect to their respective shares in recoveries from Exxon for compensation for damages resulting from the Oil Spill, including natural resource damages, and have determined that entering into this MOA is the most effective means of resolving those claims and will best allow them to fulfill their duties as Trustees;

Whereas, On or before the lodging of this MOA with the Court, the United States and the State will each have filed a complaint in this Court against the other Government asserting civil claims relating to their respective shares in recoveries from Exxon for compensation for damages arising from the Oil Spill (Governments' Complaints);

Whereas, All of these state and federal entities have determined that the procedures set forth in this Memorandum of Agreement (MOA) will best enable them to fulfill their duties as trustees to assess injuries and to restore, replace, rehabilitate, enhance or otherwise acquire the equivalent of the natural resources injured, lost or destroyed as a result of the Oil Spill;

Now Therefore, In consideration of their mutual promises, the United States, acting through the United States Departments of the Interior, Agriculture, Transportation, and Justice, NOAA, and

EPA, and the State of Alaska, acting through the State Departments of Fish and Game, Environmental Conservation, and Law (together "the Governments") have agreed to the following terms and conditions, which shall be binding on both Governments, it is hereby *Ordered, Adjudged, and Decreed* as follows:

I.—Jurisdiction

The Court has jurisdiction over the subject matter of the claims set forth in the Governments' Complaints and over the parties of this MOA pursuant to, among other authorities, 28 U.S.C. 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. 1321(f).

II.—Definitions

For purposes of this MOA,

A. *Allowed Expenses* means reasonable, unreimbursed costs obligated on or before the effective date of the Agreement and Consent Decree for the planning, conduct, evaluation and coordination of natural resource damage assessment and restoration pursued by the Governments with respect to the Oil Spill or by the State for experts and counsel in connection with the preparation of the Oil Spill Litigation and the unreimbursed response and cleanup costs incurred by the Governments on or before December 31, 1990.

B. *CERCLA* means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* as amended.

C. *Clean Water Act* means Federal Water Pollution Control Act, 33 U.S.C. 1251-1376, as amended.

D. *Joint use* means use of natural resource damage recoveries by the Governments in such a manner as is agreed upon by the Governments in accordance with Article V of this MOA.

E. *National Contingency Plan* means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR part 300.

F. *Natural resources* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976) and/or the State.

G. *Natural resource damage recovery* means those monies paid to the Governments by Exxon which are received in settlement of natural resource damage claims arising from the Oil Spill and consists of the settlement

monies not reimbursed to the Governments either as (1) allowed expenses or (2) in the case of response and cleanup costs, those unreimbursed costs incurred by either Government after December 31, 1990 and certified by the FOSC with respect to the FOSC directed costs and by the SOSC with respect to SOSC directed costs. The term includes all interest accrued on any such recoveries.

H. *Oil Spill* means the grounding of the T/V Exxon Valdez on Bligh Reef in Prince William Sound, Alaska on the night of March 23-24, 1989 and the resulting oil spill.

I. *Oil Spill Litigation* means any past, present or future civil judicial or administrative proceeding by the Governments against Exxon or by Exxon against the Governments relating to or arising out of the Oil Spill.

J. *Restore or Restoration* means any action, in addition to response and cleanup activities required or authorized by state or federal law, which endeavors to restore to their pre-spill condition any natural resource injured, lost, or destroyed as a result of the Oil Spill and the services provided by that resource or which replaces or substitutes for the injured, lost or destroyed resource and affected services. Restoration includes, injury assessment, restoration, replacement and enhancement of resources and acquisition of equivalent resources and services.

K. *Settlement monies* means all monies received from Exxon under the Agreement and Consent Decree between the Governments and Exxon in settlement of the Oil Spill Litigation, exclusive of amounts credited to Exxon for cleanup costs incurred after December 31, 1990.

L. *Trustees* means the officials now or hereafter designated by the President of the United States and the Governor of the State of Alaska to act as trustees, for purposes of CERCLA and the Clean Water Act, of natural resources injured, lost or destroyed as a result of the Oil Spill.

III.—Co-Trusteeship

A. The Governments shall act as co-trustees in the collection and joint use of all natural resource damage recoveries from Exxon for the benefit of natural resources injured, lost or destroyed as a result of the Oil Spill.

B. Nothing in this MOA shall be deemed an admission of law or fact by either Government concerning ownership, right, title, or interest in or management or control authority over natural resources or the right to recover for injury to such resources. Except in

matters concerning or relating to enforcement of this MOA and the settlement of the Oil Spill Litigation, the Governments agree that this MOA may not be used by one Government against the other for any reason.

C. Nothing in this MOA shall be construed to affect or impair in any manner the rights and obligations, if any, of any entities or persons not parties to this MOA, including without limitation:

1. The rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources affected by the Oil Spill and expending any proceeds derived therefrom;

2. The rights and obligations, if any, of legal entities or persons other than the United States and the State who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

3. The rights and obligations, if any, of the United States or the State or both relating to such Alaska Native villages and the entities or persons referred to in subparagraph 2 above.

IV.—Organization

A. General Provisions

1. All decisions relating to injury assessment, restoration activities, or other use of the natural resource damage recoveries obtained by the Governments, including all decisions regarding the planning, evaluation, and allocation of available funds, the planning, evaluation, and conduct of injury assessments, the planning, evaluation and conduct of restoration activities, and the coordination thereof, shall be made by the unanimous agreement of the Trustees. Such decisions, on the part of the Federal Trustees, shall be made in consultation with EPA.

2. The Governments shall cooperate in good faith to establish a joint trust fund for purposes of receiving, depositing, holding, disbursing and managing all natural resource damage recoveries obtained or received by the Governments in connection with settlement of the Oil Spill Litigation in accordance with paragraph V.A. The joint trust fund shall be established in the Registry of the United States District Court for the District of Alaska or as otherwise determined by stipulation of the Governments and order of the court.

3. If the Trustees cannot reach unanimous agreement on a decision pursuant to paragraph A.1. of this Article, and either Government so

certifies, either Government may resort to litigation in the United States District Court for the District of Alaska with respect to any such matter or dispute. At any time, the Governments may, by mutual agreement, submit any such matter or dispute to non-binding mediation or other means of conflict resolution.

4. 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 to advise the Trustees with respect to the matters described in paragraph IV.A.1.

5. The Trustees shall agree to an organizational structure for decisionmaking under this MOA within 90 days from the date the Agreement and Consent Decree has been approved and entered as a judgment of the Court.

B. Injury Assessment and Restoration Process

1. Nothing in this MOA limits or affects the right of each Government unilaterally to perform any natural resource injury assessment or restoration activity, in addition to the cooperative injury assessment and restoration process contemplated in this MOA, from funds other than natural resource damage recoveries as defined in paragraph G of Article II.

2. Nothing in this MOA constitutes an election on the part of either Government to adhere to or be bound by the Natural Resource Damage Assessment Regulations codified at 43 CFR Part 11.

3. Nothing in this MOA shall prevent the President of the United States or the Governor of the State of Alaska from designating, pursuant to applicable law, an official or officials to exercise any or all rights or obligations of their respective Governments under this MOA. Neither Government shall object to any designation of such officials, or to any transfer of Trustee status from one official to another, by the other Government; provided that, in no event shall either Government designate more than three Trustees for the purposes of carrying out the provisions of this MOA. The designation of such officials or of successor Trustees by either Government shall not affect the enforceability of this MOA.

C. Role of the Environmental Protection Agency

The Governments acknowledge that the President has assigned to EPA the role of advising the Federal Trustees and coordinating, on behalf of the

Federal Government, the long-term restoration of natural resources injured, lost or destroyed as a result of the Oil Spill.

V.—Distribution of Settlement Monies

A. Joint Use of Natural Resource Damage Recoveries

The Governments shall jointly use all natural resource damage recoveries for purposes of restoring, replacing, enhancing, rehabilitating or otherwise acquiring the equivalent of natural resources injured as a result of the Oil Spill and the reduced or lost services provided by such resources. The Governments shall establish standards and procedures governing the joint use and administration of all such natural resource damage recoveries. All natural resource damage recoveries shall be placed in the joint trust fund for use in accordance with the terms and conditions of this MOA.

B. Reimbursement of Allowed Expenses and Response Costs

Up to 72 million dollars for the State and up to 62 million dollars for the United States shall be available from the settlement monies, at the election of each Government, for reimbursement of allowed expenses. In addition, all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990 and certified by either the FOSC or SOSC shall be reimbursed out of the settlement monies. Reimbursements of allowed expenses described in this paragraph shall be paid directly to the Governments by Exxon over a period of 5 years.

C. Except as otherwise provided in this MOA, the Governments agree that all natural resource damage recoveries will be expended on restoration of natural resources in Alaska unless the Trustees determine, in accordance with Article IV, paragraph A.1. hereof, that spending funds outside of the State of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources injured in Alaska and services provided by such resources.

D. Nothing in this MOA shall be construed as obligating the Governments to expend any monies except to the extent funds are appropriated or are otherwise lawfully available.

VI.—Science Studies

The Governments shall continue to work cooperatively to conduct all appropriate scientific studies relating to the Oil Spill, including specifically the

scientific studies approved by the Trustees for the 1991 field season.

VII.—Covenants Not To Sue

A. Each Government covenants not to sue or to take other legal action against the other Government with respect to the following matters:

1. The authority of either Government to enter into and comply with the terms of this MOA.

2. The respective rights of either Government to engage in cleanup, damage assessment or restoration activities with respect to the Oil Spill in accordance with this MOA.

3. Any and all civil claims (including, but not limited to, cross-claims, counter-claims, and third party-claims) it may have against the other Government arising from any activities, actions, or omissions by that other Government relating to or in response to the Oil Spill which occurred prior to the execution of this MOA, other than claims to enforce this MOA.

B. Solely for purposes of the Oil Spill Litigation and any other proceedings relating to the determination, recovery, or use of natural resource damages resulting from the Oil Spill, each Government shall be entitled to assert in any such proceeding, without contradiction by the other Government, that it is a co-Trustee with the other Government over any or all of the natural resources injured, lost or destroyed as a result of the Oil Spill, and each Government covenants not to sue the other with respect to, or to take any other legal action to determine, the scope or proportionate share of either Government's ownership, rights, title or interest in or management, control, or trusteeship authority over any of the natural resources injured, lost or destroyed as a result of the Oil Spill.

C. Notwithstanding anything in this Article, each Government reserves the right to intervene or otherwise to participate in any legal proceeding concerning the claims of a third party with respect to the scope of either Government's Trusteeship and waives any objection to such intervention or participation by the other Government.

D. If the Governments become adverse to each other in the course of the Oil Spill Litigation, this MOA shall remain in effect.

E. Notwithstanding the covenants contained in paragraph VII.A. and notwithstanding any provisions of the Agreement and Consent Decree between the Governments and Exxon, if both Governments are sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree to cooperate fully in the defense of

such action, and to not assert cross-claims against each other or take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

F. Notwithstanding the covenants contained in paragraph VII.A. and notwithstanding any provisions of the Agreement and Consent Decree between the Governments and Exxon, if one of the Governments is sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree the non-sued Government shall cooperate fully in the defense of the sued Government, including intervening as a party defendant or consenting to its being impleaded, if necessary. If the non-sued Government thereby becomes a party to the action, the Governments agree not to assert cross-claims against each other, to cooperate fully in the defense of such action, and not to take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

VIII.—Enforcement of Agreement and Governing Law and Venue

A. This MOA shall be enforceable by the United States District Court for the District of Alaska, which Court shall retain jurisdiction of this matter for the purpose of entering such further orders, directions, or relief as may be appropriate for the construction, implementation, or enforcement of this MOA.

B. If this MOA is subsequently and finally determined to be invalid, this MOA shall terminate and the disposition to the Governments of any remaining natural resource damage recoveries shall be determined by further agreement of the Governments or by an allocation of such recoveries by the United States District Court for the District of Alaska, subject to appellate review in accordance with applicable law.

IX.—Multiple Copies and Effective Date

This MOA may be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. Except for the provisions contained in Article VI, which shall be effective as of the date this MOA is signed by all the signatories hereto, this MOA shall be effective as of the date the Agreement and Consent Decree has been approved and entered as a judgment of the Court.

X.—Integration and Merger

A. This MOA and the Agreement and Consent Decree between the

Governments and Exxon constitute the entire agreement between the United States and the State as to the matters addressed herein, and there exists no other agreement of any kind which is inconsistent with this MOA with respect to the subjects addressed in this MOA; provided, that the agreement reached among the Trustees as to disbursements of the original \$15 million paid by Exxon in April, 1989 shall remain in full force and effect.

XI.—Termination

The obligations of the parties under this MOA shall terminate sixteen years from the effective date of this MOA, or upon termination of the Agreement and Consent Decree, unless otherwise agreed by the Parties.

XII.—Judicial Review

This MOA creates no rights of action on the part of any persons not signatory to this MOA and shall not, except as provided in Article VII, be subject to judicial review.

This MOA is executed at the time and on the dates set forth below.

XIII.—Miscellaneous

A. This MOA can be modified only

with the express written consent of the Parties to the MOA and the approval of the Court.

B. Each undersigned representative of the Parties to this MOA certifies that he or she is fully authorized to enter into the terms and conditions of this MOA and to execute and legally bind such Party to this MOA.

The Foregoing Memorandum of Agreement and Consent Decree among the United States of America and the State of Alaska is hereby Approved and Entered this ____ day of _____, 1991.

Honorable H. Russel Holland,
United States District Judge, District of Alaska.

[Memorandum of Agreement and Consent Decree in *United States v. State of Alaska*. (D. Alaska)]

For the United States of America

Date: _____

Richard B. Stewart,

Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530.

Stuart M. Gerson,

Assistant Attorney General, Civil Division,

U.S. Department of Justice, Washington, DC 20530.

Thomas L. Sansonetti,

Solicitor, U.S. Department of the Interior.

Alan Charles Raul,

General Counsel, U.S. Department of Agriculture.

Samuel K. Skinner,

Secretary, U.S. Department of Transportation.

John A. Knauss,

Undersecretary for Oceans and Administrator, National Oceanic and Atmospheric Administration, United States Department of Commerce.

William K. Reilly,

Administrator, U.S. Environmental Protection Agency.

Date: _____

For the State of Alaska

Walter J. Hickel,

Governor, State of Alaska.

Charles E. Cole,

Attorney General, State of Alaska, Pouch K, Juneau, Alaska 99811.

Carl Rosier,

Commissioner, Department of Fish and Game.

John A. Sendor,

Commissioner, Department of Environmental Conservation.

[FR Doc. 91-6615 Filed 3-15-91; 1:17 pm]

BILLING CODE 3610-12-M

DENIAL

OF

PLEA

DM: **EXXON CORPORATION**
225 E. John W. Carpenter Freeway
Irving, Texas 75062-2298

Telephones: (214) 444-1107
444-1108
444-1109

THURSDAY, APRIL 25, 1991

EXXON RESPONDS TO COURT RULING REGARDING AGREEMENT
ENTERED INTO WITH FEDERAL AND ALASKAN GOVERNMENTS

IRVING, TX, APRIL 25 -- Recognizing the substantial costs already incurred by Exxon and the additional payments included in the agreements we entered into with the Federal and State governments, we believed that the agreements were appropriate. While we are carefully considering the implications of the judge's decision, we are continuing our preparation for trial.

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

UNITED STATES OF AMERICA,

Plaintiff,

vs

EXXON CORPORATION and EXXON SHIPPING
COMPANY,

Defendant.

No. A90-015 CRIMINAL

SENTENCING HEARING
APRIL 24, 1991
PAGES 1 THROUGH 11

Before the Honorable Russell Holland
United States District Court Judge



PROCEEDINGS

APRIL 24, 1991

(Tape: 1)

(000)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I've used those factors in evaluating this plea

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

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

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

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

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

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

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

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

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

11 THE COURT: Thirty days?

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

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

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

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

25 MR. LYNCH: Yes, Your Honor.

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

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

Anything further we need to do, gentlemen?

(No response.)

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

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

(1224)

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

END

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CERTIFICATE

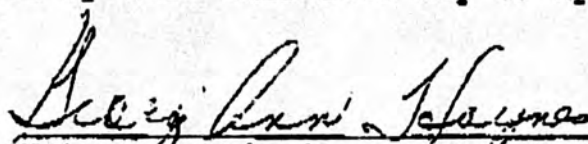
SUPERIOR COURT)
) SS.
STATE OF ALASKA)

I, Georgi Ann Haynes, Certified Professional Court Reporter for the Third Judicial District, State of Alaska, hereby certify:

That the foregoing pages contain a full, true and correct transcript.

That this transcript was prepared to the best of my knowledge and ability from United States District Court tapes.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 24th day of April, 1991.



Notary Public in and for Alaska
My commission expires: 1/24/95

FILED

APR 24 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
EXXON CORPORATION and EXXON
SHIPPING COMPANY,
Defendants.

NO. A90-015 CR

ORDER

(Plea Agreement Rejected)

The court has heretofore taken guilty pleas from the defendants as to certain of the charges pursuant to a plea agreements. The court has now completed its evaluation of that plea agreement and has determined that the same is unacceptable. The plea agreement is rejected for the reasons stated in open court on April 24, 1991.

Under the plea agreement and Rule 11, Federal Rules of Criminal Procedure, defendants are entitled to withdraw their plea of guilty. Counsel for defendants have requested time within which

ORDER (Plea Agreement Rejected)

1 to make that decision. On or before May 24, 1991, counsel for
2 defendants shall orally advise the court of their decision; at that
3 time the court will schedule further proceedings and at the request
4 of any party will schedule a status conference. Defendants shall
5 confirm their oral advice to the court by a formal motion to
6 withdraw pleas or other advice to the court with respect to the
7 status of those pleas.

8 For purposes of the Speedy Trial Act, the court notes that
9 excludable delay has occurred between March 22, 1991, and today,
10 April 24, 1991, during which time the court had under consideration
11 the proposed plea agreement. See 18 U.S.C. § 3161(h)(1)(i). Addi-
12 tional excludable delay will accrue between April 24, 1991, and
13 May 24, 1991, or such sooner date as both defendants shall have
14 filed their motion to withdraw pleas or such other notice with
15 respect to disposition of this case as the defendants may decide
16 upon. This delay has been requested by each of the defendants, and
17 the court finds that such delay is in the interest of justice and
18 is not contrary to the public interest in speedy trials for the
19 reason that this case involves an event of unusually large propor-
20 tions and therefore potentially involves extraordinarily large fines
21 such that more than a normal amount of time for reevaluation of
22 defendants' position is justifiable.

23 DATED at Anchorage, Alaska, this 24 day of April,
24 1991.

25 
United States District Judge

26 cc; M. Davis, R. Bundy, J. Clough, US Marshal, Pretrial Services

ORDER (Plea Agreement Rejected)

FILED

APR 16 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 23985
Washington, D.C. 20026-3985
202-272-9879

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

I. INTRODUCTION

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

Consequently, the United States in the plea

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

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

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

- 3 -

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

II. FACTUAL BACKGROUND

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

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

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

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

- 4 -

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

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

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

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

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

- 5 -

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

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

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

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

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

- 6 -

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

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

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III. THE PLEA AGREEMENT

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

IV. FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE

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

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

A significant factor in the grounding of the Exxon

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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believe probation is required in this matter.

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

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

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

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

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

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

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

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

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

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defendant's prison sentence after it began, stating:

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

Id. at 306-07 (citations omitted). More recent decisions of the Supreme Court on sentencing authority have cited the rule laid down in Benz without question. See United States v. DiFrancesco, 449 U.S. 117, 138 (1980). Lower courts following Benz have distinguished between a court's power to reduce a sentence, which is inherent, and a court's power to suspend execution of a sentence, which a court may do only by imposing probation. See United States v. Ellenbogen, 390 F.2d 537, 540-41 (3d Cir. 1968), cert. denied 393 U.S. 918.

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

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condition has no such need.

VI. RESPONSE TO COMMENTS FROM THE PUBLIC

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

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

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consent decree.

A. Comments Favoring the Plea Agreement

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

B. Comments Opposing Agreement Not to Prosecute Alyeska

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

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

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

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

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

C. Objections to Lack of Data on Spill Damage

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

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

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

D. Objections to Dismissal of Felony Charges

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

E. Objections That Fine Is Insufficient

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

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

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

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

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

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

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

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

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

H. Objections By Alaska Native Villages

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

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the clean up efforts."

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

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

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

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

VII. CONCLUSION

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

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


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FILED

APR 08 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

EXXON SHIPPING COMPANY)
and)
EXXON CORPORATION,)

Defendants.)

Case No. A90-015-CR

GOVERNMENT'S SUMMARY OF
DAMAGE TO NATURAL RESOURCES
IN AID OF SENTENCING

The United States, by its attorneys, submits the attached summary of natural resource damage, arising from the Exxon Valdez spill, in order to aid the Court in determining whether the sentence set forth in the plea agreement is appropriate. This summary is based on extensive damage assessments conducted by government scientists and contractors over the past two years.

This Court has ordered the parties to submit memoranda in aid of sentencing by April 16, 1991. The government will file its memorandum on that date, but is submitting the attached summary in advance of that date in order to give the

Court additional time to assess, pursuant to 18 U.S.C. § 3553(a)(2)(A), the seriousness of the offenses to which defendants have entered pleas of guilty and to assist the public in commenting on the proposed plea agreement.

Respectfully submitted this 8th day of April 1991, at Anchorage, Alaska.



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SUMMARY OF EFFECTS OF THE EXXON VALDEZ OIL SPILL
ON NATURAL RESOURCES AND ARCHAEOLOGICAL RESOURCES
March 1991

INTRODUCTION

The T/V Exxon Valdez ran aground on Bligh Reef in Prince William Sound on the night of March 23-24, 1989, spilling approximately 11 million gallons of North Slope crude oil, making this the largest oil spill in United States history. The oil spread through Prince William Sound, the Gulf of Alaska, and lower Cook Inlet. More than 1,200 miles of coastline were oiled, including portions of the Chugach National Forest, Alaska Maritime, Kodiak, and Alaska Peninsula/Becharof National Wildlife Refuges, Kenai Fjords National Park, Katmai National Park and Preserve, and Aniakchak National Monument and Preserve. Oil from the T/V Exxon Valdez impacted shorelines nearly 600 miles from Bligh Reef.

The magnitude of efforts of the state and federal governments, the public, and Exxon to contain and clean up the spill, rescue wildlife, and study the effects of the spill is unprecedented. Among those efforts are the state/federal natural resource damage assessment studies designed to measure injuries to natural resources including birds, mammals, fish and other wildlife, and marine and terrestrial habitats. These studies are intended to provide the information necessary for the Trustee agencies to manage and restore injured resources appropriately and to provide necessary documentation to enable the governments to present a claim for damages to the responsible parties. This summary briefly describes the area affected by the spill, the chronology of the spill, and the process developed to implement and manage the injury assessment studies. It focuses, however, on what has been learned over the past two years about the effects of this oil spill on natural resources.

DESCRIPTION OF THE AREA AFFECTED BY THE SPILL

Prince William Sound lies near the top of the Gulf of Alaska (see map), an 850 mile arc extending from the Aleutian Islands on the west to the islands of southeast Alaska. The gulf coast is remote, rugged, and scenic. Its maritime climate nourishes a lush, green landscape in the summer. The area is snow covered in the winter. Bears, whales, bald eagles, puffins, seals, sea lions, and sea otters are among the abundant wildlife of the area. Storms that cross the Gulf drop as much as 300 inches of rain and snow annually in the high coastal mountains. Glaciers descend from permanent ice fields capping these coastal mountain ranges, continuing to carve intricate fjords and send icebergs floating out to sea. These are the largest glaciers outside Antarctica and Greenland.

Prince William Sound is one of the largest relatively undeveloped marine ecosystems in the United States. It has one of the continent's largest tidal estuary systems. Prince William Sound has rich commercial herring and salmon fisheries. The open water of the Sound is about the size of Chesapeake Bay. Its many islands, bays, and fjords give it

more than 2,000 miles of shoreline. Prince William Sound is surrounded by land, most of which is part of Chugach National Forest.

To the southwest of Prince William Sound is the Kenai Peninsula, home of the Kenai Fjords National Park, various units of the Alaska Maritime National Wildlife Refuge, and, among others, the cities of Homer and Seward. Numerous seabird colonies are located along the coast of the Kenai Peninsula, including those most frequently visited by tourists in Alaska. Both Prince William Sound and the Kenai Peninsula are accessible by air, boat, and on a limited basis, by automobile from nearby Anchorage, Alaska's major population center. State ferries that run among the larger communities and many charter boats make it easy for people to visit the heart of the Gulf coast. In recent years, there has been a steady increase in the number of wilderness seekers, kayakers, cruise ship passengers, and other tourists visiting the area.

The Kenai Peninsula points southwest to Shelikof Strait and Kodiak Island. Shelikof Strait lies between Kodiak Island, on the south and the Alaska Peninsula on the north. Shelikof Strait is the source of a very productive commercial pollock fishery. The Kodiak National Wildlife Refuge is located on the Kodiak Archipelago and Katmai National Park and Preserve, Alaska Peninsula/Becharof National Wildlife Refuge, and Aniakchak National Monument and Preserve are located along the coast of the Alaska Peninsula. The Alaska Peninsula tapers, then scatters into the islands of the Aleutian chain.

CHRONOLOGY OF THE EXXON VALDEZ OIL SPILL

For the first three days of the spill, the weather was calm and the slick lengthened and widened amoeba-like and generally stayed in the vicinity of the grounded tanker and off the beaches. Even with these seemingly ideal circumstances for oil recovery, the amount of oil in the water completely overwhelmed efforts to contain and recover the oil. A major windstorm on March 27, 1989, pushed the oil in a southwesterly direction and oiled beaches on Little Smith, Naked, and Knight Islands. The oil continued to spread, contaminating islands, beaches, and bays in Prince William Sound. Four days into the spill, oil began to enter the Gulf of Alaska. The leading edge of the slick reached the Chiswell Islands off the coast of the Kenai Peninsula on April 2, 1989, and the major seabird nesting colonies on the Barren Islands on April 11, 1989, nineteen days into the spill. By May 18, 1989, oil had moved some 470 miles and had fouled shorelines of Prince William Sound, the Kenai Peninsula, the Kodiak Archipelago, and the Alaska Peninsula. Oil subsequently reached shorelines on the Alaska Peninsula nearly 600 miles from Bligh Reef.

During 1989, the response to contain and cleanup the spill and rescue oiled wildlife involved a massive effort. Skimmer ships were sent throughout the spill zone to vacuum oil from the water surface. Booms were positioned to keep oil from reaching important commercial salmon hatcheries in Prince William Sound. A fleet of fishing vessels, known as the "Mosquito Fleet," played an important role in protecting these hatcheries, in corralling oil to assist the skimmer ships, and in capturing oiled wildlife and

transporting these animals to rehabilitation centers. After oil contaminated shorelines, a beach cleanup program was activated. Various local committees, with community and government agency participation, provided recommendations to the U.S. Coast Guard about areas that should receive priority for cleanup. An army of workers cleaned shorelines, using techniques ranging from cleaning rocks by hand to high pressure hot water washing. Fertilizers, sometimes in a chemical base, were applied to some oiled shorelines to increase the activity of oil-metabolizing bacteria, in an experimental procedure known as bioremediation. When deteriorating weather brought an end to cleanup work in the fall of 1989, a great amount of oil remained on the shorelines. Although winter storms proved extremely effective in cleaning many beaches, spring shoreline surveys indicated that much work remained to be done in 1990. Crews operating from boats and helicopters cleaned oiled shorelines in Prince William Sound, along the Kenai and Alaska Peninsulas, and on the Kodiak Archipelago. Manual pick up of remaining oil was the principal method used during 1990, but bioremediation and relocation of oiled berms to the active surf zone were also used in some areas.¹ Another shoreline survey will be conducted during May 1991, to determine the need for additional cleanup work.

INJURY ASSESSMENT PROCESS

The Exxon Valdez oil spill occurred just prior to the most biologically active season of the year in southcentral Alaska. During the two month period after the spill, seaward migrations of salmon fry, major migrations of birds, and the primary reproductive period for most species of birds, mammals, fish, and marine invertebrate species took place. The organisms involved in these critical periods of their life cycles encountered the most concentrated, volatile, and potentially damaging forms of the spilled oil. As will be discussed in this summary, the oil affected different species differently. Whereas, for example, it directly killed large numbers of birds and sea otters that encountered oil on the water surface, it did not prohibit in and out migration and spawning of large schools of salmon and herring.

The state and federal Trustee agencies were forced to mobilize field studies rapidly with little time for planning. Through intensive efforts, studies were designed, administrative processes were accelerated, and 58 field studies were carried out. Additionally, technical services programs were organized to provide hydrocarbon analysis, histopathology, and mapping support for the field studies. Initial decisions on the types and scope of studies conducted were made by agency experts familiar with the resources and the environment. Even with the rapid deployment of studies, however, some opportunities to gather injury data were irretrievably lost during the early weeks of the spill.

A legal framework was subsequently established and studies were reviewed and modified according to their likelihood to document resource injury. Expert peer reviewers were retained and study plans used during 1989 underwent scientific review for possible

¹Exxon has represented that it has paid over \$2.0 billion to conduct cleanup activities during 1989 and 1990.

modification in 1990. Some studies were discontinued or modified if they were unable to further document resource injury, and some new studies were initiated to fill identified information needs. Status reports prepared in January 1990, were used to guide the development of plans for the second year of studies. Thirty-nine studies and three technical services programs were continued in 1990. Scientific review was again used to plan for the upcoming 1991 field season, during which 29 studies and two technical services programs will be conducted.

This summary of the effects of the Exxon Valdez oil spill on natural resources is preliminary, as studies are still underway and available data are not fully analyzed and interpreted. However, the injuries to natural resources that have been documented to date are summarized herein. This summary also addresses studies that were discontinued. It should be noted that studies were discontinued for a variety of reasons, such as the determination that field work had been completed, that there was no practicable way to measure injury, or that no injury was documented. Even though some studies failed to identify injury and were discontinued, this does not necessarily mean that the resources were not affected by the spill. Certain injuries (if present), such as possible latent or sublethal effects on reproductive or other systems in animals, might not become fully evident for a number of years after the spill. At present there is no significant indication of long-term injury to resources other than those specifically noted below. Although studies indicate that there are continuing injuries to certain resources, natural recovery may also have begun. As petroleum hydrocarbons are broken down in the ecosystem, plant and animal communities begin to reestablish themselves. This recolonization has already been observed in some of the more lightly oiled areas. In the more heavily oiled areas, this natural recovery process is expected to take longer. As this natural recovery occurs, many of the birds and mammals that feed in these areas are expected to begin recovering.

MARINE MAMMALS

Following the spill, studies of humpback whales, Stellers sea lions, sea otters, harbor seals, and killer whales were started. The humpback whale and Stellers sea lion studies were discontinued following the 1990 field season. Humpback whale investigations were limited to photo identification of whales, estimations of reproductive success, and possible relocations of whales. It was not possible to take tissue samples for petroleum hydrocarbon analysis to document exposure. The study did not show direct oil spill mortalities or reproductive failures.

The sea lion study is being completed following the 1990 pup counts. Some tissue samples were analyzed for petroleum hydrocarbon concentrations, and although there was some indication of exposure to oil, it was difficult to determine what populations were affected because of the sea lions' active seasonal movements. Because of an ongoing pre-spill population decline and premature pupping of sea lions, it was not possible to distinguish post- from pre-spill population effects clearly.

Studies of killer whales, based on observations only (because tissue sampling was not an

option), have indicated that killer whales are missing from at least one and possibly two pods in Prince William Sound. Injuries to harbor seals and sea otters have been clearly indicated and studies of these species are continuing.

Sea Otters: The population of sea otters in Prince William Sound before the spill was estimated to have been as high as 10,000. The total sea otter population of the Gulf of Alaska was estimated to be at least 20,000. Statewide, the sea otter population is estimated at 150,000. Sea otters were particularly vulnerable to the spill. As the oil moved through Prince William Sound and the Gulf of Alaska, it covered areas used by large numbers of otters. When sea otters become contaminated by oil, their fur loses its insulating capabilities, leading to death from hypothermia. Sea otters also died as a result of ingestion of oil and perhaps inhalation of toxic aromatic compounds that evaporated from the slick shortly after the spill. The effects of oil were documented by surveys of wild populations; analysis of tissues for petroleum hydrocarbons and indicators of reduced health; by tracking sea otters outfitted with radio transmitters (including those released from rehabilitation centers); and estimating total mortality from the number of sea otters found on beaches. These studies concentrated on developing an estimate of sea otter mortality in Prince William Sound and along the Kenai Peninsula, the population most affected by the spill. During 1989, a total of 1,011 sea otter carcasses were recovered in the spill area, cataloged, and stored in evidence trailers. Of these, 876 were recovered dead from the field and 135 died in rehabilitation centers or other facilities. The total number of sea otters estimated to have been killed directly by the spill ranges from 3,500 to 5,500 animals throughout the spill area.

Initial results indicate significant differences in hematology and blood chemistry parameters between sea otters in oiled and unoiled areas. Greater variation was observed in DNA content of blood lymphocytes of sea otters from oiled areas, but sperm and testicular cells showed no indication of DNA damage resulting from oil exposure. It cannot yet be determined whether these differences affect sea otter health or survival. There are indications that sea otters continue to be exposed to petroleum hydrocarbons in oiled areas. Analysis of blood and fat samples collected from animals during 1990 found elevated concentrations of certain aromatic compounds in sea otters from heavily oiled areas and elevated concentrations of petroleum hydrocarbons continue to be documented in food items eaten by sea otters in oiled areas. Additionally, other damage assessment studies have documented a decreased abundance of mussels in oiled areas, a key prey species for sea otters.

Studies have documented continuing injury to sea otters. Normally, very few prime age sea otters (animals between 2 and 8 years old) die each year and most mortality occurs among very young and old age classes. The high number of prime age sea otter carcasses found during 1990 indicates that the pattern of sea otter mortality in heavily oiled areas continues to be abnormal. Results of boat surveys indicated continued declines in sea otter abundance within oiled habitats in Prince William Sound. Preliminary results indicate that pupping rates in oiled and unoiled areas are not significantly different. However, the first information available for the spring of 1991 shows higher yearling mortality rates in oiled areas than in unoiled areas. Studies of the survival and reproductive success of sea otters released from rehabilitation

centers indicate a high level of mortality of adult animals and significantly lower pupping rates than the pre-spill mortality and pupping rates in Prince William Sound. Of the 193 sea otters released from rehabilitation centers, 45 were fitted with radio transmitters. Sixteen of these animals are still alive, 13 are known to be dead, and 15 are missing. One radio transmitter is known to have failed.

Harbor Seals: There has been no census of harbor seals in Prince William Sound since the mid-1970s when the population was estimated at 3,000 to 5,000 animals. Since that time, the harbor seal population in Prince William Sound and the Gulf of Alaska has declined substantially. A population census of Prince William Sound is planned for the summer of 1991.

Two hundred harbor seals are estimated to have been killed by the spill. Only 19 seal carcasses were recovered following the spill, since seals sink when they die. Population changes were documented by summer and fall aerial surveys of known haulout areas. Toxicological and histopathological analyses were conducted to assess petroleum hydrocarbon accumulation and persistence and to determine toxic injuries to tissues.

Population surveys, which are reliable indicators of population trends, conducted in 1984 and 1988 indicated that harbor seal populations in Prince William Sound had declined prior to the spill, with similar declines in what were subsequently oiled and unoled areas. From 1988 to 1990, however, the decline at oiled sites (35 percent) was significantly greater than at unoled sites (13 percent).

Severe debilitating lesions were found in the thalamus of the brain of a heavily oiled seal collected in Herring Bay 36 days after the spill. Similar but milder lesions were found in five other seals collected three or more months after the spill. During 1989, oiled harbor seals behaved abnormally, being lethargic or unwary. Petroleum hydrocarbon concentrations in bile were 5 to 6 times higher in seals from oiled areas one year after the spill. This indicates that seals were still encountering oil in the environment, were metabolizing stored fat reserves that had elevated levels of petroleum hydrocarbons, or both.²

Killer Whales: Approximately 182 killer whales forming nine distinct family units or "pods" resided in Prince William Sound before the spill. This count is based on pre-spill documentation. These whales were studied intensively before the spill and their group composition and dynamics are well known. Damage assessment studies of killer whales involved extensive boat-based surveys in Prince William Sound and adjacent waters. Whales were photographed and the photographs were compared to the Alaskan

²Harbor seals are taken in some Alaska villages for subsistence. The State of Alaska conducted a program, separate from the damage assessment program, to test subsistence foods potentially affected by the spill to insure that they were safe for human consumption. The State of Alaska determined that harbor seals in the affected area were safe for people to eat (Oil Spill Health Task Force, July-August 1990 Report and September-October 1990 Report. Alaska Department of Fish and Game, Division of Subsistence).

killer whale photographic database for the years 1977 to 1989 to determine changes in whale abundance, seasonal distribution, pod integrity, and mortality and natality rates.

The AB pod of 36 individual whales was sighted intact in September of 1988. When sighted on March 31, 1989, seven days after the spill, seven individuals were missing. These whales remain absent and six additional whales were missing from the AB pod in 1990. Several of the missing whales are females who left behind calves. It is unprecedented for females to abandon calves, therefore their prolonged absence implies that these adult females are dead. In addition, nine individuals from AT pod were missing in 1990. Explanations for the possible causes of death of these missing whales, including explanations apart from the effects of the spill, are being explored. Killer whale surveys will continue in 1991.

TERRESTRIAL MAMMALS

Studies were conducted on terrestrial mammals that may have been exposed to oil through foraging in intertidal habitats. These species included brown bear, mink, black bear, Sitka black-tailed deer, and river otters.

Brown bears are long-lived animals and forage seasonally in the intertidal and supratidal areas of the Alaska Peninsula and the Kodiak Archipelago. Preliminary analysis of brown bear fecal samples and some tissues show that some brown bears were exposed to petroleum hydrocarbons, but no conclusive injury has been documented. Radio-collared brown bears along the Katmai coast and at a control site on the Alaska Peninsula will continue to be monitored while the transmitters remain active.

Mink and other small mammals that are known to feed and spend part or all of their time in the intertidal zone are difficult to study. They are known to crawl off into burrows or the brush if sick or injured and carcasses are unlikely to be found. Also, information on pre-spill populations of these animals is minimal. Scientists developed a laboratory study to test reproductive effects of oil on ranch-bred mink, in which they were fed food mixed with small, non-lethal amounts of weathered oil. Although changes in reproductive rates or success were not documented, it was found that oil-contaminated food moved through the intestines of the animals at a more rapid rate than did clean food, possibly providing less nutrition to the animals. No field studies were carried out for black bear due to the difficulty of finding, collaring, or otherwise investigating these animals in the dense underbrush in which they reside. However, a literature search confirmed that these animals do forage in the intertidal zone in the spill area.

The deer study found no evidence of injury based on intensive searches of beaches that revealed no mortality attributable to the spill. However, deer taken for purposes of testing for safety for human consumption (not part of the damage assessment process) found slightly elevated petroleum hydrocarbons in some tissues in deer (which feed on kelp in intertidal areas) but it was determined that the deer were safe to eat.

River Otters: A few river otter carcasses were found by cleanup workers. River otters forage in streams and shallow coastal habitats that were contaminated by the spill. Analysis of river otter bile indicated that petroleum hydrocarbons are being accumulated by this species. Studies of radio tagged animals in Prince William Sound showed that home ranges are larger, movements more erratic, and body weights are lower in oiled habitat. Field work is continuing in 1991 to further assess the status of this species, including analysis of blood samples to measure the health of these animals.

BIRDS

Among the most conspicuous effects of the Exxon Valdez oil spill was the injury to birds. Seabirds are particularly vulnerable to oil as they spend much of their time on the sea surface while foraging. Oiled plumage insulates poorly and loses buoyancy and birds die from hypothermia or drowning. Birds surviving initial acute exposure may then ingest oil by preening. Approximately 36,000 dead birds were recovered after the spill; at least 31,000 of these deaths were attributed to the effects of oil. In addition to the large number of murres, sea ducks, and bald eagles, carcasses of loons, cormorants, pigeon guillemots, grebes, murrelets, and other species were also recovered (see attached comprehensive list of bird carcasses logged into evidence trailers by September 25, 1989). Only a small proportion of the total number of birds estimated to have been killed were recovered, as many undoubtedly floated out to sea, sank, were scavenged, were trapped and hidden in masses of oil and were not visible, were buried under sand and gravel by wave actions, decomposed, or simply beached in an area where they were not found. Additionally, it is known that, in a number of cases, carcasses found shortly after the spill were not turned in to receiving stations. Preliminary analyses provided by computer models that account for some of these variables estimate that the total number of birds killed by the spill ranges from 260,000 to 580,000 with the best approximation that between 350,000 and 390,000 birds died. Following peer review, the model will be run again to provide a more refined estimate of total mortality.

Common and Thick-billed Murres: Murres are the third most abundant seabird in Alaska (after tufted puffins and black-legged kittiwakes). A total of approximately 1,400,000 murres reside in the Gulf of Alaska (Unimak Pass to the Canadian border in southeastern Alaska). The total population of murres in Alaska is approximately 12,000,000. The murre colonies on the Chiswell Islands are the most visited by tourists in Alaska. In 1989 and 1990 murres were the most heavily affected bird species. Murre colonies impacted by the spill lost 60 to 70 percent of breeding birds. Oil in Prince William Sound affected major wintering areas of murres and other species. As oil moved out of Prince William Sound and along the Kenai Peninsula and the Alaska Peninsula, it hit major seabird nesting areas such as the Chiswell and Barren Islands, as well as numerous smaller colonies. The oil hit these areas outside Prince William Sound at the same time that adult murres were congregating on the water near colonies in anticipation of the nesting season. Approximately 22,000 murre carcasses were recovered following the spill. Colony surveys indicate that an estimated minimum of 120,000 to 140,000 breeding adult murres in the major colonies that were surveyed were killed by the spill. Extrapolating this information to other known murre colonies hit by

the spill (but not specifically studied), the mortality of breeding adult murres is estimated to have been 172,000 to 198,000. However, area-wide, including wintering and non-breeding birds, the total mortality of murres is estimated to be about 300,000. Murres exhibit strong fidelity to traditional breeding sites and infrequently immigrate to new colonies.

Normally, murres breed in densely packed colonies on cliff faces. Each murre colony initiates egg laying almost simultaneously. This synchronized breeding behavior helps the birds repel predators such as gulls and ravens. In oiled areas, murre colonies have exhibited a much lower populations than before the spill, breeding is later than normal, and breeding synchrony has been disrupted. These structural and behavioral changes in colonies have caused complete reproductive failure during 1989 and 1990, and thus lost production of at least 215,000 chicks. Murre colonies in unoiled areas displayed none of these injuries and had normal productivity. Monitoring of reproductive success of the colonies will continue in 1991.

Bald Eagles: Of the estimated Alaskan bald eagle population of 30,000 birds (20,000 adults and 10,000 fledglings), an estimated 2,200 reside in Prince William Sound. One hundred forty-four (144) dead bald eagles were found following the spill. Although there is considerable uncertainty regarding the total mortality of bald eagles, it is estimated that several times this amount may have been killed by the initial spill. Approximately 90 percent of radio-tagged bald eagles that died during subsequent studies were not found on the beach but in the brush back from the beachfront. This suggests that most of the eagles that died in the spill would not have been found by surveys typically restricted to beach areas. To assess injuries to bald eagles, helicopter and fixed-wing surveys were flown to estimate populations and productivity. Radio transmitters were attached to bald eagles to estimate survival, distribution, and exposure to oiled areas. Bald eagles in Prince William Sound were most intensively studied. Productivity surveys in 1989 indicate a failure rate of approximately 85 percent for nests on moderately or heavily oiled beaches compared to 55 percent on unoiled or lightly oiled beaches. Bald eagles have a delayed sexual maturity and have a relatively long life span under normal circumstances. Consequently, although reproduction apparently rebounded to more normal levels in 1990, population impacts as a result of poor productivity of nestlings and the death of hundreds of adult eagles in 1989 may not be readily apparent for several years. Fewer bald eagles were sighted in 1990 than in 1989, however this change was within the expected error of the survey method. An additional survey will be conducted in 1991 to see if there is a downward population trend.

Sea Ducks: More than 2,000 sea duck carcasses were recovered after the spill, including more than 200 harlequin ducks. Studies concentrated on harlequins, goldeneyes, and scoters, species that use the intertidal and shallow subtidal habitats most heavily affected by the spill. Harlequins were most affected, consistent with the fact that they feed in the shallow water area of the intertidal zone. This is the only species of sea duck studied that both nests in the spill area and feeds in the shallow intertidal zone. All of these species feed on invertebrates such as mussels and are likely to continue to be exposed to petroleum hydrocarbons through their food. About 33 percent of the harlequins collected in the spill area had poor body condition and about 40 percent had

tissues contaminated with petroleum hydrocarbons. Preliminary surveys also indicate harlequins may have failed to reproduce in the spill zone in Prince William Sound during 1990. These injuries will be investigated further during 1991.

Other Birds: Surveys and studies indicate reduced numbers of black oystercatchers, pigeon guillemots, and marbled murrelets in oiled areas. Black oystercatchers and pigeon guillemots use inshore and intertidal areas for feeding and nesting. Reduced breeding success of black oystercatchers was documented in oiled areas, largely as a result of loss of chicks along oiled beaches. It is estimated that between 1,500 and 3,000 pigeon guillemots were killed by the spill, representing as much as 10 percent of the catalogued population in the Gulf of Alaska. This species is susceptible to continued exposure to petroleum hydrocarbons because it uses intertidal rocks and waters within 200 meters of shore. Petroleum hydrocarbons were found in eggs and tissue in 1989.

Marbled and Kittlitz's murrelets represented a high proportion of the dead birds recovered in oiled areas of Prince William Sound. The reduction in the number of murrelets observed in oiled areas during cleanup in 1989 and the return of many of these birds in 1990 suggest disturbance associated with cleanup activities affected these birds. The extent of injury to certain species, including loons, cormorants, and gulls will probably never be known because pre-spill information on numbers of these birds in the spill area are not available. Data on bird distribution and abundance data gathered during aerial and boat surveys remain to be fully analyzed and interpreted. Boat surveys will continue during 1991. Studies did not document injury to certain bird species such as Peale's peregrine falcons or songbirds.

FISH/SHELLFISH

No massive die-offs of adult fish were found following the spill, and adult salmon, for example, were evidently able to migrate to spawning areas after the spill. However, fish are most vulnerable to oil contamination during the early stages of their life cycles. Accordingly, most fish studies initially focused on this phase of fish life history. During 1991, scientists will begin to be able to assess affects on adult fish such as salmon that would have been exposed to oil as eggs or larvae. Species most often affected by the spill were those that inhabit and spawn in the intertidal zone (salmon) or in the shallow areas next to shore (herring and Dolly Varden).³ Less than ten dead rockfish were found during the spill and their deaths were attributed to oil. Several species of coastal and offshore fish (pollock, halibut, sablefish, cod, yellowfin and flathead sole, and rockfish) show evidence over a large geographic area of continuing exposure to petroleum hydrocarbons in areas affected by the spill, but significant injury has not yet been documented. Exposure to petroleum hydrocarbons does not necessarily lead to

³The State of Alaska imposed the highest possible standards for commercial fishery openings and for processing plant inspections to insure that all commercially harvested salmon were free from contamination. Salmon subject to commercial harvest in the spill area were rigorously tested to insure that the catch was safe for human consumption.

injury, since many animals have the capability to physiologically "manage" the exposure with no resulting harm. In particular, salmon and other fish can metabolize petroleum hydrocarbons so that these contaminants are unlikely to be found in edible fish tissues. Indicators of exposure among fish include bile metabolites and mixed function oxidases. Since injuries from chronic exposure to oil may not manifest themselves for a number of years, it is premature to conclude that coastal and offshore species were not injured; therefore certain studies are continuing.

Pink Salmon: The full extent of short term injury to pink salmon cannot be assessed until after the 1991 run returns to spawn in the summer. Although the overall catch of pink salmon in Prince William Sound during 1990 was an all-time record (as predicted before the spill), this was primarily due to strong runs of hatchery-produced salmon. Salmon survival associated with the Armin F. Koernig hatchery, located in the middle of a heavily oiled area of the spill zone, was half that of Ester Hatchery, located outside the area of the spill. Wild production of pink salmon did not mirror the record production of hatchery fish.

Seventy-five percent of wild pink salmon spawn in the intertidal portion of streams in Prince William Sound. Wild stock salmon did not shift spawning habitat following the spill and deposited eggs in intertidal areas of oiled streams. Preliminary analyses indicate a 70 percent greater mortality of pink salmon eggs laid in the summer of 1989 and a 50 percent greater mortality in the summer of 1990 in oiled streams as compared to control streams. Larvae from heavily oiled streams showed gross morphological abnormalities, including club fins and curved spines. The pink salmon that returned to Prince William Sound in the summer of 1990 were exposed to oil as larvae as they swam under the slick, but not as eggs which were more directly exposed to oil than the larvae. Fish returning in 1991 will be the first that were exposed to oil as eggs. Eggs and larvae of wild populations continue to be exposed to oil in intertidal gravel in oiled areas.

Sockeye Salmon: Commercial harvest of sockeye salmon was curtailed in portions of Cook Inlet, Chignik, and Kodiak in 1989 because of the spill, resulting in an unusually high number of adults migrating to spawn in certain lake spawning systems (returning adults that arrive at the spawning areas are referred to as the "escapement"). Overly large spawning escapements may result in poor returns in future years by producing more juvenile salmon than can be supported by the nursery lake's productivity. Preliminary data indicate that overescapement degraded rearing habitat in lakes and that sockeye salmon survival and growth rates are lower than usual. Further study is needed before the extent of these injuries can be determined.

Dolly Varden and Cutthroat Trout: Prince William Sound is the northern extreme of the range of cutthroat trout. Both cutthroat trout and Dolly Varden use nearshore and estuarine habitat for feeding throughout their lives (in contrast to salmon which migrate out to sea). The highest concentrations of bile petroleum hydrocarbon metabolites in all fish sampled were found in Dolly Varden. Tagging studies have demonstrated that the annual mortality of adult Dolly Varden was 32 percent greater in oiled areas than in unoiled areas. The larger cutthroat trout showed similar levels of mortality in oiled and unoiled areas. Additionally, cutthroat trout growth rates were reduced in oiled areas.

Studies are continuing to measure impacts on populations of these popular sport fish species.

Pacific Herring: Populations of Pacific herring were spawning in shallow eelgrass and algal beds at the time of the spill. The effects of oil on egg survival, hatching success, larval development, and recruitment to the spawning population were studied. Study results show a large increase in the percentage of abnormal embryos and larvae in oiled areas of Prince William Sound during the 1989 reproductive season. Larvae in oiled areas also had a greater incidence of eye tumors. These effects continued but at somewhat lower rates in 1990. Results also showed greater egg mortality in oiled areas as compared to unoiled areas. Whether the adult population has been affected by these larval injuries will not be determined until the 1989 and 1990 cohorts return to spawn in 1992 and 1993.

COASTAL HABITAT

The coastal tidal zone, commonly known as the "intertidal zone," was the most severely contaminated habitat. Intertidal habitats are highly productive and biologically rich. They are particularly vulnerable to the grounding of oil, its persistence, and effects of associated clean-up activities. An interdisciplinary team with expertise in plant and systems ecology, marine biology, and statistical analysis, was established to conduct field studies to assess the effects of oil on intertidal ecosystems.

Supratidal: Results of studies in the Kodiak/Alaska Peninsula area suggest that oil in the supratidal habitat and beach cleanup disturbance decreased the productivity of grasses and other vegetation including beach rye grass, that help stabilize beach berms. In one instance, cleanup activities completely removed the vegetation. Increased production of supratidal vegetation was found in Prince William Sound in 1989. This finding corresponds with information from other oil spills. It is not known whether this increased production was a result of decreased browsing by terrestrial mammals or a fertilizer effect of the oil.

Intertidal: Natural populations of intertidal organisms were significantly reduced along heavily oiled shorelines such as Herring Bay. Densities of intertidal algae (*Fucus*), barnacles, limpets, amphipods, isopods, and marine worms were decreased. Although there were increased densities of mussels in oiled areas, they were significantly smaller than mussels in the unoiled areas and the total biomass of mussels was significantly lower. Intertidal organisms continue to be exposed to hydrocarbons from the more heavily oiled sediments. Petroleum hydrocarbon accumulation in filter feeding mussels experimentally placed in oiled areas indicate that oil remains available for uptake by other organisms. Initial findings also indicate that oiled surfaces retarded settlement by juvenile barnacles when compared to unoiled sites. In addition to direct mortality, the reproductive cycle of mussels at oiled sites in the lower Cook Inlet/Kenai Peninsula and Kodiak/Alaska Peninsula regions was delayed by several months.

Intertidal fishes were less abundant in oiled areas than in unoiled areas. In addition, gill

parasitism and respiration rates were significantly higher in fish from oiled sites compared to unoiled sites.

Fucus, the dominant intertidal plant, was severely affected by the oil and subsequent cleanup activities. The percentage of intertidal areas covered by Fucus was reduced following the spill and opportunistic plant species which characteristically flourish in disturbed areas were increased. The average size of Fucus was reduced, the number of reproductive sized plants greatly decreased, and the remaining plants of reproductive size decreased in reproductive potential due to fewer fertile receptacles per plant. There was also reduced recruitment of Fucus at oiled sites.

SUBTIDAL HABITATS

Spilled oil in some areas has migrated to and contaminated the seafloor at depths of up to 100 meters as contaminated sediments moved off beaches during winter storms and cleanup activities. There is evidence that petroleum hydrocarbons have been taken up by animals feeding on the ocean bottom. Petroleum hydrocarbon metabolites have been found in the bile of yellowfin sole, rock sole, rockfish, and pollock. Concentrations of petroleum hydrocarbon metabolites in the bile of yellowfin sole have not declined from 1989 to 1990. This contrasts with Dolly Varden which feed close to shore and where petroleum hydrocarbon metabolites in bile decreased in the same period. The effects of this exposure are still being studied. Many subtidal and intertidal species, particularly fish, have the capability of metabolizing and eliminating petroleum hydrocarbons from their bodies. Clams metabolize hydrocarbons very slowly and consequently accumulated them in high concentrations.

Contaminated clams and other invertebrates are a potential continuing source of petroleum hydrocarbons for sea otters and otherspecies that forage in the shallow subtidal zone. Samples from pollock, which feed in the water column, taken as far away as 500 mile from the wreck site on Bligh Reef, showed elevated petroleum hydrocarbon metabolite concentrations in their bile. This indicates that the water column or food supply was affected at great distances from the spill. Initial 1990 study results show a significant effect on benthic organisms associated with eelgrass beds. These are known to be highly productive habitats. The composition of benthic animal communities on soft-bottom habitats as deep as 40 meters were also significantly altered in oiled areas.

ARCHAEOLOGICAL AND SUBSISTENCE RESOURCES

The spill directly impacted archaeological sites and subsistence resources. Cleanup activities and the associated significant increases in human activity throughout the spill zone resulted in additional injuries to these resources.

Archaeological Resources: Archaeological sites along the shoreline were injured by the

spill. Review of spill response data revealed injuries from oil to a minimum of 26 archaeological sites. Among these are burial sites and home sites. Twenty-one (21) of these sites are on federally-owned land, with the remaining five on State of Alaska and private lands. Of the 21 sites on federal land, 10 are on national parks, six on national wildlife refuges, four within Chugach National Forest, and one on Bureau of Land Management land. While injury to these 26 sites was documented during cleanup, a spill-wide assessment of injuries to archaeological resources has yet to be completed. In addition to oil contamination, increased knowledge of the location of archaeological sites may put them at risk from looting. Loss of rye grass cover may threaten some sites. A comprehensive survey of injuries to archaeological resources on public lands throughout the spill zone will be conducted during 1991.

A study was conducted to determine impacts caused by oil contamination on radiocarbon dating of archaeological resources and to investigate the potential for cleaning artifacts and materials to allow such dating. Preliminary results indicate significant injury to the ability to contextually date artifacts and materials by Carbon 14 analysis. It also appears that these materials cannot be successfully "cleaned" to allow accurate dating.

Subsistence Resources: Surveys undertaken by state researchers before the spill and in 1990 indicated that subsistence harvesters in the area affected by the oil spill significantly reduced their use of subsistence resources after the spill, primarily because of their concerns about possible contamination of these resources. The oil spill disrupted the subsistence lifestyle of some communities that have historically relied upon these resources. Some communities virtually or entirely ceased subsistence harvests in 1989 and have only gradually begun to resume harvests, while other communities continued some reduced level of subsistence harvest in 1989 and thereafter. The attached report (Subsistence Use of Fish and Wildlife in 15 Alutiiq Villages after the Exxon Valdez Oil Spill) details these studies. Warnings were issued by the state in 1989 for people to avoid consumption of intertidal invertebrates (such as mussels and clams, which bioaccumulate petroleum hydrocarbons) found along shorelines contaminated by oil. After the spill, an oil spill health task force was formed, including the state and federal governments, subsistence users, and Exxon. This group helped oversee studies conducted by the state and others in conjunction with FDA and NOAA in 1989 and 1990, on subsistence food resources such as seals, deer, salmon, ducks, clams, and bottomfish. Based upon the test results these resources, with the exception of clams and mussels in certain oiled areas such as Windy Bay, were determined to be safe for human consumption.

CONCLUSION

The federal and state Trustee agencies have now concluded two field seasons of study and are currently preparing to begin a third year of studies to assess injuries to natural resources resulting from the Exxon Valdez oil spill. The information contained in this

summary is based upon the field work and data analysis conducted to date, and is preliminary. Many studies will likely need to continue for additional years before a full understanding of injuries is developed. For example, long-lived species such as bald eagles, murre, and sea otters, may not manifest some effects until a number of years have passed. For other species, such as herring and salmon that return to spawn years after hatching, it is necessary to wait for these key life history events to occur before one can determine the extent to which or if they have been injured. At present there is no indication of long-term injury for species other than those noted in this summary. Although two field seasons of study are complete, only a portion of the data gathered has been fully analyzed and interpreted. As studies and data analysis are completed, some of the information contained in this summary may need to be modified.

For the reasons given above, injury assessment studies will continue in 1991, and thereafter until the process is complete. The need to continue to understand the long-term effects of the spill will be accomplished through monitoring projects that will measure the natural recovery of resources injured by the spill as well as the effectiveness of restoration measures implemented by the Trustee agencies. The information gathered by the injury assessment studies, the restoration monitoring studies, and other studies will be used to develop and implement a restoration program that will accelerate the recovery of injured resources.

Restoration measures will begin in 1991 and are expected to become more comprehensive as the understanding of the effects of the spill improves and as experts and the public provide input on where restoration measures should be concentrated. Wherever possible, restoration will focus on those projects that will provide ecosystem-wide benefits, thereby benefitting a variety of species. These projects may include various initiatives to protect habitat; in other cases it may be necessary to conduct restoration programs that will primarily benefit a particular resource injured by the spill.

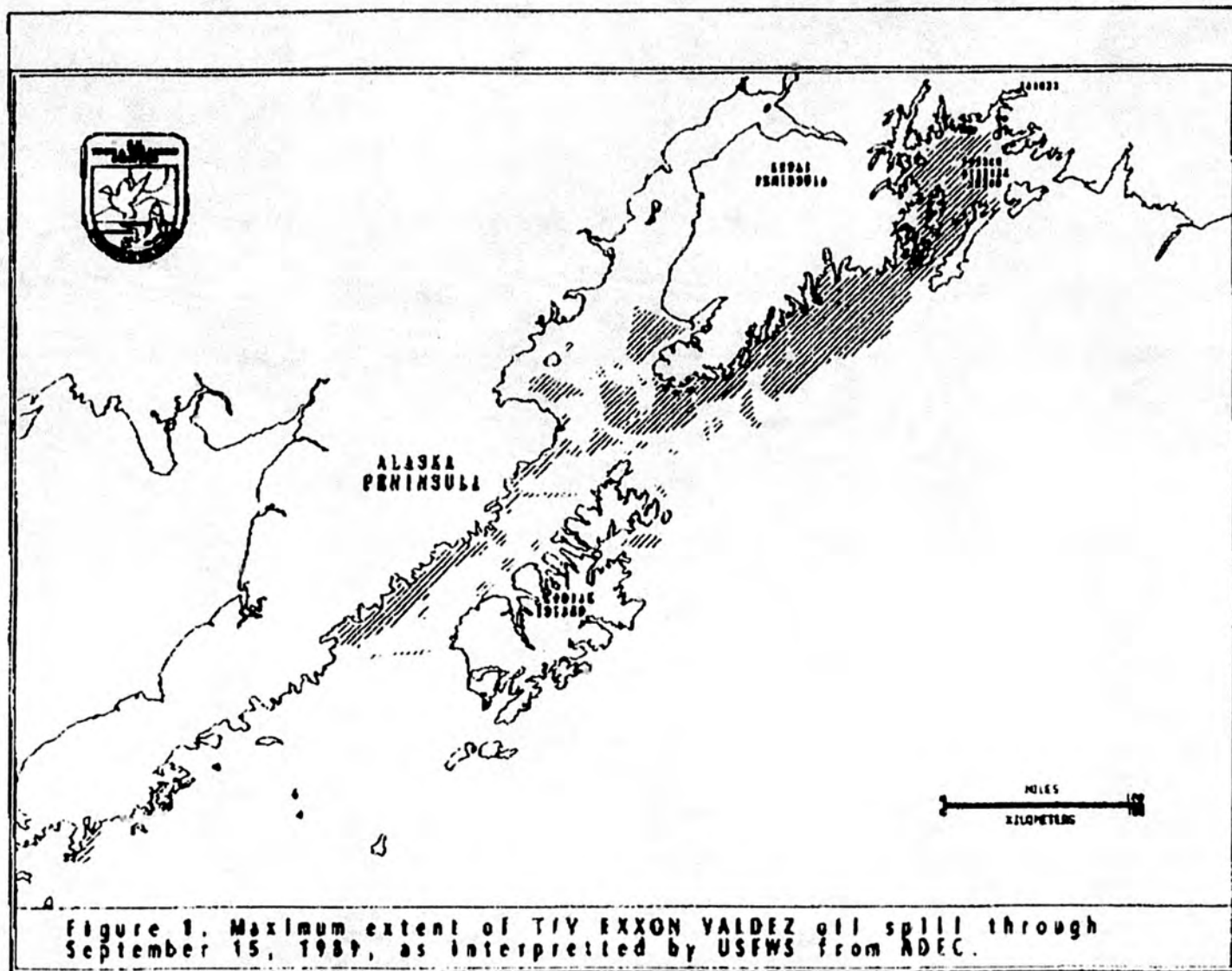


Table 1. Species composition and number of birds retrieved from oiled areas and processed at U.S. Fish and Wildlife receiving stations as of 25 September, 1989.

Species	Total	Valdez	Seward	Homer	Kodiak
Total	35,279	3,360	3,503	5,778	22,638
Unidentified bird	2,927	476	414	916	1,131
Unidentified loon	69	27	6	25	11
Common Loon	216	142	23	32	19
Yellow-billed Loon	87	72	5	3	7
Pacific Loon	18	8	5	0	5
Red-throated Loon	5	3	1	1	0
Unidentified grebe	65	27	8	11	19
Red-necked Grebe	120	79	22	12	7
Horned Grebe	277	233	15	22	7
Northern Fulmar	426	0	22	12	116
Unidentified shearwater	579	5	22	14	538
Sooty Shearwater	360	4	80	34	242
Short-tailed Shearwater	2,460	1	84	4	2,371
Unidentified petrel	69	2	24	14	29
Fork-tailed Storm-petrel	363	1	50	19	293
Leach's Storm-petrel	12	0	9	0	3
Unidentified cormorant	219	76	27	56	60
Double-crested Cormorant	38	19	10	0	9
Pelagic Cormorant	418	277	65	29	47
Red-faced Cormorant	161	90	29	9	33
Great Blue Heron	1	1	0	0	0
Unidentified swan	3	0	2	1	0
Emperor Goose	2	0	0	0	2
Canada Goose	1	0	0	1	0
Brant	3	0	1	2	0
Unidentified duck	30	4	6	20	0
Unidentified seaduck	112	63	2	11	36
Mallard	11	2	4	1	4
Northern Pintail	4	0	3	1	0
Green-winged Teal	5	0	5	0	0
Unidentified Scaup	4	1	3	0	0
Greater Scaup	27	2	21	4	0
Lesser Scaup	2	0	2	0	0
Unidentified Goldeneye	25	8	2	14	1
Common Goldeneye	6	3	0	2	1
Barrow's Goldeneye	33	19	9	4	1
Bufflehead	21	17	1	0	3
Oldsquaw	185	131	43	6	5

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

Species	Total	Valdez	Seward	Homer	Kodiak
Harlequin Duck	213	148	10	35	20
Unidentified Eider	3	0	0	3	0
Stellar's Eider	4	4	0	0	0
Common Eider	17	5	0	2	10
King Eider	9	0	0	0	9
Unidentified Scoter	162	23	17	51	71
White-winged Scoter	342	164	13	137	23
Surf Scoter	175	45	28	9	6
Black Scoter	132	112	4	8	8
Ruddy Duck	1	0	1	0	0
Unidentified merganser	3	1	0	0	2
Common Merganser	2	2	0	0	0
Red-breasted Merganser	33	30	1	1	1
Sandhill Crane	2	1	1	0	0
Black Oystercatcher	9	2	2	0	5
Golden Plover	1	0	0	1	0
Unidentified sandpiper	11	1	5	1	4
Unidentified turnstone	1	0	0	0	1
Common Snipe	1	0	0	1	0
Semipalmated Sandpiper	1	0	1	0	0
Lesser Yellowlegs	2	0	0	2	0
Western Sandpiper	5	0	0	5	0
Baird's Sandpiper	1	0	0	0	1
Least Sandpiper	4	0	2	0	2
Surfbird	3	3	0	0	0
Short-billed Dowitcher	1	0	0	0	1
Red Phalarope	2	0	0	2	0
Red-necked Phalarope	7	1	3	0	3
Long-tailed Jaeger	1	0	0	0	1
Unidentified gull	99	6	34	39	20
Glaucous-winged Gull	555	33	188	28	213
Herring Gull	8	3	5	0	0
Mew Gull	33	0	3	3	27
Black-legged Kittiwake	1,225	8	214	74	929
Arctic Tern	3	1	1	0	1
Aleutian Tern	1	0	0	0	1

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

Species	Total	Valdez	Seward	Homer	Kodiak
Unidentified alcid	173	24	0	15	134
Unidentified murre	8,851	21	775	2,101	5,954
Common Murre	10,428	399	523	1,353	3,153
Thick-billed Murre	669	16	142	73	438
Pigeon Guillemot	614	136	109	153	214
Unidentified murrelet	413	21	37	121	234
Marbled Murrelet	612	289	97	82	144
Kittlitz's Murrelet	67	23	19	21	4
Ancient Murrelet	311	3	40	73	195
Cassin's Auklet	48	0	36	2	10
Least Auklet	5	0	0	1	4
Parakeet Auklet	31	1	2	1	27
Rhinoceros Auklet	141	0	31	31	79
Unidentified puffin	46	0	7	4	35
Horned Puffin	139	0	32	13	94
Tufted Puffin	361	0	29	15	317
Bald Eagle	125	31	20	15	59
Unidentified raptor	7	1	3	2	1
Peregrine Falcon	2	0	0	0	2
Willow Ptarmigan	1	0	0	0	1
Unidentified owl	1	0	0	1	0
Great-horned Owl	3	0	0	3	0
Unidentified woodpecker	1	0	0	1	0
Cliff Swallow	3	0	3	0	0
Violet-green Swallow	1	0	1	0	0
Unidentified passerine	9	1	7	1	0
Stellar's Jay	1	1	0	0	0
Magpie	7	1	0	0	6
Common Raven	18	1	4	0	13
Northwestern Crow	34	6	3	3	22
American Robin	2	0	2	0	0
Varied Thrush	1	0	0	0	1
Hermit Thrush	1	0	1	0	0
Unidentified warbler	1	0	0	0	1
Yellow Warbler	3	0	3	0	0
Pine Grosbeak	1	0	0	0	1
Unidentified sparrow	15	0	10	2	3
Savannah Sparrow	1	0	1	0	0
Golden-crowned Sparrow	4	0	3	0	1
White-winged Crossbill	8	0	0	6	2

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EXXON VALDEZ
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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
See *Exhibit*

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING
COMPANY, and EXXON PIPELINE COMPANY,
in personam, and the T/V
EXXON VALDEZ, in rem,
Defendants.

Civil Action No.
A91-082 CIV

STATE OF ALASKA,
Plaintiff,

v.

EXXON CORPORATION, and EXXON
SHIPPING COMPANY,
Defendants.

Civil Action No.
A91-083 CIV

AGREEMENT AND CONSENT
DECREE

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AGREEMENT AND CONSENT DECREE

This Agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V EXXON VALDEZ, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

Introduction

On the night of March 23-24, 1989, the T/V EXXON VALDEZ, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as State of Alaska v. Exxon Corporation, et al., Civil No. 3AN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On March 13, 1991 and March 15, 1991, respectively, the United States and the State each filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted counterclaims against the

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United States and the State in their responses to the Federal Court Complaints.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f).

Exxon represents that, during the period from the Oil Spill through August, 1991, it expended in excess of \$2.1 billion for clean-up activities and reimbursements to the federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities,

28 U.S.C. §§ 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f). This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V EXXON VALDEZ, Official Number 692966 (now the T/V EXXON MEDITERRANEAN).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) "Alyeska" means Alyeska Pipeline Service Company, a

Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) The "TAPL Fund" means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.), the State, or both the United States and the State.

(d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources on behalf of the public for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. §§ 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, et seq., or any federal or state statute or maritime or common law relating to the environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any

similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) "Party" or "Parties" means Exxon, Exxon Pipeline, the United States, and the State, or any of them.

(f) "Trustees" means the Secretaries of the U.S. Departments of Agriculture and the Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, the Alaska Attorney General, and the Commissioners of the Alaska Departments of Environmental Conservation and Fish and Game.

(g) The "Oil Spill" means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) "Effective Date" shall mean the earliest date on which all Parties have signed this Agreement.

(i) "Final Approval" shall mean the earliest date on which all of the following have occurred: (1) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the time of approval, in a manner inconsistent with the Parties' intentions; and (2) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the

time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on December 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where
"X" equals Exxon's expenditures for work done from January 1, 1991 through March 12, 1991, in preparation for and conduct of clean-up of the Oil Spill in accordance with directions of the Federal On-Scene Coordinator, up to a maximum of \$4,000,000, plus Expenditures made by Exxon for clean-up work after March 12, 1991 in accordance with Paragraph 11; provided that all such Expenditures shall be subject to audit by the Governments.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

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September 1, 1993	\$100,000,000
September 1, 1994	\$ 70,000,000
September 1, 1995	\$ 70,000,000
September 1, 1996	\$ 70,000,000
September 1, 1997	\$ 70,000,000
September 1, 1998	\$ 70,000,000
September 1, 1999	\$ 70,000,000
September 1, 2000	\$ 70,000,000
September 1, 2001	\$ 70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent)". The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal

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to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless any Party terminates the Agreement pursuant to Paragraph 37. If the Agreement is terminated, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline,

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the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them on or before March 12, 1991 in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it on or before March 12, 1991 in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of them after December 31, 1990 in connection with the Oil Spill; and (5) to reimburse or pay costs incurred by the United States or the State or both after March 12, 1991 to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources, natural resource services, or archaeological sites and artifacts injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or services; and (6) to reimburse the State for reasonable Litigation Costs incurred by it after March 12, 1991.) The aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$67.

million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs incurred on or before March 12, 1991 (under items 1-3 above) shall not exceed \$75 million. The amounts allocated for State Litigation Costs incurred after March 12, 1991 (under item 6 above) shall not exceed \$1 million per month. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which this Court entered on August 28, 1991, in United States v. State of Alaska, Civil Action No. A91-081 CV. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the

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State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

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12. If this Agreement is terminated pursuant to Paragraph 37 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) if total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both --

(1) that based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) that a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above; or

(b) if total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against

which Exxon is seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided, however, that nothing in this Agreement shall affect or impair the following:

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(a) claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) claims by the State for tax revenues which would have been or would be collected under existing AS 43.75 (Fisheries Business Tax) but for the Oil Spill, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75;

(c) exclusively private claims, if any, by Alaska Native Villages and individual Alaska Natives, other than claims for Natural Resource Damages, seeking damages for private harms to Native subsistence well being, community, culture, tradition and way of life resulting from the Oil Spill, including private claims for private harms to Alaska Native Villages and individual Alaska Natives resulting from the impairment, destruction, injury or loss of Natural Resources caused by the Oil Spill and any other exclusively private claims that are available to Alaska Native Villages and individual Alaska Natives; and

(d) exclusively private claims, if any, by Alaska Native Corporations, other than claims for Natural Resource Damages, seeking damages for private harms resulting from injuries caused by the Oil Spill to lands in which a Native Corporation holds any present right, title, or interest, including private claims for

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lost or diminished land values, for preservation, protection and restoration of archaeological or cultural resources and archaeological sites found on the lands described in this subparagraph, for private harms resulting from injuries to Natural Resources found on lands described in this subparagraph, for impairment of riparian or littoral rights, if any, and any other claims that are available to Alaska Native Corporations as private landowners; provided, however, that such claims shall not include any claims based upon injuries to tidelands or submerged lands.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or

state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. (a) Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the State, in the State Court Action will be dismissed with prejudice and without an award of costs or

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attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this subparagraph.

(b) Not later than 15 days after Final Approval, each of the claims asserted by the United States and the State against Exxon or Exxon Pipeline in the Federal Court Complaints, except for the claim described in Paragraph 13(d) of this Agreement, each of the counterclaims asserted by Exxon and Exxon Pipeline against the United States or the State in their responses to the Federal Court Complaints, shall be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, the United States, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this subparagraph.

(c) Each of the claims asserted by Exxon against the Governments or their officials in Exxon Shipping Company, et al. v. Lujan, et al., Civil Action No. A91-219 CIV (D. Alaska) ("Lujan") shall be dismissed with prejudice, and without an award of attorneys fees or costs to any Party, not later than 5 days after United States District Court approval of any agreement(s) between the Governments and the non-Government defendants in Lujan under which all of the non-Government defendants disclaim any right to recover Natural Resource Damages.

Reopener For Unknown Injury

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay

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to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Releases and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based on or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising

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against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good

faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

Third Party Litigation

26. (a) Except as provided in subparagraph (b) of this paragraph, if any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party. However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

(b) If any person or entity, other than the TAPL Fund or Alyeska, asserts claims against the Governments, or either of

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them, that are based upon contribution or indemnity or any other theory of recovery over against the Governments arising from any liability of or payment by said person or entity to Exxon or Exxon Pipeline relating to or arising from the Oil Spill, or based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to such person or entity based on such claims. The foregoing indemnity (i) shall not be enforceable with respect to any amount in excess of value actually received by Exxon or Exxon Pipeline, and (ii) shall be enforceable only if the Governments assert in good faith all defenses they may have to such claims.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be

paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or hereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the Governments for interest on the overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. § 3717(a)(1) & (2). Interest on an

overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attn. DOJ #90-5-1-1-3343

Chief, Admiralty and Aviation Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

General Counsel
National Oceanic and Atmospheric Administration
Department of Commerce
14th & Constitution Avenue, N.W.
Washington, D.C. 20230

As to the State of Alaska:

Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

Supervising Attorney
Oil Spill Litigation Section
Department of Law
1031 W. Fourth Street, Suite 200
Anchorage, Alaska 99501

As to Exxon Corporation:

Office of the Secretary
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

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General Counsel
Exxon Corporation
225 E. John W. Carpenter Fwy.
Irving, Texas 75062-2298

As to Exxon Shipping Company:

Office of the President
Exxon Shipping Company
P.O. Box 1512
Houston, Texas 77251-1512

As to Exxon Pipeline:

Office of the President
Exxon Pipeline Company
P.O. Box 2220
Houston, Texas 77252-2220

Election to Terminate

37. Any Party may elect to terminate this Agreement if:

(1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in United States v. Exxon Shipping Co., No. A90-015 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile,

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or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

Retention of Jurisdiction

38. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

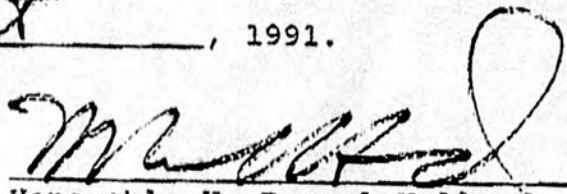
Miscellaneous

39. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

40. Each undersigned representative of a Party to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

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THE FOREGOING Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby APPROVED AND ENTERED THIS 8 DAY OF Oct, 1991.


 Honorable H. Russel Holland
 United States District Judge
 District of Alaska

cc: B. Herman (AAG-200)
 W. Bankston (BANKSTON)
 D. Serdahely (BOGLE)
 J. Clough, III

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[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR THE UNITED STATES OF AMERICA

Date: Sept 25, 1991

Barry M. Hartman
BARRY M. HARTMAN
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Date: Sept. 24, 1991

Stuart M. Gerson
STUART M. GERSON
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

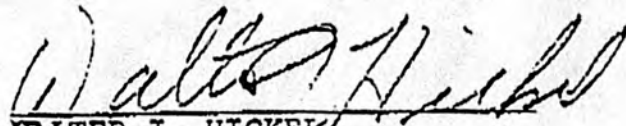
FOR THE STATE OF ALASKA

Date: Sept 25, 1991

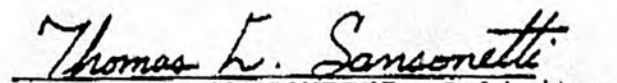
Charles E. Cole
CHARLES E. COLE
Attorney General and Lead State
Trustee
State of Alaska
Pouch K
Juneau, Alaska 99811

[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

Date: _____


WALTER J. HICKEY
Governor
State of Alaska

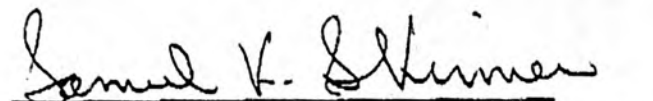
Date: _____


THOMAS L. SANSONETTI, Solicitor
U.S. Department of the Interior

Date: _____


ALAN CHARLES RAUL, General Counsel
U.S. Department of Agriculture

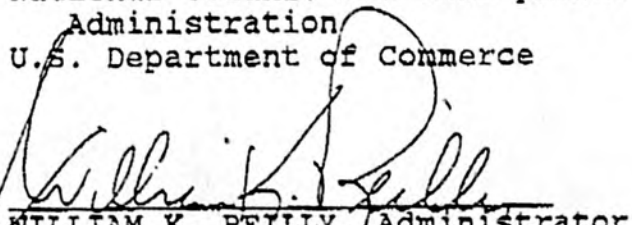
Date: _____


SAMUEL K. SKINNER, Secretary
U.S. Department of Transportation

Date: _____


THOMAS A. CAMPBELL, General Counsel
National Oceanic and Atmospheric
Administration
U.S. Department of Commerce

Date: _____


WILLIAM K. REILLY, Administrator
U.S. Environmental Protection
Agency

[Agreement and Consent Decree in United States v. Exxon Corporation, et al. (D. Alaska)]

FOR EXXON CORPORATION

Dated: Sept 25, 1991

Edward J. Lynch
EDWARD J. LYNCH
Associate General Counsel
Exxon Corporation
225 E. John W. Carpenter Freeway
Irving, Texas 75062-2298

Dated: Sept. 25, 1991

Patrick Lynch
PATRICK LYNCH
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071

Dated: _____

John F. Clough III
JOHN F. CLOUGH III
Clough & Associates
431 North Franklin Street, Suite 202
Juneau, Alaska 99801

FOR EXXON SHIPPING COMPANY and T/V EXXON VALDEZ

Dated: 9/25/91

James F. Neal
JAMES F. NEAL
Neal & Harwell
2000 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

Dated: _____

Robert C. Boney
ROBERT C. BONEY
Bogle & Gates
1031 West 4th Avenue, Suite 600
Anchorage, Alaska 99501

FOR EXXON PIPELINE COMPANY

Dated: 9-25-91

John R. Reeman
JOHN R. REEMAN
Attorney for Exxon Pipeline Company
P.O. Box 2180
Houston, Texas 77252-2180

Dated: _____

Randall J. Weddle
RANDALL J. WEDDLE
Faulkner, Banfield, Doogan & Holmes
550 West 7th Avenue, Suite 1000
Anchorage, Alaska 99501

FILED

OCT 09 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
[Signature]

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

STATE OF ALASKA,

Plaintiff,

v.

EXXON CORPORATION, et al.,

Defendants,

No. A91-083 Civil

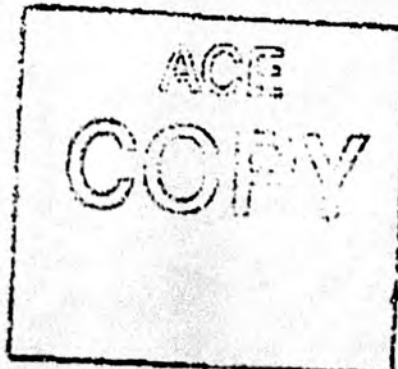
JUDGMENT

Judgment is hereby rendered in this action on the terms and conditions set forth in the Agreement and Consent Decree entered as an order of the Court on the 8 day of Oct, 1991.

ENTERED this 8 day of Oct, 1991.

[Signature]
United States District Judge

cc: O & J 4464
B. Herman (AAG-200)
W. Bankston (BANKSTON)
D. Serdahely (BOGLE)
J. Clough, III



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