

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

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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

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\$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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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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April 16, 1991

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Governor Walter J. Hickel
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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".

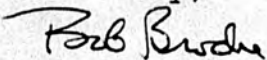
Those of us in Alaska recognize that EXXON'S oil had far reaching effects throughout the Gulf of Alaska and that in all fairness the entire area should be given appropriate consideration in the restoration process. It is through the inclusion of the municipal representative on the Trustee Council that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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 2

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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 3

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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 4

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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 5

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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 6

- 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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 7

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

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 8

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.

Exxon Valdez Oil Spill Claims Settlement Kieran Donahue page 9

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.

P.O. Box 22151 Juneau, Alaska 99802

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
DENALI GROUP SIERRA CLUB • JUNEAU AUDUBON SOCIETY • JUNEAU GROUP, SIERRA CLUB
KACHEMAK BAY CONSERVATION SOCIETY • KENAI PENINSULA AUDUBON SOCIETY • KNIK CANGERS AND KAYAKERS
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

211 4th Street, Suit 112
Juneau, AK 99801
907-586-2820
Fax# 907-463-2545

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:

Sarah Chasis
Robert Adler
Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

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

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

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

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

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

I. PUBLIC PARTICIPATION IN THE INJURY ASSESSMENT AND RESTORATION PROCESS

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

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

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

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

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

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

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

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

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

II. OTHER COMMENTS ON THE MOA

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

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

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

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

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

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

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

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

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

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

III. INDEPENDENT ENDOWMENT/FOUNDATION

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

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

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

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

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

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

ATTACHMENT 1

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

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

Members

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

The categories we suggest¹:

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

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

Mechanics of Advisory Committee

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

We suggest that:

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

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

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

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

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

Prepared by:

Sarah Chasis
Robert Adler
Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

April 18, 1991

The following environmental 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.

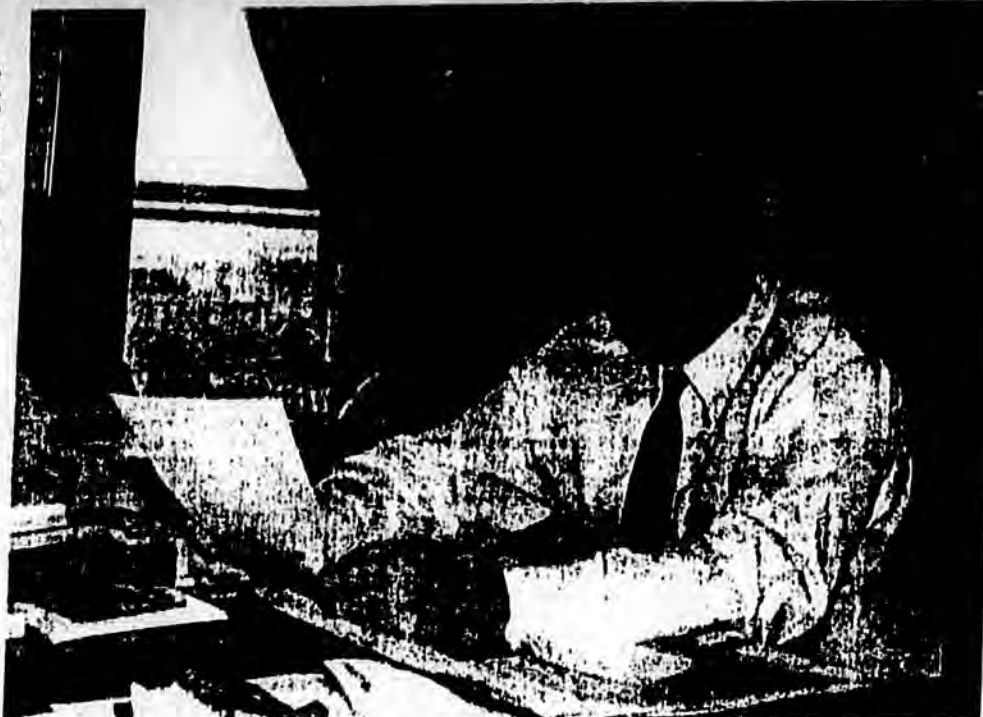
In Response to Disasters

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-



Mary Kay 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.



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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.

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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.

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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.

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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.

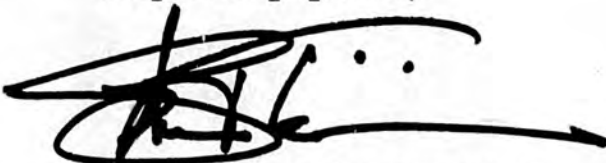
I can assure you that the last thing I or any of the other third party plaintiffs want to do is drag the State of Alaska into court on our way to seeking redress from Exxon and Alyeska. To prevent this I urge the following actions be considered:

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

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April 13, 1991

Via-Facsimile
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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
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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.

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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

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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.

NWF Comments
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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.