

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
2117 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

135

NTSB

M E M O R A N D U M

TO: Special House Committee on
Exxon Valdez Settlement

FROM: Chip Thoma

DATE: April 16, 1991

RE: Federal Felony Charges proposed to be dropped
under settlement

Here is some background on helmsman KAGAN and violations of vessel manning standards aboard the Exxon Valdez, which eventually were the basis of federal grand jury indictments against Exxon.

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

In the Matter of the Investigation of the
Accident Involving the Grounding of the
Tankership EXXON VALDEZ in Prince William
Sound, Alaska, on March 24, 1989

:
:
: Docket No.
DCA 89 MM 040
:

**PROPOSED PROBABLE CAUSE, FINDINGS
AND RECOMMENDATIONS OF THE STATE OF ALASKA**

Comments with respect to this document should be addressed to:

Robert E. LeResche
Oil Spill Coordinator
STATE OF ALASKA
124 West 5th Street
Juneau, Alaska 99811
(907) 465-2062

July 17, 1989

an average knowledge of ship handling characteristics. In a somewhat later review (for the period December 11, 1987 through January 12, 1988), Cousins was rated by Hazelwood as having excellent navigational skills and only an average knowledge of ship handling characteristics. Id.

C. Robert M. Kagan - AB

Robert M. Kagan is 46 years old and has been employed by the Exxon Shipping Company for thirteen years. ESC produced nine "Employee Evaluation and Development" forms for Kagan, each covering one- to two-month periods from February 1986 through February 1989. The evaluation forms uniformly characterize Kagan as capable of satisfactorily performing more menial shipboard tasks (tank cleaning, painting), but as having difficulty in executing seaman-related jobs which call for a higher degree of technical knowledge. Kagan Service Records, Exh. 5D. Kagan consistently required a good deal of supervision. Kagan was reported as having a short attention span and tending to easily get bogged down in trivial matters, even to the point of compromising safety. The last evaluation of Kagan's performance (for the period January 20, 1989 through February 14, 1989) stated that even though Kagan was sailing as an AB, he needed to improve his overall performance and he "lacks the necessary skills to do the AB's job." This evaluation also noted that Kagan required too much supervision to be a productive crew member. Despite this negative evaluation, ESC permitted Kagan to continue to serve as an AB. Consequently, on March 24, Kagan was

on watch as helmsman while the EXXON VALDEZ was in the ice-laden and confined waters, even though Kagan was "nervous" at the prospect of being the helmsman in Prince William Sound. LeCain Tr. 775-776.

D. Maureen C. Jones - AB

Maureen Jones is 24 years old and has been employed by the Exxon Shipping Company since September 1987. She is a graduate of the Maine Maritime Academy. ESC produced eight evaluations of Jones which uniformly rate her as a capable and competent AB who generally exceeds the requirements of the position. Jones Service Records, Exh. 5E. From the evaluations provided, it appears Jones was an energetic member of the crew who was interested in advancing to Mate and higher. In her effort to achieve advancement, Jones was eager to take on overtime tasks. It appears that Jones' interest in a career at sea and in advancing to higher positions strongly influenced those officers who evaluated her.

Other EXXON VALDEZ officers possessed various licenses as set forth in Exhibit 2B. This Exhibit indicates that the Board investigators would be reviewing Coast Guard and Merchant Mariners' documents to assess the level of experience of the ABs. As of the date of this submission, the State has not received any such further NTSB analysis.

Alyeska did not perform its duties consistent with the plan on the morning of the grounding. This failure of performance was not the result of any weakness in the State approved plan. Mr. Kelso testified that, with the benefit of hindsight, no changes to the Contingency Plan would have rectified the mistakes made by Alyeska in its negligent performance under the plan. Kelso Tr. 1169.

VIII. VESSEL MANNING STANDARDS

A. Coast Guard Manning Level Statutes and Requirements

One of the significant issues raised by the grounding of the EXXON VALDEZ concerns the manning levels of tanker vessels. The EXXON VALDEZ had issued to it a U. S. Coast Guard Certificate of Inspection which required a minimum of fourteen officers and crew (fifteen if a radioman was required by FCC regulation),^{47/} excluding stewards. The EXXON VALDEZ was required to and did carry a radioman. In addition, two stewards and two oilers were on the journey from Valdez on March 23, 1989, for a crew of twenty.

Section 3309 of Title 46 of the United States Code requires the Coast Guard to issue tank vessels Certificates of Inspection, the terms and conditions of which must be observed by the ship operators. Among the limitations to be placed in the Certificate of Inspection are minimum manning levels. 46 U.S.C. § 8101-8105; 46 C.F.R. § 15.101-15.915. The Coast Guard regula-

^{47/} The FCC requires a licensed radioman when the vessel is over 300 gross tons.

tions do not specify, and the Coast Guard has not established, standards of manning levels for merchant ships. 46 C.F.R. § 15.501-525; § 15.801-915; Grady/Barton/Steen Interview, Exh. 10E, p. 1. According to the Coast Guard, the manning levels established for each ship are determined on a case-by-case basis. The "minimum crew level" specified in the Certificate of Inspection is defined by the Coast Guard as the crew complement that cannot be further reduced and still provide for the safe operation of the vessel. Id.

The specific job-by-job manning level guidelines are set forth in 46 C.F.R. § 15.801 et seq. A vessel the size and displacement of the EXXON VALDEZ is required to have one master, §15.805, three licensed mates, §15.810(a)(1) and a chief engineer, §15.820(a)(1). The Coast Guard determines the overall manning requirements by setting the number of assistant engineers and able seamen, based on (1) the size and type of vessel, (2) the installed equipment, (3) the proposed routes of operation, (4) the cargo carried, (5) the type of service of the vessel, (6) the degree of automation, (7) the use of labor saving devices, and (8) the organizational structure of the vessel. 46 C.F.R. § 15.501(b), § 15.825, § 15.840. Additionally, the FCC requires vessels over 300 gross tons, such as the EXXON VALDEZ, to have a licensed radio operator. 47 U.S.C. § 353, 47 C.F.R. 80.159(b).

Any deviation from the manning levels set forth in a vessel's Certificate of Inspection renders the vessel without legal authorization to operate. 46 U.S.C. § 8101(d), 46 C.F.R.

§ 15.515(a). To effect a change in the manning level, requests must be made by the master or agent of the vessel to the Coast Guard pursuant to 46 C.F.R. § 15.505, and such changes, once approved, must be endorsed on the Certificate of Inspection by the Coast Guard. 46 C.F.R. § 31.15-1(a).

B. Establishment of Manning Levels for
the EXXON VALDEZ

Exhibit 10G contains a series of correspondence and memoranda relating to the ESC request to the Coast Guard to reduce the manning levels for both the EXXON VALDEZ and its sister ship the EXXON LONG BEACH. The culmination of this correspondence is a copy of a USCG letter dated May 27, 1988, to Paul Myers of ESC, issuing amended Certificates of Inspection authorizing reduced manning levels and the operation of unattended engine rooms. Reduced Manning Correspondence, Exh. 10G, p. 21-22. The authorizing letter also approves Exxon's proposal to implement a Maintenance Department on both vessels. Although this Coast Guard approval is granted by letter dated May 27, 1988, the Certificate of Inspection for the EXXON VALDEZ reproduced in Exhibit 3A is dated November 18, 1988. It cannot be determined from the record what, if any other, manning level changes were made to the Certificates of Inspection in the period from May to November. The Certificates of Inspection set out in Exhibit 3A reflect the operation of a Maintenance Department, although, according to the Third Mate, the Maintenance Department had been disbanded for approximately one year prior to the grounding. Cousins Tr. 25. ESC's failure to adhere to its Cer-

tificate of Inspection is a violation of 46 U.S.C. § 3309.

The Coast Guard's approval of reduced manning levels for the EXXON VALDEZ was the product of bureaucratic misdirection. It appears from Exhibit 10G that the Coast Guard inadvertently issued to the EXXON VALDEZ a reduced manning Certificate of Inspection without first having properly completed the standard Coast Guard review process. The process requires approval of the local Coast Guard field office (Officer in Charge of Marine Inspection (OCMI)) and the Coast Guard Merchant Vessel Personnel Branch (MVP). Grady/Barton/Steen Interview, Exh. 10E, p. 2; Flyntz Tr. 1025. In the case of the EXXON VALDEZ, the MVP was never initially asked to review the decision of the OCMI to reduce the EXXON VALDEZ manning levels, which had been inadvertently authorized by the OCMI. Vessel Manning Correspondence, Exh. 10G, p. 13. Consequently, the Coast Guard, which was in the process of evaluating ESC's request to reduce the manning level of the EXXON LONG BEACH, advised Exxon that its determination on the EXXON LONG BEACH would control both vessels. Id. ESC apparently agreed with this approach and submitted additional documents supporting its request for reduced manning levels of the EXXON VALDEZ and EXXON LONG BEACH, Id., pp. 15-18. This additional data appeared to satisfy the Coast Guard, which ultimately issued amended Certificates of Inspection to both vessels. Id.

C. The Exxon Shipping Company Approach
to Manning Levels

The reduction in the manning levels of the EXXON VALDEZ is consistent with the policy of ESC to reduce manning on all its major vessels to minimum levels and to utilize its licensed and unlicensed crew in as flexible a manner as possible and as a cost savings device. Iarossi Tr. 892-894.

In a paper titled "Surrendering the Memories" dated June 1988, Mr. Iarossi stated that it is ESC's policy to reduce by the year 1990 its standard crew complement to sixteen on its fully automated diesel powered vessels (such as the EXXON VALDEZ), down from twenty in 1984.^{48/} While Iarossi notes that other ships, mostly foreign flag ships, have successfully operated at such low crew levels, the paper makes little mention of considerations of ship safety or crew fatigue. By focusing the crew manning debate solely on the issue of economics, ESC does a disservice to the public.

The lengths to which ESC has gone in pursuit of its economic goal of crew reduction are recorded in several other manning-related documents. These documents reflect the fact that Exxon pursued a demanning and crew flexibility strategy designed to maximize cost savings. It as well appears that the decisional criteria employed by the Coast Guard in analyzing demanning re-

^{48/} The State of Alaska requested this and other manning-related documents accompany the record in this investigation. See letter of Robert E. LeResche to L. A. Colucciello dated June 9, 1989, copies (with enclosures) of which were served on all parties.

quests does not include crew fatigue, except for a cursory analysis of crew overtime records. Grady/Barton/Steen Interview, Exh. 10E, p. 1.

ESC was apparently all too aware of the weight the Coast Guard placed on ship overtime levels. As a result, ESC, by internal direction, instructed its masters to manipulate overtime levels to reduce them to "zero" so as to better justify to the Coast Guard the elimination of all unlicensed crew from the Engine Department.

Three internal Exxon memoranda, all from S. W. McRobbie to various ESC ship masters, orders the masters to purposefully reduce overtime in order to satisfy Coast Guard overtime concerns. In one memo, McRobbie states:

When the Engine Department shifts to day work, it is imperative that Engine Department unlicensed overtime be essentially nonexistent. . . .

because:

. . .the UMS [unmanned engine room status] diesel ships have already had their initial demanning requests denied due to the volume of unlicensed engine room overtime, regardless of type.

ESC Memoranda from S. W. McRobbie, undated.

In another memo, McRobbie states:

Yet in order to establish the type of overtime pattern which will demonstrate to the U.S.C.G. that the vessel can be safely operated without the QMED ratings, you must strive to control the amount and type of overtime used by these routings.

ESC Memorandum from S. W. McRobbie to Captain/EXXON BAYTOWN, October 25, 1988. In yet another memo, McRobbie states:

Whereas your vessel is earmarked for. . . UMS approvals. . . and QMED demanning when the UMS is achieved, we need to immediately begin closely allocating and managing all Engine Department overtime.

The goal is to closely control all operational overtime and extra manpower which will have a direct bearing on how the Coast Guard will assess manpower requirements for safely operating as a UMS vessel.

This heavy-handed attempt to manipulate the facts regarding manning levels is indicative of ESC's cavalier approach to manning levels.

ESC's deliberate manipulation of overtime records for the purpose of gaining Coast Guard approval has fortunately been counteracted. According to the senior staff of the Coast Guard Office of Vessel Manning, it has gone to the extraordinary lengths of requiring ESC masters and chief engineers to warrant to the Coast Guard that overtime records submitted as demanning justification are, in fact, "representative" of normal overtime activity and not an artificially low level as ordered by management. Grady/Barton/Steen Interview, Exh. 10E, p. 4. The NTSB should recommend that the Coast Guard review any decisions authorizing lower manning levels or unmanned engine room status to insure the data supplied by ESC was not manipulated solely to gain Coast Guard approval of its cost-savings requests.

Other serious allegations have recently been pressed by Exxon's Seamen's Union regarding both Exxon demanning strategies and Coast Guard approval procedures as reflected in Union documents which Alaska by its letter dated June 7, 1989 requested accompany the record. While Alaska has no desire to inject it-

self or the Board into any industrial dispute, the Union's letter dated March 7, 1989, raises issues the NTSB has wisely agreed to address in the interest of safe shipping.

The NTSB Interviews of John Hillman and John Spencer, two of the six members of the Board of Governors of the Exxon's Seamans Union, raise a host of manning and safety issues. For example, Hillman makes a strong case that Exxon manipulated overtime records solely to justify the ESC's demanning requests. Hillman Tr. 14-19. Hillman and Spencer also explain that, by making officers part of management, Exxon has made officer overtime impossible to document, and that work previously performed by unlicensed personnel (often on overtime) is now being accomplished by officers with no overtime being recorded. Hillman Tr. 12-13; Spencer Tr. 10. Hillman notes also that, in addition to the almost daily overtime Exxon's crews are asked to work, ESC has extended their tour of duty from 60 days to 90 and 100 days, thereby further exacerbating the crew fatigue factor. Hillman Tr. 22,39. Hillman testified that ESC has refused to come to terms with the Union because of its insistence that the Union agree to demanning levels the Union believes are inherently unsafe. Hillman Tr. 40-41. Hillman also raised a new issue involving a recent change in ESC procedure, which requires that while in port or during lightering operations a minimum crew of eight--four officers and four unlicensed (two of which must be ABs)--must remain onboard the vessel in case of emergency. With a reduced compliment of AB's, an given routine watch standing

requirements, this new ESC directive requires the AB's be on board or on watch, thereby further compounding the crew fatigue factor. Hillman suggests, with considerable logic, that this new directive is indicative of the need for increased manning levels. Hillman Tr. 48-49.

Alaska believes it to be in the public interest and the national interest that the U. S. tanker fleet be properly crewed and that manning levels not be based solely on owner/operator cost or competitive considerations, as Exxon approaches the issue.

D. The Relationship Between Manning Levels and Safety

The question of crew manning level is not just an economic issue. It is obviously inextricably interrelated with the core concept of shipping safety. If manning levels are pushed to unreasonably low levels, then crew workloads increase, as does crew fatigue. Inattentive or exhausted crew members do not work at peak efficiency. The Coast Guard, recognizing this fact, has underwritten a study of safety and its relationship to reduced manning levels. The Study is titled "Shipboard Crew, Fatigue, Safety and Reduced Manning." Grady/Barton/Steen Interview, Exh. 10E, p. 4. The interview summary stated that the findings of this and another study titled "Effect of Smaller Crews on Maritime Safety" will be incorporated in the Coast Guard reduced manning decision process "in the future." *Id.* In other words, at least up until now, the decisional criteria used by the Coast Guard to approve reduced manning requests placed more emphasis on

the availability of automation and labor-saving devices (46 CFR § 15.501(b); § 15.825 and § 15.840) than on basic safety considerations.

E. Crew Duty Time Limitations

Although they appear to be mainly honored by ESC in the breach, the Congress has established limits on the time officers and crew can continuously be on duty or at work. As these rules relate to the EXXON VALDEZ, they provide that:

- (A) An owner, operator or master may not permit an officer to take charge of the deck watch on a vessel when leaving or immediately after leaving port if the officer has not been off duty for at least six hours within twelve hours immediately before the time of leaving.
- (B) A licensed individual or a seaman may not be required to work more than eight hours in one day except when needed for
 - (1) maneuvering, shifting the berth of, mooring or unmooring the vessel;
 - (2) performing work necessary for the safety of the vessel, its crew or cargo;
 - (3) saving life on board another vessel in jeopardy;
 - (4) performing fire, lifeboat, or other drills in port or at sea

Captain Deppe was asked how ESC insured adherence to the law requiring at least six hours of rest for watch officers within the twelve hours prior to getting underway. Incredibly he responded that "We [ESC] don't have any program to give six hours of rest to any deck officer before we get underway." Deppe Tr. 1096. Yet, Mr. Flyntz, Assistant Chief of Merchant Vessel Personnel for the Coast Guard, testified that the Coast Guard relies

on the statutory rest provision to insure that crews are not fatigued prior to the vessel getting underway. Flyntz Tr. 1066. There is no evidence in the record concerning the systems or programs Exxon has in place regarding the other statutory crew duty limits. It is difficult for the State to understand how ESC can dispatch its tanker fleet with so little regard for the law or for the alertness and readiness of its crews.

The crew of the EXXON VALDEZ who were interviewed during the field investigation or questioned at the hearing regarding their work schedules provide some insight into the ineffectiveness of Exxon's management of the crew duty time statutes. Appendix D is Alaska's reconstruction of the length of time the critical deck crew were at work or at rest during the 24-hour period prior to the grounding. This analysis reveals that Cousins had only three and a half hours rest in the twelve hours prior to departing Valdez in contravention of 46 U.S.C. § 8104(a). Cousins may also have had less rest than he testified to at the hearing. Accordingly to John Spencer, Cousins was observed by one of the EXXON VALDEZ pumpmen as having "pounded the deck" all afternoon on March 23 thereby contradicting Cousins' claim that he was resting in his quarters from 1330 to 1700. Spencer Tr. 7-10. Of the other crew members, Kagan, the 0000-0400 helmsman, worked ten and a half hours on March 23. Jones, the 0000-0400 lookout, put in an over eleven-hour day of work on March 23 and Chief Mate Kunkel worked nine hours and forty-five minutes on March 23 before turning in at 2200.

Unfortunately, the record does not permit Alaska to determine the work schedule of the crew prior to the arrival in Valdez. However, from the information available to the State, it appears that Exxon paid little, if any, attention to the issue of crew fatigue and alertness, all to the detriment of the citizens of the State of Alaska.

F. ESC Proposed Revisions to Federal Law
Regulating Minimum Manning Levels

ESC has been in the forefront of an effort to amend various crew-manning level statutes, which, if adopted, would authorize reduced manning levels and loosen crew scheduling rules. On January 20, 1988, Frank Iarossi co-signed and circulated a paper containing proposed major modifications to the statutes controlling vessel manning requirements.^{49/} Among the proposals was the repeal of Congressionally imposed rules limiting

- (a) crossover between deck and maintenance departments
- (b) licensing of dual purpose officers
- (c) officer rest periods prior to departure from port.

In addition, Iarossi suggested the repeal of all requirements for a minimum number of licensed officers based on the vessel's gross tonnage.

The justification offered for these changes in manning was the need for improved efficiency and to insure that ESC is

^{49/} This document is within the package of documents the State by its letter dated June 9, 1989 requested the NTSB include in the record and permit the parties to refer to in their respective submissions.

competitive with foreign flag vessels. No recognition is given in this paper to safety concerns or to the link between safety and crew size. This ESC cosponsored document is consistent with the Company's several attempts to reduce shipboard manning levels in the name of competition, even though ECS's tankers in the Valdez trade are statutorily protected from foreign flag competition. 46 U.S.C. § 883.^{50/} ESC's advocacy for these statutory changes is consistent with its apparent disregard for the consequences of a catastrophic event such as the grounding of a heavily laden tanker vessel.

IX. THE UNITED STATES COAST GUARD VESSEL TRAFFIC SERVICE

The Vessel Traffic Service (VTS), operated by the U. S. Coast Guard, is a vessel movement system established by the Ports and Waterways Safety Act of 1972. 33 U.S.C. §§ 1221-1236. The Trans-Alaska Pipeline Authorization Act 43, U.S.C. § 1651-1655, amended the Ports and Waterways Safety Act to require the Coast Guard to establish and operate a vessel traffic service in Prince William Sound. The requirement for such a system was created by the need to move North Slope crude oil from Valdez to the lower 48 states by tank vessels transporting on an average daily basis 2 million barrels (84,000,000 gallons) of crude oil through ecologically sensitive Prince William Sound. The Congress wisely wished to insure that the movement of such large quantities of oil would be safely conducted. VTS Factual Report, Exh 2C, p. 3.

^{50/} Pursuant to Jones Act exemptions, a small number of foreign flag vessels, averaging one per week, call on Valdez. McCall Tr. 1291.

FEDERAL REGISTER

federal register

**Tuesday
March 19, 1991**

Part III

Department of Commerce

**National Oceanic and Atmospheric
Administration**

**Settlement Agreement Concerning Exxon
Valdez Oil Spill and Memorandum of
Agreement Between the United States
and the State of Alaska and Exxon
Corp., et al.; Notice of 30 Day Comment
Period**

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Settlement Agreement Concerning the Exxon Valdez Oil Spill Between the United States, the State of Alaska and the Exxon Corp., Exxon Shipping Co. and Exxon Pipeline Co.

AGENCIES: National Oceanic and Atmospheric Administration, Department of Agriculture, Department of the Interior, Department of Justice, Department of Transportation, the Environmental Protection Agency and the Department of Law, State of Alaska.

ACTION: Notice of 30 day comment period.

SUMMARY: Notice is given that officials representing the State of Alaska and the United States reached agreement on March 12, 1991, with Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company (Exxon) on a settlement resolving all civil claims of the respective governments arising from the March 24, 1989 Exxon Valdez oil spill. Comment is sought concerning the proposed civil settlement, which is published together with this Notice. Comments must be received no later than April 18, 1991.

ADDRESSES: Written comments concerning the proposed Settlement Agreement are to be submitted to Thomas A. Campbell, General Counsel of NOAA, U.S. Department of Commerce, room 5816, 14th Street and Constitution Avenue, NW., Washington, DC, 20230, who is receiving comments on behalf of the Administrator of NOAA, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Transportation, the Administrator of the Environmental Protection Agency and the United States Attorney General. A copy of the comments must also be sent to Barbara Herman, Attorney General's Office, State of Alaska, 1031 West 4th Avenue, suite 200, Anchorage, Alaska 99501, who is receiving the comments on behalf of the State of Alaska.

FOR FURTHER INFORMATION CONTACT: Daniel Addison, Office of General Counsel, NOAA, Department of Commerce, Washington, DC 20230, telephone (202) 377-1400.

SUPPLEMENTARY INFORMATION: The grounding on the night of March 23-24, 1989 of the tanker Exxon Valdez resulted in the discharge of approximately 11 million gallons of North Slope crude oil into Alaska's Prince William Sound. The Exxon Valdez Oil Spill affected the

environment and natural resources in the Sound and along the coasts of Kodiak Island, Lower Cook Inlet, the Kenai Peninsula and the Alaska Peninsula.

The State of Alaska has filed an action, *State of Alaska v. Exxon Corporation, et al.*, Civil No. 3AN-89-6852, and Exxon has asserted counterclaims against the State. The U.S. Government filed a civil claim against Exxon on March 13, 1991 and at the same time, together with the state, lodged an Agreement and Consent Decree resolving both the U.S. and Alaska civil claims. This agreement represents the largest natural resource damage settlement in U.S. history and is designed to provide for the restoration of the natural resources affected by the spill. The Agreement also addresses full recovery of past and necessary future costs incurred by the State of Alaska and the United States to complete the clean-up activities and to determine the breadth of injury, loss or destruction of natural resources. When completed, the restoration of areas affected by the spill will be the largest commitment of resources to restore the environment in U.S. history.

The Settlement Agreement provides that \$900 million will be paid to the United States and the State over an 11 year period. These funds will be used to design, implement and monitor restoration activities; to continue the necessary scientific studies deemed necessary to determine the full extent of natural resource injury, loss or destruction due to the spill; to conduct any further cleanup activities deemed necessary by the United States Coast Guard or by the State; and to recover past costs incurred during the natural resource damage assessment process. To address the possibility of currently unknown injuries to the environment, the Settlement Agreement also contains a reopener clause committing Exxon to pay up to an additional \$100 million for restoration projects for natural resources and habitats that are later discovered to be injured as a result of the spill.

A separate Memorandum of Agreement (MOA) between Alaska and the Federal Government was also executed at the same time. The MOA will govern the relationship between the governments in administering the fund created with this settlement. This MOA also provides that the public will be given meaningful opportunities to participate in the restoration process. This State/Federal MOA will be published in a separate Federal Register notice.

Comment is sought from the public concerning the proposed Settlement Agreement. The Agreement provides that the governments can withdraw from the Settlement Agreement within 15 days of the close of the comment period if the comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate, or if, before the end of the 15th day following the close of the comment period, the Alaska State Legislature has not approved the Agreement as written.

Dated: March 14, 1991.
Grayson R. Cecil,

Special Counsel for Natural Resources.

Proposed Consent Decree and Settlement Agreement

Richard B. Stewart, Assistant Attorney General, Environment & Natural Resources Division.

Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, DC 20530—Attorneys for Plaintiff, United States of America.

Charles E. Cole, Attorney General, State of Alaska, Pouch K, Juneau, Alaska 99811—Attorney for Plaintiff, State of Alaska.

United States District Court, District of Alaska

United States of America, Plaintiff, v. Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company, in personam, and the T/V Exxon Valdez, in rem, Defendants. Civil Action No.

The State of Alaska, Plaintiff, v. Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company, in personam, and the T/V Exxon Valdez, in rem, Defendants. Civil Action No.

Agreement and Consent Decree

This agreement and Consent Decree (the "Agreement") is made and entered into by the United States of America and the State of Alaska ("State") (collectively referred to as the "Governments"), Exxon Corporation and Exxon Shipping Company ("Exxon Shipping") (collectively referred to, together with the T/V Exxon Valdez, as "Exxon"), and Exxon Pipeline Company ("Exxon Pipeline").

Introduction

On the night of March 23-24, 1989, the T/V Exxon Valdez, owned by Exxon Shipping, went aground on Bligh Reef in Prince William Sound, Alaska. As a result of the grounding, several of the vessel's cargo tanks ruptured and approximately 11 million gallons of crude oil owned by Exxon Corporation

spilled into Prince William Sound (the "Oil Spill").

The State has filed an action in the Superior Court for the State of Alaska, Third Judicial District, arising from the Oil Spill, identified as *State of Alaska v. Exxon Corporation, et al.*, Civil No. 3AN-89-6852 ("State Court Action"), and Exxon has asserted counterclaims against the State in that action.

On or before the lodging of this Agreement with the Court, the United States and the State will each have filed a complaint in this Court against Exxon and Exxon Pipeline, asserting civil claims relating to or arising from the Oil Spill ("Federal Court Complaints"). Exxon and Exxon Pipeline have asserted or will assert counterclaims against the United States and the State in their responses to the Federal Court Complaints. Exxon Corporation and Exxon Shipping Company have also filed administrative demands against the United States Coast Guard, with the U.S. Coast Guard, Coast Guard Maintenance & Logistics Command—Pacific at Alameda, California under date of September 21, 1990.

The United States and the State represent that it is their legal position that only officials of the United States designated by the President and state officials designated by the Governors of the respective states are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under section 311(f) of the Clean Water Act, 33 U.S.C. 1321(f).

Exxon represents that, during the period from the Oil Spill through the end of 1990, it expended in excess of \$2 billion for clean-up activities and reimbursements to the Federal, State, and local governments for their expenses of response to the Oil Spill.

The Parties recognize that the payments called for in this Agreement are in addition to those described above, are compensatory and remedial in nature, and are made to the Governments in response to their pending or potential civil claims for damages or other civil relief against Exxon and Exxon Pipeline arising from the Oil Spill.

Now, Therefore, The Parties agree, and it is hereby Ordered, adjudged, and decreed As follows:

Jurisdiction

1. The Court has jurisdiction over the subject matter of the claims set forth in the Federal Court Complaints and over the parties to this Agreement pursuant to, among other authorities, 28 U.S.C. 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. 1321(f).

This Court also has personal jurisdiction over Exxon and Exxon Pipeline, which, solely for the purposes of this Agreement, waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District.

Parties

2. "United States" means the United States of America, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the federal government.

3. "State" means the State of Alaska, in all its capacities, including all departments, divisions, independent boards, administrations, natural resource trustees, and agencies of the state government.

4. "Exxon" means Exxon Corporation, a New Jersey corporation, Exxon Shipping Company, a Delaware corporation, and the T/V Exxon Valdez, Official Number 982906 (now the T/V Exxon Mediterranean).

5. "Exxon Pipeline" means Exxon Pipeline Company, a Delaware corporation.

Definitions

6. Whenever the following capitalized terms are used in this Agreement, they shall have the following meanings:

(a) *Alyeska* means Alyeska Pipeline Service Company, a Delaware corporation, its shareholders and owner companies, and its present and former shareholder representatives.

(b) *The TAPL Fund* means the Trans-Alaska Pipeline Liability Fund, a federally chartered corporation organized and existing under the laws of the State of Alaska.

(c) *Natural Resources* means land, fish, wildlife, biota, etc. water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 et seq.) and/or the State.

(d) *Natural Resources Damages* means compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, 33 U.S.C. 1251, et seq., the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1601, et seq., or any federal or state statute or maritime or common law relating to the

environment, including (1) costs of damage assessment, (2) compensation for loss, injury, impairment, damage or destruction of Natural Resources, whether temporary or permanent, or for loss of use value, non-use value, option value, amenity value, bequest value, existence value, consumer surplus, economic rent, or any similar value of Natural Resources, and (3) costs of restoration, rehabilitation or replacement of injured Natural Resources or the acquisition of equivalent resources.

(e) *Party or Parties* means Exxon, Exxon Pipeline, the United States, and the state, or any of them.

(f) *Trustees* means the Secretaries of the U.S. Departments of Agriculture and Interior, the Administrator of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Alaska Attorney General.

(g) *The Oil Spill* means the occurrence described in the first paragraph of the Introduction above, and all consequences proximately caused by or arising from the Oil Spill, including, without limitation, response, cleanup, damage assessment and restoration activities.

(h) *Effective Date* shall mean the earliest date on which all Parties have signed this Agreement.

(i) *Final Approval* shall mean the earliest date on which all of the following have occurred: (1) the Agreement has been lodged with the Court and noticed in the Federal Register, and the period for submission of public comments has expired; (2) the period for withdrawal of consent by the Governments under Paragraph 37 has expired; (3) the Court has approved and entered the Agreement as a judgment, without modification and without interpreting a material term of the Agreement, prior to or at the time of approval, in a manner inconsistent with the Parties' intentions; and (4) the time for appeal from that judgment has expired without the filing of an appeal, or the judgment has been upheld on appeal and either the time for further appeal has expired without the filing of a further appeal or no further appeal is allowed.

Effect of Entry of Decree by Court

7. Upon approval and entry of this Agreement by the District Court, this Agreement and Consent Decree shall constitute a final judgment between the Governments and Exxon and Exxon Pipeline in accordance with its terms.

Payment Terms

8. Exxon shall pay to the Governments pursuant to this Agreement a total of \$900 million, discharged as follows:

(a) Exxon shall pay, within 10 days after the Effective Date, \$90,000,000.

(b) Exxon shall pay on September 1, 1992 the amount determined by the following formula:

amount payable = \$150,000,000 minus X, where "X" equals Exxon's expenditures for work done from January 1, 1991 to the Effective Date, in preparation for and conduct of clean-up of the Oil Spill in accordance with directions of the Federal On-Scene Coordinator, up to a maximum of \$4,000,000, plus Expenditures made by Exxon for clean-up work after the Effective Date in accordance with Paragraph 11.

(c) Exxon shall pay each of the amounts specified in the following schedule by the dates set forth in that schedule:

September 1, 1993 \$100,000,000
 September 1, 1994 \$70,000,000
 September 1, 1995 \$70,000,000
 September 1, 1996 \$70,000,000
 September 1, 1997 \$70,000,000
 September 1, 1998 \$70,000,000
 September 1, 1999 \$70,000,000
 September 1, 2000 \$70,000,000
 September 1, 2001 \$70,000,000

(d) The payments required by this paragraph shall be made as directed jointly in writing, not less than 5 business days before the due date, by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska.

9. If Final Approval has not occurred by the date a payment required under Paragraph 8 is due, Exxon shall, on or before that date, deposit the amount of the payment into an interest-bearing trust account (the "Escrow") in a federally chartered bank ("Escrow Agent"). The Escrow agreement between Exxon and the Escrow Agent shall provide that the Escrow Agent shall submit to the jurisdiction and venue of the United States District Court for the District of Alaska in connection with any litigation arising out of that Escrow agreement. Exxon shall notify the Governments promptly in writing of any deposit of a payment due under this Agreement into the Escrow. Upon Final Approval and within five (5) business days of receipt of written instructions as to payment signed jointly by the Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice, and the Attorney General, State of Alaska, Exxon shall require that a sum be paid to the Governments equal

to all amounts required to be paid into the Escrow pursuant to this paragraph together with an amount calculated by applying to each deposit a rate equal to the average daily yield on three-month Treasury Bills in effect while the funds are on deposit. "The average daily yield on three-month Treasury Bills" means the arithmetic mean of the three-month Treasury Bill rates, as quoted in the H.15 (519) weekly release published by the Board of Governors of the Federal Reserve System under the caption "U.S. Government Securities/Treasury Bills/Secondary Market," multiplied by the actual number of days of such deposit divided by 360. For the purposes of calculating such arithmetic mean, each Saturday, Sunday and holiday shall be deemed to have a rate equal to the rate for the immediately preceding business day. If the earnings accrued on the Escrow are insufficient to make the payment to Governments required by this paragraph and to pay the reasonable fees and expenses of the Escrow Agent, Exxon shall pay the difference so that such amounts will be paid in full. No amount shall be disbursed from the Escrow for any reason, except to make the payment required by this paragraph or to pay reasonable fees and expenses of the Escrow Agent and, after the foregoing payments, to close out the Escrow, unless one of the following events occurs: (1) The United States or the State withdraws its consent to entry of the Agreement pursuant to Paragraph 37; or (2) any Party terminates the Agreement pursuant to Paragraph 38. If one of these events occurs, all sums in the Escrow shall be returned to Exxon.

10. As agreed to between the Governments, without any consultation with or participation by Exxon or Exxon Pipeline, the amounts paid under Paragraphs 8 or 9 shall be applied by the Governments solely for the following purposes: (1) to reimburse the United States and the State for response and clean-up costs incurred by either of them on or before December 31, 1990 in connection with the Oil Spill; (2) to reimburse the United States and the State for natural resource damages assessment costs (including costs of injury studies, economic damages studies, and restoration planning) incurred by either of them prior to the Effective Date in connection with the Oil Spill; (3) to reimburse the State for attorneys fees, experts' fees, and other costs (collectively, "Litigation Costs") incurred by it prior to the Effective Date in connection with litigation arising from the Oil Spill; (4) to reimburse the United States and the State for response and clean-up costs incurred by either of

them after December 31, 1990 in connection with the Oil Spill; and (5) after the Effective Date, to assess injury resulting from the Oil Spill and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or services; provided, however, that the aggregate amount allocated for United States past response and clean-up costs and damage assessment costs (under items 1 and 2 above) shall not exceed \$62 million, and the aggregate amount allocated for State past response and clean-up costs, damage assessment costs, and Litigation Costs (under items 1-3 above) shall not exceed \$72 million. The Governments represent that the monies paid by Exxon to the Governments pursuant to this Agreement will be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska ("MOA"), which the Governments have submitted or will submit to this Court to resolve claims of the Governments against one another with respect to their respective shares in recoveries for Natural Resource Damages resulting from the Oil Spill. This paragraph and the MOA do not create any rights in, or impose any obligations on, Exxon, Exxon Pipeline, Alyeska, or any other person or entity except the Governments.

Commitment by Exxon to Continue Clean-up

11. (a) Exxon shall continue clean-up work relating to the Oil Spill after the Effective Date, as directed by and in accordance with the directions of the Federal On-Scene Coordinator ("FOSC"), subject to prior approval by the FOSC of the costs of work directed by the FOSC. After the Effective Date, Exxon shall also perform any additional clean-up work directed by the State On-Scene Coordinator ("State OSC") that does not interfere or affirmatively conflict with work directed by the FOSC or with federal law, in accordance with the directions of, and subject to prior approval of costs by, the State OSC. If Exxon concludes that work directed by the State OSC would interfere or affirmatively conflict with work directed by the FOSC, or with federal law, it shall promptly notify the State OSC and the FOSC of the potential conflict and shall not be required to proceed with the work directed by the State OSC until the FOSC or the Court determines that there is no conflict or that any potential

conflict has been eliminated, and directs Exxon how to proceed. Exxon should have no liability to any person or entity, including the Governments, by reason of undertaking clean-up work performed in accordance with directions of the FOSC or the State OSC.

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the FOSC or the State OSC in accordance with subparagraph 11(a). As used in this paragraph, and in subparagraph 8(b) and Paragraph 12, "Expenditures" shall include, without limitation, costs and obligations incurred for salary, wages, benefits, and expenses of Exxon employees, for contractors, for equipment purchase and rental, for office and warehouse space, and for insurance, accounting, and other professional services.

12. If this Agreement is terminated pursuant to Paragraphs 37 or 38 below, or if a final judicial determination is made that this Agreement will not be approved and entered, Exxon shall be entitled to set off against any liability it may have to either Government arising from the Oil Spill the amount of any Expenditures made by Exxon for clean-up work directed by the FOSC or the State OSC under Paragraph 11(a), if the work meets the following criteria:

(a) If total Expenditures incurred by Exxon for clean-up after the Effective Date are \$35 million or less, Expenditures for work shall be set-off if Exxon shows both—

(1) That based on the information available at the time to the FOSC or State OSC who directed the work, the anticipated cost of the work was grossly disproportionate to the net environmental benefits reasonably anticipated from the work, or the work could not reasonably have been expected to result in a net environmental benefit; and

(2) That a reasonable time before beginning to perform the work, Exxon submitted a written objection to the work to the FOSC or State OSC who directed the work, requesting reconsideration of the work directions on one of the grounds set forth in subparagraph 12(a)(1) above; or

(b) If total Expenditures by Exxon for clean-up after the Effective Date exceed \$35 million, Expenditures for work shall be set-off unless the Government or Governments against which Exxon is

seeking to assert the set-off provided by this paragraph show that, based on the information available at the time to the FOSC or State OSC who directed the work, the work was reasonably expected to result in a net environmental benefit, and the anticipated cost of the work was not substantially out of proportion to the net environmental benefit reasonably anticipated from the work.

Releases and Covenants Not to Sue by the Governments

13. Effective upon Final Approval, the Governments release and covenant not to sue or to file any administrative claim against Exxon with respect to any and all civil claims, including claims for Natural Resource Damages, or other civil relief of a compensatory and remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on: (1) any of the civil claims alleged in the pending action against Exxon by the State in the State Court Action, (2) any of the civil claims asserted in the Federal Court Complaints, or (3) any other civil claims that could be asserted by either or both of the Governments against Exxon relating to or arising from the Oil Spill; provided, however, that nothing in this Agreement shall affect or impair the following:

(a) Claims by either Government to enforce this Agreement, including without limitation Exxon's agreement to make additional payments as set forth in Paragraphs 17-19;

(b) The rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages;

(c) The rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

(d) Claims by the State for tax revenues which would have been or would be collected under existing AS 43.75 (Fisheries Business Tax) but for the Oil Spill, provided that, if the State obtains a judgment for such a claim against Exxon or Exxon Pipeline, the State will enforce against Exxon or Exxon Pipeline only that part of the

judgment that would be refunded to local governments under AS 43.75.130 had the amount recovered been paid as taxes under AS 43.75.

14. Effective upon Final Approval, except insofar as Exxon Pipeline is liable to the Governments, or either of them, for claims relating to or arising from the Oil Spill as a result of its ownership interest in, participation in, or responsibility for Alyeska, each of the Governments provides to Exxon Pipeline covenants not to sue identical to the covenants not to sue provided to Exxon in Paragraph 13. This paragraph shall not be construed as a release or covenant not to sue given by either Government to Alyeska.

15. Effective upon the Effective Date, each of the Governments covenants not to sue any present or former director, officer, or employee of Exxon or Exxon Pipeline with respect to any and all civil claims, including Natural Resource Damages, or other civil remedies of a compensatory or remedial nature which have been or may be asserted by the Governments, including without limitation any and all civil claims under all federal or state statutes and implementing regulations, common law or maritime law, that arise from, relate to, or are based on, or could in the future arise from, relate to, or be based on the Oil Spill; provided, however, that if any such present or former director, officer, or employee brings any action against the Governments, or either of them, for any claim whatsoever arising from or relating to the Oil Spill (or if an action against the Governments is pending at the time of Final Approval, and the director, officer, or employee fails to dismiss the action within 15 days of Final Approval), this covenant not to sue shall be null and void with respect to the director, officer, or employee bringing such action. In the event either Government obtains a judgment against any present or former director, officer, or employee of Exxon or Exxon Pipeline for liability relating to or arising from the Oil Spill, the Governments shall enforce the judgment only to the extent that the individual or individuals against whom the judgment was obtained are able to satisfy the judgment, without indemnification by Exxon or Exxon Pipeline, personally or through insurance policies purchased by the individual or individuals.

16. Not later than 15 days after Final Approval, each of the claims asserted by the State against Exxon and Exxon Pipeline, except for the claim described in Paragraph 13(d) of this Agreement, and each of the claims asserted by Exxon or Exxon Pipeline against the

State, in the State Court Action will be dismissed with prejudice and without an award of costs or attorneys fees to any Party. Exxon, Exxon Pipeline, and the State shall enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement this paragraph.

Reopener For Unknown Injury

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

(a) The cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and

(b) The injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

19. The Governments shall file with Exxon, 90 days before demanding any payment pursuant to Paragraph 17, detailed plans for all such restoration projects, together with a statement of all amounts they claim should be paid under Paragraph 17 and all information upon which they relied in the preparation of the restoration plan and the accompanying cost statement.

Release and Covenants Not To Sue by Exxon and Exxon Pipeline

20. Effective upon Final Approval, Exxon and Exxon Pipeline release, and covenant not to sue or to file any administrative claim against, each of the Governments and their employees with respect to any and all claims, including without limitation claims for Natural Resource Damages and cleanup costs, under federal or state statutes and implementing regulations, common law, or maritime law, that arise from, relate to, or are based on or could in the future arise from, relate to, or be based on: (1) any of the civil claims asserted by either

of them against the State in the State Court Action, (2) any civil claims asserted by Exxon or Exxon Pipeline against either Government in their responses to the Federal Court Complaints, or (3) any other civil claims that have been or could be asserted by Exxon or Exxon Pipeline against either of the Governments relating to or arising from the Oil Spill, except that nothing in this Agreement shall affect or impair the rights of Exxon and Exxon Pipeline to enforce this Agreement. This paragraph shall not be construed as a release or covenant not to sue given by Alyeska (including its shareholders and owner companies other than Exxon Pipeline) to the Governments.

Trans-Alaska Pipeline Liability Fund

21. The release in Paragraph 20 shall not be construed to bar any claim by Exxon against the TAPL Fund relating to or arising from the Oil Spill. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Exxon or Exxon Pipeline by the TAPL Fund, Exxon agrees to indemnify and hold the Governments harmless from any liability that they have to the TAPL Fund based on such claims. If the TAPL Fund asserts any claims against the Governments that are based upon subrogation rights arising from any monies paid to Alyeska by the TAPL Fund, Exxon agrees to indemnify the Governments for 20.34% of any such liability that either Government has to the TAPL Fund based on such claims.

Provisions Pertaining to Alyeska

22. Effective upon Final Approval, the Governments release and covenant not to use Alyeska with respect to all claims for Natural Resource Damages and with respect to all other claims for damages for injury to Natural Resources, whether asserted or not, that either may have against Alyeska relating to or arising from the Oil Spill. If Alyeska asserts claims against the Governments, or either of them, that are based upon third party contribution or subrogation rights, or any other theory of recovery over against the Governments, or either of them, arising from any liability of or settlement payment by Alyeska to Exxon or Exxon Pipeline for any claims, including without limitation Natural Resource Damages and cleanup costs, relating to or arising from the Oil Spill, Exxon shall indemnify and hold the Governments harmless from any liability that the Governments have to Alyeska based on such claims.

23. In order to resolve as completely as practicable all civil claims of the Governments arising from the Oil Spill

against all Exxon Defendants, including Exxon Pipeline (which has a 20.34% participation in Alyeska), and in consideration of Exxon's obligations hereunder, the Governments agree that if either recovers any amount from Alyeska for any claim of any kind relating to or arising from the Oil Spill (such as asserted in the State Court Action against Alyeska), each Government so recovering shall instruct Alyeska to pay to Exxon, and shall take other reasonable steps to ensure that Exxon receives, 20.34% of the amount due to that Government from Alyeska.

24. Exxon and Exxon Pipeline agree that, if Alyeska receives any amount from the Governments for any claim of any kind relating to or arising from the Oil Spill, except for an amount indemnified by Exxon under Paragraph 22 or 25, Exxon and/or Exxon Pipeline shall promptly pay to the Government against which judgment is entered 20.34% of such amount.

25. If Alyeska successfully asserts claims, if any, against the Governments, or either of them, that are based upon Alyeska's own damages or losses, or upon third party contribution or subrogation rights, or other theories of recovery over, arising from Alyeska's liability to persons other than Exxon or Exxon Pipeline relating to the Oil Spill, Exxon shall indemnify the Governments for any sums paid by either of them to Alyeska based on such claims; provided that the Governments shall assert in good faith all defenses the Governments may have to such claims by Alyeska, and provided further that no indemnity shall be provided under this paragraph if the Governments refuse a good faith proposal for a monetary settlement of such claims agreed to by Exxon and Alyeska, under which Alyeska shall fully release the Governments in exchange for a payment by or other consideration from Exxon, on behalf of the Governments, to Alyeska.

Third Party Litigation

26. If any person or entity not a party to this Agreement ("Third Party") asserts a claim relating to or arising from the Oil Spill in any present or future litigation against Exxon or Exxon Pipeline and the Governments, or against Exxon or Exxon Pipeline and either the United States or the State, each of the sued Parties ("Sued Parties") shall be responsible for and will pay its share of liability, if any, as determined by the proportional allocation of liability contained in any final judgment in favor of such Third Party, and no Sued Party shall assert a right of contribution or indemnity against any other Sued Party.

However, notwithstanding any other provision of this Agreement, the Sued Parties may assert any claim or defense against each other necessary as a matter of law to obtain an allocation of liability among the Sued Parties in a case under this paragraph. Any such actions between the Sued Parties shall be solely for the purpose of allocating liability, if any. The Sued Parties shall not enforce any judgment against each other in such cases.

27. Neither Exxon nor Exxon Pipeline shall assert any right of contribution or indemnity against either Government in any action relating to or arising from the Oil Spill where that respective Government is not a party. Neither Government shall assert any right of contribution or indemnity against Exxon or Exxon Pipeline in any action relating to or arising from the Oil Spill where Exxon and Exxon Pipeline, respectively, are not parties, except that either Government may assert against Exxon the rights to indemnification as expressly provided in Paragraphs 21, 22, and 25.

28. Any liability which Exxon incurs as a result of a suit by a Third Party, as described in Paragraphs 26 or 27, shall not be attributable to or serve to reduce the payments required to be paid by Exxon pursuant to Paragraph 8 or any additional payment required under Paragraph 17.

29. The Parties agree that they will not tender each other to any Third Party as direct defendants in any action pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

30. If a Third Party, which has previously reached or thereafter reaches a settlement with Exxon, brings an action against the Governments, or either of them, the sued Government(s) shall undertake to apportion liability, if any, according to principles of comparative fault without the joinder of Exxon, and shall assert that joinder of Exxon is unnecessary to obtain the benefits of allocation of fault. Notwithstanding any other provision of this Agreement, if the court rejects the sued Government(s)' efforts to obtain a proportional allocation of fault without Exxon's joinder, the sued Government(s) may institute third-party actions against Exxon solely for the purpose of obtaining allocation of fault. The Governments in such third-party actions shall not enforce any judgment against Exxon.

Interest for Late Payments

31. If any payment required by Paragraphs 8 or 9 of this Agreement is not made by the date specified in those Paragraphs, Exxon shall be liable to the

Governments for interest on the overdue amount(s), from the time payment was due until full payment is made, at the rate established by the Department of the Treasury under 31 U.S.C. 3717(a) (1) & (2). Interest on an overdue payment shall be paid in the same manner as the payment on which it accrued.

Reservations of Rights

32. This Agreement does not constitute an admission of fact or law, or of any liability, by any Party to this Agreement. Except as expressly stated in this Agreement, each Party reserves against all persons or entities all rights, claims, or defenses available to it relating to or arising from the Oil Spill. Nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.

33. Nothing in this Agreement creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Agreement.

34. Nothing in this Agreement shall prevent or impair the Governments from providing program assistance or funding to those not signatories to this Agreement under the programs of their agencies pursuant to legislative authorization or appropriation.

35. Nothing in this Agreement shall affect or impair any existing contract between Exxon or Exxon Pipeline and any entity of either Government, including without limitation the agreement between Exxon and the Environmental Protection Agency dated December 21, 1990, relating to joint conduct of bioremediation studies.

Notices and Submittals

36. Whenever, under the terms of this Consent Decree, written notice is required to be given by one Party to another, it shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice of changes to the other Parties in writing.

As to the United States:

Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. Attn: DOJ #90-5-1-1-3343.
Chief, Admiralty and Aviation Branch, Civil Division, U.S. Department of Justice, 601 D Street, NW., Washington, DC 20530.
General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, 14th & Constitution Avenue, NW., Washington, DC 20230.

As to the State of Alaska:

Attorney General, State of Alaska, Pouch K, Juneau, Alaska 99811.
Supervising Attorney, Oil Spill Litigation Section, Department of Law, 1031 W. Fourth Street, Suite 200, Anchorage, Alaska 99501.

As to Exxon:

Office of the Secretary, Exxon Corporation, 225 E. John W. Carpenter Fwy, Irving, Texas 75062-2298.
General Counsel, Exxon Corporation, 225 E. John W. Carpenter Fwy, Irving, Texas 75062-2298.
Mr. A. Elmer, President, Exxon Shipping Company, P.O. Box 1512, Houston, Texas 77251-1512.

As to Exxon Pipeline:

Mr. D. G. Warner, President, Exxon Pipeline Company, P.O. Box 2220, Houston, Texas 77252-2220.

Process for Entry of Agreement

37. Notice of this Agreement shall be published in the *Federal Register*, and the Agreement shall be subject to public comment for a period of thirty (30) days after such publication. Each Government reserves the right to withdraw its consent to the Agreement, within fifteen (15) days following the close of the public comment period, if comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate or if, before the end of that 15 day period, the Alaska State Legislature has not approved the Agreement as written. If the United States or the State withdraws its consent to the Agreement in accordance with this Paragraph, the Agreement shall be deemed terminated as of the date of the notice of withdrawal of consent.

38. Any Party may elect to terminate this Agreement if: (1) any court of competent jurisdiction disapproves or overturns any plea agreement entered into between the United States and Exxon in *United States v. Exxon Shipping Co.*, No. A90-015 CR (D. Alaska); (2) a final judicial determination is made by such court that this Agreement will not be approved and entered without modification; or (3) such court modifies this Agreement in a manner materially adverse to that Party, or interprets a material provision of this Agreement in a manner inconsistent with the Parties' intentions, prior to or contemporaneously with a final judicial determination approving the Agreement as modified. A Party electing to terminate this Agreement pursuant to this paragraph must do so within 10 days after an event specified in the

preceding sentence, and shall immediately notify the other Parties of such election in writing by hand delivery, facsimile, or overnight mail. Termination of this Agreement by one Party shall effect termination as to all Parties. For purposes of this paragraph and Paragraph 37, "termination" and "terminate" shall mean the cessation, as of the date of notice of such termination, of any and all rights, obligations, releases, covenants, and indemnities under this Agreement, provided, that termination shall not affect or impair Exxon's rights to obtain return of any deposits made into the Escrow pursuant to the final sentence of Paragraph 9, and provided further, that the provisions of Paragraphs 11 and 12, relating to clean-up, shall continue in effect notwithstanding any termination.

Retention of Jurisdiction

39. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agreement.

Miscellaneous

40. This Agreement can be modified only with the express written consent of the Parties to the Agreement and the approval of the Court.

41. Each undersigned representative of the Parties to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

The foregoing Agreement and Consent Decree among plaintiffs the United States of America and the State of Alaska and defendants Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, is hereby approved and entered this ____ day of _____, 1991.

Honorable H. Russel Holland,
United States District Judge, District of Alaska.

[FR Doc. 91-6814 Filed 3-15-91; 1:17 pm]
BILLING CODE 3510-12-6

DEPARTMENT OF COMMERCE

Memorandum of Agreement Between the United States and the State of Alaska Concerning the Exxon Valdez Oil Spill

AGENCIES: National Oceanic and Atmospheric Administration, Department of Agriculture, Department of the Interior, the Environmental

Protection Agency and the Department of Law, State of Alaska.

ACTION: Notice of 30 day comment period.

SUMMARY: Notice is given that officials representing the State of Alaska, the United States and Exxon Corporation have reached agreement on a settlement resolving all civil and criminal claims of the respective governments arising from the March 24, 1989 Exxon Valdez oil spill. In addition the United States and the State of Alaska have entered into a Memorandum of Agreement (MOA) implementing certain terms of the settlement agreement. Comment is sought concerning the MOA, which is published together with this Notice. Comments must be received no later than [April 18, 1991.]

ADDRESSES: Written comments concerning the proposed Settlement Agreement are to be submitted to Thomas A. Campbell, General Counsel of NOAA, U.S. Department of Commerce, room 5816, 14th Street and Constitution Avenue, NW., Washington, DC 20230, who is receiving comments on behalf of the Administrator of NOAA, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Transportation, the Administrator of the Environmental Protection Agency and the United States Attorney General. A copy of the comments must also be sent to Barbara Herman, Attorney General's Office, State of Alaska, 1031 West 4th Avenue, suite 200, Anchorage, Alaska 99501, who is receiving the comments on behalf of the State of Alaska.

FOR FURTHER INFORMATION CONTACT: Daniel Addison, Office of General Counsel, NOAA, Department of Commerce, Washington, DC 20230, telephone (202) 377-1400.

SUPPLEMENTARY INFORMATION: The March 23-24, 1989, grounding of the tanker Exxon Valdez resulted in the discharge of approximately 11 million gallons of North Slope crude oil into Alaska's Prince William Sound. The Exxon Valdez Oil Spill affected the environment and natural resources in the Sound and along the coasts of Kodiak, Kenai Peninsula and the Alaska Peninsula.

As indicated in a separate FR notice, representatives of the State of Alaska, United States and Exxon Corporation have entered into a settlement agreement resolving all civil claims between the parties. The settlement provided for Exxon to provide funds to be used to conduct response actions, scientific studies and implement restoration activities for the restoration

of the environment. This proposed MOA resolves claims of the State of Alaska and the United States concerning natural resource recoveries regarding the oil spill and outlines how certain terms of the Settlement Agreement will be implemented by the State of Alaska and the United States. This MOA also provides that the public will be given meaningful opportunities to participate in the restoration process. Public comment is invited regarding the nature and extent of appropriate public involvement in the restoration process.

In summary, the MOA establishes that all monies received through the proposed Settlement Agreement and Consent Decree will be managed jointly by Federal and State natural resource trustees except for certain allowed expenses identified in the MOA. The Federal and State natural resource trustees shall act as cotrustees of the affected environment. As such, all decisions concerning the use of damage recoveries will be made by unanimous agreement of the State and Federal natural resource trustees.

The MOA is not intended to affect or impair the rights and obligations of persons or entities not parties to the MOA.

Dated: March 14, 1991.

Grayson R. Cecil

Proposed MOA Between State of Alaska and the United States

Richard B. Stewart, Assistant Attorney General, Environment & Natural Resources, Division.

Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, DC 20530.

Attorneys for Plaintiff United States of America

Charles E. Cole, Attorney General, State of Alaska, Pouch K, State Capitol, Juneau, Alaska 99801.

Attorney for Plaintiff State of Alaska

United States District Court District of Alaska

United States of America, Plaintiff v. State of Alaska, Defendant.

Civil Action No.

The State of Alaska, Plaintiff v. United States of America, Defendant.

Civil Action No.

Memorandum of Agreement and Consent Decree

This Memorandum of Agreement and Consent Decree (the MOA) is made and entered into by the United States of America (United States) and the State of

Alaska (State) (collectively referred to as the Governments).

Introduction

Whereas, Section 311 of the Clean Water Act, 33 U.S.C. 1321, establishes liability to the United States and to States for injury, loss or destruction to natural resources resulting from the discharge of oil or the release of hazardous substances or both;

Whereas, The United States and the State are trustees and/or co-trustees for natural resources injured, lost or destroyed as a result of the Exxon Valdez Oil Spill;

Whereas, Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607, the National Contingency Plan, 40 CFR 300.615(a), and the Natural Resource Damage Assessment Regulations, 43 CFR 11.32(a)(1)(ii), provide a framework for and encourage the state and federal trustees to cooperate with each other in carrying out their responsibilities for natural resources;

Whereas, The Secretaries of the United States Departments of the Interior and Agriculture and the Administrator of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce, have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. 1321, and CERCLA, 42 U.S.C. 9607, and otherwise have statutory responsibilities related to the natural resources injured, lost or destroyed as a result of the Oil Spill, and the United States Environmental Protection Agency (EPA) has been designated by the President of the United States to coordinate restoration activities on behalf of the United States;

Whereas, The Commissioners of the State Departments of Fish and Game and Environmental Conservation and the Attorney General of the State of Alaska have been designated trustees for purposes of the Clean Water Act, 33 U.S.C. 1321, and CERCLA, 42 U.S.C. 9607, and otherwise have statutory responsibilities relating to the natural resources injured, lost or destroyed as a result of the Oil Spill;

Whereas, The United States Coast Guard, an agency of the United States Department of Transportation, is the pre-designated Federal On-Scene Coordinator (FOSC) to direct response efforts and to coordinate all other efforts at the scene of the Oil Spill, pursuant to the Clean Water Act, 33 U.S.C. 1321, and the National Contingency Plan, 40 CFR 300, and is coordinating its efforts with the Federal Trustees in accordance with the National Contingency Plan;

Whereas, The State Department of Environmental Conservation is the State On-Scene Coordinator (SOSC) to direct containment and cleanup of discharged oil pursuant to AS 46.04.020;

Whereas, The United States Department of Justice (Justice) and the Department of Law for the State of Alaska (Law) have constitutional and statutory responsibilities for litigation management and specifically for prosecuting claims for damages for injury, loss or destruction to the natural resources affected by the Oil Spill;

Whereas, All of the above state and federal entities have determined that it is in furtherance of their statutory and trust responsibilities to assure that all injuries, loss or destruction to state and federal natural resources are fully compensated and to assure that such compensation is used in accordance with law;

Whereas, The United States and the State have entered into an Agreement and Consent Decree ("Agreement and Consent Decree") with Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company (collectively referred to as Exxon) which provides for the recovery of compensation for damages resulting from the Oil Spill, including natural resource damages;

Whereas, The United States and the State have claims against one another with respect to their respective shares in recoveries from Exxon for compensation for damages resulting from the Oil Spill, including natural resource damages, and have determined that entering into this MOA is the most effective means of resolving those claims and will best allow them to fulfill their duties as Trustees;

Whereas, On or before the lodging of this MOA with the Court, the United States and the State will each have filed a complaint in this Court against the other Government asserting civil claims relating to their respective shares in recoveries from Exxon for compensation for damages arising from the Oil Spill (Governments' Complaints);

Whereas, All of these state and federal entities have determined that the procedures set forth in this Memorandum of Agreement (MOA) will best enable them to fulfill their duties as trustees to assess injuries and to restore, replace, rehabilitate, enhance or otherwise acquire the equivalent of the natural resources injured, lost or destroyed as a result of the Oil Spill;

Now Therefore, In consideration of their mutual promises, the United States, acting through the United States Departments of the Interior, Agriculture, Transportation, and Justice, NOAA, and

EPA, and the State of Alaska, acting through the State Departments of Fish and Game, Environmental Conservation, and Law (together "the Governments") have agreed to the following terms and conditions, which shall be binding on both Governments, it is hereby *Ordered, Adjudged, and Decreed* as follows:

I.—Jurisdiction

The Court has jurisdiction over the subject matter of the claims set forth in the Governments' Complaints and over the parties of this MOA pursuant to, among other authorities, 28 U.S.C. 1331, 1333 and 1345, and section 311(f) of the Clean Water Act, 33 U.S.C. 1321(f).

II.—Definitions

For purposes of this MOA,

A. *Allowed Expenses* means reasonable, unreimbursed costs obligated on or before the effective date of the Agreement and Consent Decree for the planning, conduct, evaluation and coordination of natural resource damage assessment and restoration pursued by the Governments with respect to the Oil Spill or by the State for experts and counsel in connection with the preparation of the Oil Spill Litigation and the unreimbursed response and cleanup costs incurred by the Governments on or before December 31, 1990.

B. *CERCLA* means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* as amended.

C. *Clean Water Act* means Federal Water Pollution Control Act, 33 U.S.C. 1251-1376, as amended.

D. *Joint use* means use of natural resource damage recoveries by the Governments in such a manner as is agreed upon by the Governments in accordance with Article V of this MOA.

E. *National Contingency Plan* means the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR part 300.

F. *Natural resources* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976) and/or the State.

G. *Natural resource damage recovery* means those monies paid to the Governments by Exxon which are received in settlement of natural resource damage claims arising from the Oil Spill and consists of the settlement

monies not reimbursed to the Governments either as (1) allowed expenses or (2) in the case of response and cleanup costs, those unreimbursed costs incurred by either Government after December 31, 1990 and certified by the FOSC with respect to the FOSC directed costs and by the SOSC with respect to SOSC directed costs. The term includes all interest accrued on any such recoveries.

H. *Oil Spill* means the grounding of the T/V Exxon Valdez on Bligh Reef in Prince William Sound, Alaska on the night of March 23-24, 1989 and the resulting oil spill.

I. *Oil Spill Litigation* means any past, present or future civil judicial or administrative proceeding by the Governments against Exxon or by Exxon against the Governments relating to or arising out of the Oil Spill.

J. *Restore or Restoration* means any action, in addition to response and cleanup activities required or authorized by state or federal law, which endeavors to restore to their pre-spill condition any natural resource injured, lost, or destroyed as a result of the Oil Spill and the services provided by that resource or which replaces or substitutes for the injured, lost or destroyed resource and affected services. Restoration includes, injury assessment, restoration, replacement and enhancement of resources and acquisition of equivalent resources and services.

K. *Settlement monies* means all monies received from Exxon under the Agreement and Consent Decree between the Governments and Exxon in settlement of the Oil Spill Litigation, exclusive of amounts credited to Exxon for cleanup costs incurred after December 31, 1990.

L. *Trustees* means the officials now or hereafter designated by the President of the United States and the Governor of the State of Alaska to act as trustees, for purposes of CERCLA and the Clean Water Act, of natural resources injured, lost or destroyed as a result of the Oil Spill.

III.—Co-Trusteeship

A. The Governments shall act as co-trustees in the collection and joint use of all natural resource damage recoveries from Exxon for the benefit of natural resources injured, lost or destroyed as a result of the Oil Spill.

B. Nothing in this MOA shall be deemed an admission of law or fact by either Government concerning ownership, right, title, or interest in or management or control authority over natural resources or the right to recover for injury to such resources. Except in

matters concerning or relating to enforcement of this MOA and the settlement of the Oil Spill Litigation, the Governments agree that this MOA may not be used by one Government against the other for any reason.

C. Nothing in this MOA shall be construed to affect or impair in any manner the rights and obligations, if any, of any entities or persons not parties to this MOA, including without limitation:

1. The rights and obligations, if any, of Alaska Native villages to act as trustees for the purposes of asserting and compromising claims for injury to, destruction of, or loss of natural resources affected by the Oil Spill and expending any proceeds derived therefrom;

2. The rights and obligations, if any, of legal entities or persons other than the United States and the State who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill;

3. The rights and obligations, if any, of the United States or the State or both relating to such Alaska Native villages and the entities or persons referred to in subparagraph 2 above.

IV.—Organization

A. General Provisions

1. All decisions relating to injury assessment, restoration activities, or other use of the natural resource damage recoveries obtained by the Governments, including all decisions regarding the planning, evaluation, and allocation of available funds, the planning, evaluation, and conduct of injury assessments, the planning, evaluation and conduct of restoration activities, and the coordination thereof, shall be made by the unanimous agreement of the Trustees. Such decisions, on the part of the Federal Trustees, shall be made in consultation with EPA.

2. The Governments shall cooperate in good faith to establish a joint trust fund for purposes of receiving, depositing, holding, disbursing and managing all natural resource damage recoveries obtained or received by the Governments in connection with settlement of the Oil Spill Litigation in accordance with paragraph V.A. The joint trust fund shall be established in the Registry of the United States District Court for the District of Alaska or as otherwise determined by stipulation of the Governments and order of the court.

3. If the Trustees cannot reach unanimous agreement on a decision pursuant to paragraph A.1. of this Article, and either Government so

certifies, either Government may resort to litigation in the United States District Court for the District of Alaska with respect to any such matter or dispute. At any time, the Governments may, by mutual agreement, submit any such matter or dispute to non-binding mediation or other means of conflict resolution.

4. The Trustees shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group to advise the Trustees with respect to the matters described in paragraph IV.A.1.

5. The Trustees shall agree to an organizational structure for decisionmaking under this MOA within 90 days from the date the Agreement and Consent Decree has been approved and entered as a judgment of the Court.

B. Injury Assessment and Restoration Process

1. Nothing in this MOA limits or affects the right of each Government unilaterally to perform any natural resource injury assessment or restoration activity, in addition to the cooperative injury assessment and restoration process contemplated in this MOA, from funds other than natural resource damage recoveries as defined in paragraph G of Article II.

2. Nothing in this MOA constitutes an election on the part of either Government to adhere to or be bound by the Natural Resource Damage Assessment Regulations codified at 43 CFR Part 11.

3. Nothing in this MOA shall prevent the President of the United States or the Governor of the State of Alaska from designating, pursuant to applicable law, an official or officials to exercise any or all rights or obligations of their respective Governments under this MOA. Neither Government shall object to any designation of such officials, or to any transfer of Trustee status from one official to another, by the other Government; provided that, in no event shall either Government designate more than three Trustees for the purposes of carrying out the provisions of this MOA. The designation of such officials or of successor Trustees by either Government shall not affect the enforceability of this MOA.

C. Role of the Environmental Protection Agency

The Governments acknowledge that the President has assigned to EPA the role of advising the Federal Trustees and coordinating, on behalf of the

Federal Government, the long-term restoration of natural resources injured, lost or destroyed as a result of the Oil Spill.

V.—Distribution of Settlement Monies

A. Joint Use of Natural Resource Damage Recoveries

The Governments shall jointly use all natural resource damage recoveries for purposes of restoring, replacing, enhancing, rehabilitating or otherwise acquiring the equivalent of natural resources injured as a result of the Oil Spill and the reduced or lost services provided by such resources. The Governments shall establish standards and procedures governing the joint use and administration of all such natural resource damage recoveries. All natural resource damage recoveries shall be placed in the joint trust fund for use in accordance with the terms and conditions of this MOA.

B. Reimbursement of Allowed Expenses and Response Costs

Up to 72 million dollars for the State and up to 62 million dollars for the United States shall be available from the settlement monies, at the election of each Government, for reimbursement of allowed expenses. In addition, all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990 and certified by either the FOSC or SOSC shall be reimbursed out of the settlement monies. Reimbursements of allowed expenses described in this paragraph shall be paid directly to the Governments by Exxon over a period of 5 years.

C. Except as otherwise provided in this MOA, the Governments agree that all natural resource damage recoveries will be expended on restoration of natural resources in Alaska unless the Trustees determine, in accordance with Article IV, paragraph A.1. hereof, that spending funds outside of the State of Alaska is necessary for the effective restoration, replacement or acquisition of equivalent natural resources injured in Alaska and services provided by such resources.

D. Nothing in this MOA shall be construed as obligating the Governments to expend any monies except to the extent funds are appropriated or are otherwise lawfully available.

VI.—Science Studies

The Governments shall continue to work cooperatively to conduct all appropriate scientific studies relating to the Oil Spill, including specifically the

scientific studies approved by the Trustees for the 1991 field season.

VII.—Covenants Not To Sue

A. Each Government covenants not to sue or to take other legal action against the other Government with respect to the following matters:

1. The authority of either Government to enter into and comply with the terms of this MOA.

2. The respective rights of either Government to engage in cleanup, damage assessment or restoration activities with respect to the Oil Spill in accordance with this MOA.

3. Any and all civil claims (including, but not limited to, cross-claims, counter-claims, and third party-claims) it may have against the other Government arising from any activities, actions, or omissions by that other Government relating to or in response to the Oil Spill which occurred prior to the execution of this MOA, other than claims to enforce this MOA.

B. Solely for purposes of the Oil Spill Litigation and any other proceedings relating to the determination, recovery, or use of natural resource damages resulting from the Oil Spill, each Government shall be entitled to assert in any such proceeding, without contradiction by the other Government, that it is a co-Trustee with the other Government over any or all of the natural resources injured, lost or destroyed as a result of the Oil Spill, and each Government covenants not to sue the other with respect to, or to take any other legal action to determine, the scope or proportionate share of either Government's ownership, rights, title or interest in or management, control, or trusteeship authority over any of the natural resources injured, lost or destroyed as a result of the Oil Spill.

C. Notwithstanding anything in this Article, each Government reserves the right to intervene or otherwise to participate in any legal proceeding concerning the claims of a third party with respect to the scope of either Government's Trusteeship and waives any objection to such intervention or participation by the other Government.

D. If the Governments become adverse to each other in the course of the Oil Spill Litigation, this MOA shall remain in effect.

E. Notwithstanding the covenants contained in paragraph VII.A. and notwithstanding any provisions of the Agreement and Consent Decree between the Governments and Exxon, if both Governments are sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree to cooperate fully in the defense of

such action, and to not assert cross-claims against each other or take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

F. Notwithstanding the covenants contained in paragraph VII.A. and notwithstanding any provisions of the Agreement and Consent Decree between the Governments and Exxon, if one of the Governments is sued by a Third Party on a claim relating to or arising out of the Oil Spill, the Governments agree the non-sued Government shall cooperate fully in the defense of the sued Government, including intervening as a party defendant or consenting to its being impleaded, if necessary. If the non-sued Government thereby becomes a party to the action, the Governments agree not to assert cross-claims against each other, to cooperate fully in the defense of such action, and not to take positions adverse to each other. Each shall pay its percentage of liability, if any, as determined in a final judgment.

VIII.—Enforcement of Agreement and Governing Law and Venue

A. This MOA shall be enforceable by the United States District Court for the District of Alaska, which Court shall retain jurisdiction of this matter for the purpose of entering such further orders, directions, or relief as may be appropriate for the construction, implementation, or enforcement of this MOA.

B. If this MOA is subsequently and finally determined to be invalid, this MOA shall terminate and the disposition to the Governments of any remaining natural resource damage recoveries shall be determined by further agreement of the Governments or by an allocation of such recoveries by the United States District Court for the District of Alaska, subject to appellate review in accordance with applicable law.

IX.—Multiple Copies and Effective Date

This MOA may be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. Except for the provisions contained in Article VI, which shall be effective as of the date this MOA is signed by all the signatories hereto, this MOA shall be effective as of the date the Agreement and Consent Decree has been approved and entered as a judgment of the Court.

X.—Integration and Merger

A. This MOA and the Agreement and Consent Decree between the

Governments and Exxon constitute the entire agreement between the United States and the State as to the matters addressed herein, and there exists no other agreement of any kind which is inconsistent with this MOA with respect to the subjects addressed in this MOA; provided, that the agreement reached among the Trustees as to disbursements of the original \$15 million paid by Exxon in April, 1989 shall remain in full force and effect.

XI.—Termination

The obligations of the parties under this MOA shall terminate sixteen years from the effective date of this MOA, or upon termination of the Agreement and Consent Decree, unless otherwise agreed by the Parties.

XII.—Judicial Review

This MOA creates no rights of action on the part of any persons not signatory to this MOA and shall not, except as provided in Article VII, be subject to judicial review.

This MOA is executed at the time and on the dates set forth below.

XIII.—Miscellaneous

A. This MOA can be modified only

with the express written consent of the Parties to the MOA and the approval of the Court.

B. Each undersigned representative of the Parties to this MOA certifies that he or she is fully authorized to enter into the terms and conditions of this MOA and to execute and legally bind such Party to this MOA.

The Foregoing Memorandum of Agreement and Consent Decree among the United States of America and the State of Alaska is hereby Approved and Entered this ____ day of _____, 1991.

Honorable H. Russel Holland,
United States District Judge, District of Alaska.

[Memorandum of Agreement and Consent Decree in *United States v. State of Alaska*. (D. Alaska)]

For the United States of America

Date: _____
Richard B. Stewart,
Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530.

Stuart M. Gerson,
Assistant Attorney General, Civil Division,

U.S. Department of Justice, Washington, DC 20530.

Thomas L. Sansonetti,
Solicitor, U.S. Department of the Interior.
Alan Charles Raul,
General Counsel, U.S. Department of Agriculture.
Samuel K. Skinner,
Secretary, U.S. Department of Transportation.
John A. Knauss,
Undersecretary for Oceans and Administrator, National Oceanic and Atmospheric Administration, United States Department of Commerce.
William K. Reilly,
Administrator, U.S. Environmental Protection Agency.

Date: _____
For the State of Alaska
Walter J. Hickel,
Governor, State of Alaska.
Charles E. Cole,
Attorney General, State of Alaska, Pouch K, Juneau, Alaska 99811.
Carl Rosier,
Commissioner, Department of Fish and Game.
John A. Sendor,
Commissioner, Department of Environmental Conservation.
[FR Doc. 91-6615 Filed 3-15-91; 1:17 pm]
BILLING CODE 3610-12-M

DENIAL

OF

PLEA

DM: **EXXON CORPORATION**
225 E. John W. Carpenter Freeway
Irving, Texas 75062-2298

Telephones: (214) 444-1107
444-1108
444-1109

THURSDAY, APRIL 25, 1991

EXXON RESPONDS TO COURT RULING REGARDING AGREEMENT
ENTERED INTO WITH FEDERAL AND ALASKAN GOVERNMENTS

IRVING, TX, APRIL 25 -- Recognizing the substantial costs already incurred by Exxon and the additional payments included in the agreements we entered into with the Federal and State governments, we believed that the agreements were appropriate. While we are carefully considering the implications of the judge's decision, we are continuing our preparation for trial.

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

UNITED STATES OF AMERICA,

Plaintiff,

vs

EXXON CORPORATION and EXXON SHIPPING
COMPANY,

Defendant.

No. A90-015 CRIMINAL

SENTENCING HEARING
APRIL 24, 1991
PAGES 1 THROUGH 11

Before the Honorable Russell Holland
United States District Court Judge



PROCEEDINGS

APRIL 24, 1991

(Tape: 1)

(000)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I've used those factors in evaluating this plea

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

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

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

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

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

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

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

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

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

11 THE COURT: Thirty days?

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

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

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

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

25 MR. LYNCH: Yes, Your Honor.

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

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

Anything further we need to do, gentlemen?

(No response.)

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

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

(1224)

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

END

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FILED

APR 24 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EXXON CORPORATION and EXXON
SHIPPING COMPANY,

Defendants.

NO. A90-015 CR

ORDER

(Plea Agreement Rejected)

The court has heretofore taken guilty pleas from the defendants as to certain of the charges pursuant to a plea agreements. The court has now completed its evaluation of that plea agreement and has determined that the same is unacceptable. The plea agreement is rejected for the reasons stated in open court on April 24, 1991.

Under the plea agreement and Rule 11, Federal Rules of Criminal Procedure, defendants are entitled to withdraw their plea of guilty. Counsel for defendants have requested time within which

ORDER (Plea Agreement Rejected)

FILED

APR 16 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 23985
Washington, D.C. 20026-3985
202-272-9879

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-CR
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S MEMORANDUM
	)	IN AID OF SENTENCING
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

CORRECTION

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

FILED

APR 24 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Deputy

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FOR THE DISTRICT OF ALASKA

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ORDER (Plea Agreement Rejected)

1 to make that decision. On or before May 24, 1991, counsel for
2 defendants shall orally advise the court of their decision; at that
3 time the court will schedule further proceedings and at the request
4 of any party will schedule a status conference. Defendants shall
5 confirm their oral advice to the court by a formal motion to
6 withdraw pleas or other advice to the court with respect to the
7 status of those pleas.

8 For purposes of the Speedy Trial Act, the court notes that
9 excludable delay has occurred between March 22, 1991, and today,
10 April 24, 1991, during which time the court had under consideration
11 the proposed plea agreement. See 18 U.S.C. § 3161(h)(1)(i). Addi-
12 tional excludable delay will accrue between April 24, 1991, and
13 May 24, 1991, or such sooner date as both defendants shall have
14 filed their motion to withdraw pleas or such other notice with
15 respect to disposition of this case as the defendants may decide
16 upon. This delay has been requested by each of the defendants, and
17 the court finds that such delay is in the interest of justice and
18 is not contrary to the public interest in speedy trials for the
19 reason that this case involves an event of unusually large propor-
20 tions and therefore potentially involves extraordinarily large fines
21 such that more than a normal amount of time for reevaluation of
22 defendants' position is justifiable.

23 DATED at Anchorage, Alaska, this 24 day of April,
24 1991.

25 
United States District Judge

26 cc; M. Davis, R. Bundy, J. Clough, US Marshal, Pretrial Services

ORDER (Plea Agreement Rejected)

FILED**APR 16 1991**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

CHARLES A. De MONACO
 Assistant Chief
 Environmental Crimes Section
 Environment and Natural Resources
 Division
 U.S. Department of Justice
 P.O. Box 23985
 Washington, D.C. 20026-3985
 202-272-9879

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. A90-015-CR
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S MEMORANDUM
	)	IN AID OF SENTENCING
EXXON CORPORATION AND	)	
EXXON SHIPPING COMPANY,	)	
	)	
Defendants.	)	

I. INTRODUCTION

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife. The disaster was caused by egregious failings that could and should have been foreseen and prevented.

Consequently, the United States in the plea

agreement seeks imposition of the largest criminal fine in an environmental case to date. This fine would reflect the seriousness of the conduct that caused the grounding of the Exxon Valdez, and the resulting environmental injury, and would send a strong message that companies that violate environmental statutes face serious punishment. In addition, the plea agreement provides for immediate payment of substantial compensation to the State of Alaska. This payment will provide needed funds for the rehabilitation of Prince William Sound and other areas affected by the spill.

The plea agreement addresses more than punishment and compensation. It also acknowledges that the defendants made substantial efforts to rectify the consequences of their conduct by financing oil spill clean-up efforts. Consequently, the plea agreement does not ask that either defendant be placed on probation, and provides that one-half of the fine be remitted. It thus provides a message that the government will take into account steps voluntarily taken by responsible parties to correct the consequences of acts that constitute environmental crimes.

This criminal prosecution and the resulting plea agreement cannot resolve all the issues relating to the oil spill. However, the government believes that the purposes of criminal prosecution -- conviction of the guilty, just punishment for wrongful conduct, deterrence of future criminal conduct, and the need to provide compensation to

- 3 -

victims -- are effectively addressed by the plea agreement, and the United States respectfully urges the Court to approve it.

II. FACTUAL BACKGROUND

Most of the significant facts that underlie the criminal charges in this case have been set forth in prior pleadings.¹ Consequently, this memorandum does not provide a lengthy factual background of the grounding, but summarizes briefly what the government's evidence would have shown if the case had gone to trial. While most of this evidence relates to conduct of Exxon Shipping's employees, the government would have been prepared to prove that Exxon Shipping was acting as Exxon's agent, making Exxon liable under this Court's ruling upholding the government's theory of agency liability.

The VLCC tanker² vessel Exxon Valdez departed Valdez on March 23, 1989 at about 9:20 p.m., transporting crude oil owned by Exxon Corporation. Assigned to direct the ship through the initial portion of Prince William Sound was

¹See e.g., Bill of Particulars, July 31, 1990; Government's Consolidated Opposition to Motions of Exxon Corporation to Dismiss Counts One, Two, Three, Four and Five, Sept. 20, 1990; Government's Opposition to Motion of Exxon Shipping Company to Dismiss Count Four for Failure to Charge an Offense, Sept. 20, 1990; Factual Basis for Guilty Plea of Exxon Shipping Company, March 22, 1991.

² Very large crude carrier, a tanker exceeding 160,000 dead-weight tons. The Exxon Valdez had a capacity of more than 60 million gallons of crude oil.

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Captain William Murphy, a certified marine pilot. The master of the Exxon Valdez was Captain Joseph Hazelwood. Prior to leaving port, Captain Hazelwood had consumed several alcoholic beverages with two of his shipmates.³

Captain Murphy disembarked at 11:24 p.m. Before doing so, he informed Captain Hazelwood of the presence of glacial ice blocking the shipping lanes. Captain Hazelwood, who was the only person on the vessel who had the required pilotage certification for Prince William Sound, then resumed responsibility for navigating the ship. In order to avoid the ice, Hazelwood ordered the ship to alter course to 180 degrees, a course out of the shipping lanes and directly toward Bligh Reef. He placed the ship on autopilot and ordered the ship to "load program up."⁴ After the course was changed, the individuals on the bridge with Captain Hazelwood were Third Mate Gregory Cousins and helmsman Robert Kagan, a "step-up" (or temporary) able-bodied seaman (AB).

Captain Hazelwood instructed Cousins to turn the ship back into the shipping lanes when it reached a point

³Ten hours after the grounding of the Exxon Valdez, blood and urine samples were taken from Captain Hazelwood. The blood sample showed an alcohol concentration of .061 percent and the urine sample showed an alcohol concentration of .09 percent. The government has no evidence that Captain Hazelwood consumed alcohol between the time of the grounding and the time the blood and urine samples were obtained.

⁴ At "load program up," the speed of the main engine was being increased slowly by a computer from maneuvering full ahead (55 rpm) to full-ahead sea speed (78.9 rpm). It would have required about 43 minutes to attain the maximum speed.

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about three minutes to the south. He then left the bridge and went to his cabin to "get out some messages," leaving the bridge critically undermanned while Cousins had to perform a dangerous nighttime maneuver around ice and near reefs.⁵

After Hazelwood left the bridge, Cousins disengaged the autopilot, took navigational fixes, and ordered a series of rudder commands intended to route the ship between Bligh Reef and the leading edge of the glacial ice, a distance estimated by Cousins to be .9 mile. As a result of errors by Cousins and Kagan, the Exxon Valdez ran aground on Bligh Reef shortly after midnight on March 24, 1989, rupturing eight cargo tanks and discharging approximately 11 million gallons of crude oil into the pristine waters of Prince William Sound, causing the death of several hundred thousand migratory birds.⁶

The person with the primary responsibility for safely navigating the Exxon Valdez was Captain Hazelwood. He was known to both defendants to be an alcoholic. Medical records provided to both defendants in 1985 showed that he was hospitalized in an alcohol rehabilitation facility and diagnosed as suffering from episodic alcohol abuse and dysthymia and that he needed aftercare treatment. After

⁵ There is no evidence that Captain Hazelwood sent out any messages that evening.

⁶As stated at page 8 of the government's Summary of Damage to Natural Resources, preliminary estimates of the total number of birds killed range from 260,000 to 580,000.

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Hazelwood's hospitalization and a three-month leave of absence, Exxon Shipping's managers returned him to duty as a ship's master. Unfortunately, his rehabilitation proved unsuccessful; he continued to use and abuse alcohol on and off duty up to the time of the grounding. Exxon Shipping failed to respond to reports and evidence that it received of Captain Hazelwood's ongoing alcohol use and abuse, and to take adequate steps to monitor his fitness to serve as a master in light of his history of alcohol abuse.

Robert Kagan was the helmsman at the time of the grounding. He had been an ordinary seaman with Exxon Shipping since 1974. In 1985, Kagan was "stepped-up" to AB for a few months, but then returned to ordinary seaman because of his unsatisfactory performance. In late 1988, Mr. Kagan was again "stepped up" to AB and assigned to serve on the Exxon Valdez. After serving 30 days on the ship, the chief mate prepared a written evaluation of Mr. Kagan's performance as an AB, which was received by the Exxon Shipping Fleet Manning Department prior to the grounding. This performance evaluation stated that "Mr. Kagan lacks the necessary skills to do the AB's job" and rated him "unsatisfactory" in his ability to work without supervision. A few weeks before the grounding, the alternate master of the Exxon Valdez told Captain Hazelwood that Mr. Kagan could not steer a ship and required too much supervision.

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III. THE PLEA AGREEMENT

Pursuant to the plea agreement, Exxon Corporation has pled guilty to a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a), and Exxon Shipping has pled guilty to violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1)(A); the Refuse Act, 33 U.S.C. §§ 407 and 411; and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a). The total maximum statutory fines that the court could impose for these violations as to both defendants is \$420,000.00, unless the loss-doubling provision of 18 U.S.C. § 3571(d) is applied. However, in the plea agreement, Exxon Shipping has agreed to the imposition of a fine of \$75 million, with \$37.5 million remitted, and Exxon has agreed to a fine of \$25 million with \$12.5 remitted. In addition to the agreed-upon fines, the defendants have agreed to make compensatory payments of \$50 million to the State of Alaska. The parties have agreed that the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., apply to the plea agreement.

IV. FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE

The court has asked the parties to address succinctly the plea agreement in light of the sentencing factors in 18 U.S.C. § 3553. The relevant factors are discussed below.

A. § 3553(a)(1) - The nature and circumstances of the offense

A significant factor in the grounding of the Exxon

- 8 -

Valdez was Captain Joseph Hazelwood's decision to leave the bridge while the ship was executing a critical nighttime maneuver around glacial ice in the vicinity of Bligh Reef. In the face of increasing danger, which demanded greater precaution, Captain Hazelwood's decision to leave the bridge was a dereliction of his duty to supervise the safe navigation of the vessel. His unsound judgment in leaving the bridge undermanned set into motion a chain of events that culminated foreseeably in the ship running aground.

Third Mate Gregory Cousins, the junior officer left alone in charge of trying to guide the VLCC tanker, travelling at approximately 12 knots, through a .9 mile passage separating a field of glacial ice and Bligh Reef, was overwhelmed by the task that confronted him. As a result of having to do both the job of conning the vessel and fixing the vessel's position frequently, he failed to ensure that his rudder commands were properly executed and failed to assess the increasingly dangerous situation as the vessel approached Bligh Reef. The failure of the third mate and the helmsman to exercise due care in directing the ship safely past the reef were proximate causes of the grounding.

Neither Exxon Corporation nor Exxon Shipping should find refuge in the fact that Captain Hazelwood's conduct

- 9 -

violated company policy.⁷ Both defendants were aware that Captain Hazelwood had a history of alcohol abuse and dysthymia. After returning him to command of one of the world's largest oil tankers, it was incumbent upon them to monitor him carefully for alcohol abuse. This was not done. Had effective monitoring occurred, Captain Hazelwood would have been relieved of duty prior to the grounding. As Lawrence Rawl, C.E.O. of Exxon Corporation said after the grounding, "The first drink the captain had after he had (been) rehabilitated was a basis for dismissal."

The Fleet Manning Department of Exxon Shipping, which made the decision to temporarily assign Robert Kagan as an AB to the Exxon Valdez, was notified prior to the grounding that he lacked the skills necessary to do an AB's job. In light of this evaluation, and a long history of poor performance ratings, he should not have been retained in that capacity on the Exxon Valdez.

B. § 3553(a)(2)(A) - The need of the sentence to reflect the seriousness of the offense

The Exxon Valdez oil spill is the largest oil spill in United States history. As an aid to the Court in determining whether the sentence set forth in the plea agreement is appropriate, the United States filed a "Summary of Effects of the Exxon Valdez Oil Spill on Natural Resources

⁷ In a 1987 performance evaluation of Captain Hazelwood, the evaluator noted that he "does not proactively support co. policies at times."

- 10 -

and Archaeological Resources" on April 8, 1991. This document summarizes the injuries to natural resources that have been documented to date. Based on the seriousness of the harm resulting from the oil spill, the fine contained in the plea agreement is appropriate.

C. § 3553(a)(2)(A) - The need of the sentence to promote respect for the law

More than any other case in environmental litigation, this case has riveted the attention of the nation, and has been a sobering lesson that the environment is a vulnerable victim that requires great care in the conduct of environmentally hazardous activities. Acceptance of the plea agreement should heighten the business community's and the public's awareness of and respect for laws designed to protect the environment.

D. § 3553(a)(2)(A) - The need of the sentence to provide just punishment for the offense

The maximum statutory penalties allowable for the crimes to which the defendants have pled guilty total \$420,000.00. The fine agreed to in this plea agreement is \$100 million with \$50 million remitted. This fine would be the largest criminal fine ever imposed in an environmental criminal case. A fine of this magnitude is warranted in light of the egregiously deficient conduct of the defendant's employees and agents, both aboard the Exxon Valdez and in management, and of the tremendous harm to the environment and the people of Alaska caused by those failings.

- 11 -

E. § 3553(a)(2)(B) - The need of the sentence to afford adequate deterrence to criminal conduct

Criminal violations of environmental statutes have the potential to and often result in enormous injury. The United States believes that the fine imposed in this case must send a strong message to businesses and individuals alike. As the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping in failing to exercise the high standard of care required in transporting crude oil through a pristine environment. Imposition of the statutory fines that would apply in this case, amounting to no more than \$420,000.00, would utterly fail to send that message. For that reason, the United States believes that the loss-doubling provision of 18 U.S.C. § 3571(d) should be applied. The fines contained in the plea agreement and agreed to by the defendants are of a magnitude that should deter future corporate carelessness with the environment.

F. § 3553(a)(3) - The kinds of sentences available

Only two sanctions apply to an organization convicted of a crime. Those sanctions - a fine or a term of probation - are set forth in 18 U.S.C. §3551(c). In considering whether to impose a fine and the amount of the fine, the court should consider, in addition to the factors set forth in § 3553(a) and described elsewhere in this

- 12 -

sentencing memorandum, the factors set forth in 18 U.S.C. § 3572. Those factors, which are discussed below, amply support imposition of the \$100 million fine set forth in the plea agreement as well as the remission of a portion of it.

The first of those factors is whether the defendant is an organization. If so, the Court should consider its size. Exxon Corporation is one of the largest and most profitable corporations in the world, and its wholly owned subsidiary, Exxon Shipping Company, has assets worth hundreds of millions of dollars.

The next factor to be considered is any measure taken by the organization to discipline any employee responsible for the offense. In this case, Exxon Shipping fired Captain Hazelwood for his conduct of using alcohol four hours before assuming duty and for his leaving the bridge during a hazardous maneuver. Mr. Cousins was reassigned to the status of AB as disciplinary action for his role on the grounding.⁸

The last factor the court can consider in determining the amount of the fine are any measures taken by the defendants to prevent a recurrence of the offense. Since the grounding, Exxon Corporation has revised its substance

⁸ Following the grounding, Mr. Cousins' license was suspended for nine months by the USCG. The government is unaware of any other disciplinary action taken against Exxon Shipping employees as a result of the events related to the grounding.

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abuse policy substantially. Specifically, employees who have had or are found to have a substance abuse problem will not be permitted to work in safety sensitive positions and employees who have returned from rehabilitation will be required to participate in an aftercare program. The policy subjects persons in safety sensitive positions to unannounced periodic or random drug and alcohol testing and permits the defendants to conduct unannounced searches for drugs and alcohol on property owned or controlled by the defendants.

In addition, the defendants have created the position of loading mate in the Ports of Valdez and San Francisco. The loading mate has the responsibility of loading and unloading cargo from tanker vessels in port. The creation of this position should eliminate a significant source of fatigue. The National Transportation Safety Board concluded that the third mate's fatigue and excessive workload contributed to the grounding of the Exxon Valdez, and that Exxon Shipping's personnel policies encouraged marine employees "to work long hours without concern for debilitating fatigue."

A primary reason the government would request a term of probation in this case would be to serve as a vehicle for the Court to order restitution as a condition of probation. Since the terms of the plea agreement include a payment of \$50 million in compensatory payments to the State of Alaska by the defendants, the United States does not

- 14 -

believe probation is required in this matter.

G. § 3553(a)(6) - The need to avoid unwarranted sentence disparities among defendants guilty of similar conduct

There have been only a few other prosecutions for negligent oil spills, and none have involved environmental harm as widespread as that caused by the Exxon Valdez spill. The only other case that approaches this one is United States v. Ashland Oil Co., No. 88-146 CR (W.D. Penn. 1988), where the court imposed a fine of \$2.25 million for a negligent spill of about 700,000 gallons of diesel oil into the Monongahela River. That spill was the largest inland oil spill in U.S. history. The present case involves a spill about 16 times larger than the Ashland spill, and Exxon Corporation is several times larger than Ashland Corporation. Thus, it is appropriate that the fine in this case be much larger than in Ashland. The government believes that the record \$100 million fine agreed to in this case, with \$50 million remitted, appropriately reflects the seriousness of the offenses to which defendants have pled guilty, and is not inconsistent with other fines for oil spills.

H. § 3553(a)(7) - The need to provide restitution to any victim of the offense

While restitution is an important consideration, the criminal sentence cannot provide relief to every victim of the oil spill. However, many of those injured by the spill have been compensated or will be compensated. For

- 15 -

example, the plea agreement provides \$50 million in compensatory payments to the State of Alaska and a separate civil settlement requires the defendants pay up to \$900 million over the next ten years, and possibly an additional \$100 million if reopener conditions are met, for the restoration of Prince William Sound. The defendants have also paid more than \$300 million to third parties in settlement of claims resulting from the oil spill and there are presently pending, in federal and state court, a multitude of claims requesting various forms of relief. It would be extremely complicated, in light of all the pending litigation, for this Court to fashion an order of restitution for all those who claim to have suffered losses resulting from the oil spill.

Under 18 U.S.C. § 3663(d), the Court may decline to make a restitution order if the Court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any of the victims. A protracted hearing to determine restitution for every victim of the oil spill may run afoul of Fed. R. Crim. P. 32(a)(1), which generally requires that sentence shall be imposed without unnecessary delay.

- 16 -

V. **LEGAL AUTHORITY TO IMPOSE THE FINE SET FORTH IN THE PLEA AGREEMENT AND TO THEREAFTER REMIT A PART OF THE FINE**

The Court asked the parties to address the Court's authority to impose the agreed fine, and to remit a portion of a fine once the fine has been imposed. The plea agreement calls for imposition of a \$75 million fine on Exxon Shipping, and a \$25 million fine on Exxon Corporation. The Court's authority to impose these fines rests on 18 U.S.C. § 3571(d), which permits a fine of up to double the gross pecuniary loss to persons other than the defendant caused by the offense. If sentencing under this statute were litigated, the government would be prepared to prove that the offenses to which the defendants have entered pleas of guilty caused pecuniary losses to others in excess of \$50 million, providing a basis for a fine of \$100 million. In the plea agreement at page 4, defendants agree that there is a legal basis for the Court to impose the agreed fines.

The plea agreement calls for remission of \$37.5 million of Exxon Shipping's fine, and \$12.5 million of Exxon Corporation's fine, in recognition of defendants' conduct following the spill. The Court has the authority to order remission of part of a fine it has imposed, because the Court has the inherent authority to reduce a sentence it has imposed. In United States v. Benz, 282 U.S. 304 (1931), the Supreme Court upheld a district court's reduction of a

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defendant's prison sentence after it began, stating:

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented.

Id. at 306-07 (citations omitted). More recent decisions of the Supreme Court on sentencing authority have cited the rule laid down in Benz without question. See United States v. DiFrancesco, 449 U.S. 117, 138 (1980). Lower courts following Benz have distinguished between a court's power to reduce a sentence, which is inherent, and a court's power to suspend execution of a sentence, which a court may do only by imposing probation. See United States v. Ellenbogen, 390 F.2d 537, 540-41 (3d Cir. 1968), cert. denied 393 U.S. 918.

The distinction between reduction and suspension is logical: reduction of a sentence is unconditional, while a suspended sentence may be reimposed at some future date. A defendant whose sentence is suspended is entitled to be placed on a term of probation with a definite ending date and express conditions, so that he knows what conduct, during what period, will subject him to reimposition of his sentence. A defendant whose sentence is reduced without

- 18 -

condition has no such need.

VI. RESPONSE TO COMMENTS FROM THE PUBLIC

The Court has directed the parties to respond to the public's comments on the plea agreement. The Court received 87 comments in response to the Court's invitation to the public to express their views on the criminal plea agreement in this case. Almost all the comments were from private citizens residing in Alaska. The Audubon Society, the Green Party, and the National Wildlife Federation also submitted comments, as did two attorneys representing plaintiffs in the civil oil spill litigation. Finally, three Alaskan villages and one native corporation submitted comments.

Many of the comments raise similar objections or concerns about the plea agreement. Hence, instead of responding to each comment separately, we have grouped the comments into several categories sharing common themes, and have responded to each of those themes. One characteristic that almost all of the comments share is that they address both the criminal plea agreement and the proposed consent decree, often confusing the two. Many of the objections concern the adequacy of the civil recoveries under the consent decree, rather than the sentence proposed under the plea agreement. The proposed consent decree is independent from the plea agreement; consequently, it is not appropriate for the government to respond here to objections to the

- 19 -

consent decree.

A. Comments Favoring the Plea Agreement

Eleven commenters urged the Court to accept the plea agreement. In general, those commenters cited the value of obtaining a certain result in this case immediately, rather than an uncertain result after years of litigation. Some commenters also cited a desire to give Exxon credit for its efforts to clean up the spill. The government agrees that the definite sentence set forth in the plea agreement is preferable to the uncertain sentence that could result even if convictions were obtained after trial. The range of uncertainty in this case is particularly broad, because of the dramatic difference between the normal maximum fines and the level of fines that the Court could, in its discretion, impose under the Alternative Fines Act.

B. Comments Opposing Agreement Not to Prosecute Alyeska

Representative George Miller, Vice-Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, wrote to the Court to say that he objects to the provision in that plea agreement in which the government agreed not to prosecute Alyeska Pipeline Service Company for any offense arising from Alyeska's preparation of oil spill contingency plans. The National Wildlife Federation raised a similar objection. Vice-Chairman Miller stated that Alyeska knew that it could not and would not

- 20 -

respond effectively to a major oil spill, and suggested that the government could charge Alyeska with violating the false statement provision of the Clean Water Act, 33 U.S.C. § 1319(c)(4), or the false statement provision at 18 U.S.C. § 1001.

At the outset, it is necessary to clarify the meaning of the non-prosecution provision of the plea agreement and respond to this comment. First, the plea agreement preserves the federal government's right to prosecute any employees of Alyeska for any criminal conduct that may have been associated with the spill plan. This would, of course, include the government's ability to prosecute any individuals for possible false statements in violation of 18 U.S.C. § 1001. Moreover, the State of Alaska retains full authority to prosecute Alyeska and its employees for any criminal violation of state law that may have occurred.

The government conducted a thorough investigation of possible criminal conduct associated with Alyeska's submission of spill plans. The evidence would not support a prosecution for false statements under the Clean Water Act, 33 U.S.C. § 1319(c)(4), because that section applies only to documents required to be filed under the Clean Water Act. Alyeska's spill plans were not required to be filed under that Act. After carefully weighing the evidence, the relevant law and attendant litigation risks, the possible

- 21 -

sanctions for any criminal charges that might have been brought against Alyeska,⁹ and the unprecedented criminal fines and guilty pleas the government would obtain from Exxon under the plea agreement, the government concluded that it was in the best interests of the public to include a non-prosecution agreement for Alyeska in the plea agreement.

C. Objections to Lack of Data on Spill Damage

In order to assist the Court in reviewing the plea agreement, the government filed a summary of preliminary results of a number of extensive oil spill damage assessment studies. That summary does not purport to offer a definitive tally of the tremendous damage done by the spill to the waters, wildlife and people of Alaska. It does, however, provide the government's present best estimate of these damages, based on all the information they have collected over the two years since the spill. This assessment of the harm caused by the spill was available to responsible government officials who negotiated the plea agreement and consent decree. While the full scope of that harm may not be known for several years, there are no present indications of significant long term injury to resources other than those specifically identified in the summary.

⁹The maximum corporate fine for a false statement in violation of 18 U.S.C. § 1001 is \$500,000, pursuant to 18 U.S.C. § 3571(c).

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Notwithstanding the government's release of a full summary of the natural resource damage assessment study results, a number of commenters object that they cannot evaluate the plea agreement without access to all state and federal studies on injury to natural resources caused by the spill. However, the plea agreement does not seek to redress all injury caused by the Exxon Valdez spill; it seeks only to affix criminal responsibility for the spill, to impose just punishment, and to begin a flow of restitution that will continue in the civil context. In order to determine whether punishment in this case is just, it is enough to know that Exxon and its subsidiary, in violation of applicable environmental laws, caused an environmental disaster of unprecedented proportions, warranting a fine of unprecedented proportions.

D. Objections to Dismissal of Felony Charges

A few letters opposed the plea agreement because it calls for the dismissal of Counts 4 and 5 of the Indictment, which charged felony offenses. The decision by the Department of Justice to dismiss certain counts in an indictment at the time of sentencing is one committed to the discretion of the prosecutors.

E. Objections That Fine Is Insufficient

A number of letters ask the Court to not accept the plea agreement on the basis that the fine and the restitution called for in the agreement are inadequate. The plea

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agreement provides for the largest criminal fine ever imposed in an environmental prosecution. To date, the largest criminal fine for an oil spill is \$2.25 million, paid by the Ashland Oil Company in a Clean Water Act prosecution arising out a serious river spill, which contaminated drinking water in several states and disrupted the lives of thousands of people.

The size of the proposed fine in this case is much greater than that imposed on Ashland just over two years ago. The magnitude of the fine reflects both the larger size of these corporate defendants and the damage created by the Exxon Valdez oil spill. The record fine and the concomitant restitution are designed to punish both defendants for their actions and send a strong message of deterrence to other potential polluters.

F. Objections That the Settlement Deprives Public of a Public Trial

A few of the comments oppose the plea agreement because it means that there will be no public trial of the criminal charges. This is the result of any plea agreement, and is the manner in which most convictions in federal criminal cases are obtained. The commenters misconstrue the purpose of a criminal trial, which is not to satisfy the public's curiosity, but to determine guilt.

In any event, unlike most criminal cases, most of the evidence of the defendants' criminal conduct in this case

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has been made public. This evidence was aired in inquiries by the National Safety Transportation Board, several Congressional committees, and the Alaska State Oil Spill Commission, as well as in U.S. Coast Guard proceedings to suspend the licenses of Joseph Hazelwood and Gregory Cousins, and the State of Alaska's six-week trial of Joseph Hazelwood, much of which was broadcast on radio and television.

G. Objections to Payment of Civil Damages Over Ten-Year Period

Comments that the plea agreement should not be accepted because of the payment schedule set forth in the settlement of state and federal civil claims have no relevance to this separate criminal case. The fines and restitution specified in the plea agreement will be paid within thirty days of the Court's acceptance of the agreement.

H. Objections By Alaska Native Villages

Three Alaska Native Villages, a council of elders, and one Native corporation submitted comments objecting to the plea agreement. For example, Mr. Patrick Norman, President of the Port Graham Corporation, objected to the agreement because the fine monies will go into a national fund for victims of crime. Mr. Norman stated that since the money compensates for crimes committed in Alaska, "the money should be spent on the cities, and villages that were traumatized emotionally and physically by the oil spill and

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the clean up efforts."

By statute, federal criminal fines are deposited in the fund established by the Victims of Crimes Act, 42 U.S.C. § 10601, et. seq. There is no mechanism for a federal criminal fine to be used as compensation for a particular class of victims, or for natural resource damages. For this reason, the plea agreement imposes a substantial criminal fine as punishment and then specifies that an additional \$50 million be paid as restitution to the State of Alaska. Paragraph IV.A. expressly provides that: "Such [restitution] monies are to be used by the State of Alaska exclusively for restoration projects relating to the 'EXXON VALDEZ' oil spill." By this provision, the plea agreement provides generally for redress of injuries similar to those sought by Mr. Norman and the Port Graham Corporation. The restitution monies will be paid soon after the acceptance of the plea agreement, and will be earmarked for the restoration of areas adversely affected by the Exxon Valdez oil spill.

I. Objections to Lack of Provision Regarding Damage to Archeological Resources

Seven commenters objected to the plea agreement because it does not address damage to cultural resources protected by the Archeological Resources Protection Act. None of the commenters suggested how such damage might be addressed. There are extensive pending civil claims by private parties that rest on damage to cultural resources.

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Issues concerning possible archeological damage are issues concerning the civil settlement, and not the resolution of the criminal prosecution.

VII. CONCLUSION

This prosecution was brought after investigation determined that criminal conduct was involved in the grounding of the Exxon Valdez. In a plea agreement submitted to the Court for approval, both defendants have offered guilty pleas and have agreed to pay a fines totalling \$100 million, \$50 million of which would be remitted, and have agreed to pay \$50 million in compensatory payments to the State of Alaska. The government believes that this would be a just resolution of the criminal charges, and respectfully urges the Court to accept the plea agreement.

Dated this 16th day of April, 1991, at Anchorage, Alaska.



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FILED

APR 08 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

EXXON SHIPPING COMPANY)
and)
EXXON CORPORATION,)

Defendants.)

Case No. A90-015-CR

GOVERNMENT'S SUMMARY OF
DAMAGE TO NATURAL RESOURCES
IN AID OF SENTENCING

The United States, by its attorneys, submits the attached summary of natural resource damage, arising from the Exxon Valdez spill, in order to aid the Court in determining whether the sentence set forth in the plea agreement is appropriate. This summary is based on extensive damage assessments conducted by government scientists and contractors over the past two years.

This Court has ordered the parties to submit memoranda in aid of sentencing by April 16, 1991. The government will file its memorandum on that date, but is submitting the attached summary in advance of that date in order to give the

Court additional time to assess, pursuant to 18 U.S.C. § 3553(a)(2)(A), the seriousness of the offenses to which defendants have entered pleas of guilty and to assist the public in commenting on the proposed plea agreement.

Respectfully submitted this 8th day of April 1991, at Anchorage, Alaska.



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SUMMARY OF EFFECTS OF THE EXXON VALDEZ OIL SPILL
ON NATURAL RESOURCES AND ARCHAEOLOGICAL RESOURCES
March 1991

INTRODUCTION

The T/V Exxon Valdez ran aground on Bligh Reef in Prince William Sound on the night of March 23-24, 1989, spilling approximately 11 million gallons of North Slope crude oil, making this the largest oil spill in United States history. The oil spread through Prince William Sound, the Gulf of Alaska, and lower Cook Inlet. More than 1,200 miles of coastline were oiled, including portions of the Chugach National Forest, Alaska Maritime, Kodiak, and Alaska Peninsula/Becharof National Wildlife Refuges, Kenai Fjords National Park, Katmai National Park and Preserve, and Aniakchak National Monument and Preserve. Oil from the T/V Exxon Valdez impacted shorelines nearly 600 miles from Bligh Reef.

The magnitude of efforts of the state and federal governments, the public, and Exxon to contain and clean up the spill, rescue wildlife, and study the effects of the spill is unprecedented. Among those efforts are the state/federal natural resource damage assessment studies designed to measure injuries to natural resources including birds, mammals, fish and other wildlife, and marine and terrestrial habitats. These studies are intended to provide the information necessary for the Trustee agencies to manage and restore injured resources appropriately and to provide necessary documentation to enable the governments to present a claim for damages to the responsible parties. This summary briefly describes the area affected by the spill, the chronology of the spill, and the process developed to implement and manage the injury assessment studies. It focuses, however, on what has been learned over the past two years about the effects of this oil spill on natural resources.

DESCRIPTION OF THE AREA AFFECTED BY THE SPILL

Prince William Sound lies near the top of the Gulf of Alaska (see map), an 850 mile arc extending from the Aleutian Islands on the west to the islands of southeast Alaska. The gulf coast is remote, rugged, and scenic. Its maritime climate nourishes a lush, green landscape in the summer. The area is snow covered in the winter. Bears, whales, bald eagles, puffins, seals, sea lions, and sea otters are among the abundant wildlife of the area. Storms that cross the Gulf drop as much as 300 inches of rain and snow annually in the high coastal mountains. Glaciers descend from permanent ice fields capping these coastal mountain ranges, continuing to carve intricate fjords and send icebergs floating out to sea. These are the largest glaciers outside Antarctica and Greenland.

Prince William Sound is one of the largest relatively undeveloped marine ecosystems in the United States. It has one of the continent's largest tidal estuary systems. Prince William Sound has rich commercial herring and salmon fisheries. The open water of the Sound is about the size of Chesapeake Bay. Its many islands, bays, and fjords give it

more than 2,000 miles of shoreline. Prince William Sound is surrounded by land, most of which is part of Chugach National Forest.

To the southwest of Prince William Sound is the Kenai Peninsula, home of the Kenai Fjords National Park, various units of the Alaska Maritime National Wildlife Refuge, and, among others, the cities of Homer and Seward. Numerous seabird colonies are located along the coast of the Kenai Peninsula, including those most frequently visited by tourists in Alaska. Both Prince William Sound and the Kenai Peninsula are accessible by air, boat, and on a limited basis, by automobile from nearby Anchorage, Alaska's major population center. State ferries that run among the larger communities and many charter boats make it easy for people to visit the heart of the Gulf coast. In recent years, there has been a steady increase in the number of wilderness seekers, kayakers, cruise ship passengers, and other tourists visiting the area.

The Kenai Peninsula points southwest to Shelikof Strait and Kodiak Island. Shelikof Strait lies between Kodiak Island, on the south and the Alaska Peninsula on the north. Shelikof Strait is the source of a very productive commercial pollock fishery. The Kodiak National Wildlife Refuge is located on the Kodiak Archipelago and Katmai National Park and Preserve, Alaska Peninsula/Becharof National Wildlife Refuge, and Aniakchak National Monument and Preserve are located along the coast of the Alaska Peninsula. The Alaska Peninsula tapers, then scatters into the islands of the Aleutian chain.

CHRONOLOGY OF THE EXXON VALDEZ OIL SPILL

For the first three days of the spill, the weather was calm and the slick lengthened and widened amoeba-like and generally stayed in the vicinity of the grounded tanker and off the beaches. Even with these seemingly ideal circumstances for oil recovery, the amount of oil in the water completely overwhelmed efforts to contain and recover the oil. A major windstorm on March 27, 1989, pushed the oil in a southwesterly direction and oiled beaches on Little Smith, Naked, and Knight Islands. The oil continued to spread, contaminating islands, beaches, and bays in Prince William Sound. Four days into the spill, oil began to enter the Gulf of Alaska. The leading edge of the slick reached the Chiswell Islands off the coast of the Kenai Peninsula on April 2, 1989, and the major seabird nesting colonies on the Barren Islands on April 11, 1989, nineteen days into the spill. By May 18, 1989, oil had moved some 470 miles and had fouled shorelines of Prince William Sound, the Kenai Peninsula, the Kodiak Archipelago, and the Alaska Peninsula. Oil subsequently reached shorelines on the Alaska Peninsula nearly 600 miles from Bligh Reef.

During 1989, the response to contain and cleanup the spill and rescue oiled wildlife involved a massive effort. Skimmer ships were sent throughout the spill zone to vacuum oil from the water surface. Booms were positioned to keep oil from reaching important commercial salmon hatcheries in Prince William Sound. A fleet of fishing vessels, known as the "Mosquito Fleet," played an important role in protecting these hatcheries, in corralling oil to assist the skimmer ships, and in capturing oiled wildlife and

transporting these animals to rehabilitation centers. After oil contaminated shorelines, a beach cleanup program was activated. Various local committees, with community and government agency participation, provided recommendations to the U.S. Coast Guard about areas that should receive priority for cleanup. An army of workers cleaned shorelines, using techniques ranging from cleaning rocks by hand to high pressure hot water washing. Fertilizers, sometimes in a chemical base, were applied to some oiled shorelines to increase the activity of oil-metabolizing bacteria, in an experimental procedure known as bioremediation. When deteriorating weather brought an end to cleanup work in the fall of 1989, a great amount of oil remained on the shorelines. Although winter storms proved extremely effective in cleaning many beaches, spring shoreline surveys indicated that much work remained to be done in 1990. Crews operating from boats and helicopters cleaned oiled shorelines in Prince William Sound, along the Kenai and Alaska Peninsulas, and on the Kodiak Archipelago. Manual pick up of remaining oil was the principal method used during 1990, but bioremediation and relocation of oiled berms to the active surf zone were also used in some areas.¹ Another shoreline survey will be conducted during May 1991, to determine the need for additional cleanup work.

INJURY ASSESSMENT PROCESS

The Exxon Valdez oil spill occurred just prior to the most biologically active season of the year in southcentral Alaska. During the two month period after the spill, seaward migrations of salmon fry, major migrations of birds, and the primary reproductive period for most species of birds, mammals, fish, and marine invertebrate species took place. The organisms involved in these critical periods of their life cycles encountered the most concentrated, volatile, and potentially damaging forms of the spilled oil. As will be discussed in this summary, the oil affected different species differently. Whereas, for example, it directly killed large numbers of birds and sea otters that encountered oil on the water surface, it did not prohibit in and out migration and spawning of large schools of salmon and herring.

The state and federal Trustee agencies were forced to mobilize field studies rapidly with little time for planning. Through intensive efforts, studies were designed, administrative processes were accelerated, and 58 field studies were carried out. Additionally, technical services programs were organized to provide hydrocarbon analysis, histopathology, and mapping support for the field studies. Initial decisions on the types and scope of studies conducted were made by agency experts familiar with the resources and the environment. Even with the rapid deployment of studies, however, some opportunities to gather injury data were irretrievably lost during the early weeks of the spill.

A legal framework was subsequently established and studies were reviewed and modified according to their likelihood to document resource injury. Expert peer reviewers were retained and study plans used during 1989 underwent scientific review for possible

¹Exxon has represented that it has paid over \$2.0 billion to conduct cleanup activities during 1989 and 1990.

modification in 1990. Some studies were discontinued or modified if they were unable to further document resource injury, and some new studies were initiated to fill identified information needs. Status reports prepared in January 1990, were used to guide the development of plans for the second year of studies. Thirty-nine studies and three technical services programs were continued in 1990. Scientific review was again used to plan for the upcoming 1991 field season, during which 29 studies and two technical services programs will be conducted.

This summary of the effects of the Exxon Valdez oil spill on natural resources is preliminary, as studies are still underway and available data are not fully analyzed and interpreted. However, the injuries to natural resources that have been documented to date are summarized herein. This summary also addresses studies that were discontinued. It should be noted that studies were discontinued for a variety of reasons, such as the determination that field work had been completed, that there was no practicable way to measure injury, or that no injury was documented. Even though some studies failed to identify injury and were discontinued, this does not necessarily mean that the resources were not affected by the spill. Certain injuries (if present), such as possible latent or sublethal effects on reproductive or other systems in animals, might not become fully evident for a number of years after the spill. At present there is no significant indication of long-term injury to resources other than those specifically noted below. Although studies indicate that there are continuing injuries to certain resources, natural recovery may also have begun. As petroleum hydrocarbons are broken down in the ecosystem, plant and animal communities begin to reestablish themselves. This recolonization has already been observed in some of the more lightly oiled areas. In the more heavily oiled areas, this natural recovery process is expected to take longer. As this natural recovery occurs, many of the birds and mammals that feed in these areas are expected to begin recovering.

MARINE MAMMALS

Following the spill, studies of humpback whales, Stellers sea lions, sea otters, harbor seals, and killer whales were started. The humpback whale and Stellers sea lion studies were discontinued following the 1990 field season. Humpback whale investigations were limited to photo identification of whales, estimations of reproductive success, and possible relocations of whales. It was not possible to take tissue samples for petroleum hydrocarbon analysis to document exposure. The study did not show direct oil spill mortalities or reproductive failures.

The sea lion study is being completed following the 1990 pup counts. Some tissue samples were analyzed for petroleum hydrocarbon concentrations, and although there was some indication of exposure to oil, it was difficult to determine what populations were affected because of the sea lions' active seasonal movements. Because of an ongoing pre-spill population decline and premature pupping of sea lions, it was not possible to distinguish post- from pre-spill population effects clearly.

Studies of killer whales, based on observations only (because tissue sampling was not an

option), have indicated that killer whales are missing from at least one and possibly two pods in Prince William Sound. Injuries to harbor seals and sea otters have been clearly indicated and studies of these species are continuing.

Sea Otters: The population of sea otters in Prince William Sound before the spill was estimated to have been as high as 10,000. The total sea otter population of the Gulf of Alaska was estimated to be at least 20,000. Statewide, the sea otter population is estimated at 150,000. Sea otters were particularly vulnerable to the spill. As the oil moved through Prince William Sound and the Gulf of Alaska, it covered areas used by large numbers of otters. When sea otters become contaminated by oil, their fur loses its insulating capabilities, leading to death from hypothermia. Sea otters also died as a result of ingestion of oil and perhaps inhalation of toxic aromatic compounds that evaporated from the slick shortly after the spill. The effects of oil were documented by surveys of wild populations; analysis of tissues for petroleum hydrocarbons and indicators of reduced health; by tracking sea otters outfitted with radio transmitters (including those released from rehabilitation centers); and estimating total mortality from the number of sea otters found on beaches. These studies concentrated on developing an estimate of sea otter mortality in Prince William Sound and along the Kenai Peninsula, the population most affected by the spill. During 1989, a total of 1,011 sea otter carcasses were recovered in the spill area, cataloged, and stored in evidence trailers. Of these, 876 were recovered dead from the field and 135 died in rehabilitation centers or other facilities. The total number of sea otters estimated to have been killed directly by the spill ranges from 3,500 to 5,500 animals throughout the spill area.

Initial results indicate significant differences in hematology and blood chemistry parameters between sea otters in oiled and unoled areas. Greater variation was observed in DNA content of blood lymphocytes of sea otters from oiled areas, but sperm and testicular cells showed no indication of DNA damage resulting from oil exposure. It cannot yet be determined whether these differences affect sea otter health or survival. There are indications that sea otters continue to be exposed to petroleum hydrocarbons in oiled areas. Analysis of blood and fat samples collected from animals during 1990 found elevated concentrations of certain aromatic compounds in sea otters from heavily oiled areas and elevated concentrations of petroleum hydrocarbons continue to be documented in food items eaten by sea otters in oiled areas. Additionally, other damage assessment studies have documented a decreased abundance of mussels in oiled areas, a key prey species for sea otters.

Studies have documented continuing injury to sea otters. Normally, very few prime age sea otters (animals between 2 and 8 years old) die each year and most mortality occurs among very young and old age classes. The high number of prime age sea otter carcasses found during 1990 indicates that the pattern of sea otter mortality in heavily oiled areas continues to be abnormal. Results of boat surveys indicated continued declines in sea otter abundance within oiled habitats in Prince William Sound. Preliminary results indicate that pupping rates in oiled and unoled areas are not significantly different. However, the first information available for the spring of 1991 shows higher yearling mortality rates in oiled areas than in unoled areas. Studies of the survival and reproductive success of sea otters released from rehabilitation

centers indicate a high level of mortality of adult animals and significantly lower pupping rates than the pre-spill mortality and pupping rates in Prince William Sound. Of the 193 sea otters released from rehabilitation centers, 45 were fitted with radio transmitters. Sixteen of these animals are still alive, 13 are known to be dead, and 15 are missing. One radio transmitter is known to have failed.

Harbor Seals: There has been no census of harbor seals in Prince William Sound since the mid-1970s when the population was estimated at 3,000 to 5,000 animals. Since that time, the harbor seal population in Prince William Sound and the Gulf of Alaska has declined substantially. A population census of Prince William Sound is planned for the summer of 1991.

Two hundred harbor seals are estimated to have been killed by the spill. Only 19 seal carcasses were recovered following the spill, since seals sink when they die. Population changes were documented by summer and fall aerial surveys of known haulout areas. Toxicological and histopathological analyses were conducted to assess petroleum hydrocarbon accumulation and persistence and to determine toxic injuries to tissues.

Population surveys, which are reliable indicators of population trends, conducted in 1984 and 1988 indicated that harbor seal populations in Prince William Sound had declined prior to the spill, with similar declines in what were subsequently oiled and unoiled areas. From 1988 to 1990, however, the decline at oiled sites (35 percent) was significantly greater than at unoiled sites (13 percent).

Severe debilitating lesions were found in the thalamus of the brain of a heavily oiled seal collected in Herring Bay 36 days after the spill. Similar but milder lesions were found in five other seals collected three or more months after the spill. During 1989, oiled harbor seals behaved abnormally, being lethargic or unwary. Petroleum hydrocarbon concentrations in bile were 5 to 6 times higher in seals from oiled areas one year after the spill. This indicates that seals were still encountering oil in the environment, were metabolizing stored fat reserves that had elevated levels of petroleum hydrocarbons, or both.²

Killer Whales: Approximately 182 killer whales forming nine distinct family units or "pods" resided in Prince William Sound before the spill. This count is based on pre-spill documentation. These whales were studied intensively before the spill and their group composition and dynamics are well known. Damage assessment studies of killer whales involved extensive boat-based surveys in Prince William Sound and adjacent waters. Whales were photographed and the photographs were compared to the Alaskan

²Harbor seals are taken in some Alaska villages for subsistence. The State of Alaska conducted a program, separate from the damage assessment program, to test subsistence foods potentially affected by the spill to insure that they were safe for human consumption. The State of Alaska determined that harbor seals in the affected area were safe for people to eat (Oil Spill Health Task Force, July-August 1990 Report and September-October 1990 Report. Alaska Department of Fish and Game, Division of Subsistence).

killer whale photographic database for the years 1977 to 1989 to determine changes in whale abundance, seasonal distribution, pod integrity, and mortality and natality rates.

The AB pod of 36 individual whales was sighted intact in September of 1988. When sighted on March 31, 1989, seven days after the spill, seven individuals were missing. These whales remain absent and six additional whales were missing from the AB pod in 1990. Several of the missing whales are females who left behind calves. It is unprecedented for females to abandon calves, therefore their prolonged absence implies that these adult females are dead. In addition, nine individuals from AT pod were missing in 1990. Explanations for the possible causes of death of these missing whales, including explanations apart from the effects of the spill, are being explored. Killer whale surveys will continue in 1991.

TERRESTRIAL MAMMALS

Studies were conducted on terrestrial mammals that may have been exposed to oil through foraging in intertidal habitats. These species included brown bear, mink, black bear, Sitka black-tailed deer, and river otters.

Brown bears are long-lived animals and forage seasonally in the intertidal and supratidal areas of the Alaska Peninsula and the Kodiak Archipelago. Preliminary analysis of brown bear fecal samples and some tissues show that some brown bears were exposed to petroleum hydrocarbons, but no conclusive injury has been documented. Radio-collared brown bears along the Katmai coast and at a control site on the Alaska Peninsula will continue to be monitored while the transmitters remain active.

Mink and other small mammals that are known to feed and spend part or all of their time in the intertidal zone are difficult to study. They are known to crawl off into burrows or the brush if sick or injured and carcasses are unlikely to be found. Also, information on pre-spill populations of these animals is minimal. Scientists developed a laboratory study to test reproductive effects of oil on ranch-bred mink, in which they were fed food mixed with small, non-lethal amounts of weathered oil. Although changes in reproductive rates or success were not documented, it was found that oil-contaminated food moved through the intestines of the animals at a more rapid rate than did clean food, possibly providing less nutrition to the animals. No field studies were carried out for black bear due to the difficulty of finding, collaring, or otherwise investigating these animals in the dense underbrush in which they reside. However, a literature search confirmed that these animals do forage in the intertidal zone in the spill area.

The deer study found no evidence of injury based on intensive searches of beaches that revealed no mortality attributable to the spill. However, deer taken for purposes of testing for safety for human consumption (not part of the damage assessment process) found slightly elevated petroleum hydrocarbons in some tissues in deer (which feed on kelp in intertidal areas) but it was determined that the deer were safe to eat.

River Otters: A few river otter carcasses were found by cleanup workers. River otters forage in streams and shallow coastal habitats that were contaminated by the spill. Analysis of river otter bile indicated that petroleum hydrocarbons are being accumulated by this species. Studies of radio tagged animals in Prince William Sound showed that home ranges are larger, movements more erratic, and body weights are lower in oiled habitat. Field work is continuing in 1991 to further assess the status of this species, including analysis of blood samples to measure the health of these animals.

BIRDS

Among the most conspicuous effects of the Exxon Valdez oil spill was the injury to birds. Seabirds are particularly vulnerable to oil as they spend much of their time on the sea surface while foraging. Oiled plumage insulates poorly and loses buoyancy and birds die from hypothermia or drowning. Birds surviving initial acute exposure may then ingest oil by preening. Approximately 36,000 dead birds were recovered after the spill; at least 31,000 of these deaths were attributed to the effects of oil. In addition to the large number of murres, sea ducks, and bald eagles, carcasses of loons, cormorants, pigeon guillemots, grebes, murrelets, and other species were also recovered (see attached comprehensive list of bird carcasses logged into evidence trailers by September 25, 1989). Only a small proportion of the total number of birds estimated to have been killed were recovered, as many undoubtedly floated out to sea, sank, were scavenged, were trapped and hidden in masses of oil and were not visible, were buried under sand and gravel by wave actions, decomposed, or simply beached in an area where they were not found. Additionally, it is known that, in a number of cases, carcasses found shortly after the spill were not turned in to receiving stations. Preliminary analyses provided by computer models that account for some of these variables estimate that the total number of birds killed by the spill ranges from 260,000 to 580,000 with the best approximation that between 350,000 and 390,000 birds died. Following peer review, the model will be run again to provide a more refined estimate of total mortality.

Common and Thick-billed Murres: Murres are the third most abundant seabird in Alaska (after tufted puffins and black-legged kittiwakes). A total of approximately 1,400,000 murres reside in the Gulf of Alaska (Unimak Pass to the Canadian border in southeastern Alaska). The total population of murres in Alaska is approximately 12,000,000. The murre colonies on the Chiswell Islands are the most visited by tourists in Alaska. In 1989 and 1990 murres were the most heavily affected bird species. Murre colonies impacted by the spill lost 60 to 70 percent of breeding birds. Oil in Prince William Sound affected major wintering areas of murres and other species. As oil moved out of Prince William Sound and along the Kenai Peninsula and the Alaska Peninsula, it hit major seabird nesting areas such as the Chiswell and Barren Islands, as well as numerous smaller colonies. The oil hit these areas outside Prince William Sound at the same time that adult murres were congregating on the water near colonies in anticipation of the nesting season. Approximately 22,000 murre carcasses were recovered following the spill. Colony surveys indicate that an estimated minimum of 120,000 to 140,000 breeding adult murres in the major colonies that were surveyed were killed by the spill. Extrapolating this information to other known murre colonies hit by

the spill (but not specifically studied), the mortality of breeding adult murres is estimated to have been 172,000 to 198,000. However, area-wide, including wintering and non-breeding birds, the total mortality of murres is estimated to be about 300,000. Murres exhibit strong fidelity to traditional breeding sites and infrequently immigrate to new colonies.

Normally, murres breed in densely packed colonies on cliff faces. Each murre colony initiates egg laying almost simultaneously. This synchronized breeding behavior helps the birds repel predators such as gulls and ravens. In oiled areas, murre colonies have exhibited a much lower populations than before the spill, breeding is later than normal, and breeding synchrony has been disrupted. These structural and behavioral changes in colonies have caused complete reproductive failure during 1989 and 1990, and thus lost production of at least 215,000 chicks. Murre colonies in unoiled areas displayed none of these injuries and had normal productivity. Monitoring of reproductive success of the colonies will continue in 1991.

Bald Eagles: Of the estimated Alaskan bald eagle population of 30,000 birds (20,000 adults and 10,000 fledglings), an estimated 2,200 reside in Prince William Sound. One hundred forty-four (144) dead bald eagles were found following the spill. Although there is considerable uncertainty regarding the total mortality of bald eagles, it is estimated that several times this amount may have been killed by the initial spill. Approximately 90 percent of radio-tagged bald eagles that died during subsequent studies were not found on the beach but in the brush back from the beachfront. This suggests that most of the eagles that died in the spill would not have been found by surveys typically restricted to beach areas. To assess injuries to bald eagles, helicopter and fixed-wing surveys were flown to estimate populations and productivity. Radio transmitters were attached to bald eagles to estimate survival, distribution, and exposure to oiled areas. Bald eagles in Prince William Sound were most intensively studied. Productivity surveys in 1989 indicate a failure rate of approximately 85 percent for nests on moderately or heavily oiled beaches compared to 55 percent on unoiled or lightly oiled beaches. Bald eagles have a delayed sexual maturity and have a relatively long life span under normal circumstances. Consequently, although reproduction apparently rebounded to more normal levels in 1990, population impacts as a result of poor productivity of nestlings and the death of hundreds of adult eagles in 1989 may not be readily apparent for several years. Fewer bald eagles were sighted in 1990 than in 1989, however this change was within the expected error of the survey method. An additional survey will be conducted in 1991 to see if there is a downward population trend.

Sea Ducks: More than 2,000 sea duck carcasses were recovered after the spill, including more than 200 harlequin ducks. Studies concentrated on harlequins, goldeneyes, and scoters, species that use the intertidal and shallow subtidal habitats most heavily affected by the spill. Harlequins were most affected, consistent with the fact that they feed in the shallow water area of the intertidal zone. This is the only species of sea duck studied that both nests in the spill area and feeds in the shallow intertidal zone. All of these species feed on invertebrates such as mussels and are likely to continue to be exposed to petroleum hydrocarbons through their food. About 33 percent of the harlequins collected in the spill area had poor body condition and about 40 percent had