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FILED

APR 25 1989

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By PRE Deputy

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
the EXXON VALDEZ)
_____)

No. A89-095 Civil
(Consolidated)

PRE-TRIAL ORDER NO. 1

Cases Consolidated; Discovery
Stayed; Preliminary Case Organization

A.

Pre-Trial Consolidation

There are currently pending before this court twenty-six cases arising out of the March 24, 1989, grounding of the Exxon Valdez. It appears to the court on a preliminary basis that many, if not all, of these cases are appropriate for consolidation. All of the cases listed on Exhibit A, attached hereto, are hereby ordered consolidated for pre-trial proceedings. This order shall not have the effect of making any person,

1 corporation, or other entity a party to any action in which he,
2 she, or it has not been joined and served in accordance with the
3 Federal Rules of Civil Procedure.

4 This Pre-Trial Order No. 1 shall have application to
5 all subsequently filed cases which assert claims based upon the
6 grounding of the Exxon Valdez on March 24, 1989. All such cases
7 shall be assigned to the undersigned judge without regard to the
8 court's "blind draw" system of assigning cases. All such cases
9 shall be deemed consolidated with all earlier filed cases without
10 further order. A copy of this order shall be forthwith delivered
11 or mailed by the clerk of court to counsel in any such newly
12 filed cases. Counsel in newly filed cases shall be responsible
13 for familiarizing themselves with all prior filings, and in
14 particular any then operative pre-trial orders of the court.

15 The parties to any case which has or will become con-
16 solidated as a result of this order shall have thirty (30) days
17 from the service of this order upon them within which to object
18 to consolidation, seek a severance of their claim or claims, or
19 otherwise seek relief from this or any subsequent pre-trial order
20 entered prior to the filing of any such case.

21 B.

22 Filing & Docketing Procedures; Service
23 of Pleadings; Inquiries to Clerk & Staff

24 All documents filed in these consolidated cases more
25 than five (5) days subsequent to the date of this order shall
26 bear the following caption, and no other:

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ALASKA
3

4 In re)
5 the EXXON VALDEZ) No. A89-095 Civil
6) (Consolidated)
7)

8 provided, however, that the original complaint of a party shall
9 take the usual form, naming all plaintiffs and all defendants.

10 The face page of each document filed with the clerk
11 shall, in addition to the foregoing caption, bear an appropriate
12 title which:

- 13 (1) shall identify the document as pertain-
14 ing to "all cases", or shall identify by
15 number the case or cases to which it
16 pertains;
- 17 (2) shall identify the party tendering the
18 document by use of the party's letter
19 and number designation assigned to that
20 party by the clerk of court in docketing
21 the case;
- 22 (3) shall identify as briefly as possible
23 the nature of the document; and
- 24 (4) shall identify the party or parties
25 against whom it is directed by use of
26 that party's or parties' letter and

1 number designation assigned by the clerk
2 of court in docketing the case.

3 For example:

4 Case No. A89-096 Civil

5 P-26 through P-32 & P-35 Motion for
6 Protective Order against D-1 and D-2

7 [--or--]

8 Re Case No. A89-XXX Civil

9 All Defendants' Opposition to Motion for
10 Summary Judgment by P-18, P-19, P-20 & P-24

11 Commencing with Case No. A89-095 Civil, the clerk of
12 court shall reconstruct a master docket, itemizing all of the
13 filings in all of the cases herewith consolidated and assigning
14 an appropriate, consecutive "P" (for plaintiff) and "D" (for
15 defendant) party number to all parties. Intervenors shall be
16 similarly assigned a serial number with the prefix "I", and
17 third-party defendants shall be similarly assigned a serial
18 number with the prefix "3D". The clerk shall maintain only one
19 master file, consisting of all documents filed in all of the
20 consolidated cases. Except as noted below, individual case files
21 duplicating portions of the master file shall not be maintained.

22 As additional cases are filed, each shall be assigned
23 its serial case number, and a copy of the face page of the
24 complaint only shall be placed in that file. The full complaint,
25 as well as all subsequent filings, shall be made a part of the
26 clerk's master file for these consolidated cases.

1 The court's case management clerk shall compile and
2 maintain a master service list for these consolidated cases. An
3 initial such list shall be prepared forthwith and shall consist
4 of the lead or first-named attorney only who has signed a plead-
5 ing or appearance for a party. The designated counsel for
6 service for a party may be changed from time to time by notice
7 filed with the clerk, but such notice shall become effective five
8 (5) days after inclusion by the case management clerk on the
9 master service list. The master service list shall be distrib-
10 uted to all counsel whenever it is amended; and counsel shall be
11 responsible for employing the current master service list.
12 Counsel are urged to exercise good judgment in the means of
13 service employed; and, where circumstances suggest the need for
14 expedited service, counsel shall make use of FAX facilities,
15 courier services, express mail, or the like.

16 Unless and until otherwise ordered by the court, all
17 parties to these consolidated proceedings shall serve all docu-
18 ments filed with the clerk of court upon all counsel on the
19 current master service list. Proof of service of all documents
20 upon the parties to these consolidated cases shall be by affida-
21 vit or certification that:

22 Service of [TITLE OF DOCUMENT] has been made
23 upon all counsel of record based upon the
24 court's Master Service List of [DATE].

25 No other more detailed proof of service shall be required or
26 received by the clerk. Multiple service for a party may be

1 effected by counsel as a courtesy; but service in accordance
2 herewith shall be sufficient.

3 Service on parties of any order entered in response to
4 a motion, stipulation, application, request, etc., will be the
5 responsibility of the party who has requested such order. Proof
6 of such service shall be by affidavit as set out above.

7 The court clerk's staff is already receiving an extra-
8 ordinary number of telephonic inquiries concerning this case.
9 The clerk of court is authorized in her discretion to receive or
10 decline such inquiries inasmuch as budgetary constraints under
11 which that office is currently working have resulted in substan-
12 tial understaffing that is unlikely to be reversed in this or the
13 following fiscal year. The clerk's staff will decline to answer
14 telephonic inquiries which in substance seek information as to
15 the status of filings. The latter type of inquiry will have to
16 be made in person, either by local counsel or through the employ-
17 ment of private contractors who provide "court-watch" services.

18 C.

19 Organization of Plaintiffs' Counsel

20 Counsel for some of the plaintiffs have heretofore
21 taken steps to organize themselves. The court has received
22 informal¹ communications from the firm of Ashburn & Mason, dated
23 -----

24 ¹ These communications were in the form of letters. Such
25 communications do not become a part of the court's official
26 files, and therefore have a considerable potential for
creating confusion. While the referenced communications are
(--continued)

1 April 17, 1989, from the firm of Smith, Coe & Patterson, dated
2 April 13, 1989, and from the firm of Weidner & Associates, dated
3 April 21, 1989. The court is concerned that the present efforts
4 of counsel to organize themselves may be a bit premature. Some
5 of plaintiffs' counsel purport to have selected a plaintiffs'
6 committee; but this must of necessity have been done without the
7 presence of some counsel who will be involved in other, recently-
8 filed or soon-to-be-filed cases.

9 The court will convene a scheduling and planning con-
10 ference pursuant to Rule 16(b), Federal Rules of Civil Procedure,
11 on a date to be set by the court approximately ninety (90) days
12 from April 1, 1989. In this regard, counsel should be-prepared
13 to deal with the following subjects:

- 14 (1) the items set out in Rule 16(b);
- 15 (2) class certification proceedings;
- 16 (3) organization of plaintiffs' counsel; and
- 17 (4) organization of defendants' counsel.

18
19
20
21 -----
22 (footnote 1 continued:)

23 not deemed to have been inappropriate in any sense (indeed,
24 the court is appreciative of the fact that counsel for
25 plaintiffs are endeavoring to organize themselves), all
26 future communications with the court will please take the
form of a document which has been served in accordance with
this order and filed with the court.

1 D.

2 Discovery

3 All discovery in these consolidated cases is stayed
4 pending further order of the court.

5 The court will convene a discovery conference pursuant
6 to Rule 26(f), Federal Rules of Civil Procedure, on a date to be
7 set by the court approximately one hundred twenty (120) days from
8 April 1, 1989. In this regard, counsel should be prepared to
9 deal with the following subjects:

10 (1) the items set out in Rule 26(f);

11 (2) the selection of a Discovery Master who
12 will be employed by the parties to over- -
13 see and manage all pre-trial discovery
14 subject to review by summary appeal to
15 the court;

16 (3) creation of a discovery library (docu- -
17 ment depository) and designation of a
18 librarian who shall be responsible for:
19 management of all discovery materials,
20 including such functions as a uniform
21 system of numbering which may be used
22 throughout this litigation by all
23 parties, copying and distribution of
24 records, indexing, and the like; and
25
26

1 (4) formation of one or more plaintiffs'
2 discovery committees to coordinate
3 plaintiffs' discovery.
4

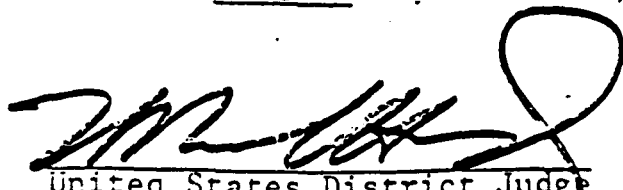
5 E.

6 Caveat to Counsel

7 Present indications are that these consolidated cases
8 have the potential for being the largest and most complex ever
9 filed in this court. Accordingly, the case will call for an
10 extraordinary level of effort and cooperation on the part of all
11 counsel to the end that the rights of all plaintiffs and defen-
12 dants may be promptly and effectively determined. Counsel will
13 have ample opportunity to argue the substantive issues which the
14 case will present.

15 With regard to the management of the case and proce-
16 dural considerations, contentiousness, egocentric approaches to
17 litigation, and "hardball" tactics will not be tolerated.
18 Rather, the court will expect and require of all counsel the
19 highest degree of candor, accommodation, and civility. Counsel
20 must comport themselves so as to engender trust and a spirit of
21 cooperation among plaintiffs' counsel and between plaintiff
22 counsel and defense counsel.

23 DATED at Anchorage, Alaska, this 25 day of April,
24 1989.

25 
26 United States District Judge

cc: All counsel copied in consolidated cases.

In re;
the EXXON VALDEZ

A89-095 Civil	A89-118 Civil
A89-096 Civil	A89-125 Civil
A89-099 Civil	A89-126 Civil
A89-102 Civil	A89-129 Civil
A89-103 Civil	A89-135 Civil
A89-104 Civil	A89-136 Civil
A89-106 Civil	A89-138 Civil
A89-107 Civil	A89-139 Civil
A89-108 Civil	A89-140 Civil
A89-109 Civil	A89-141 Civil
A89-110 Civil	A89-144 Civil
A89-111 Civil	A89-145 Civil
A89-117 Civil	A89-149 Civil

Exhibit A

In re;
the EXXON VALDEZ

A89-095 Civil	A89-118 Civil
A89-096 Civil	A89-125 Civil
A89-099 Civil	A89-126 Civil
A89-102 Civil	A89-129 Civil
A89-103 Civil	A89-135 Civil
A89-104 Civil	A89-136 Civil
A89-106 Civil	A89-138 Civil
A89-107 Civil	A89-139 Civil
A89-108 Civil	A89-140 Civil
A89-109 Civil	A89-141 Civil
A89-110 Civil	A89-144 Civil
A89-111 Civil	A89-145 Civil
A89-117 Civil	A89-149 Civil

Exhibit A

FILED

APR 25 1989

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By lll Deputy

Douglas J. Serdahely
BOGLE & GATES
1031 West 4th Avenue, Suite 600
Anchorage, Alaska 99501
(907) 276-4557

Richard M. Clinton
BOGLE & GATES
Bank of California
900 4th Avenue
Seattle, Washington 98164
(206) 682-5151

Attorneys for defendants
Exxon Corporation and
Exxon Shipping Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CORDOVA DISTRICT FISHERMEN)
UNITED, INC., an Alaska)
corporation; PRINCE WILLIAM)
SOUND AQUACULTURE CORPOR-)
ATION, an Alaska non-profit)
corporation; and ELMER J.)
CHESHER, on their own behalf)
and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

EXXON CORPORATION, a New)
Jersey corporation; EXXON)
SHIPPING COMPANY, a Delaware)
corporation; and ALYESKA)
PIPELINE SERVICE COMPANY, a)
Delaware corporation;)

Defendants.)

Case No. A89-099 Civil

DEFENDANT EXXON'S RESPONSE TO CERTAIN PLAINTIFFS'
PROPOSED PRETRIAL ORDER, AND REQUEST FOR
OPPORTUNITY TO BE HEARD

RESPONSE TO PROPOSED PRETRIAL ORDER AND
REQUEST FOR OPPORTUNITY TO BE HEARD -1-
DJS139AJ

BOGLE & GATES

1031 West 4th Avenue
Anchorage, AK 99501
(907) 276 4557

On April 24, 1989, counsel for the Exxon defendant(s) in this action ("Exxon") received, for the first time, a copy of a letter dated April 17, 1989, addressed to Ms. Phyllis Rhodes, Chief Deputy Clerk, signed by Attorney Lewis Gordon of Ashburn & Mason (purporting to act as "liason counsel" for a certain group of plaintiffs in the pending state and federal court litigation arising out of the Valdez oil spill incident) and proposing a certain pretrial order for such litigation.

Notwithstanding the representation on the bottom of such letter that "all counsel of record" in the various "Exxon Valdez oil spill actions" were served with a copy of such letter, proposed pretrial order and attached materials, counsel for Exxon did not receive such documents until April 24, 1989, after requesting the same from plaintiffs' counsel. Such failure of service was, apparently, inadvertent.

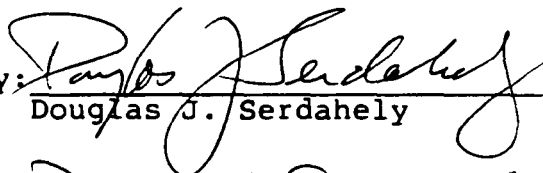
With respect to plaintiffs' letter, proposed pretrial order and materials, Exxon makes the following comments and requests. First, Exxon strongly objects to any ex parte communications between counsel for any party and the court, however well-intentioned they may be, on any subject matter arising out of this litigation. Second, Exxon requests that in the future, all counsel take steps to ensure that any written communications filed with the court be served on all parties to the particular action in which the document is submitted. In this regard, Exxon further objects to the practice of counsel

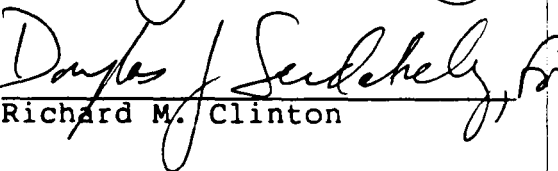
communicating to the court by letter, and requests that substantive communications -- such as proposals for pretrial orders -- be made through an appropriate pleading or memorandum duly filed and served in the case or be made orally on the record in open court.

Finally, inasmuch as Exxon has just received its copy of plaintiffs' letter, proposed pretrial order and materials, Exxon has not yet had sufficient opportunity to review, evaluate or comment upon plaintiffs' submission to the court. Accordingly, Exxon respectfully requests the court to set an appropriate briefing schedule and/or hearing date so as to afford all parties in this action a reasonable opportunity to comment upon plaintiffs' proposed pretrial order.

RESPECTFULLY SUBMITTED this 25th day of April, 1989.

BOGLE & GATES
Attorneys for Defendants Exxon
Corporation and Exxon Shipping
Company

By: 
Douglas J. Serdahely

By: 
Richard M. Clinton

BOGLE & GATES

Su
10th Avenue
Anchorage, AK 99501
(907) 276-4557

RESPONSE TO PROPOSED PRETRIAL ORDER AND
REQUEST FOR OPPORTUNITY TO BE HEARD -3-
DJS139AJ

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Attorneys for defendants
Exxon Corporation and
Exxon Shipping Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CORDOVA DISTRICT FISHERMEN)
UNITED, INC., an Alaska)
corporation; PRINCE WILLIAM)
SOUND AQUACULTURE CORPOR-)
ATION, an Alaska non-profit)
corporation; and ELMER J.)
CHESHER, on their own behalf)
and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

EXXON CORPORATION, a New)
Jersey corporation; EXXON)
SHIPPING COMPANY, a Delaware)
corporation; and ALYESKA)
PIPELINE SERVICE COMPANY, a)
Delaware corporation;)

Defendants.)

Case No. A89-099 Civil

BOGLE & GATES

Sui
1031 West 4th Avenue
Anchorage, AK 99501
(907) 276-4557

AFFIDAVIT OF DOUGLAS J. SERDAHELY

STATE OF ALASKA)
 : ss.
THIRD JUDICIAL DISTRICT)

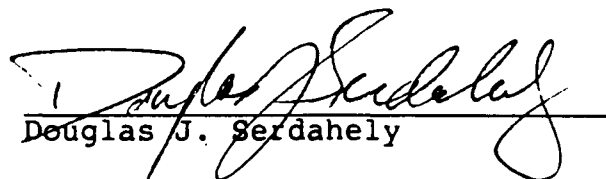
Douglas J. Serdahely, being first duly sworn, upon oath, deposes and says:

1. I am counsel of record for the Exxon defendant(s) ("Exxon") in this action.

2. I did not receive a copy of Mr. Lewis Gordon's letter to the court of April 17, 1989, plaintiffs' proposed pretrial order and supporting materials until April 24, 1989, when I contacted Mr. Gordon to inquire about the same. My first indication that such materials had been sent to the court but not served upon counsel for Exxon was when I received on April 24, 1989, a service copy of Attorney John Hansen's "Objection to Filing of Pretrial Order" in Goreson v. Exxon Corp., et al., 3AN-89-2533.

3. Mr. Gordon apologized for the failure of service and explained that the omission was caused by a secretarial error.

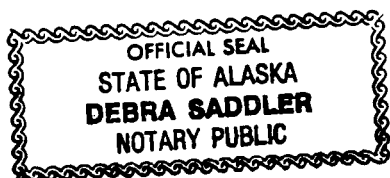
DATED this 25th day of April, 1989.


Douglas J. Serdahely

BOGLE & GATES

Su: _____
103 _____ b Avenue
Anchorage, AK 99501
(907) 276 4557

SUBSCRIBED AND SWORN to before me this 25th day of
April, 1989.



Debra Saddler
Notary Public for Alaska
My Commission Expires: 10-21-92

BONE & GATES

103, 4th Avenue
Anchorage, AK 99501
(907) 276-4557

AFFIDAVIT OF DOUGLAS J. SERDAHELY -3-
DJS167AJ

Douglas J. Serdahely
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(907) 276-4557

Richard M. Clinton
BOGLE & GATES
Bank of California
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Seattle, Washington 98164
(206) 682-5151

Attorneys for defendants
Exxon Corporation and
Exxon Shipping Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CORDOVA DISTRICT FISHERMEN)
UNITED, INC., an Alaska)
corporation; PRINCE WILLIAM)
SOUND AQUACULTURE CORPOR-)
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CHESHER, on their own behalf)
and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

EXXON CORPORATION, a New)
Jersey corporation; EXXON)
SHIPPING COMPANY, a Delaware)
corporation; and ALYESKA)
PIPELINE SERVICE COMPANY, a)
Delaware corporation;)

Defendants.)

Case No. A89-099 Civil

BOGLE & GATES

1031 West 4th Avenue
Anchorage, AK 99501
(907) 276-4557

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
: SS.
THIRD JUDICIAL DISTRICT)

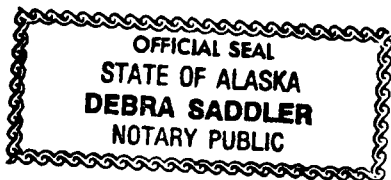
Joy C. Steveken, being first duly sworn, upon oath, deposes and says: that she is employed as a legal secretary in the offices of Bogle & Gates, 1031 West 4th Street, Suite 600, Anchorage, Alaska 99501; that on the 25th day of April, 1989, she served copies of the Defendant Exxon's Response to Certain Plaintiffs' Proposed Pretrial Order and Request for Opportunity to be Heard, Affidavit of Douglas J. Serdahely and Order via U.S. Mail, postage prepaid, to the following individuals:

A. William Saupe
John C. McCarron
Ashburn & Mason
1130 West Sixth Avenue, Suite 100
Anchorage, Alaska 99501

Charles P. Flynn
Burr, Pease & Kurtz, P.C.
810 N Street
Anchorage, Alaska 99501

Joy C. Steveken
Joy C. Steveken

SUBSCRIBED AND SWORN to before me this 25th day of April, 1989.



Debra Saddler
Notary Public for Alaska
My Commission Expires: 10-21-92

BOGLE & GATES
Suite 600
1031 West 4th Avenue
Anchorage, AK 99501
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the preservation of records and tangible things (a copy of which is attached hereto as Exhibit "A").¹

II. DISCUSSION

A. Any Order Regarding the Establishment of Procedures For the Preservation of Records or Other Tangible Evidence Should Apply Only to Defendants

Paragraph one (1) of plaintiffs' proposed Order limits the application of any procedures established by this Court for the preservation of records or other tangible evidence to only the defendants. In distinction to this limitation, defendants' proposed Order not only includes the class representative,² but also all putative class members in the event that this matter is certified as a class action.³ For the following reasons, however, plaintiffs submit that neither they nor any other class members should be included within the scope of a preservation Order setting forth procedures to ensure against the destruction of evidence.

First, the paramount interest of any preservation Order which might issue in this case is to ensure the perpetuation of evidence that relates to either the grounding of the Exxon Valdez, the environmental effects of the resulting oil spill, the handling of the ensuing clean-up, or the planning for the contingency of an oil spill from this or any other ocean-going vessel transporting crude oil from the

¹. Defendants' proposed form of Order that was the subject of the parties' discussions is also attached hereto as Exhibit "B".

²See Exhibit "B", paras. 1(b) and 6.

³See Exhibit "B", para. 4.

terminus of the Trans-Alaska Pipeline at Valdez, Alaska. In this regard, there can be no question that neither the class representatives nor the class members they seek to represent has played any role in either causing this disaster, measuring its environmental effect on a wide-scale basis to assess damages, or aggravating that effect through allegedly inadequate clean-up efforts. Rather, it is defendants, and defendants alone, who have been the "actors" involved in all of the operating events giving rise to plaintiffs' claims for injunctive relief and monetary damages; and thus, defendants and defendants alone, who have exclusive control (be it actual or constructive) of most, if not all, of the records or physical evidence which relate to these issues.

Second, the fact that the class representatives and other putative class members may have documentary or other evidence to buttress their individual claims for damages clearly does not compel the conclusion that any proposed Order regarding evidence retention procedures should apply to them as well as the defendants. To the contrary, the type of documentary or other evidence which plaintiffs may have is only relevant to prove amount of any particular plaintiff's claim and has no direct bearing upon the essential class-wide liability and damage issues connected to either the grounding of the Exxon Valdez, the effect of the resulting oil spill, the handling of the ensuing clean-up, or the planning for the contingency of any oil spill.

Third, inclusion of the class representatives or the putative class members within the scope of this Court's Order might indirectly cause an unjust hardship by permitting defendants to subsequently move before this Court to preclude the claims of certain class members who inadvertently destroyed or lost the record or other evidence supporting their losses. While damages can ordinarily be proven to a trier-of-fact in one of several ways (including, for example, through either the presentation of documents or oral testimony, its evidentiary form is not usually determinative of its admissibility (only its weight). However, if the class representatives and putative class members were subject to any proposed Order and did in fact fail to preserve certain evidence, their claims could conceivably be barred as a sanction for their having unintentionally run afoul of this Court's interdiction.

In sum, there is no meaningful or demonstrable reason for subjecting either the class representatives or putative class members to any Order concerning the preservation of evidence during the pendency of this litigation when it is considered that much, if not all, of the documentary or physical evidence relating to proof of the class-wide liability and damage issues are already, or will in the future be, in defendants' possession by virtue of their singular involvement in the events giving rise to all of the claims. Moreover, inclusion of either the class representatives or putative class members within the scope of

any proposed preservation Order only serves to submit them to the substantial risk of some unintended and arcane interpretation of the Order's language.

Conversely, there can be little or no doubt that plaintiffs or putative class members who deliberately or inadvertently fail to preserve documentary or other evidence in support of the amount of their own individual claims are submitting themselves to the obvious risk that they may ultimately be unable to prove the total amount of their losses. This fact alone should assure defendants that the plaintiffs and the putative class members will be vigilant in preserving any evidence relating to proof of those claims.

B. The Scope of Any Order Regarding The Establishment of Procedures for the Preservation of Records or Other Tangible Evidence Should Protect Against the Likelihood of Real, Substantial and Irreparable Harm.

1. Documents or Physical Evidence that Are Purportedly Protected From Discovery By Recognized Evidentiary Privileges Must Be Protected from Destruction

Paragraph two (2), subpart "a", of Plaintiff's Proposed Order delimits the outermost reach of the protection afforded against the possible destruction of either documentary or physical evidence. It seeks to apply its prophylaxis to any documentary or physical evidence regarding (or capable of leading to further information regarding) the grounding of the Exxon Valdez, the effect of the resulting oil spill, the handling of the ensuing clean-up, or the planning for the contingency of an oil spill--whether or not this documentary

or physical evidence is arguably protected from discovery by any recognized evidentiary privilege.⁴

If any preservation Order fails to include within its protective ambit evidence that might possibly be considered privileged (and thus, not discoverable), there would exist no available means for plaintiffs or other class members to effectively challenge any asserted privilege after the destruction of that document or thing. Likewise, even assuming Plaintiffs or other class members could successfully challenge the defendants assertion of privilege concerning a particular document or thing after its destruction, there exists the likelihood of real, substantial and irreparable harm because of the impracticability for plaintiffs to either directly or indirectly obtain that same information from some other source.

2. Interim Drafts of Writings and Telephone Message Slips Must be Protected from Destruction

In addition to excluding from any preservation Order evidence that ultimately may or may not be determined to be privileged, defendants would also specifically exclude from the Order's protection any "interim drafts of writings and telephone message slips, provided that the final writings and an original logbook or other recording of telephone message slips are preserved."⁵

⁴But, see, Exhibit "B", para. 1(b)

⁵See Exhibit "B", para. 1(b).

each situation as it arises to consensually permit the destruction of additional physical evidence.⁷

As this Court itself has recently recognized in Pre-trial Order No.1, "[p]resent indications are that these consolidated cases have the potential for being the largest and most complex ever filed in this court."⁸ Given these circumstances, defendants' provision totally exempting the destruction of any physical evidence utilized "in the normal course of business"⁹ might inevitably eviscerate the very protections any preservation Order intended to provide. Instead, the parties should be trusted to resolve each matter as it may present itself in order to avoid the imposition of an overbroad provision that will certainly cause more harm in its application than the harm it seeks to prevent. This is especially so considering this Court's exhortation that this "case will call for an extraordinary level of effort and cooperation on the part of all counsel to the end that the rights of all plaintiffs and defendants may be promptly and effectively determined".¹⁰

⁷See Exhibit "A", para. 3 [re: obligatory consultation between counsel to resolve all questions and request for Court intervention only absent the parties' ability to agree].

⁸See Pre-Trial Order No. 1, at p.9.

⁹See Exhibit "B", para. 5. Indeed, as proposed in defendants' Order this amorphous provision (i.e., "in the normal course of business") need not even apply to activities related to the Prince William Sound oil spill clean-up or the clean-up of any other spill.

¹⁰See Pre-Trial Order No. 1, at p. 9.

However, before seeking this Court's imprimatur to presumably destroy evidence, defendants should be required to demonstrate not only the information that these documents contain, but also their purported burden in conserving these documents as opposed to their purported need to destroy them. No less specificity would be required to be shown by defendants in identifying these documents if they were merely interposing an objection to their production - - which, of course, they are not.

3. Physical Evidence Utilized By Defendants in Connection With The Oil Spill Clean-Up Must Be Protected From Destruction Unless These Physical Things Are Specifically Exempted From The Preservation Order By Express Terms Or The Parties' Subsequent Agreement

Paragraph five (5) of Plaintiffs' proposed Order attempts to balance the vicissitudes of managing defendants' ongoing clean-up efforts (including the speed with which these efforts must be completed) against the public importance of the issues at stake in this litigation and its special evidentiary needs. this balance is achieved by permissibly excusing the destruction of certain physical evidence utilized by defendants in connection with their clean-up activities;⁶ and further, providing a self-executing means for all of the involved parties to immediately address

⁶See Exhibit "A", para. 5 subpart (a) [re: inadvertent destruction of oil spill clean-up and containment equipment, or vessels, vehicles or containers used to transport or hold such equipment and subpart (b) [re: intentional destruction of clothing, bags or rags, or, crude oil spilled from the Exxon Valdez]

4. "Accountings" Must Be Prepared by Defendants in the Event of either: The Removal of Physical Evidence from this State; Or, The Transference of Documents Or Physical Evidence To The Custody of Third-Persons.

Both paragraphs six (6) and seven (7) of plaintiffs' proposed Order set forth the manner in which defendants should account for protected evidence in the event of either its removal from the State of Alaska or its transference to any governmental body or other third-person. The proscriptions of paragraph six (6) are specifically limited to physical evidence, while those contained in paragraph seven (7) apply to both documentary and tangible things.

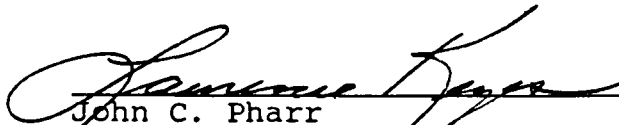
Because of the multiple investigative efforts now involving hundreds of individuals and diverse federal and private entities, defendants may well be required to remove physical evidence from this forum in order to furnish it to these out-of-state third-parties. In that event, only the safeguards enumerated in paragraph six (6) can adequately ensure against this evidence being lost, destroyed or forever altered in a fashion which might irreparably harm plaintiffs and the plaintiff class in their own case investigation.

Paragraph seven (7) likewise provides for an "accounting" procedure. While it applies to both documents or things transferred to third-persons, it requires no prior agreement between counsel. It is also less stringent as far as any proposed requirement for the photographing of physical evidence since there is presumptively better control, and hence less chance for the destruction, of items remaining in Alaska.

III. CONCLUSION

In consequence of all of the foregoing, plaintiffs and the plaintiff Class respectfully request that this Honorable Court enter an Order regarding the establishment of procedures for preserving both documentary and physical evidence in the form attached hereto as Exhibit "A".

Respectfully submitted this 10th day of May, 1989.



John C. Pharr
Laurence Keyes
733 W. 4th Avenue, #201
Anchorage, Alaska 99501
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which may lead to the discovery of information relating, referring, or pertaining to, any oil spill Contingency Plan and its development, amendment, or implementation; the Exxon Valdez, its crew, its loading and voyage on or about March 23, 1989, or the oil spill in Prince William Sound resulting therefrom, which is the subject of this litigation (the "oil spill"): the efforts by any persons, entity, or agency to clean-up, contain or monitor the oil spill; any investigation by any person, entity, or agency into the circumstances, effects, or causes of the oil spill; and, any claims or damages alleged to result, directly or indirectly, from the oil spill or its aftermath.

(b) Without limiting or affecting the immediate application of this Order to any existing documents or physical thing or evidence as described above, any document and physical thing or evidence referred to in any discovery request made during this litigation shall, from the time of the request, be treated for purposes of this Order as being subject to this Order, unless and until the Court rules otherwise or the parties, through their counsel, stipulate otherwise.

3. Counsel are to confer to resolve questions as to what documents or physical evidence are outside the scope of this Order regarding preservation of evidence or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents or physical evidence. If counsel are unable to agree, any

party may apply to the Court for clarification or relief from this Order upon reasonable notice. A party which, within 60 days after receiving written notice from another party that specified documents or things will be destroyed or altered, fails to indicate in writing its objection, shall be deemed to have agreed to such destruction or alteration.

4. As used in this Order, "documents" shall mean and include any writing, drawing, film, videotape, chart, photograph, phono or tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained and any other form of tangible preservation of information.

5. (a) The destruction of the following identified physical things shall not be considered a violation of this Order, when such destruction is caused inadvertently and without intention in connection with, or arising out of, the usage of these physical things in the course of the present Prince William Sound oil spill clean-up efforts: (i) oil spill clean-up and containment equipment and, (ii) vessels, vehicles, or containers used to transport or hold such equipment. In the event that oil spill clean-up and containment equipment, or vessels, vehicles or containers used to transport or hold such equipment are inadvertently destroyed pursuant to this subparagraph, then, in that event,

defendants shall make a good faith effort to keep a record to sufficiently identify the physical evidence so destroyed.

(b) Destroying or permitting the destruction of either (i) clothing, bags or rags utilized in the oil spill clean-up efforts; or, (ii) crude oil spilled from the Exxon Valdez, shall not be considered a violation of this Order.

6. (a) Defendants may not move any physical evidence out of the State of Alaska, without first following the procedure set forth in Paragraph 3 above to either obtain the consent of counsel or an appropriate Court Order.

(b) In the event that either counsels' consent or a Court Order is obtained, defendants shall keep the following record and inventory of the physical evidence to be removed. The record and inventory shall consist of:

(1) A statement of where the physical evidence is to be moved.

(2) An inventory of the physical evidence;

(3) Dated photographs of the physical evidence before it was removed to document the condition of the physical evidence prior to its removal; and,

(4) The name and address of the person or entity who will have control of the physical evidence after its removal.

7. During the pendency of this litigation, defendants, their respective officers, agents, servants, employees, and attorneys shall not relinquish custody or control of either the originals or copies of any documents, or, any physical

evidence, which are subject to this Order, to any governmental body or agency, or any other third party, without retaining a copy of any such document, and, preparing a complete accounting of any such transfer (that includes an identification of the documents or physical evidence so transferred, the name and address of the person or entity to whom the documents or physical evidence were transferred, the name and address of the person who transferred the documents or physical evidence, the date of the transfer, and the address of the location(s) to which the documents or physical evidence were transferred). This accounting shall be maintained by counsel for the named parties.

8. Any party may seek a modification of this Order from the Court, after counsel for the parties have consulted in good faith regarding any such proposed modification.

DATED this _____ day of _____, 1989.

United States District Judge

LAW OFFICES OF
JOHN C. PHARR
711 T 4TH AVENUE
SUITE 200
ANCHORAGE, AK 99501

(907) 272-2525

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DRAFT PROPOSED ORDER . 5/8/89

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)	
)	No. A89-095 Civil
the EXXON VALDEZ)	
)	(Consolidated)
)	
)	

Re Case No. A89-096 Civil

ORDER REGARDING PRESERVATION OF EVIDENCE

The Court, having carefully considered the parties' Partial Stipulation Regarding the Preservation of Evidence, supporting and opposing memoranda and proposed orders,

Hereby orders as follows:

1. (a) All documents preserved by the parties from the commencement of this litigation through May 1, 1989, pursuant to interim agreements, stipulations and/or the Court's interim document retention Order entered herein on April 24, 1989, shall

ORDER REGARDING PRESERVATION
OF EVIDENCE
DJS250AJ

Exhibit <u>B</u>
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DRAFT PROPOSED ORDER 5/8/89

remain preserved unless and until otherwise agreed upon by the parties or ordered by the Court as set forth in paragraph 3 below.

(b) Subsequent to May 1, 1989, and during the pendency of this litigation, each of the named parties herein and their respective officers, agents, servants, employees and attorneys, shall neither destroy nor permit the destruction of any document or physical evidence within the parties' possession, control or custody not otherwise protected from discovery by recognized evidentiary privileges, which relates, refers or pertains to or which may lead to evidence relevant to: (1) the Oil Spill Contingency Plan and/or its development, amendment or implementation; (2) the Exxon Valdez and its crew, its loading and voyage on or about and after March 23, 1989, and/or the oil spill in Prince William Sound resulting therefrom, which is the subject of this litigation (the "oil spill"); (3) the efforts by any person, entity or agency to clean up, contain and/or monitor the oil spill; (4) any investigation by any person, entity or agency into the circumstances, effects and/or causes of the oil spill; and (5) any claims or damages alleged to result, directly or indirectly, from the oil spill or its aftermath. Documents specifically excluded from this provision are interim drafts of writings and telephone message slips, provided that the final writings and an original logbook or other recording of telephone message slips are preserved.

ORDER REGARDING PRESERVATION
OF EVIDENCE
DJS250AJ

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DRAFT PROPOSED ORDER 5/8/89

(c) Without limiting or affecting the immediate application of this Order to any existing documents or physical evidence, any document or physical evidence referred to in any discovery request made in this litigation shall, from the time of the request, be treated for purposes of this Order as subject to this Order unless and until the Court rules otherwise or the parties, through their counsel, stipulate otherwise.

2. As used in this Order, "document" shall mean and include any writing, drawing, film, videotape, chart, photograph, phono or tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained and any other form of tangible preservation of information.

3. Counsel are to confer to resolve questions as to the scope of this Stipulation and Order regarding the preservation of documents or physical evidence which need not be preserved and as to an earlier date for permissible destruction of particular categories of documents or physical evidence. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this Stipulation and Order upon reasonable notice. A party which, within 60 days after receipt by counsel of record of written notice from another party that

ORDER REGARDING PRESERVATION
OF EVIDENCE
DJS250AJ

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Exhibit	<u>B</u>
Pg	<u>3</u> of <u>6</u>

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specified documents or things will be destroyed or altered, fails to indicate to counsel of record its written objection to such destruction or alteration, shall be deemed to have agreed to such destruction or alteration.

4. In the event that this matter is certified as a class action, the substance of the evidence preservation requirements of this Order shall be included in the initial notice to class members and the terms hereof shall immediately thereafter become binding on all such persons or entities who have not previously become subject thereto by virtue of their capacities as named plaintiffs. The form, contents and manner of such notification, and the financial responsibility therefor, will be addressed by the parties and/or the Court at a later date.

5. Destroying or permitting the destruction of physical evidence other than documents shall not be considered a violation of this Order when such destruction arises out of the usage of such physical evidence in the normal course of business, including, but not limited to, activities relating to the Prince William Sound oil spill cleanup or the cleanup of any other oil spill. By way of illustration, physical evidence subject to this paragraph includes oil spill cleanup and containment equipment, vessels, vehicles or containers used to transport or hold such

ORDER REGARDING PRESERVATION
OF EVIDENCE
DJS250AJ

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DRAFT PROPOSED ORDER 5/8/89

equipment, miscellaneous supplies (including, but not limited to, clothing, bags, rags, etc.) utilized in oil spill cleanup and containment, and crude oil spilled from the Exxon Valdez.

6. During the pendency of this litigation, each of the parties herein and their respective officers, agents, servants, employees and attorneys, shall not relinquish custody or control of the originals of any documents subject to this Order to any governmental body or agency, or any other third party, without retaining a copy thereof and preparing a complete accounting of such transfer including an identification of the documents so transferred, the name and address of the person or entity to whom the documents were transferred, the name and address of the person who transferred the documents, the date of the transfer and the address of the location(s) to which the documents were transferred. The term "original" document is defined to mean the first document (whether a copy or otherwise) which a party has received or taken possession of. The accountings shall be maintained by counsel for the respective named parties. In the event that this matter is certified as a class action, the unnamed class members shall themselves maintain their own accounting.

7. Any party to this Stipulation and Order may seek a modification of this Stipulation and Order from the Court, after counsel for the parties have consulted in good faith regarding any such proposed modification.

ORDER REGARDING PRESERVATION
OF EVIDENCE
DJS250AJ

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DRAFT PROPOSED ORDER 5/8/89

DATED at Anchorage, Alaska, this ____ day of May, 1989.

Hon. H. Russel Holland
United States District Judge

ORDER REGARDING PRESERVATION
OF EVIDENCE
DJS250AJ

Exhibit B
Pg 6 of 6

FILED

APR 25 1989

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By lll Deputy

Charles P. Flynn, Esq.
BURR, PEASE & KURTZ
810 N Street
Anchorage, AK 99501
907/276-6100

Attorneys for Defendant Alyeska Pipeline Service Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MARTIN GORESON, JAMES R. GORESON,)
JEFFREY A. MOORE, JAMES D. EWING,)
DOUG JENSEN, DANIEL LOWELL,)
WHITTIER SEAFOODS, INC., CORDOVA)
AIR SERVICE, INC., F/V DEW DROP,)
INC. and F/V DEBRA LEE, INC.,)

Plaintiffs,)

v.)

EXXON U.S.A., INC., a Delaware)
corporation, EXXON CORPORATION,)
a Delaware corporation, EXXON)
SHIPPING COMPANY, a Delaware)
corporation, ALYESKA PIPELINE)
SERVICE COMPANY, a Delaware)
corporation, TRANS-ALASKA)
PIPELINE LIABILITY FUND, in)
personam, and EXXON VALDEZ,)
in rem,)

Defendants.)

No. ~~A89-106 Civ.~~
A89-095

RESPONSE TO PRE-TRIAL ORDER No. 1

On April 24, 1989, at 4:12 in the afternoon, defendant Alyeska received a copy of plaintiffs' letter communication to the court dated April 17, 1989, and the attached "Pretrial Order No. 1" which was apparently delivered, without

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CPF/lst

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filing, to Judge Shortell as presiding judge of the Superior Court for the State of Alaska, Third Judicial District, and to Ms. Phyllis Rhodes as Chief Deputy Clerk of the United States District Court for the District of Alaska. Defendant Alyeska was not served with either the letter, or the attached "Pre-trial Order No. 1" prior to learning of its existence from other plaintiffs' counsel.

Defendant Alyeska responds to this communication to the court with several points. First, the court should discourage informal or ex parte communications between litigants in this proceeding and the court. The rules provide a way in which to ask the court to do things, and this litigation will undoubtedly be long and difficult enough without superimposing the difficulties inevitably imposed by informal or ex parte communication.

Second, the court should treat plaintiffs' communication as a motion for entry of that order. Defendants should then be entitled to respond to that order, as provided by the rules. At this point, defendant Alyeska has had no opportunity to thoughtfully review the proposed pretrial order, and cannot yet report its agreements or disagreements with the proposal. Defendant should have the normal period of time provided by the rules for that purpose. This will promote the efficient and

orderly administration of justice, and assure the court that it is fully informed as to the positions of each of the parties, and will be able to consider each of those positions in taking action.

Defendant Alyeska has filed a copy of this response in each of the case files in which it has been served. A "judge's copy" has been independently served upon Judges Shortell, Hunt and Gonzales, as well as Ms. Rhodes.

DATED: April 25, 1989.

BURR, PEASE & KURTZ
Attorneys for Alyeska Pipeline
Service Company

By


Charles P. Flynn

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BURR, PEASE & KURTZ
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Attorneys for Defendant Alyeska Pipeline Service Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MARTIN GORESON, JAMES R. GORESON,)
JEFFREY A. MOORE, JAMES D. EWING,)
DOUG JENSEN, DANIEL LOWELL,)
WHITTIER SEAFOODS, INC., CORDOVA)
AIR SERVICE, INC., F/V DEW DROP,)
INC. and F/V DEBRA LEE, INC.,)

Plaintiffs,)

No. A89-106 Civ.

v.)

EXXON U.S.A., INC., a Delaware)
corporation, EXXON CORPORATION,)
a Delaware corporation, EXXON)
SHIPPING COMPANY, a Delaware)
corporation, ALYESKA PIPELINE)
SERVICE COMPANY, a Delaware)
corporation, TRANS-ALASKA)
PIPELINE LIABILITY FUND, in)
personam, and EXXON VALDEZ,)
in rem,)

Defendants.)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

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CPF/lst

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& KURTZ
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Y STREET
A...SE, AK 99501
. 276-6100

Linda S. Foley, an employee of Burr, Pease & Kurtz,
810 N Street, Anchorage, Alaska, being duly sworn, states that
on April 25, 1989, she mailed a copy of a Response to
Pre-trial Order No. 1. and (proposed) Order to:

Charles W. Ray, Jr., Esq.
TUGMAN and CLARK
711 H Street, Suite 500
Anchorage, AK 99501

John T. Hansen, Esq.
HANSEN & LEDERMAN
711 H Street, Suite 600
Anchorage, AK 99501

Douglas J. Serdahely, Esq.
BOGLE & GATES
1031 West Fourth Avenue, Suite 600
Anchorage, AK 99501

Linda S. Foley
Linda S. Foley

SUBSCRIBED and SWORN to before me this 25th day of
April, 1989.

Marcy E. Krueger
NOTARY PUBLIC in and for Alaska
My Commission Expires: 3-11-93