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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

1 David W. Oesting
2 Davis Wright Tremaine
3 550 W. 7th Avenue, Suite 1450
4 Anchorage, Alaska 99501
5 (907) 276-4488

6 Jerry S. Cohen
7 Cohen, Milstein, Hausfeld & Toll
8 1401 New York Ave., N.W.
9 Suite 600
10 Washington, D.C. 20005
11 (202) 628-3500

12 Co-lead Counsel for Plaintiffs

Hon. H. Russel Holland

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF ALASKA
15

16 In re)
17) Case No. A89-095 Civil
18 EXXON VALDEZ OIL SPILL LITIGATION) (Consolidated)
19)

20 Re: Case Nos. A89-095, A89-117, A89-118, A89-140
21 A89-149, A89-238, A89-264, A89-446
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JOINT MEMORANDUM FOR PLAINTIFFS IN OPPOSITION TO
ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
AS TO PLAINTIFFS SAID TO HAVE NO PHYSICAL IMPACT OR INJURY

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I. THIS COURT MUST APPLY THE REMEDIAL LAW OF ALASKA, WHICH EXPRESSLY REJECTS THE LIMITATION UPON RECOVERY ADVOCATED BY THE ALYESKA DEFENDANTS.....6

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5	Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	passim
6	Nelson v. United States, 639 F.2d 469 (9th Cir. 1980)	17
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13	Sewell v. M/V Point Barrow, 556 F. Supp. 168 (D. Alaska 1983)	passim
14	Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	16
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17	The Harrisburg, 119 U.S. 199 (1886)	17
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United States v. City of Redwood City, 640 F.2d
963 (9th Cir. 1981) 5, 33

Walker Distributing Co. v. Lucky Lager Brewing
Co., 323 F.2d 1 (9th Cir. 1963) 33

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MISCELLANEOUS

Conference Rep. No. 933-924, 1973 U.S. Code Cong.
& Admin. News 2523 15-16

119 Cong. Rec. 24296-97 16

5 C. Wright & A. Miller, Federal Practice &
Procedure: Civil § 1357 at 601-03 6

1 The Alyeska defendants other than Exxon Pipeline Co.¹
2 have moved for judgment on the pleadings dismissing those
3 plaintiffs (other than commercial fishermen) whom they
4 characterize as suing only "for purely economic damages where
5 there has been no physical injury to a plaintiff's person or
6 property." Memorandum of Points and Authorities in Support of
7 Motion of Defendants for Judgment on the Pleadings, served
8 February 26, 1990 (hereafter "Alyeska Mem."), p. 2. This Joint
9 Memorandum in Opposition is filed jointly on behalf of
10 plaintiffs listed in Appendix A to the motion to demonstrate the
11 error of the legal premises of the motion. In addition to this
12 Joint Memorandum, some plaintiffs are filing separate or
13 supplemental memoranda focused on their particular situations.²

14 The Alyeska defendants' motion addresses only a small
15 minority of the plaintiffs and does not seek to eliminate all
16

17 ¹ The moving defendants are six of the seven oil company
18 subsidiaries that own and control Alyeska Pipeline Service
19 Company ("Alyeska"), which operates the Trans-Alaska Pipeline
20 System and the shipping terminal facilities at Valdez and which
21 had responsibilities for the cleanup of the oil spill from the
22 EXXON VALDEZ that is the subject matter of this litigation, as
23 well as George M. Nelson, who is Alyeska's president. The Exxon
24 defendants do not join the motion either in their capacities as
25 owners and/or operators of the EXXON VALDEZ or in their capacity
26 as one of the Alyeska owners.

27 ² Although the Alyeska defendants have filed substantially
28 identical motions in State and Federal Court, the targeted
plaintiffs are not entirely the same in the two Courts. More
important, the issues in the two Courts are not identical,
though they have many common elements. Accordingly, the
memoranda in opposition are not completely identical.

1 claims for "purely economic damages" from the litigation. The
2 movants promise to revisit the same issue later through summary
3 judgment motions against other plaintiffs which claim both dam-
4 ages for "actual impact from the oil" and "economic damages that
5 do not flow from the claimed physical impact of oil." Id. p. 2
6 n.1. Even if the present motion were to be granted, therefore,
7 it would not eliminate any category of claims from the
8 litigation. It would not even eliminate the targeted
9 plaintiffs, because these plaintiffs also have claims in this
10 Court which would not be subject to dismissal on the grounds
11 urged by the motion and which seek similar relief for the same
12 injuries.³ Nor does the motion address the plaintiffs'
13 equitable claims, including particularly those of the use and
14 enjoyment plaintiffs who seek predominantly injunctive relief to

15
16 ³ For example, plaintiffs sue the Exxon defendants and the
17 Trans-Alaska Pipeline Liability Fund ("TAPS Fund") for strict
18 liability under the Trans-Alaska Pipeline Authorization Act, 43
19 U.S.C. § 1653(c), and assert claims against the Exxon defendants
20 under the implied right of action for negligence created by that
21 Act. Such statutory claims plainly could not be extinguished by
22 the judge-made principle of maritime law that the motion
23 advocates.

24 Because the motion is limited to an effort to eliminate
25 certain plaintiffs altogether, and does not attempt to prune the
26 claims of those who remain, it suffices to show that each
27 targeted plaintiff states at least one claim. Although there
28 are some differences among the various complaints, they are not
material for purposes of this motion. Because the oil spill
occurred only a year ago, any of the plaintiffs could add, by
amendment or otherwise, any claim it has not yet asserted. See,
e.g., Hurn v. Retirement Fund Trust, 648 F.2d 1252 (9th Cir.
1981).

26 JOINT MEMORANDUM FOR PLAINTIFFS
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28 MOTION FOR JUDGMENT ON THE PLEADINGS

1 mitigate the effects of the spill. Thus, even if the motion had
2 merit it would not serve its ostensible purpose of simplifying
3 the litigation.

4 The present motion is generic in nature, and does not
5 analyze the claims of the targeted plaintiffs either
6 comprehensively or in detail. In substance, the Alyeska
7 defendants are merely asking the Court for a ruling on an
8 abstract proposition that they hope to apply for their benefit
9 as the litigation goes on. The proposition advocated by the
10 motion rests on the simplistic premises (1) that plaintiffs'
11 claims in this litigation are wholly governed by federal
12 maritime law to the entire exclusion of Alaska State law and (2)
13 that federal maritime law precludes any recovery by anyone other
14 than a commercial fisherman for economic or other loss not
15 caused by direct physical injury to person or property.

16
17 This Joint Memorandum shows that both of these premises
18 are wrong. The law to be applied by a federal court sitting in
19 admiralty commonly incorporates State law, particularly if State
20 law provides additional remedies. As Judge Fitzgerald held when
21 allowing recovery in admiralty under an Alaska penalty statute:

22 "The Supreme Court has consistently held that
23 while admiralty suits are to be governed by
24 federal procedural and substantive rules, * * *
25 admiralty courts may recognize and enforce rights
26 and obligations created by state law. * * *"

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1 Sewell v. M/V Point Barrow, 556 F. Supp. 168, 169 (D. Alaska
2 1983) (citations omitted).⁴ Thus, this Court should apply the
3 Alaska law as established by Mattingly v. Sheldon Jackson Col-
4 lege, 743 P.2d 356 (Alaska 1987), which expressly provides a
5 negligence remedy to specially foreseeable plaintiffs who have
6 not suffered any physical impact or injury. And in any event,
7 the Alyeska defendants misstate the purely federal maritime law
8 of the Ninth Circuit, which does not impose the "bright line
9 sharply delineating permissible and impermissible claims" upon
10 which their motion depends (see Alyeska Mem. p. 9); rather, it
11 allows room for suit by all plaintiffs who are able to prove
12 that their injuries were specially foreseeable. The motion must
13 therefore be denied because its legal premises are erroneous.

14 The plaintiffs who are the named targets of the Alyeska
15 defendants' motion and the classes represented by some of them
16 fall into several different categories with somewhat differing
17 injuries. Even if State law were inapplicable, the targeted
18 plaintiffs could not be dismissed under the maritime law of the
19 Ninth Circuit without detailed analysis of their alleged
20 injuries. In the final section of this Memorandum, we briefly
21

22 ⁴ The Court held that coastwise seamen suing for two
23 weeks' unpaid wages in admiralty could also collect penalties of
24 90 days' wages under AS § 23.05.140, notwithstanding their
25 express exclusion from the penalty provisions of the federal
statute generally dealing with the subject of unpaid seamen's
wages.

26 JOINT MEMORANDUM FOR PLAINTIFFS
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1 demonstrate the failure of the motion to meet its burden of
2 showing, on a case-by-case basis, that these plaintiffs'
3 injuries -- which are further explained in particular
4 plaintiffs' supplemental submissions -- are insufficient to
5 state claims as a matter of law.

6
7 At the outset, we emphasize the exacting standards by
8 which motions such as the present one are judged under Rule
9 12(c):

10 "[I]n acting on a motion to dismiss, the
11 plaintiff's allegations must be assumed to be
12 true and the complaint must be construed in the
13 light most favorable to the plaintiff. * * *
14 Moreover, the accepted rule is that a complaint
15 is not to be dismissed 'unless it appears beyond
16 doubt that the plaintiff can prove no set of
17 facts in support of his claim which would entitle
18 him to relief.' * * * Under this rule it is only
19 the extraordinary case in which dismissal is
20 proper. * * *"

21
22 United States v. City of Redwood City, 640 F.2d 963, 966 (9th
23 Cir. 1981) (citations omitted). It may also be pertinent to
24 note the related principle that

25
26 "The court should be especially reluctant to
27 dismiss on the basis of the pleadings when the
28 asserted theory of liability is novel or extreme,
since it is important that new legal theories be
explored and assayed in the light of actual facts
rather than a pleader's suppositions."

29
30 Electrical Construction & Maintenance Co. v. Maeda Pacific
31 Corp., 764 F.2d 619, 623 (9th Cir. 1985), quoting 5 C. Wright &

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JOINT MEMORANDUM FOR PLAINTIFFS
IN OPPOSITION TO ALYESKA DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS

1 A. Miller, Federal Practice & Procedure: Civil § 1357 at 601-03.
2 While we do not consider the claims of any of the targeted
3 plaintiffs "novel or extreme," the movants apparently do and
4 therefore their motion should be considered under this
5 principle.

6 I. THIS COURT MUST APPLY THE REMEDIAL LAW OF ALASKA,
7 WHICH EXPRESSLY REJECTS THE LIMITATION UPON
8 RECOVERY ADVOCATED BY THE ALYESKA DEFENDANTS.

9 A. Alaska Negligence Law Provides A Remedy For
10 "Purely Economic" Injury To Plaintiffs Whose
11 Injury Was Specially Foreseeable.

12 The Alaska Supreme Court's 1987 landmark decision in
13 Mattingly v. Sheldon Jackson College, supra, dealt categorically
14 with the issue raised by the present motion and laid down a rule
15 of recovery that is exactly the opposite of that which the
16 Alyeska defendants ask this Court to follow in this litigation.
17 The Court reversed a Rule 12(c) dismissal of a businessman's
18 claim for purely economic damages resulting from negligent
19 physical injury to his employees, holding that "judicial
20 reluctance to allow recovery for purely economic losses is
21 discordant with contemporary tort doctrine," 743 P.2d at 360,
22 and that the plaintiff was "entitled to have the matter proceed
23 on the issue of negligently caused economic losses," id. at 361.
24 The damages claimed in that case included "losses of business
25 income and profit and increases in expenses," id.; the Court had

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1 no occasion to consider what else might be an "economic loss"
2 but gave no indication that the concept would be narrowly within
3 defined.

4 Mattingly recognizes the need to avoid "limitless li-
5 ability" upon which the Alyeska defendants' motion harps, but
6 agrees with the New Jersey Supreme Court that
7

8 "The answer to the allegation of unchecked li-
9 ability is not the judicial obstruction of a
10 fairly grounded claim for redress. Rather, it
11 must be a more sedulous application of
12 traditional concepts of duty and proximate causa-
13 tion to the facts of each case."

14 Id. at 359-60, quoting from People Express Airlines, Inc. v.
15 Consolidated Rail Corp., 495 A.2d 107, 111 (N.J. 1985). In
16 agreement with the New Jersey Court, Mattingly defines the scope
17 of available recovery in terms of foreseeability under the
18 particular circumstances of the plaintiff or class of plaintiffs
19 suing and of the alleged negligence. The test under Alaska
20 State law is, therefore, whether the evidence will show that

21 "[T]he defendants knew or reasonably should have
22 foreseen both that particular plaintiffs or an
23 identifiable class of plaintiffs were at risk and
24 that ascertainable economic damages would ensue
25 from the conduct. Thus, knowledge or special
26 reason to know of the consequences of the
27 tortious conduct in terms of the persons likely
28 to be victimized and the nature of the damages
likely to be suffered will suffice * * *."

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JOINT MEMORANDUM FOR PLAINTIFFS
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1 743 P.2d at 360, quoting from 495 A.2d at 115. All of the
2 plaintiffs have made allegations sufficient to bring them within
3 this rubric, and therefore Alaska law allows them to proceed to
4 the proof of those allegations. See Section IV, infra.⁵

5 The Alyeska defendants' motion does not even mention
6 this definitive exposition of the Alaska law. The motion does
7 not, however, argue that these plaintiffs' claims are not
8 cognizable under Alaska law, but merely "reserves" the issue.
9 Alyeska Mem. p. 25. As we shall now show, this State law
10 remedial rule must be applied by this Court in the exercise of
11 its maritime jurisdiction under the circumstances of this
12 litigation.⁶

13
14 ⁵ Indeed, as we show further in Section III, it would be
15 hard to conceive of a clearer case of foreseeable injury to
16 identifiable classes of plaintiffs than this. During the years
17 between 1969 and 1977 when the environmental risks of the
18 proposed Trans-Alaska Pipeline were hotly debated, the opponents
19 explicitly warned that oil spills would result in precisely the
20 injuries alleged in this litigation and to precisely the kinds
21 of persons who are the plaintiffs and members of the plaintiff
22 classes. The Alyeska Contingency Plan itself detailed many such
23 potential injuries.

24 ⁶ Although the targeted plaintiffs do not seek relief in
25 this Court under the strict liability provisions of the Alaska
26 Environmental Conservation Act ("Alaska Act"), AS § 46.03.822
27 et seq., it is of general significance that the Alaska Act also
28 has provided, both before and after its May 1989 amendment, for
recovery of "all damages to persons or property, public or
private." AS § 46.03.822. Such damages "include but are not
limited to injury to or loss of persons or property, real or
personal, loss of income, loss of the means of producing income,
or the loss of an economic benefit." AS § 46.03.824 (emphasis
added). "Economic benefit" is defined (and was before the
(Footnote continued)

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1
2 B. State Created Remedies Are Commonly Available
3 In Maritime Actions In Federal Court.

4 It has long been established that

5 "With respect to maritime torts * * * the State
6 may modify or supplement the maritime law by
7 creating liability which a court of admiralty
8 will recognize and enforce when the state action
9 is not hostile to the characteristic features of
10 the maritime law or inconsistent with federal
11 legislation, * * * [i.e., when it] 'does not
12 contravene any acts of Congress, nor work any
13 prejudice to the characteristic features of the
14 maritime law, nor interfere with its proper
15 harmony and uniformity in its international and
16 interstate relations.' * * *

17 "This criterion * * * is a broad recognition of
18 the authority of the States to create rights and
19 liabilities with respect to conduct within their
20 borders, when the state action does not run
21 counter to federal laws or the essential features
22 of an exclusive federal jurisdiction."

23 Just v. Chambers, 312 U.S. 383, 388, 389, 391 (1941) (holding
24 that Florida rule on survival of actions applied in admiralty
25 where maritime tort occurred on navigable waters within the
26 State's territory, notwithstanding the absence of any right to

27 (Footnote continued)
28 amendment) as "a benefit measurable in economic terms, including
29 but not limited to the gathering, catching, or killing of food
30 or other items utilized in a subsistence economy and their
31 replacement cost." AS § 46.03.826(2) (emphasis added). Such
32 "benefits" clearly include recreation as well as business and
33 subsistence activities; in any event, the available damages are
34 expressly not limited to those mentioned. The State
35 legislature's purpose to allow just the kind of damages that the
36 Alyeska defendants seek to sweep away could not be clearer.

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1 survival under established maritime law); see also e.g., Hess v.
2 United States, 361 U.S. 314, 319 (1959) ("in an action for
3 wrongful death in state territorial waters the conduct said to
4 give rise to liability is to be measured not under admiralty's
5 standards but under the substantive standards of the state
6 law"). In Kossick v. United Fruit Co., 365 U.S. 731, 739
7 (1961), the Court explained that it is incorrect to assert (as
8 the movants do here)

9
10 "that wherever a maritime interest is involved,
11 no matter how slight or marginal, it must
12 displace a local interest, no matter how pressing
13 and significant. But the process is surely
14 rather one of accommodation, entirely familiar in
15 many areas of overlapping state and federal
16 concern, or a process somewhat analogous to the
17 normal conflict of laws situation where two
18 sovereignties assert divergent interests in a
19 transaction as to which both have some concern.
20 * * *

21 "Thus, for instance, it blinks at reality to
22 assert that because a longshoreman, living ashore
23 and employed ashore by shoreside employers,
24 performs seaman's work, the State with these
25 contacts must lose all concern for the
26 longshoreman's status and well-being. * * *
27 [T]his Court has attempted an accommodation
28 between a liability dependent primarily upon a
breach of a maritime duty and state rules govern-
ing the extent of recovery for such breach."

21 The latter -- rules governing the extent of recovery -- are what
22 is involved here, and they are ordinarily determined by State
23 law when, as here, State contacts predominate. See also, e.g.,
24 Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652,
25

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1 672 (1st Cir. 1980), cert. denied, 450 U.S. 912 (holding that
2 application of local statute creating a right of action for a
3 breach of maritime law could not be challenged as "run[ning]
4 counter to the essential features of federal jurisdiction").

5 In Askew v. American Waterways Operators, Inc., 411 U.S.
6 325, 338 (1973), the Court confirmed these principles and
7 observed that there are only "isolated instances where 'state
8 law must yield to the needs of a uniform federal maritime law
9 when this Court finds inroads on a harmonious system.'" The
10 Court explained, quoting from its earlier opinion in Romero v.
11 International Terminal Operating Co., 358 U.S. 354, 373-74
12 (1959), that

13
14 "[T]his limitation still leaves the States a wide
15 scope. State-created liens are enforced in
16 admiralty. State remedies for wrongful death and
17 state statutes providing for the survival of ac-
18 tions, both historically absent from the relief
19 offered by admiralty, have been upheld when ap-
20 plied to maritime causes of action. Federal
21 courts have enforced these statutes. State rules
22 for the partition and sale of ships, state laws
23 governing the specific performance of arbitration
24 agreements, state laws regulating the effect of a
25 breach of warranty under contracts of maritime
26 insurance -- all these laws and others have been
27 accepted as rules of decision in admiralty cases,
28 even, at times, when they conflicted with a rule
of admiralty law which did not require
uniformity."

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1 The Court went on to refer to "[t]he many instances in which
2 state action had created new rights, recognized and enforced in
3 admiralty." Id. at 339.⁷

4 The Alyeska defendants' motion ultimately concedes that
5 the constitutional supremacy principle upon which it relies is
6 not absolute, and that "[i]t is indeed true that substantive
7 state law may play a role in maritime cases." It attempts,
8 however, to minimize that role as extending only to "limited
9 circumstances not found here." Id. p. 28. This basic premise
10 of the motion is, however, a gross understatement of the choice
11 of law principles established by the Supreme Court, particularly
12 in the context of remedial matters which do not involve setting
13 behavioral standards for the conduct of maritime activities.
14 State law is applied expansively unless there would be a clear
15 conflict with federal substantive law or the uniformity of
16 maritime law would be disrupted in some crucial respect. We now
17 show that the State law remedies in question here would not
18 create any substantive conflict or crucial lack of uniformity
19

20 ⁷ The Alaska decisions cited at Alyeska Mem. pp. 26-28
21 merely reflect, in shorthand fashion, the Alaska Supreme Court's
22 understanding of the general constitutional rule established by
23 the various United States Supreme Court decisions, and do not
24 add any further limitation. In any event, those decisions'
25 reference to application of maritime law necessarily includes
26 maritime law's reference back to state law on such remedial
27 questions. The Alaska Supreme Court has specifically recognized
28 the applicability of State remedial rules in maritime actions in
State courts. Williams v. Eckert, 643 P.2d 991, 997 (Alaska
1982).

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1 even if -- contrary to our argument in Section II infra -- those
2 remedies were not also available under purely federal maritime
3 law.

4
5 C. There Is No Conflict Between Federal Substantive
6 Law And The State Law Providing Remedies For
7 These Plaintiffs' Injuries.

8 In Askew v. American Waterways Operators, Inc., supra,
9 the Supreme Court held that a statute imposing strict li-
10 abilities for injury from an oil spill in a State's territorial
11 waters is neither preempted by any federal statute nor
12 constitutionally inconsistent with federal jurisdiction over
13 maritime activities. Askew rejected a challenge to the State of
14 Florida's Oil Spill Prevention and Pollution Act, holding that
15 the Federal Water Quality Improvement Act of 1970 (the predeces-
16 sor of the Clean Water Act, 33 U.S.C. §§ 1251-1376) did not
17 preclude, but in fact allowed, State regulation of water pol-
18 lution from oil discharges, 411 U.S. at 329, and that there was
19 no fundamental constitutional bar to application of State law.
20 In Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir.
21 1984), the Court of Appeals for the Ninth Circuit, after closely
22 examining the entire federal marine environmental protection
23 scheme, similarly held that Congress had not occupied the field
24 of regulating discharges of pollutants from tankers into a
25 State's territorial waters. Thus, in the field of oil pollution
26 control, federal maritime law does not preempt the States, and

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1 State law has full force and effect "absent a clear conflict
2 with the federal law." Askew, 411 U.S. at 341. With respect to
3 creation of additional remedies, Askew expressly held that

4
5 "[S]ince Congress dealt only with 'cleanup'
6 costs, it left the States free to impose 'li-
7 ability' in damages for losses suffered both by
8 the States and by private interests. The Florida
Act imposes liability without fault. So far as
liability without fault for damages to state and
private interests is concerned, the police power
has been held adequate for that purpose."

9
10 411 U.S. at 336.⁸

11 With respect to oil that has been transported through
12 the Trans-Alaska pipeline, the absence of any conflict between
13 federal law and the remedies provided by Alaska law is
14 especially clear. The Trans-Alaska Pipeline Authorization Act,
15 43 U.S.C. § 1653 (TAPAA), the federal legislation which most

16
17 ⁸ The Court emphasized the strong State interest in "oil
18 spillage -- an insidious form of pollution of vast concern to
19 every coastal city or port and to all of the estuaries on which
20 the life of the ocean and the lives of the coastal people are
greatly dependent." 411 U.S. at 328-29. And it went on to
discuss in some detail the wide range of economic and ecological
interests that are properly of State concern. Id. at 332-33 and
n.5.

21 The citizens of coastline states suffer the greatest
22 injury from catastrophic oil spills in their territorial waters.
23 Consequently, each of the 22 coastline states and Puerto Rico
24 have provided by statute for recovery of oil pollution damages.
25 Three states -- Alaska, Florida, and Washington -- allow for
recovery of all economic damages by all persons. AS § 46.03.822
(1989); Fla. Stat. Ann. § 376.205 (1975); Wash. Rev. Code Ann. §
90.48.336 (Supp. 1973).

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1 directly concerns oil spills in Prince William Sound, expressly
2 provides that it "shall not be interpreted to preempt the field
3 of strict liability or to preclude any State from imposing ad-
4 ditional requirements." 43 U.S.C. § 1653(c)(9). Moreover,
5 TAPAA is entirely compatible with the Alaska remedial rule
6 established in Mattingly v. Sheldon Jackson College, supra.
7 Under TAPAA, as under Alaska law, a plaintiff damaged by a
8 discharge of oil which has been transported through the Trans-
9 Alaska Pipeline can recover damages without any physical impact
10 requirement. Under TAPAA, plaintiffs can recover "all damages"
11 up to the statutory dollar limits. 43 U.S.C. §§ 1653(a)(1),
12 (c)(1). Such damages include "loss of use of natural resources"
13 and "loss of profits or impairment of earning capacity due to
14 injury to or destruction of real or personal property or natural
15 resources, including loss of subsistence hunting, fishing and
16 gathering opportunities." 43 C.F.R. § 29.1(e) (1988).⁹

17 Even if general federal maritime law would otherwise
18 have placed any limits upon the scope of the damages available
19 to remedy a spill of Alaska oil, any such limits would plainly
20 be superseded by TAPAA. Indeed, when TAPAA was considered by
21 the Joint House and Senate Conference Committee, the Conferees

22
23 ⁹ These regulations expressly allow claims "arising out
24 of, or directly resulting from" an oil spill, thereby
25 eliminating any requirement of direct physical injury. "Loss of
use of natural resources" is specifically intended to encompass
claims such as those of sport fishermen. Cf. 43 U.S.C. § 1813.

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1 expressed concern about limitations imposed by federal maritime
2 law and an intent to override any such limitations by establish-
3 ing "a rule of strict liability for damages from discharges of
4 oil transported through the Trans-Alaska Pipeline up to
5 \$100,000,000." Conference Rep. No. 93-924, 1973 U.S. Code Cong.
6 & Admin. News 2523, 2530. The Conferees went on to note that
7 "[t]he States are expressly not precluded from setting higher
8 limits * * *," id. at 2531; the implication is clear that those
9 "higher limits" would encompass the same kinds of damages as the
10 statutory damages.¹⁰

11 Application of the Alaska damage principles here would
12 do no more than raise the "limits" on the liabilities of persons
13 who would otherwise be or liable for negligence under federal
14 maritime law. The award of damages for economic losses would
15 complement and extend, not frustrate, the federal scheme for
16 imposing liability for oil discharges. See, e.g., California v.
17 ARC America Corp., 109 S.Ct. 1661, 1667 (1989) ("Ordinarily,
18 state causes of action are not pre-empted solely because they
19

20 ¹⁰ That Congress did not intend to preclude the States from
21 setting higher limits for damages from oil spills is confirmed
22 by the last sentence of 43 U.S.C. § 1653(c)(3) which, in regard
23 to discharges of oil from vessels loaded at terminal facilities
24 of the pipeline provides: "The unpaid portion of any claim [for
25 damages arising out of an oil spill against the TAPS fund] may
be asserted and adjudicated under other applicable federal or
state law." (Emphasis added.) During the floor debates,
specific reference was made to the Alaska Act, leaving no doubt
that Congress specifically contemplated that it would apply to
oil spills in Alaska waters. See 119 Cong. Rec. 24296-97.

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1 impose liability over and above that authorized by federal
2 law"); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984)
3 (award of punitive damages does not frustrate federal remedial
4 scheme of Atomic Energy Act).

5
6 Federal maritime law has been particularly receptive to
7 application of State law to expand upon the remedies available
8 to injured plaintiffs:

9 "The Supreme Court, especially in recent years,
10 has allowed the application in admiralty of state
11 laws which broaden the scope of a party's li-
12 ability beyond that recognized in the maritime
13 law * * *, while it has tended to reject the ap-
14 plication in admiralty of state laws which narrow
15 or wholly defeat a previously recognized maritime
16 right of recovery."

17 In re M/T Alva Cape, 405 F.2d 962, 969-70 (2d Cir. 1969) (cita-
18 tions omitted); see also, St. Hilaire Moya v. Henderson, 496
19 F.2d 973, 980 (8th Cir.), cert. denied, 419 U.S. 884 (1974)
20 (refusing to apply a State statute that would have limited
21 recovery, but noting that "[t]he Supreme Court has sustained the
22 application of state laws which broaden the scope of liability
23 beyond the general maritime standard").¹¹ In Sewell v. M/V

24 ¹¹ Defendants argue that "courts in a variety of contexts
25 have rejected attempts to apply state law in maritime actions,"
26 Alyeska Mem. p. 30, and for support cite Nelson v. United
27 States, 639 F.2d 469, 473 (9th Cir. 1980); Nygaard v. Peter Pan
28 Seafoods, Inc., 701 F.2d 77, 80 (9th Cir. 1983); and Evich v.
Morris, 819 F.2d 256, 257-58 (9th Cir.), cert. denied, 484 U.S.
914 (1987).

(Footnote continued)

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1 Point Barrow, supra, Judge Fitzgerald relied on the latter case
2 as "establishing standards to be applied for determining the
3 compatibility of state law with maritime law." 556 F. Supp. at
4 170.

5 D. Allowance Of The Remedies Provided By Alaska Law
6 Would Not Impair National Uniformity In Any Crucial
7 Respect Even If Those Remedies Were Unusual.

8 The Supreme Court decisions discussed above recognize
9 that there is considerable room for differences from State to
10 State in the remedial consequences under federal maritime law of

11
12 _____
(Footnote continued)

13 The first two of these cases were actions for wrongful
14 death brought after the creation of a direct remedy for wrongful
15 death under federal maritime law in Moragne v. States Marine
16 Lines, Inc., 398 U.S. 375 (1970). Previously, there had been no
17 such federal remedy under the rule of The Harrisburg, 119 U.S.
18 199 (1886), but admiralty courts had "accommodated the humane
19 policies of state wrongful-death statutes by allowing recovery
20 whenever an applicable state statute favored such recovery."
21 Moragne, 398 U.S. at 393; see, e.g., Hess v. United States,
22 supra. After the federal remedy was established, the Ninth
23 Circuit held in the cited cases that that remedy superseded
24 state remedies for wrongful death. The third case cited by
25 defendants (Evich) dealt with the analytically identical situa-
26 tion of survival of actions, noting that federal law now
27 provided a direct survival right and concluding that the same
28 principle superseded State law on the same subject. The Ninth
Circuit's determination that a plaintiff should not have
alternative wrongful death or survival rights under federal and
State law obviously does not support the very different proposi-
tion that the movants assert here, which is that the alleged
absence of a federal right precludes the State from creating
one. Indeed, the Supreme Court decisions allowing State law to
fill the gap before there was a federal right are directly
contrary to the latter proposition. See pp. 9-12, supra.

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1 negligence or other violation of law occurring in State territo-
2 rial waters. In Askew, the Court opined that impermissible
3 intrusion upon the uniformity of maritime law would be found
4 only in "isolated instances." 411 U.S. at 338. In East River
5 Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864
6 n.2 (1986), the Court reiterated (but had no occasion to
7 consider applying) the rule of deference to the law of the
8 "forum state" in an admiralty case where that State has a
9 "'pressing and significant' interest in the tort action." It
10 cited in this regard Kossick v. United Fruit Co., supra, which
11 had framed the question as whether the matter before the Court
12 in admiralty was "of such a 'local' nature that its validity
13 should be judged by state law." 365 U.S. at 735. The primacy
14 of local interests over any principle of national uniformity
15 has, as we have noted, been especially recognized in pollution
16 cases. Askew, supra; see Huron Portland Cement Co. v. City of
17 Detroit, 362 U.S. 440, 448 (1960).

18 It is difficult to imagine a maritime incident that
19 could be more "peculiarly a matter of state and local concern,"
20 Huron, 362 U.S. at 446, and that could have more greatly af-
21 fected local interests, than the EXXON VALDEZ oil spill. The
22 question before the Court arises from an event particular to
23 Alaska: the spill of North Slope crude oil in the fragile
24 ecological area of Prince William Sound. Congress recognized
25

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1 the difference between a spill in Prince William Sound and an
2 oil spill anywhere else through its enactment of TAPAA. The oil
3 companies, in exchange for permission to drill for North Slope
4 oil and to transport it through environmentally sensitive and
5 treasured areas, acquiesced in and became subject to TAPAA,
6 which, among other things, specifically contemplates liability
7 to all persons suffering economic and ecological damages.

8
9 In any event, there is no crucial need for uniformity
10 with respect to the extent of recovery as long as the duty of
11 care is uniform. No federal policy is impaired if the courts in
12 some States permit, while those in other States disallow,
13 recovery by persons suffering a particular kind of harm from an
14 oil spill. Alyeska cannot seriously contend that it had a
15 federal right to gauge the level of care with which it carried
16 out its prevention and cleanup obligations by relying on a
17 limitation of potential liability for failure to fulfill those
18 obligations. Indeed, increasing the measure of liability can
19 only have the salubrious effect of advancing the uniform federal
20 policy of deterring conduct that could cause oil spill injury.
21 In any event, allowing recovery for all damages, as Alaska law
22 does, is simply an expansion of the remedy for breach of a
23 maritime duty which the State has full constitutional authority
24 to grant. As in Sewell v. M/V Point Barrow, supra, such a State
25 created remedy is "compatible with federal law" and therefore

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1 must be honored by this Court sitting in admiralty. 556
2 F. Supp. at 171.¹²

3 With respect to Alyeska in particular, the Court would
4 not at all interfere with the uniformity of maritime law by ap-
5 plying the measure of damages provided by State law (assuming,
6 contrary to what we shall show in the next section, that it
7 would differ from federal law). Maritime law is traditionally
8 and principally concerned with the navigation of vessels at sea:
9

10 "[Maritime] law deals with navigational rules --
11 rules that govern the manner and direction those
12 vessels may rightly move upon the waters. When a
13 collision occurs or a ship founders at sea, the
14 law of admiralty looks to those rules to
15 determine fault, liability, and all other ques-
16 tions that may arise from such a catastrophe.
17 Through long experience, the law of the sea knows
18 how to determine whether a particular ship is
19 seaworthy, and it knows the nature of maintenance
20 and cure, It is concerned with maritime liens,
21 the general average, captures and prizes, limita-
22 tions of liability, cargo damage, and claims of
23 salvage."

24 Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249,
25 270 (1972); accord, Askew, 411 U.S. at 344 ("Jensen and
26 Knickerbocker Ice [the leading Supreme Court cases where state

27 ¹² More generally, there is nothing novel about variations
28 in the extent of liability depending upon the State in which a
tort occurs or causes injury. See, e.g., Kilberg v. Northeast
Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961) (New York
Court of Appeals refused to apply Massachusetts limitation on
wrongful death recovery to accident occurring in Massachusetts,
holding that limitation was a matter of procedure not substance
even though New York did not have a wrongful death statute).

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1 remedies (under workmen's compensation statutes) were not al-
2 lowed in maritime actions] have been confined to their facts,
3 viz., to suits relating to the relationships of vessels, plying
4 the high seas and our navigable waters, and to their crews.");
5 cf. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403-04
6 (1970) (distinguishing between remedies and rules of maritime
7 conduct).

8
9 Alyeska, unlike the defendants in the reported cases
10 involving oil spills or other pollutants on navigable waters, is
11 not engaged in maritime commerce either directly as a vessel
12 owner or operator, see Union Oil Co. v. Oppen, 501 F.2d 558, 561
13 (9th Cir. 1974); In re Oil Spill by Amoco Cadiz, 699 F.2d 909
14 (7th Cir.), cert. denied, 464 U.S. 864 (1983); In re Lloyd's
15 Leasing, Ltd., 697 F. Supp. 289 (S.D. Tex. 1988), or indirectly
16 as an operator's insurer, see Oppen v. Aetna Insurance Co., 485
17 F.2d 252, 256-57 (9th Cir. 1973). Thus, it is particularly
18 clear that determination of the extent of the Alyeska
19 defendants' liability can have no impact upon the central
20 concerns of maritime law.

21 II. EVEN APART FROM STATE LAW, THE FEDERAL MARITIME
22 LAW APPLICABLE IN THIS CIRCUIT DOES NOT PRECLUDE
23 CLAIMS FOR PURELY ECONOMIC INJURY WHICH WERE
24 SPECIFICALLY FORESEEABLE.

25 Just as the Alyeska Memorandum ignores Alaska law, so
26 also does its discussion of the remedial rules of pure federal

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1 maritime law all but ignore the landmark decision of the Ninth
2 Circuit, which in the absence of any controlling Supreme Court
3 precedent establishes federal law for Alaska. That decision is
4 Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (hereafter
5 "Oppen"), which not only establishes the existence of a remedy
6 for commercial fishermen's injuries from an oil spill -- as the
7 motion concedes -- but more generally rejects the "bright line"
8 rule advocated by the motion and provides ample room for the
9 claims of other plaintiffs that the motion seeks to eliminate.

10 That the economic injury issue remains open in the
11 Supreme Court is clear from its recent remarks, in passing, in
12 East River Steamship Corp. v. Transamerica Delaval Inc., 476
13 U.S. 858 (1986). That case involved the quite different ques-
14 tion whether, in the absence of any substantial State interest,
15 see 476 U.S. at 864 n.2, a shipowner could assert strict product
16 liability against the shipbuilder to recover damages for harm
17 only to the ship itself. The Court noted that it was not not
18 "reach[ing] the issue whether a tort cause of action can ever be
19 stated in admiralty when the only damages sought are economic,"
20 476 U.S. at 871 n.6, thereby confirming that the issue remains
21 open in the Supreme Court. By accompanying this remark with a
22 citation to the 1927 decision that the Alyeska defendants take
23 as the talisman of their "bright line" theory (Robins Dry Dock &
24

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1 Repair Co. v. Flint, 275 U.S. 303 (1927)), the East River deci-
2 sion confirms that the Ninth Circuit in Oppen correctly declined
3 to treat Robins Dry Dock as controlling on the question of who
4 is entitled to a remedy for injury caused by an oil spill.

5 In Oppen, the Ninth Circuit had before it the question
6 whether commercial fishermen could recover for their economic
7 losses caused by the 1969 oil spill off the coast of Santa
8 Barbara, California. The Court found it unnecessary to decide
9 whether the proper scope of their recovery should be determined
10 by reference to State law, because it concluded that admiralty
11 law would provide as expansive a remedy as California law.
12 Contrary to the main thrust of the Alyeska defendants'
13 Memorandum, the Ninth Circuit mentioned Robins Dry Dock only in
14 passing (at 564); distinguished as irrelevant cases discussing
15 the extent of product liability (such as the subsequent East
16 River Steamship case in the Supreme Court) (at 564-65); negated
17 any categorical "bright line" rule against "purely economic"
18 damages by noting a long list of situations -- including
19 maritime cases involving both fishermen and other plaintiffs --
20 where such damages were allowed (at 565-68); and found that
21 "[i]t is thus apparent that we are not foreclosed by precedent
22 from examining on the merits" the question of particular
23

24
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1 plaintiffs' right to sue for economic injuries caused by
2 negligence (at 568).¹³

3
4 ¹³ The Ninth Circuit was correct in finding no controlling
5 principle in Robins Dry Dock. A close look at Justice Holmes'
6 laconic 1927 decision shows no basis for deriving any "bright
7 line" rule that could preclude tort or statutory recovery for
8 foreseeable economic losses proximately caused by a massive
9 modern oil spill. The issue in Robins Dry Dock was whether the
10 time charterer of a ship, suing in contract, could recover from
11 a shipyard which had negligently damaged it for loss of use
12 while it was out of commission, notwithstanding a lack of
13 privity between the charterer and the shipyard. As Justice
14 Holmes wrote, the question presented was "whether the
15 [plaintiffs] have an interest protected by the law against
16 unintended injuries inflicted upon the vessel by third persons
17 who know nothing of the charter." 275 U.S. at 308. His conclu-
18 sion for the Court was simply that the plaintiffs had no such
19 interest:

20 "Their loss arose only through their contract with the
21 owners -- and * * * no authority need be cited to show
22 that, as a general rule, at least, a tort to the person
23 or property of one man does not make the tortfeasor li-
24 able to another merely because the injured person was
25 under a contract with that other, unknown to the doer
26 of the wrong." Id. at 308-09.

27 There is no rational basis for arguing that this
28 limited decision was intended to establish a categorical rule of
law that would limit tort or statutory recovery for victims of a
catastrophic oil spill. The policy underlying the decision --
viz. that parties to a contract such as the charter party in
issue in Robins Dry Dock are able to allocate the risks among
themselves "through their contract relations", 275 U.S. at 308
-- cannot apply in the context of a tort or statutory action
brought by innocent third parties whose injuries have been
foreseeably caused by the negligent conduct of a defendant such
as Alyeska (or conduct for which it is strictly liable). There
is not a word in Robins Dry Dock suggesting that physical injury
is a prerequisite to assertion of a tort claim which, as here,
places no reliance on any contractual relationship.

Similarly, the language the movants cite from the East
(Footnote continued)

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1 Oppen therefore proceeded to consider, as a question of
2 first impression under maritime law,

3 "whether the defendants owed a duty to the
4 plaintiffs, commercial fishermen, to refrain from
5 negligent conduct in their [oil] operations,
6 which conduct reasonably and foreseeably could
7 have been anticipated to cause a diminution of
8 the aquatic life in the Santa Barbara Channel
9 area and thus cause injury to the plaintiffs'
10 business."

11 501 F.2d at 568. In considering what the federal principle
12 should be, the Court was guided by California law,¹⁴ which in
13 turn reflected "the prevailing view." Id. It agreed with the
14 California principle that

15 "[T]he presence of a duty on the part of the
16 defendants in this case would turn substantially
17 on foreseeability. That being the crucial
18 determinant, the question must be asked whether
19 the defendants could reasonably have foreseen

20 _____
21 (Footnote continued)

22 River Steamship decision (Alyeska Mem. p. 18) focuses on the
23 different subject of claims by charterers, as well as arising in
24 the product liability context which Oppen correctly
25 distinguished from negligent oil spillage, 501 F.2d at 564-65.
26 Moreover, the Supreme Court's caveat that it was not reaching
27 the issue of purely economic damages, 476 U.S. at 871 n.6, makes
28 clear that there is no basis for the Alyeska defendants' attempt
to use this language here.

29 Further, it is plain that Robins Dry Dock is not even
30 arguably applicable to plaintiffs' allegations of negligent or
31 intentional misrepresentations regarding Alyeska's alleged
32 ability adequately to respond to catastrophic oil spills in
33 Prince William Sound. These are clearly not maritime torts.

34 14 As previously noted, the Court found it unnecessary to
35 decide whether it was bound by California law.

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1 that negligently conducted drilling operations
2 might diminish aquatic life and thus injure the
3 business of commercial fisherman. We believe the
4 answer is yes. * * * To assert that the
5 defendants were unable to foresee that negligent
6 conduct resulting in a substantial oil spill
7 could diminish aquatic life and thus injure the
8 plaintiffs is to suppose a degree of general
9 ignorance of the effects of oil pollution not in
10 accord with good sense."

11 Id. at 569.

12 Oppen also considered a number of other pertinent fac-
13 tors, all of which were found to militate in favor of allowing
14 commercial fishermen's purely economic claims. (1) "[T]he fact
15 that the injury flows directly from the action of escaping oil
16 on the life in the sea [citing Askew], the public's deep disap-
17 proval of injuries to the environment and the strong policy of
18 preventing such injuries, all point to the existence of a
19 required duty" (at 569). (2) "The same conclusion is reached
20 when the issue before us is approached from the standpoint of
21 economics" because the parties responsible for the oil spill are
22 in a far better position than the plaintiffs to avoid the costs
23 of resulting harm (at 569-70). (3) "The injury here asserted by
24 the plaintiff is a pecuniary loss of a particular and special
25 nature, limited to the class of commercial fishermen which they
26 represent" (at 570).

27 Oppen correctly recognized that the remedies to be
28 provided for a catastrophic oil spill from a modern supertanker

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1 should not be determined by mechanical application of archaic
2 rules developed in very different maritime contexts. As the
3 Supreme Court held in Moragne v. States Marine Lines, Inc., 398
4 U.S. 375 (1970), which created a federal wrongful death remedy,
5 the maritime law must be and is capable of absorbing progressive
6 state policies (both judicial and statutory) as developing
7 circumstances warrant. The Ninth Circuit was, therefore, cor-
8 rect in looking to contemporary tort policy to craft an ap-
9 propriate remedy for what was, and remains in part, an open
10 question as to the extent of the remedies to be provided by
11 federal maritime law.

12 Upon analysis, the principle enunciated for the Ninth
13 Circuit in Oppen is hard to distinguish from that established by
14 the Alaska Supreme Court in Mattingly v. Sheldon Jackson Col-
15 lege. See p. 7, supra. Thus, the relevant federal law equally
16 allows suit, without any prerequisite of physical impact, by any
17 plaintiff belonging to an identifiable class which would
18 foreseeably suffer ascertainable economic damages from an oil
19 spill in Prince William Sound.

20 Contrary to the movants' assertion (Alyeska Mem. pp. 23-
21 24), the principle adopted in Oppen is not restricted to claims
22 brought by commercial fisherman. While the Court was careful to
23 point out that "this case does not open the door to claims that
24 may be asserted by those, other than commercial fisherman, whose
25

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1 economic or personal affairs were discommoded by the oil spill"
2 and disclaimed any intent "to suggest, for example, that every
3 decline in the general commercial activity of every business in
4 the Santa Barbara area following the occurrences of 1969
5 constitutes a legally cognizable injury," 501 F.2d at 570, it
6 was merely following the sound jurisprudential rule of limiting
7 its holding to the parties and facts before it. That does not,
8 however, prevent application of the Court's rationale to other
9 parties in other cases such as the present one -- with the
10 necessary consequence of allowing suit by other plaintiffs whose
11 injuries were similarly foreseeable.¹⁵

12
13 To be sure, there are some lower court decisions in
14 other Circuits that take a different view of the requirements of
15 federal maritime law. Principal among these is State of
16 Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir.
17 1985) (en banc), cert. denied, 477 U.S. 903 (1986), a hotly
18 debated decision marked by a strong dissent (by Judge Wisdom for
19 himself and four other judges) that substantially follows and
20 expands upon the Oppen analysis. The views of the Testbank
21 majority, of course, cannot negate the law of the Ninth Circuit,
22

23 ¹⁵ As previously noted, the TAPAA regulations broadly
24 permit recovery of all categories of damages in question here,
25 including inter alia damages from loss of use of natural
resources.

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1 which alone governs here.¹⁶ While there is little profit in
2 discussing cases from outside the Ninth Circuit, it should be
3 noted that Oppen's case-by-case foreseeability approach is sup-
4 ported by at least two other Courts of Appeals. See Petitions
5 of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968); In re
6 Complaint of Bethlehem Steel Corp., 631 F.2d 441 (6th Cir.
7 1980), cert. denied, 450 U.S. 921 (1981).¹⁷

8
9 III. NONE OF THE PLAINTIFFS TARGETED BY THE MOTION COULD
10 PROPERLY BE DISMISSED ON THE PLEADINGS UNDER RULE 12
11 WITHOUT OPPORTUNITY FOR FACTUAL DEVELOPMENT OF THEIR
12 ALLEGATIONS OF INJURY.

11 All of the plaintiffs against whom the Alyeska
12 defendants' motion is directed fall within identifiable classes
13 of foreseeable victims of an oil spill. As plaintiffs have al-
14 leged (e.g., Amended And Consolidated Class Action Complaint
15 ¶¶ 87-97) the opponents of the Trans-Alaska Pipeline warned that
16 oil spills would cause the kinds of massive injuries alleged in
17 this litigation to broad categories of persons such as those who
18 are the plaintiffs here. In response to those objections, the

19
20 ¹⁶ Most of the other cases on which the movants rely -- all
21 from outside the Ninth Circuit -- deal with situations more
22 closely akin to Robins, in several instances claims by
23 plaintiffs whose access to ships or waterways was blocked by the
24 defendant's negligence. No point would be served by detailed
25 discussion of these cases, which have no authority in the light
26 of Oppen.

27 ¹⁷ These variations among the circuits dispel the notion
28 of nationwide uniformity that the Alyeska defendants assert in
claiming that State law is inapplicable.

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1 Alyeska defendants provided an Oil Spill Contingency Plan for
2 Prince William Sound which identified potential injuries to
3 persons such as these plaintiffs and set forth procedures
4 purporting to protect against such injuries in case of an oil
5 spill. Pertinent portions of that Contingency Plan are set
6 forth as Appendix A to this Memorandum: Pages 3-7 through 3-15
7 identify at risk communities located within Prince William
8 Sound; pages 6-109 through 6-124 identify at risk commercial and
9 sport fishing areas; and pages 6-90 through 6-96 identify at
10 risk wildlife and fish and note their economic and ecological
11 importance to Prince William Sound and persons and businesses in
12 nearby areas.¹⁸

13 The Ninth Circuit's observation in Oppen applies to all
14 of the present plaintiffs: a failure to foresee specific injury
15 to processors, sellers and transporters of seafood from the area
16 impacted by the spill, to tendermen handling such seafood, to
17 tour operators and other providers of tourist services in the
18 Prince William Sound area, to sport fishermen using the area, to
19 charterers of boats in the area, to Alaska Natives dependent
20 upon the impacted wildlife resources for subsistence, to
21 employees of seafood processors and canneries, and to providers
22 of maritime services to commercial fishermen in the area could

23
24 ¹⁸ For example, salmon are correctly characterized in the
25 Plan as "a major source of income for people living in the
Prince William Sound area." Id. p. 6-90.

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1 only result from "a degree of general ignorance of the effects
2 of oil pollution not in accord with good sense." 501 F.2d at
3 569. All of them, in the language of Oppen, "lawfully and
4 directly make use of a resource of the sea, viz. its fish, in
5 the ordinary course of their business. This type of use is
6 entitled to protection from negligent conduct by the defendants
7 in their [oil] operations." Id. at 570.

8
9 The direct consequences of the EXXON VALDEZ oil spill
10 are, of course, both broader and deeper than those of any oil
11 spill in United States history. The area affected by the spill
12 -- unlike, for example, Santa Barbara, California -- is one
13 whose economic and recreational focus is primarily upon the sea
14 and its resources. This litigation is about real injuries to
15 real people who work in industries dependent upon the waters
16 fouled by the EXXON VALDEZ and build their lives around those
17 waters in places such as Cordova, Valdez, Kodiak, Chignik, Homer
18 and Kenai. Because the economies and cultures of such
19 communities are dependent upon fishing, processing of the
20 products of the sea, supplying the needs of fishermen, maritime
21 tourism and sportfishing, an oil spill such as this one will
22 inevitably have direct impact upon shore-based as well as
23 maritime interests. As this disaster has already demonstrated,
24 that impact is pervasive and of enormous financial magnitude.
25 It threatens to to cause many enterprises to collapse, wiping

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1 out the fruits of business owners' years of hard work, depriving
2 residents of employment and crippling local economies. That the
3 impact will extend beyond fishermen themselves and those whose
4 persons or property may happen to have been physically injured
5 by the oil itself could therefore not be more plainly and
6 specifically foreseeable. Under these unique circumstances, it
7 would be arbitrary in the extreme to deny compensation to
8 plaintiffs who have suffered injuries amounting to many millions
9 of dollars by accepting the restrictive principles that the
10 Alyeska defendants' motion urges upon this Court.

11 Even if the specific foreseeability of the injuries suf-
12 fered by any of the plaintiffs were in doubt, that would not
13 justify the requested grant of judgment on the pleadings.
14 United States v. City of Redwood City, 640 F.2d 963, 966 (9th
15 Cir. 1981) ("[E]ven if the face of the pleadings indicates that
16 the recovery is very remote, the claimant is still entitled to
17 offer evidence to support its claims."). This is an aspect of
18 the fundamental principles noted at the outset of this
19 Memorandum (p. 6, supra): that such dismissals are rarely
20 granted, particularly where unsettled questions of law are
21 involved; that all factual allegations are assumed to be true
22 and construed in the light most favorable to plaintiffs; and
23 that all reasonable inferences are to be drawn in plaintiffs'
24
25

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1 favor. See id.; Walker Distributing Co. v. Lucky Lager Brewing
2 Co., 323 F.2d 1, 3-4 (9th Cir. 1963).

3
4 CONCLUSION

5 For the foregoing reasons, the Alyeska defendants' mo-
6 tion for the extraordinary relief of judgment on the pleadings
7 to deprive the targeted plaintiffs of any opportunity to show
8 that their injuries from the EXXON VALDEZ oil spill are
9 compensable under either Alaska or federal maritime law should
10 be denied.

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1 Respectfully submitted this 26th day of March, 1990.

2 SONOSKY, CHAMBERS, SACHSE
3 & MILLER

4
5 By 

6 Lloyd Benton Miller
7 900 W. 5th Avenue, Suite 700
8 Anchorage, Alaska 99501
9 (907) 258-6377

Liaison Counsel for Plaintiffs

10 DAVIS WRIGHT TREMAINE

11 MILBERG, WEISS, BERSHAD,
12 SPECTHRIE & LERACH

13 ADOLPH & SMYTH

14 On the brief:

15 James vanR. Springer
16 Dickstein, Shapiro & Morin

17 Christopher B. Kende
18 Holtzmann, Wise & Shepard

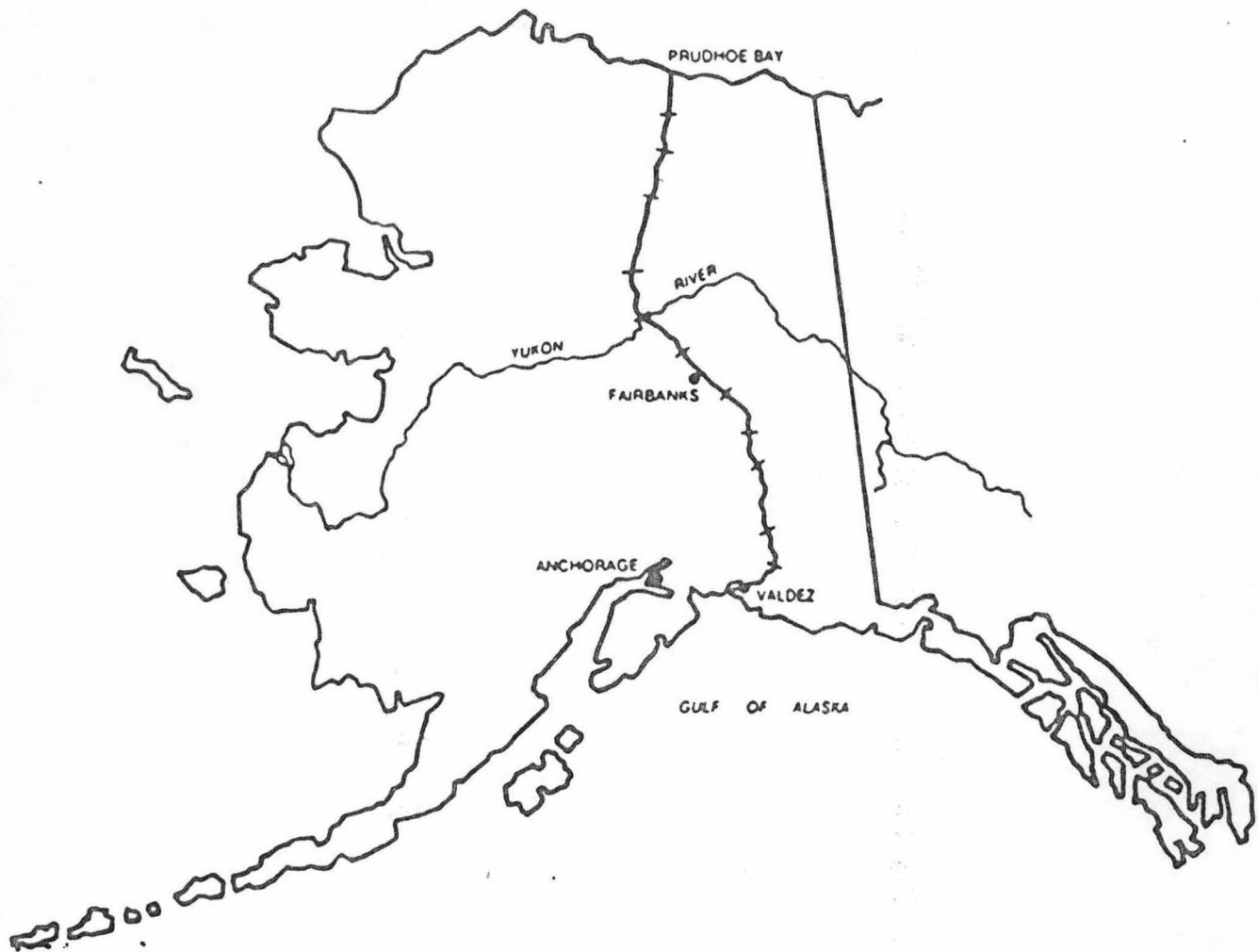
19 Gary E. Mason
20 Cohen, Milstein, Hausfeld
21 & Toll

22
23
24
25
26 JOINT MEMORANDUM FOR PLAINTIFFS
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OIL SPILL CONTINGENCY PLAN

PRINCE WILLIAM SOUND

JANUARY 1987



Alyeska pipeline
SERVICE COMPANY

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OIL SPILL CONTINGENCY PLAN
PRINCE WILLIAM SOUND
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PRINCE WILLIAM SOUND
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PRINCE WILLIAM SOUND

100 INTRODUCTION

101 PURPOSE

The Oil Spill Contingency Plan for Prince William Sound has been prepared for Alyeska and contractor personnel located at Valdez Terminal. This Contingency Plan defines specific Immediate Response Actions to be taken as a result of a spill to:

- (1) Alert specific Alyeska and contractor personnel located at Valdez Terminal.
- (2) Initiate reconnaissance actions to determine the exact location, nature and extent of the spill.
- (3) Initiate control actions to minimize the spread of oil, prevent oil from reaching sensitive areas and to clean up the oil spill.

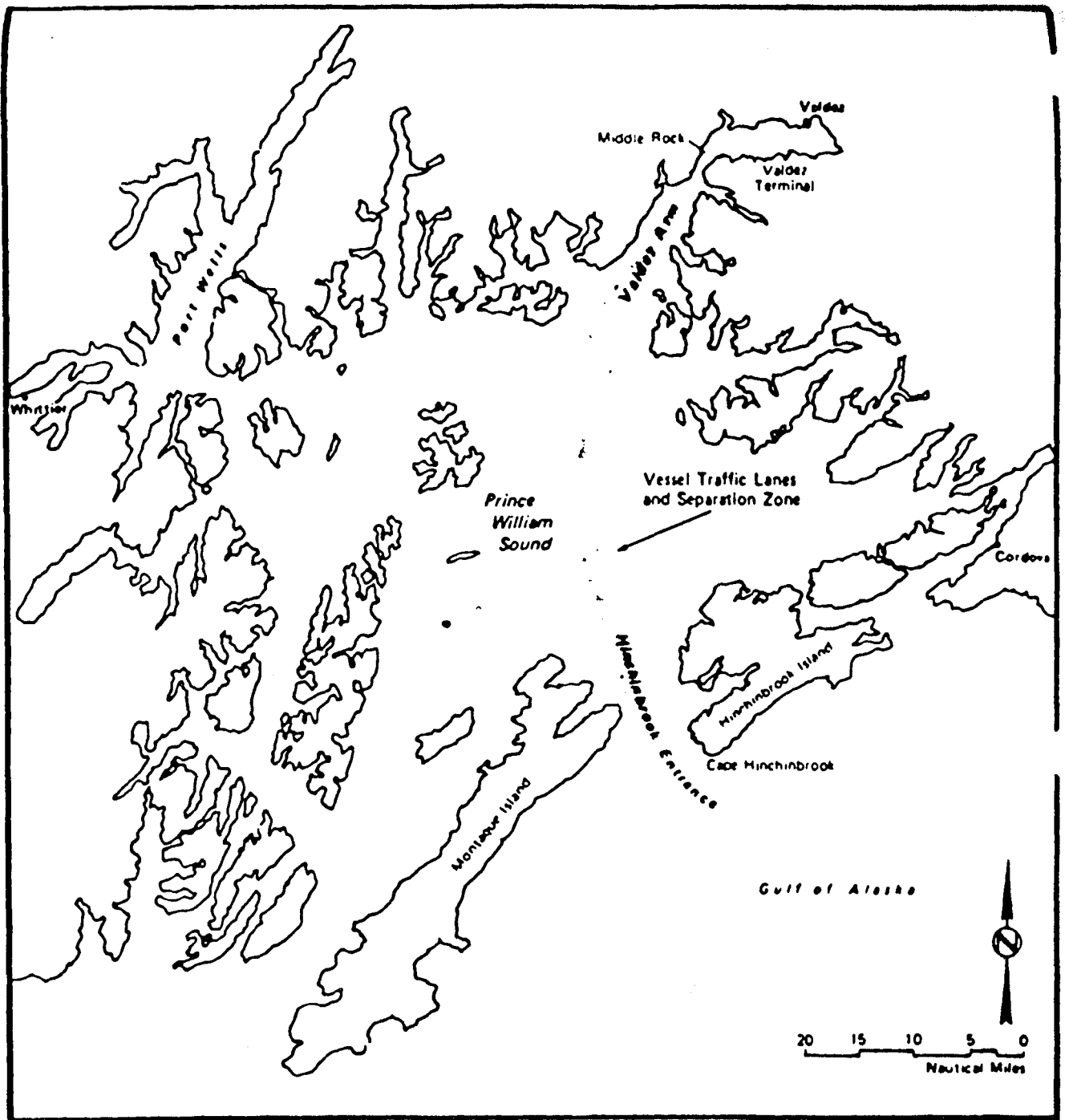
The Oil Spill Contingency Plan is designed to fully comply with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), the State of Alaska Regulations (Title 18) and stipulations of both the Federal and State Right-of-Way agreements. Alyeska Pipeline Service Company will ensure the Plan is followed during any spill event. Therefore, this Contingency Plan includes provisions for oil spill control, prompt notification of government agencies and other requirements spelled out in detail in the General Provisions.

102 CONCEPT

This Contingency Plan covers the entire Prince William Sound from Middle Rock in Valdez Narrows to the southern limit of Hinchinbrook Entrance off Cape Hinchinbrook as shown on Figure 102-1. This Contingency Plan has been developed specifically for rapid and effective response to possible oil spills due to marine vessels in trade with Alyeska's Valdez Terminal.

Preplanned responses have been delineated to ensure that Immediate Response Actions are taken upon detection of an oil spill. Figure 103-2 in the General Provisions is a functional flow diagram of the actions taken for a spill incident. Upon detection of a spill, the Terminal Controller will notify the Shift Supervisor, the Terminal Superintendent, the U.S. Coast Guard and the State Department of Environmental Conservation. Following the above notification, the Terminal Controller will send an initial notification message on the message processor, which is preaddressed to the Alyeska Oil Spill Coordinator and other government agencies.

In subsequent paragraphs of this Contingency Plan, the Contingency Response Organization is outlined and details of the Response Actions are presented. The Contingency Plan also covers cleanup actions and presents support annexes covering Prince William Sound.



PRINCE WILLIAM SOUND

Figure 102-1

20 CONTINGENCY RESPONSE ORGANIZATION

The Alyeska Oil Spill Task Force is organized to provide fast and effective initial response and follow-up capabilities for all Alyeska related oil spills. The activities of the Task Force are under the direction of the Alyeska Oil Spill Coordinator. The Terminal Superintendent is responsible to the Alyeska Oil Spill Coordinator and has authority and responsibility for all actions under this Contingency Plan.

201 TERMINAL IMMEDIATE RESPONSE ORGANIZATION

The Immediate Response Organization for Prince William Sound is staffed by Alyeska operating and maintenance personnel within the Valdez Terminal. This organization is shown on Figure 201-1.

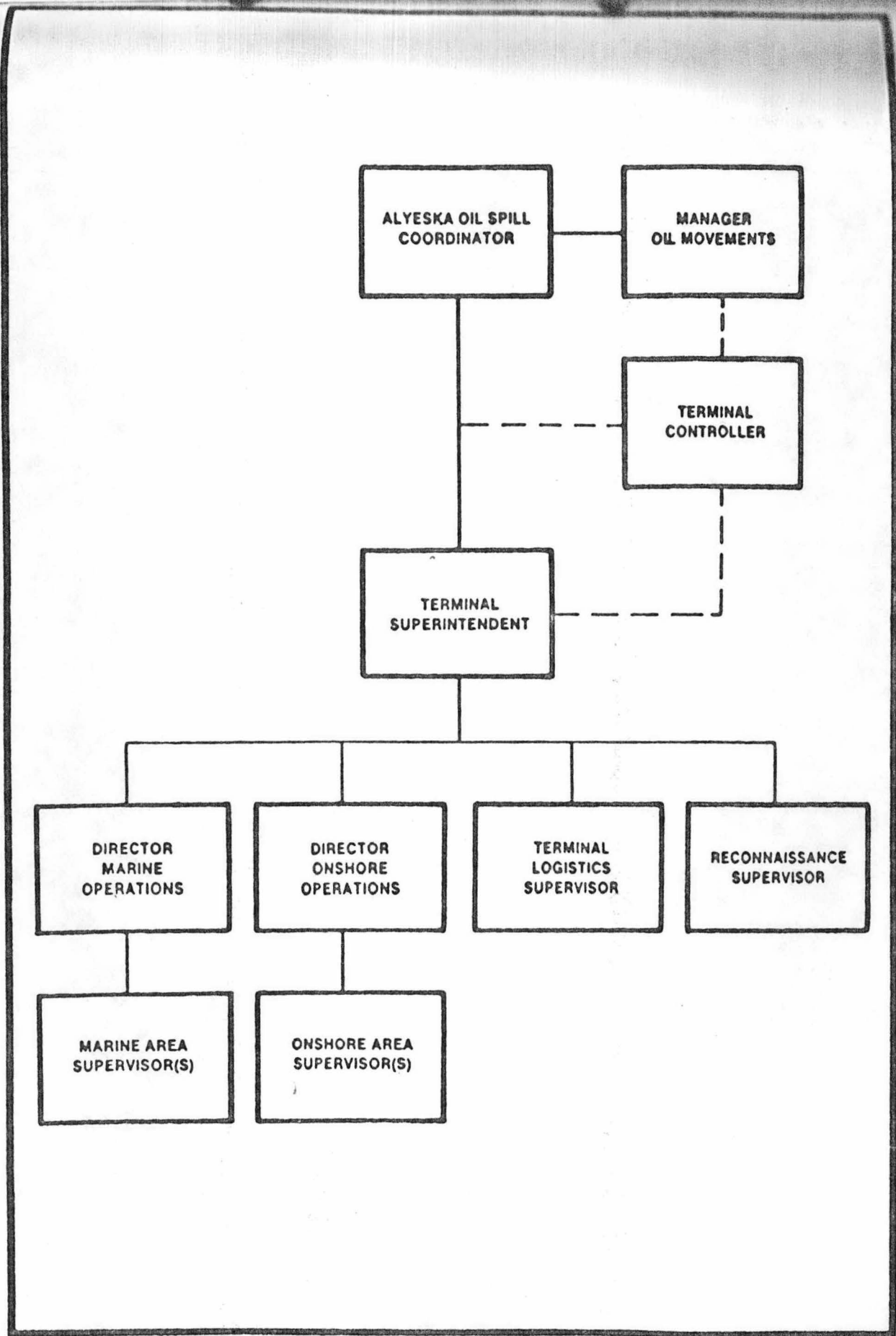
202 OIL SPILL TASK FORCE

The Alyeska Oil Spill Task Force is divided into four functional areas: Management, Advisory, Support and Field Response. The managerial, advisory and support areas generally perform staff functions and the required positions will normally be staffed by Alyeska personnel based in the Anchorage Headquarters.

As indicated in Paragraph 200, the Terminal Superintendent has full responsibility for all field actions in connection with any oil spill in Prince William Sound attributed to marine vessels in trade with the Alyeska Valdez Terminal. He will keep the Alyeska Oil Spill Coordinator advised of all actions and will be supported as necessary by the Oil Spill Task Force as described in the General Provisions.

Depending upon the size and nature of the spill, relief personnel and additional resources will be provided to the Terminal Superintendent by the Alyeska Oil Spill Coordinator.

The Alyeska Oil Spill Task Force will, from time to time, distribute an up-to-date Emergency Telephone List to all parties having assigned duties in the Oil Spill Contingency Plan and to other parties having interest in the Plan.



TERMINAL IMMEDIATE RESPONSE ORGANIZATION

Figure 201-1

300 IMMEDIATE RESPONSE ACTIONS

The following presentation provides typical alert, reconnaissance and control actions for spills occurring in Prince William Sound. It is impractical to make specific plans for every circumstance variation; therefore, it must be recognized that flexibility is an integral part of these procedures and that judgments will have to be made by trained field personnel.

301 ALERT PROCEDURES

In the event a marine vessel in trade with Alyeska's Valdez Terminal develops a leak or observes an oil slick in Prince William Sound, the marine vessel shall notify the Terminal Controller. There may be other notifications of such incidents by third parties; in any event, the following alert procedures will be initiated:

- (1) Terminal Controller will alert the Terminal Superintendent and the Alyeska Oil Spill Coordinator. The Terminal Controller will also notify, by telephone, the Valdez Marine Safety Office of the U.S. Coast Guard and the Valdez District Office of the Department of Environmental Conservation and send the initial report on the message processor.
- (2) The Alyeska Oil Spill Coordinator will alert Task Force members and notify the appropriate government agencies.
- (3) The Terminal Superintendent will take the following actions:
 - Alert the Reconnaissance Supervisor
 - Alert the Director of Marine Operations
 - Alert the Terminal Logistics Supervisor
 - Notify Federal and State Field Representatives

300

302 RECONNAISSANCE ACTIONS

Reconnaissance in response to a reported spill in Prince William Sound is a singular event related solely to the incident at hand. The emphasis here is on confirming and or visually locating the spill as rapidly as possible and assessing the nature and extent of the spill and advising the Terminal Superintendent of these details in order that appropriate response actions can be taken. The best estimate of the spill location should be derived from the Prince William Sound nautical chart. In cases involving marine vessels, the captain of the vessel should relay this information in with his report of the spill. In such cases, the Reconnaissance Supervisor will coordinate his reconnaissance efforts with the ship's captain to determine the nature and extent of the spill.

The movement of the spilled oil is very important. The prediction of the movement over time has been computerized by Alyeska in an Oil Spill Trajectory Program for Prince William Sound. The Reconnaissance Supervisor needs to collect the following information for use in this program.

Date of spill

Date spill occurred

Latitude and longitude of spill locations (in degrees and minutes)

Wind speed and direction at spill location (in knots and degrees true)

Tide data (time of last high water, maximum tidal difference for the day)

Spill volume (in barrels, if known)

303 CONTROL ACTIONS

Control actions have two functions: (1) to contain oil at the source of the spill (tanker(s)) and (2) to contain oil spilled on the waters of Prince William Sound. Therefore, Immediate Response Team containment personnel are divided into two teams—Containment Tanker Team and Containment Slick Team.

The function of the Containment Tanker Team is to contain the spill at the tanker, if the spill is continuing or if the potential for additional spills exist. The function of the Containment Slick Team is to contain on open water any spilled oil that has moved away from the spill source. Specific control actions for each type of team are given below.

Spill Containment at Tanker

The U.S. Coast Guard has stated that a leaking tanker in Prince William Sound will be directed to a sheltered bay for containment and lightering activities. The Containment Tanker Team will report to the tanker, if there is oil in the immediate vicinity or if the spill is continuing. Depending on the geography of the bay selected, the Containment Tanker Team will boom off the bay to prevent oil from escaping into the open waters of Prince William Sound or, if this is not feasible, the team will deploy a boom in arc on the side of the tanker on which the leak is located or the oil is surfacing. If the oil is moving quickly away from the tanker, it may be necessary to deploy the boom somewhat away from the tanker and move the arched boom into the side of the tanker to maximize containment. Caution should be exercised when the spill is a result of a damaged hull. In such a case, the boom should be held away from the damaged hull by using fenders or other means. In some cases, it may be necessary to completely boom the stricken vessel. See Annex 605 in Support Annexes.

Spill Containment on Open Waters

An oil slick on open water that has moved away from the spill source will be contained by the Containment Slick Team. The Reconnaissance Supervisor will direct the team to the slick area and coordinate the team's movements to most effectually contain the slick. The boom should be deployed to control the movement of as much of the oil slick as possible. Additional boom or additional teams may be required.

DISPERSANTS

Chemical dispersants, if properly used, can reduce the interfacial tension between oil and water, resulting in a cloud of fine droplets that may undergo accelerated natural dispersion and degradation. The increased surface-area-to-volume ratio for such droplets enhances biodegradation while allowing for the loss of lighter (more toxic) hydrocarbon fractions through evaporation. The removal of oil from the surface of the water also permits these natural processes to occur in the water column. The oil is therefore free from any surface transport (possibly by wind into a sensitive shoreline), and the oil is less likely to come into contact or adhere to birds and animals.

The use of dispersants at the Marine Terminal in Valdez and in the waters travelled by tankers using the terminal provide an additional spill control measure.

The use of dispersants is not considered a "cleanup" technique. However, they do provide Alyeska, the government On-scene Coordinator (OSC), and the Regional Response Team (RRT) with an important trade-off option. Dispersants, for example, may create higher temporary concentrations of oil in the near-surface water column organisms to the total population than would occur if the oil was left untreated and allowed to concentrate near or on the shore. Each spill situation must be assessed in light of the full range of spill response options available. The relative merits of chemical dispersion versus non-dispersion must be considered for the specific oil, environment and season associated with the spill.

When considering the advantages and disadvantages of physical removal techniques, burning, natural degradation and shoreline cleanup, it becomes apparent that chemical dispersants are an additional response

304 EXCLUSION

Exclusion actions are steps taken to prevent spilled oil from contaminating a specific area. These actions are usually taken for a definite purpose, primarily to protect:

- Human life
- Wildlife and/or wildlife habitats
- Property
- Areas of aesthetic beauty

Exclusion actions are also taken to prevent oil from contaminating areas that are very difficult or impossible to contain or for a combination of the above reasons.

Exclusion steps should be taken after the initial response action to contain the spill. Assessment of the spill's size and its possible movement are required for effective, efficient exclusion. If initial containment actions have not contained all the spilled oil, exclusion actions may be required. The Terminal Superintendent or Reconnaissance Supervisor will determine need for exclusion actions during assessment of the spill incident.

Oil-on-water movement depends on the volume of oil, its physical properties, the tidal current, and the wind speed and direction. After initial spreading occurs, the movement largely depends on the tidal current and the wind speed and direction. These two factors must be considered in making exclusion action decisions. If the current and/or wind conditions at the time of a spill indicate that uncontained oil may move to one of the sensitive areas discussed below, appropriate exclusion actions for that area must be taken. Any forecast changes in wind speed and/or direction must also be considered. Exclusion actions for the threatened area must be taken if the spill might not be fully contained when the anticipated change occurs.

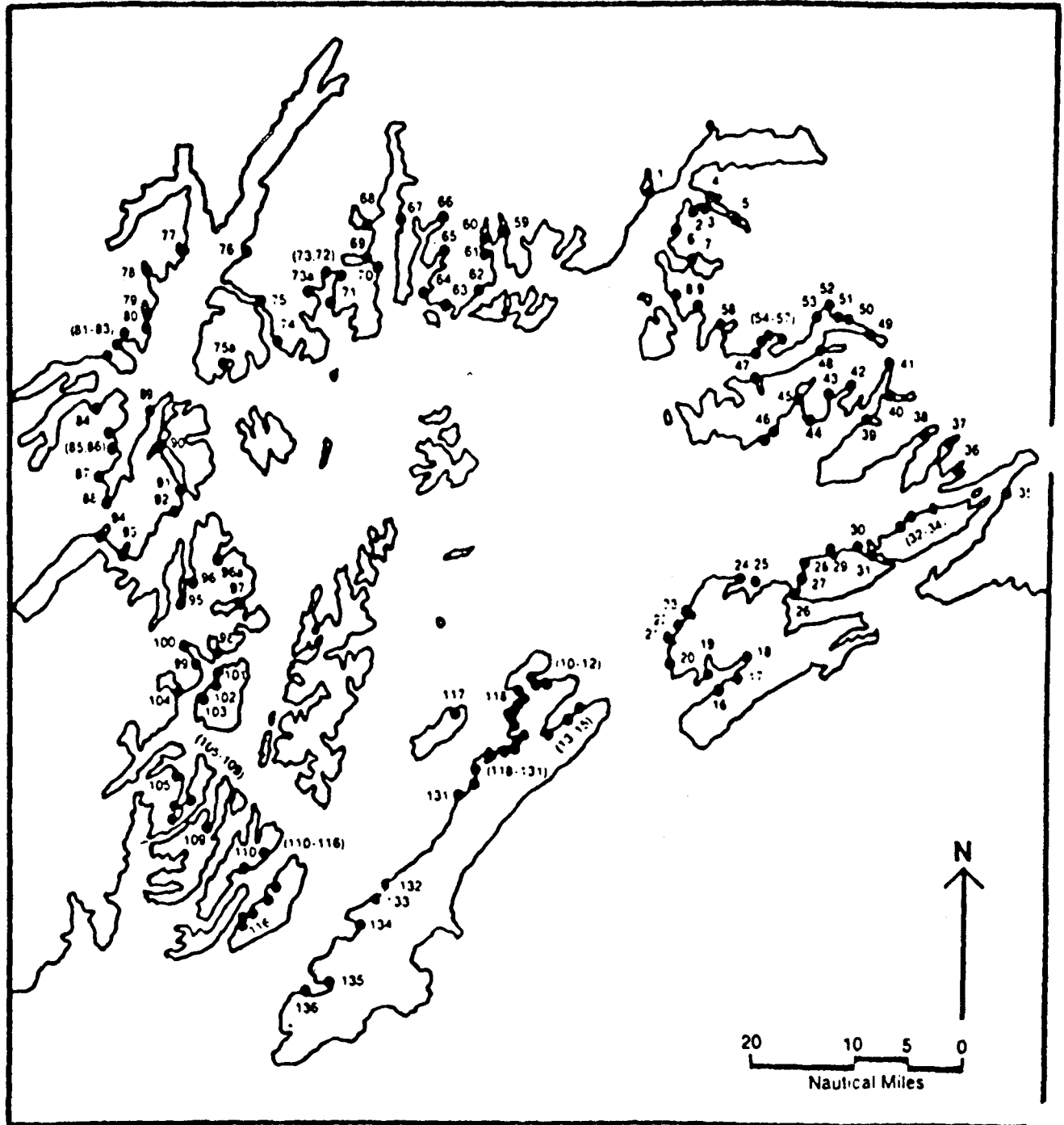
Booms with a cylindrical float and a suspended skirt will generally be used for exclusion. When all available boom is in use, additional booms may be fabricated on site. Annex 905 of the General Provisions discusses the correct use of the various types of booms and gives emergency boom construction information. Booms may be deployed by any of the vessels at the terminal. Mooring launches or tugs should be used for towing booms to the site when the distance is great and/or speed is important.

Two primary methods will be used in exclusion booming—enclosure and diversion. Enclosure involves completely closing off an area, such as a harbor, bay inlet or land form. Diversion booming is used to deflect oil that is moving in a dominant direction from a critical area to a less critical area or further out into the body of water. This method works well in conjunction with cleanup or skimming procedures as it tends to concentrate the oil and direct its path.

It is theorized that the two most probable areas in Prince William Sound that would be subject to oil spills from marine vessels in trade with Alyeska's Valdez Terminal are the Valdez Arm and Hinchinbrook Entrance.

Therefore, the exclusion sites for these two areas are presented in the first of the numerical listing of the predesignated exclusion sites in Prince William Sound. Figure 304-1 shows the numerical location of the exclusion sites. Detailed photo maps are provided showing the exclusion sites. An index of the exclusion sites showing detailed area maps and and exclusion site photos is given in Figure 304-2. Area maps and exclusion site photos follow Figure 304-2. Detailed descriptions of the individual exclusion sites are interspersed with the exclusion site photos. The sensitivity of the exclusion sites by months is given in Figure 304-115 at the end of th site photos.

The scattered communities listed below are located within Prince William Sound. If an oil slick is approaching



Note. NUMBERS REFER TO EXCLUSION SITES AND ACTIONS RECOMMENDED TO PROTECT SENSITIVE AREAS LISTED IN FIGURE 304-2.

EXCLUSION SITES

Figure 304-1

any one of these communities, actions should be taken to exclude the slick or prevent its reaching the community. These actions may include open water containment or diversion booming.

- Tatitlek
- Alice Cove
- Cordova
- Sawmill Bay (Evans Island)
- Chenega
- Whittier

EXCLUSION SITE	SENSITIVE AREA PROTECTED	GENERAL LOCATION	AREA MAP FIGURE	EXCLUSION SITE FIGURE
1	Twin Falls Creek Stellar Creek	Sawmill Bay	304-4	304-11
2	Leushakoff Creek	Jack Bay	304-4	304-12
3	Gregorieff Creek	Jack Bay	304-4	304-12
4	Vlaskoff Creek	Jack Bay	304-4	304-13
5	Naomoff Creek	Jack Bay	304-4	304-14
6	Donaldson Creek	Valdez Arm	304-4	304-15
7	Indian Creek Duck River Millard Creek Turner Creek	Galena Bay	304-4	304-16
8	Galdhaugh Creek	Virgin Bay Tatitlek Narrows	304-4	304-17
9	Borodkin Creek	Boulder Bay Tatitlek Narrows	304-4	304-18
10	Unnamed Creek 758	Ricky Bay	304-5	304-19
11	Rocky Creek	Rocky Bay	304-5	304-19
12	Curren Creek	Rocky Bay	304-5	304-19
13	Udall Creek McKernan Creek	Zaikof Bay	304-5	304-20
14	Rosswog Creek	Zaikof Bay	304-5	304-20
15	Pautzke Creek	Zaikof Bay	304-5	304-21
16	Etches Creek	Port Etches	304-5	304-22
17	Garden Cove Creek Garden Creek	Port Etches	304-5	304-23
18	Nuchek Creek	Port Etches	304-5	304-24
19	Constantine Creek	Constantine Harbor	304-5	304-25
20	Bear Cape Creek	Bear Cape Hinchinbrook Entrance	304-5	304-26

EXCLUSION SITE LISTING

Figure 304-2

EXCLUSION SITE	SENSITIVE AREA PROTECTED	GENERAL LOCATION	AREA MAP FIGURE	EXCLUSION SITE FIGURE
21	Deer Creek	Deer Cove Hinchinbrook Entrance	304-5	304-27
22	Jauania Creek	Hinchinbrook Entrance	304-5	304-28
23	Brown Bear Creek	Shelter Bay Hinchinbrook Entrance	304-5	304-29
24	Eagle Creek Cook Creek	Anderson Bay	304-5	304-30
25	Bear Creek Double Bay Creek Double Creek	Double Bay	304-6	304-31
26	Honker Creek Cutoff Creek Dan Creek	Hawkins Island Cutoff	304-6	304-32
27	Hawkins Cutoff Creek	Hawkins Island Cutoff	304-6	304-33
28	Makaka Creek	Hawkins Island	304-6	304-34
29	Hawkins Creek	Hawkins Island	304-6	304-35
30	Rollins Creek	Canoe Passage	304-6	304-36
31	Canoe Creek Zillensendoff Creek	Canoe Passage	304-6	304-36
32	Cedar Creek Spruce Creek Hemlock Creek	Cedar Bay	304-6	304-37
33	Windy Creek	Windy Bay	304-6	304-38
34	Orca Creek	Hawkins Island	304-6	304-39
35	Humpback Creek	Orca Inlet	304-6	304-40
36	Raging Creek	Simpson Bay	304-6	304-41
37	Simpson Creek	Simpson Bay	304-6	304-42
38	Sheep River Koppen Creek	Sheep Bay	304-6	304-43
39	Comfort Creek	Port Gravina	304-6	304-44
40	Beartrap River	Port Gravina	304-6	304-45
304-2-1				

Figure 304-2 (continued)

EXCLUSION SITE	SENSITIVE AREA PROTECTED	GENERAL LOCATION	AREA MAP FIGURE	EXCLUSION SITE FIGURE
41	Gravina River	Port Gravina	304-6	304-46
42	Control Creek	Port Gravina	304-6	304-47
43	Olsen Bay Creek	Olsen Bay	304-6	304-48
44	Carlson Creek	Port Gravina	304-6	304-49
45	St Matthews Creek	Port Gravina	304-6	304-50
46A, B	Hell's Hole	Port Gravina	304-6	304-51A, B, C
47	Irish Creek	Port Fidalgo	304-4	304-52
48	Whalen Creek	Port Fidalgo	304-4	304-53
49	Unnamed Creek 82	Port Fidalgo	304-4	304-54
50	Keta Creek	Port Fidalgo	304-4	304-55
51	Fidalgo River	Port Fidalgo	304-4	304-55
52	Sunny River Unnamed Creek 86	Port Fidalgo	304-4	304-55
53	Short Creek	Port Fidalgo	304-4	304-56
54	Fish Creek Unnamed Creek 90	Fish Bay	304-4	304-57
55	Unnamed Creek 91	Fish Bay	304-4	304-57
56	Kirkwood Creek	Fish Bay	304-4	304-58
57	Rock Creek	Fish Bay	304-4	304-58
58	Lagoon Creek	Landlocked Bay	304-4	304-59
59	Long Creek East Long Bay Creek	Long Bay	304-7	304-60
60	Billy's Hole	Long Bay	304-7	304-61
61	Vanishing Creek West Long Bay Creek	Long Bay	304-7	304-61
62	Eickelberg Creek	Eickelberg Bay	304-7	304-62
63	Backyard Creek	Fairmount Bay	304-7	304-63
304-2-2				

Figure 304-2 (continued)

SITE	AREA PROTECTED	LOCATION	FIGURE	FIGURE
41	Gravina River	Port Gravina	304-6	304-46
42	Control Creek	Port Gravina	304-6	304-47
43	Olsen Bay Creek	Olsen Bay	304-6	304-48
44	Carlson Creek	Port Gravina	304-6	304-49
45	St Matthews Creek	Port Gravina	304-6	304-50
46A, B	Hell's Hole	Port Gravina	304-6	304-51A, B, C
47	Irish Creek	Port Fidalgo	304-4	304-52
48	Whalen Creek	Port Fidalgo	304-4	304-53
49	Unnamed Creek 82	Port Fidalgo	304-4	304-54
50	Keta Creek	Port Fidalgo	304-4	304-55
51	Fidalgo River	Port Fidalgo	304-4	304-55
52	Sunny River Unnamed Creek 86	Port Fidalgo	304-4	304-55
53	Short Creek	Port Fidalgo	304-4	304-56
54	Fish Creek Unnamed Creek 90	Fish Bay	304-4	304-57
55	Unnamed Creek 91	Fish Bay	304-4	304-57
56	Kirkwood Creek	Fish Bay	304-4	304-58
57	Rock Creek	Fish Bay	304-4	304-58
58	Lagoon Creek	Landlocked Bay	304-4	304-59
59	Long Creek East Long Bay Creek	Long Bay	304-7	304-60
60	Billy's Hole	Long Bay	304-7	304-61
61	Vanishing Creek West Long Bay Creek	Long Bay	304-7	304-61
62	Eickelberg Creek	Eickelberg Bay	304-7	304-62
63	Backyard Creek	Fairmount Bay	304-7	304-63
304-2-2				

Figure 304-2 (continued)


EXCLUSION SITE	SENSITIVE AREA PROTECTED	GENERAL LOCATION	AREA MAP FIGURE	EXCLUSION SITE FIGURE
64	Granite Creek	Granite Bay Wells Bay	304-7	304-63
65	Cedar Creek	Cedar Bay Wells Bay	304-7	304-64
66	Wells River Unnamed Creek 233	Wells Bay	304-7	304-65
67	 Cannery Creek Fish Hatchery	Unakwik Inlet	304-7	304-66
68	Jonah Creek	Unakwik Inlet	304-7	304-67
69	Siwash River	Siwash Bay Unakwik Inlet	304-7	304-68
70	Unakwik Creek	Unakwik Inlet	304-7	304-68
71	Blackbear Creek	Eaglek Bay	304-7	304-69
72	Canyon Creek	Eaglek Bay	304-7	304-70
73	Eaglek River	Eaglek Bay	304-7	304-70
73A	Fish Hatchery Cascade Falls	Eaglek Bay	304-7	304-70a
74	Esther Passage Lake	Esther Passage	304-7	304-71
75	Triple Creek	Esther Passage	304-8	304-72
75A	Fish Hatchery	Esther Island	304-8	304-70a
76	Coghill River	College Fjord	304-8	304-73
77	Lagoon Creek	Harrison Lagoon Port Wells	304-8	304-74
78	Mill Creek	Bettles Bay Port Wells	304-8	304-75
79	Hummer Creek	Hummer Bay Port Wells	304-8	304-76
80	Pirate Cove Creek	Pirate Cove Port Wells	304-8	304-77
81	Meacham Creek	Pigot Bay Port Wells	304-8	304-78
304-2-3				

Figure 304-2 (continued)

SITE	AREA PROTECTED	LOCATION	FIGURE	FIGURE
82	Swanson Creek	Pigot Bay Port Wells	304-8	304-78
83	Logging Camp Creek	Logging Camp Bay Passage Canal	304-8	304-79
84	Tebenkoff Creek Blackstone Creek	Blackstone Bay	304-8	304-80
85	Halferty Creek	Cochrane Bay	304-8	304-81
86	Paulson Creek	Cochrane Bay	304-8	304-81
87	Parks Creek	Cochrane Bay	304-8	304-82
88	Cochrane Creek	Cochrane Bay	304-8	304-83
89	Wickett Creek	Cochrane Bay	304-8	304-84
90	Shrode Creek	Long Bay Culross Passage	304-8	304-85
91	Culross Creek	Culross Passage	304-8	304-86
92	Mink Creek	Port Nellie Juan	304-9	304-87
93	East Finger Creek	East Finger Inlet Port Nellie Juan	304-9	304-88
94	West Finger Creek	West Finger Inlet Port Nellie Juan	304-9	304-89
95	Chimensky Lagoon	McClure Bay	304-9	304-90
96	McClure Creek	McClure Bay	304-9	304-90
96A	Fish Hatchery	Main Bay	304-9	304-90a
97	Eshamy Lake Eshamy River Self Creek Ellshansky Creek	Eshamy Bay	304-9	304-91
98	Paddy Creek	Paddy Bay	304-9	304-92
99	Erb Creek	Ewan Bay	304-9	304-93
100	Ewan Creek	Ewan Bay	304-9	304-93
101	Unnamed Creek 620	Dangerous Passage	304-9	304-94
304-2-4				

Figure 304-2 (continued)

EXCLUSION SITE	SENSITIVE AREA PROTECTED	GENERAL LOCATION	AREA MAP FIGURE	EXCLUSION SITE FIGURE
102	Totemoff Creek	Chenaga Island	304-9	304-94
103	Brigaloff Creek	Chenaga Island	304-9	304-94
104	Jackpot Lakes Creek Kompkoff River Jackpot Bay Creek Jackpot Creek	Jackpot Bay	304-9	304-95
105	Claw Creek	Whale Bay	304-9	304-96
106	Pablo Creek	Whale Bay	304-9	304-97
107	Unnamed Creek 634	Whale Bay	304-9	304-97
108	Whale Creek	Whale Bay	304-9	304-98
109	Johnson Creek Halverson Creek	Bainbridge Island	304-9	304-99
110	Bjorne Creek	Latouche Passage	304-10	304-100
111	O'Brien Creek	Sawmill Bay Evans Island	304-10	304-101
111A	San Juan Fish Hatchery	Sawmill Bay Evans Island	304-10	304-101a
112	Hayden Creek	Latouche Passage	304-10	304-102
113	Horseshoe Creek	Latouche Passage	304-10	304-102
114	Falls Creek Latouche Island Creek	Latouche Passage	304-10	304-103
115	Big Bay	Latouche Passage	304-10	304-103
116	Montgomery Creek	Latouche Passage	304-10	304-104
117	Green Creek	Green Island	304-10	304-105
118	Dry Creek	Montague Island	304-10	304-106
119	Unnamed Creek 753	Montague Island	304-10	304-106
120	Stockdale Creek	Montague Island	304-10	304-106
121	Unnamed Creek 751	Montague Island	304-10	304-106
122	Unnamed Creek 750 Shad Creek	Montague Island	304-10	304-107

304-2-5

Figure 304-2 (continued)

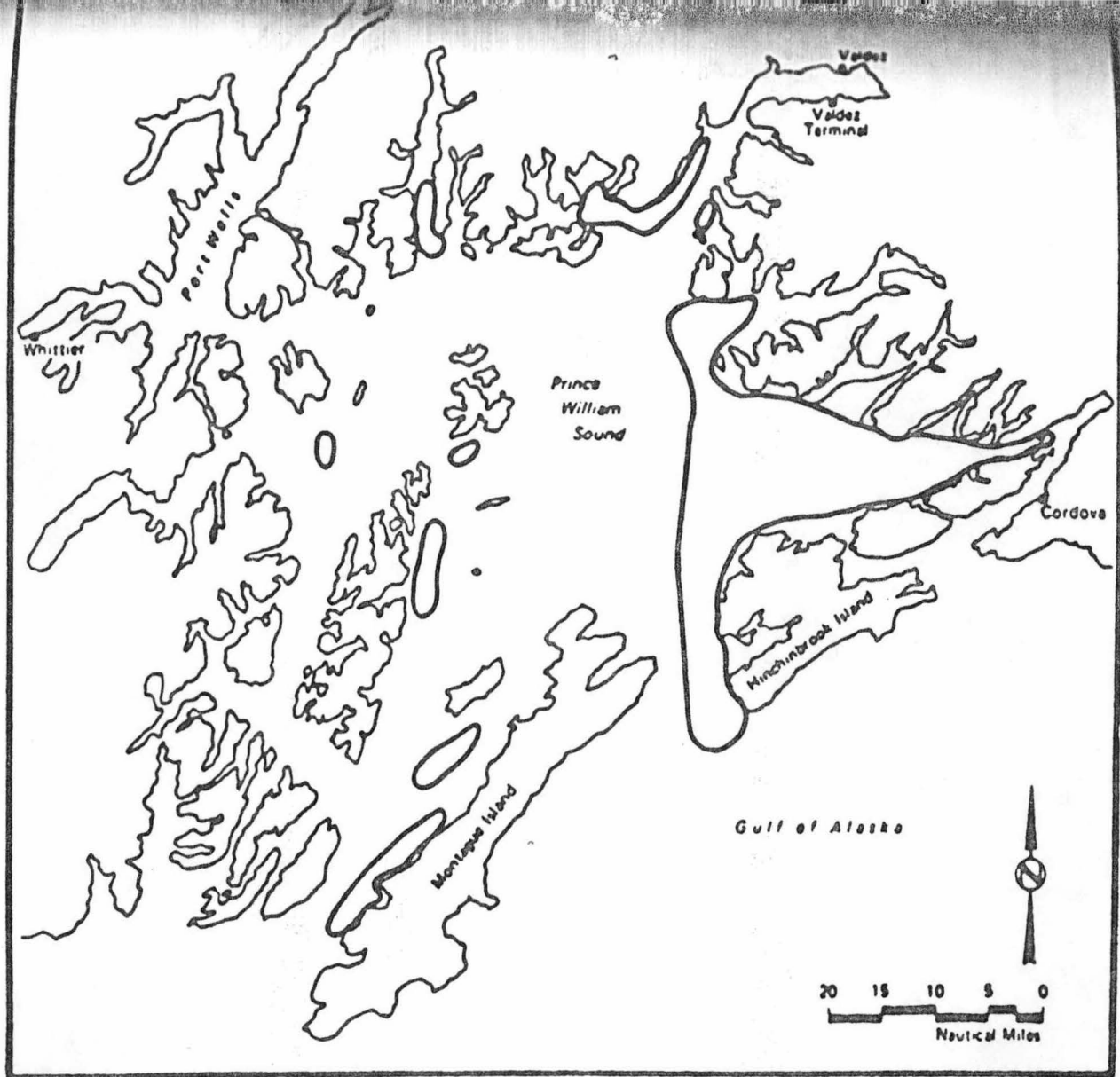
EXCLUSION SITE	SENSITIVE AREA PROTECTED	GENERAL LOCATION	AREA MAP FIGURE	EXCLUSION SITE FIGURE
123	Unnamed Creek 748	Montague Island	304-10	304-107
124	Cabin Creek Complex	Montague Island	304-10	304-107
125	Schumann Creek	Montague Island	304-10	304-107
126	Wild Creek	Montague Island	304-10	304-107
127	Wilby Creek	Montague Island	304-10	304-107
128	Chalmers River	Montague Island	304-10	304-108
129	Kalez Creek	Montague Island	304-10	304-109
130	Swamp Creek	Montague Island	304-10	304-109
131	Unnamed Creek 735	Montague Island	304-10	304-110
132	Unnamed Creek 719	Montague Island	304-10	304-111
133	Unnamed Creek 717	Montague Island	304-10	304-111
134	Hanning River Quadra Creek	Montague Island	304-10	304-112
135	MacLeod Creek	Montague Island	304-10	304-113
136	Trap Creek	Montague Island	304-10	304-114

Figure 304-2 (continued)

The major commercial fisheries in Prince William Sound are salmon and crab (tanner, king and Dungeness) fisheries. Shrimp, herring and herring roe-on-kelp, halibut, other ground fish and razor clams comprise a much smaller commercial fishery in terms of dollar value, pounds landed and fishing effort. The major fishing grounds for each species, the gear used and the fishing season are presented in Figure 605-1 through 605-12. Figure 605-13 shows the in-season species for each month of the year. The locations of the major areas can be compared to the ship traffic lanes most frequently used at present and to the Vessel Traffic Lanes and Separation Zone (Figure 605-14). There is relatively little conflict between fishermen and the ship traffic, except during severe storms, when ships may take shelter in the lee of islands where fishing gear is present.

The main sport fishing areas are generally close to the population centers (Valdez, Cordova, Whittier; Figure 605-15). Salmon, halibut and crabs (especially Dungeness crabs) are the major species sought. Hardshell clams (little necks and butter clams) are probably present in every bay in Prince William Sound, but their heaviest use tends to be near population centers.

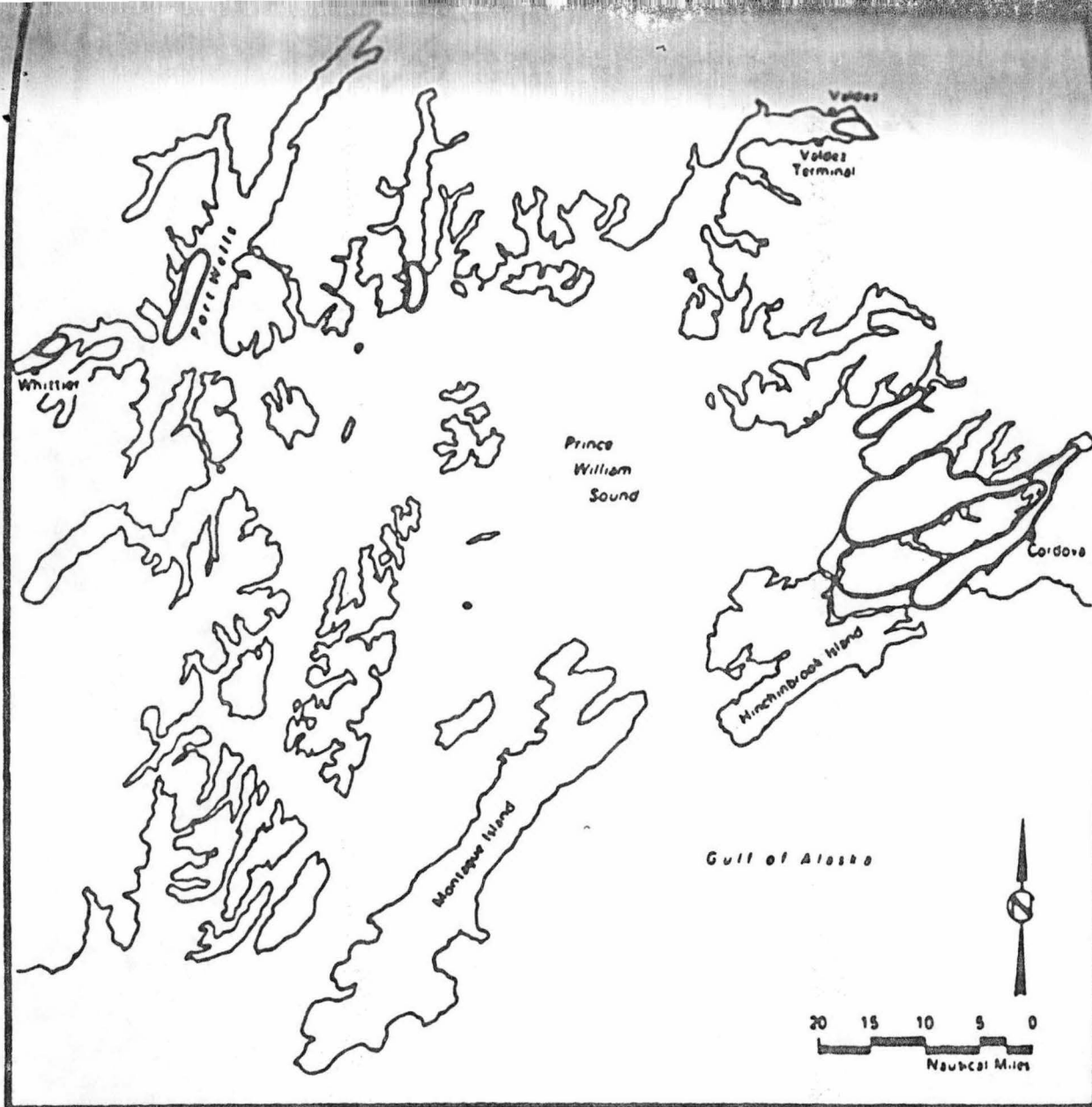
An oil spill is not expected to significantly affect most of the commercial or sport fishery species, with the possible exception of salmon. However, the fishing industry may be affected because fishermen will generally be unwilling to foul their boats or gear with the oil. In addition, oil on fish, crustaceans or clams will make them less marketable, if not less palatable. The meat of intertidal species, such as clams, may be tainted and rendered unpalatable.



TANNER CRAB

Figure 605-1

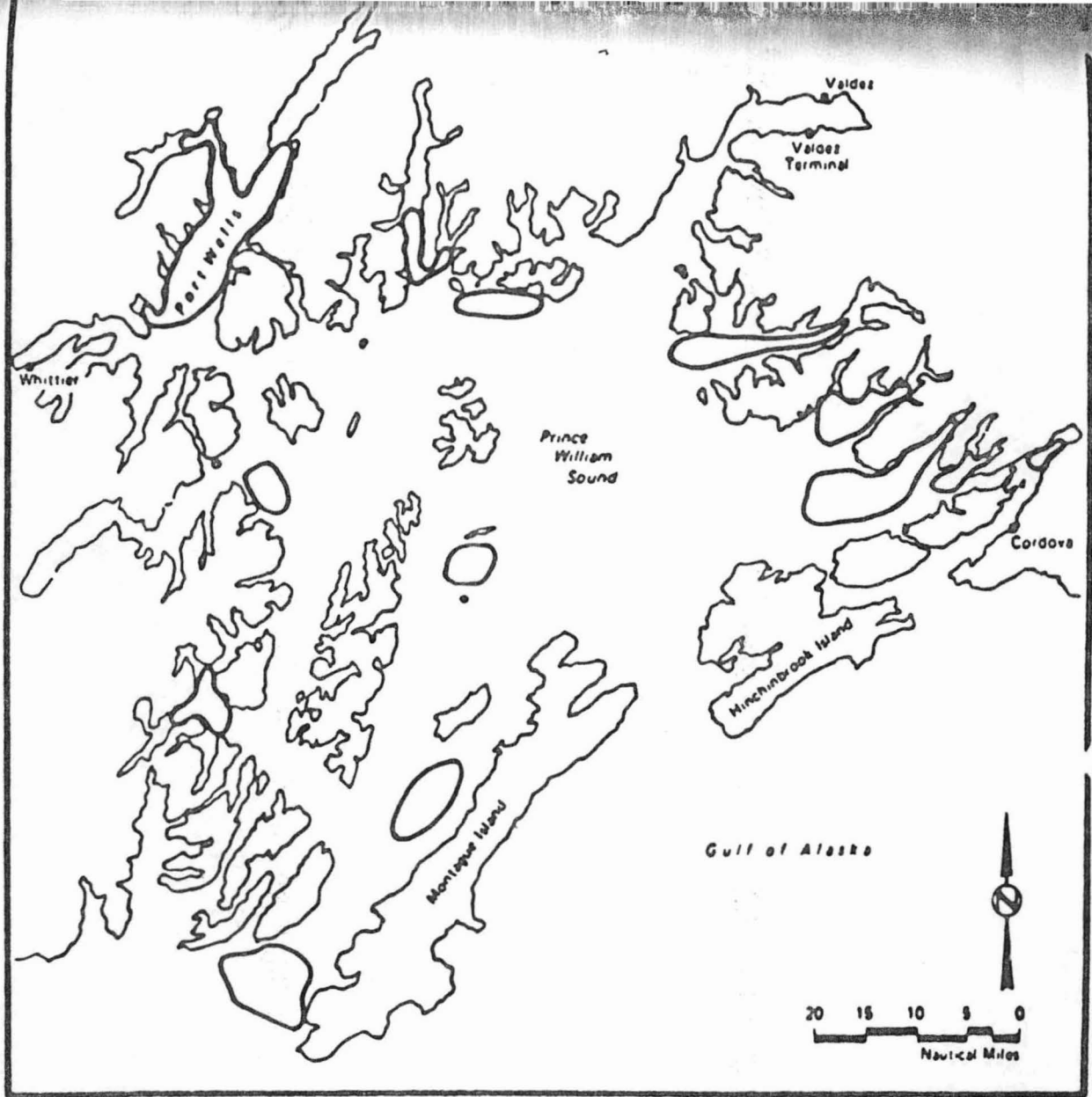
November 15 - May 31
Gear: Pots



DUNGENESS CRAB

Figure 605-2

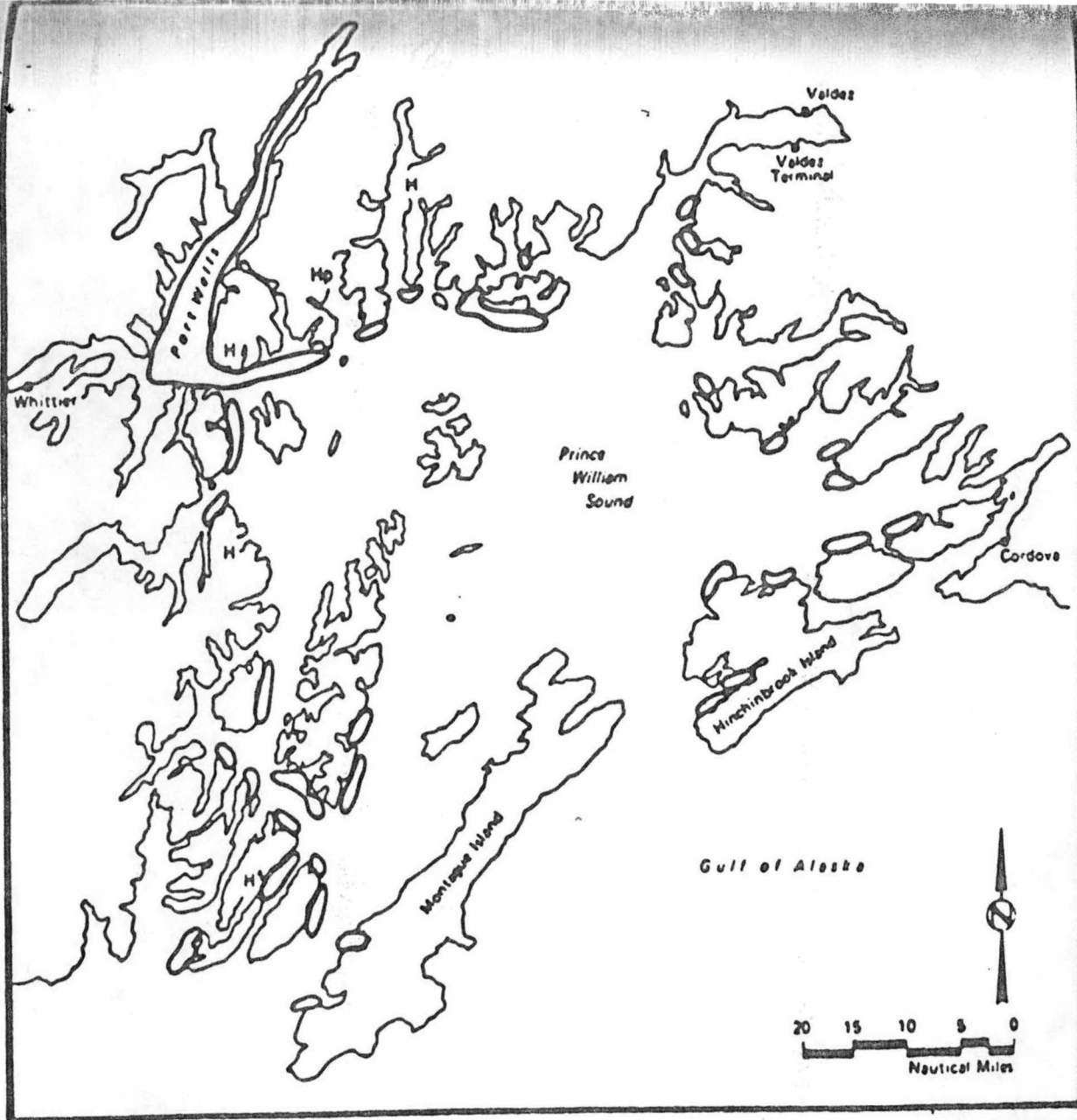
September 1 - June 1
 Gear: Pots
 (Gulf Dungeness Crab season is 12 mo./yr.)



KING CRAB

Figure 605-3

August 1 - March 15
Gear: Pots

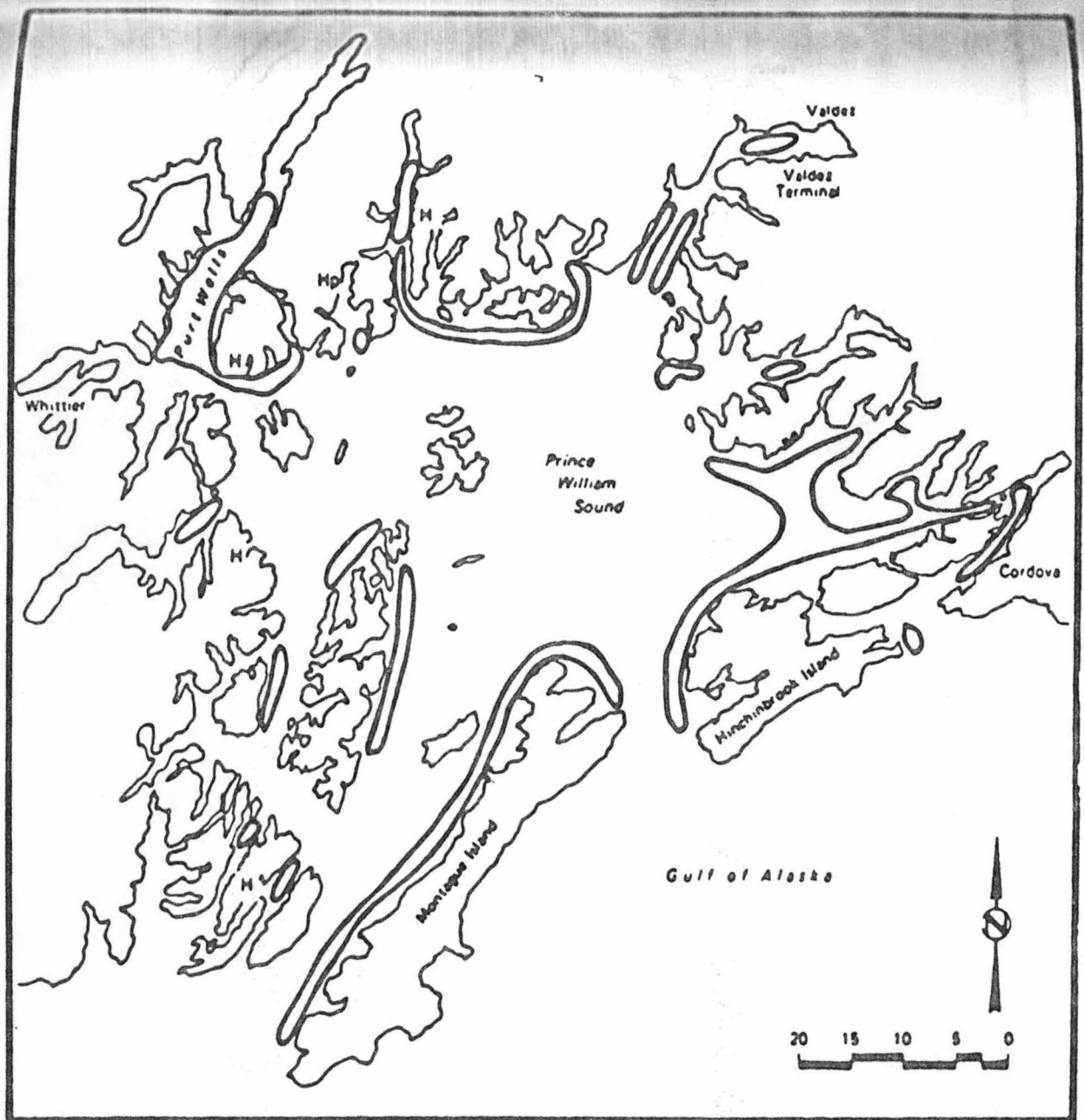


SALMON

Figure 605-4

July 15 - August 10
 Gear: Purse Seine
 Major Hooking Areas
 (Around hard areas almost all bays)

H=existing fish hatcheries
 Hp=proposed hatchery

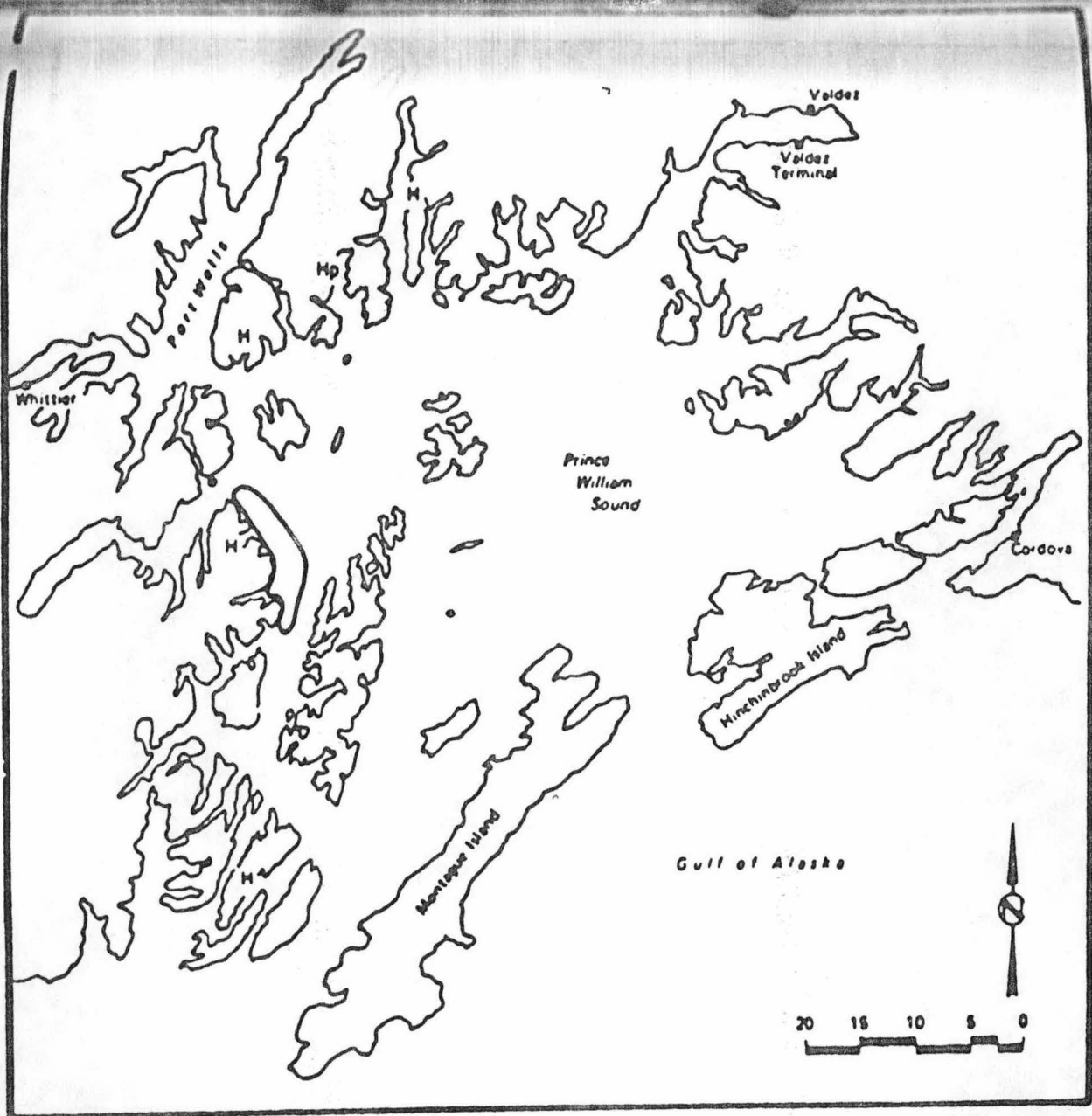


SALMON

Figure 605-5

June 15 - July 15
 Gear: Purse Seine & Drift Gill Net

H=existing fish hatcheries
 Hp=proposed hatchery

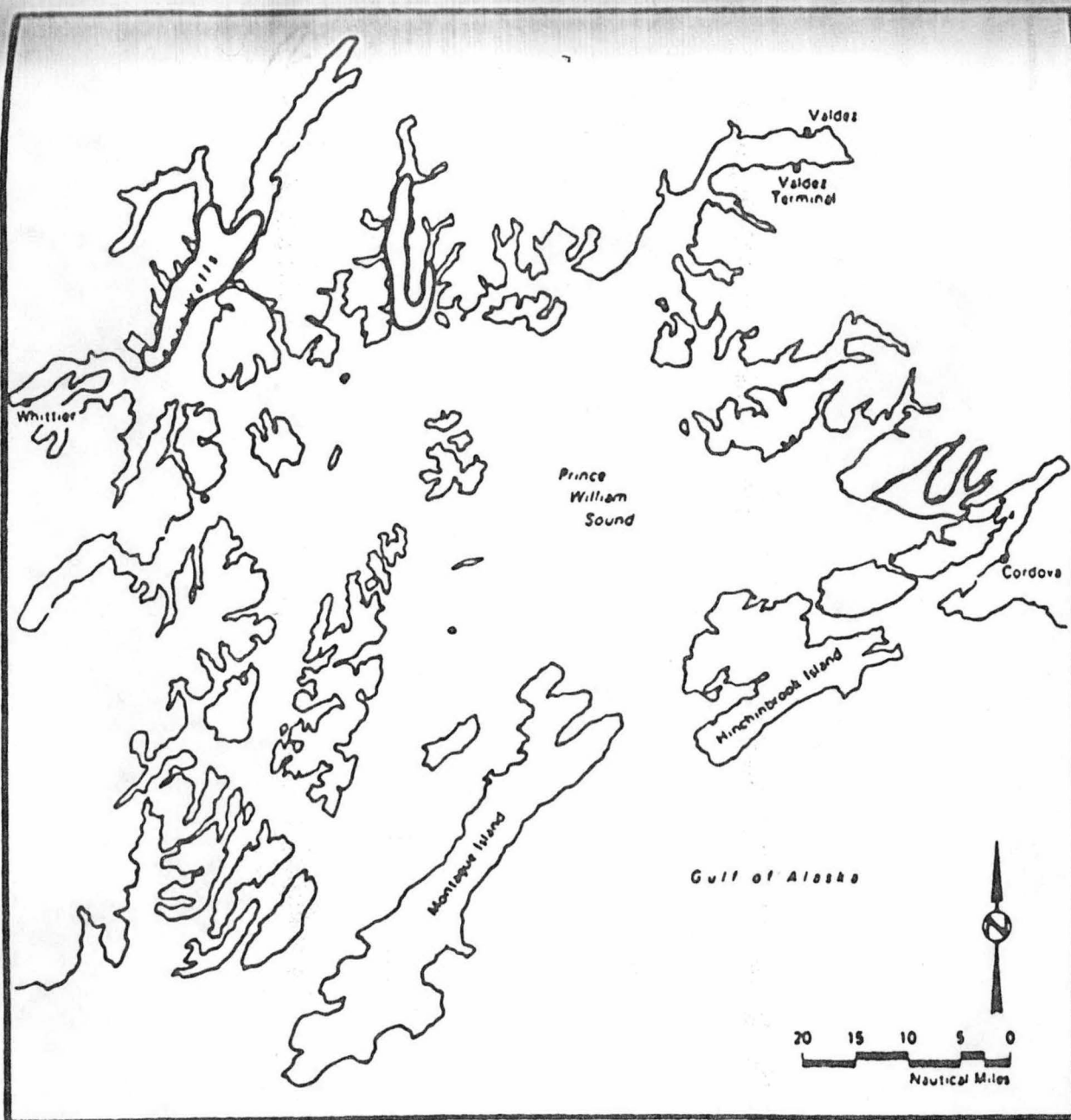


SALMON

Figure 605-6

July 1 - August 25
 Gear: Drift Gill Net & Set Net

H=existing fish hatcheries
 Hp=proposed hatchery



SHRIMP

Figure 605-7

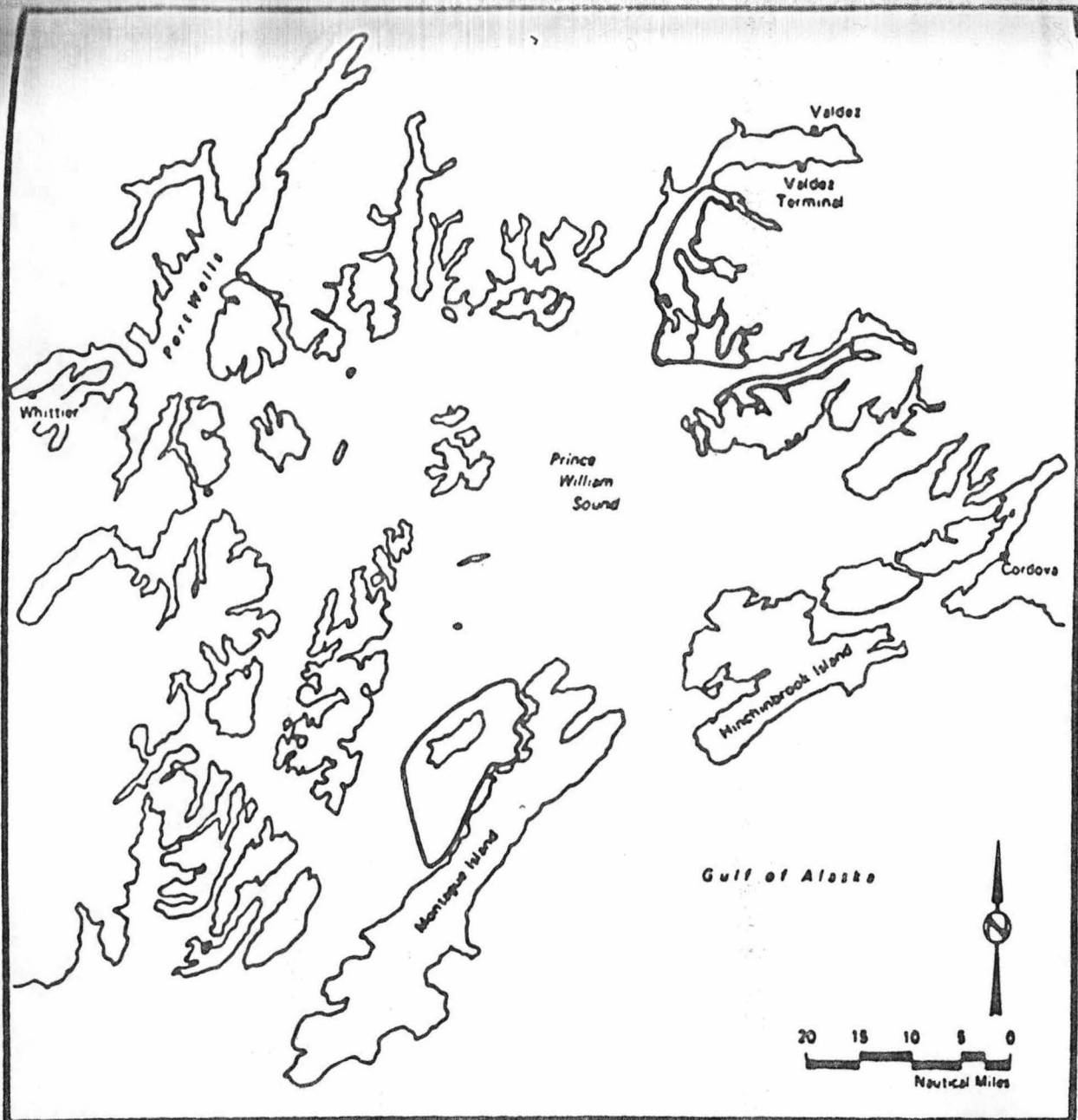
October 1 - May 31
 Gear: Pots
 Trawls



HERRING - SAC ROE

Figure 605-8

April 1 - May 31
Gear. Purse Seine



HERRING ROE-ON-KELP

Figure 605-9

April 1 - May 31
 Gear: Grappling Hooks & Skindivers



HALIBUT

Figure 605-10

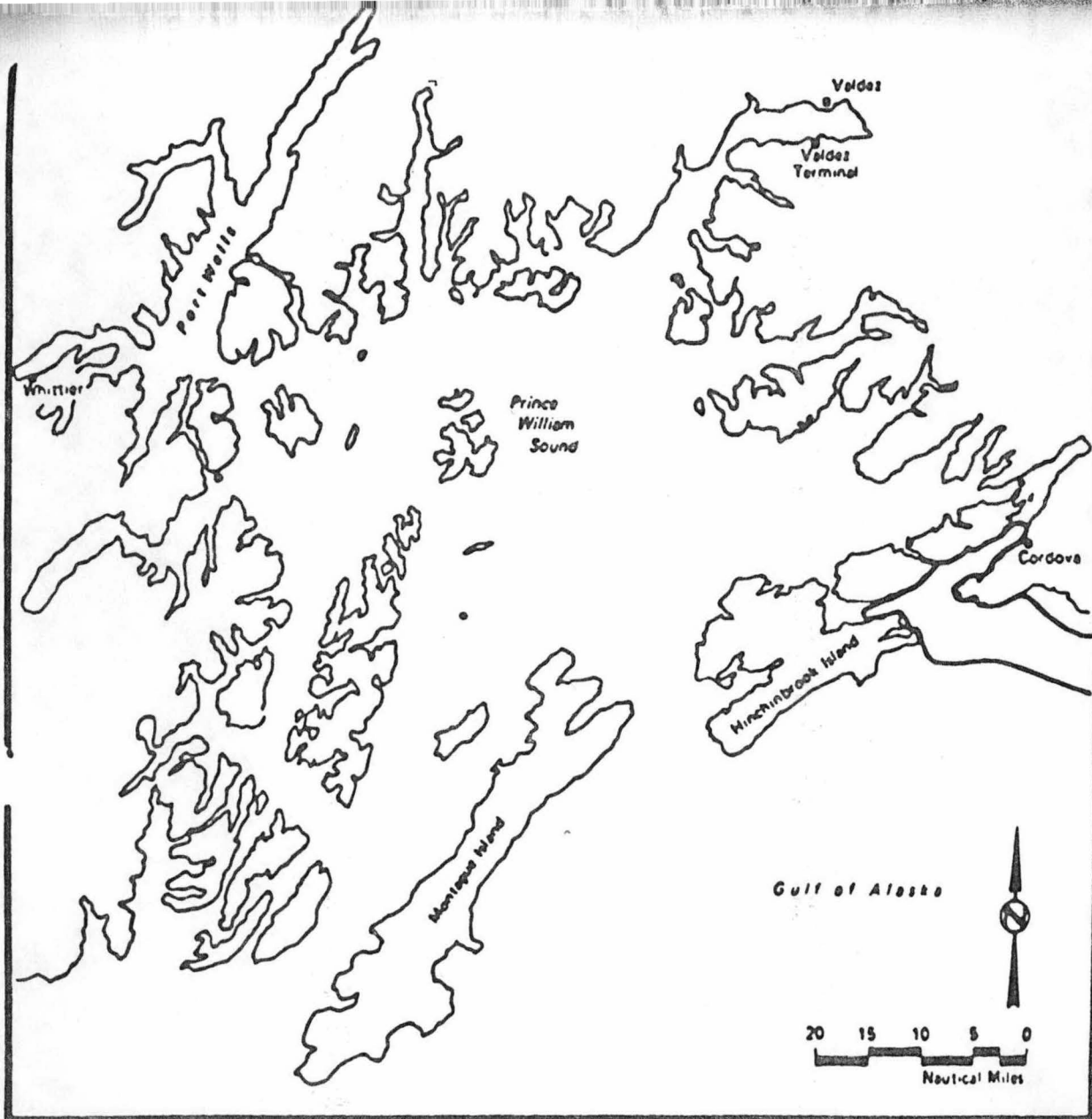
May 1 - October 15
 Gear: Skates-Long Lines
 (Heavy halibut fishing in Gulf areas especially along Montague shore)



GROUND FISH

All year
 Gear: Long Line
 Bottom Trawl

Figure 605-11



RAZOR CLAM

Figure 605-12

April 1 - October 30
 Gear: Shovel

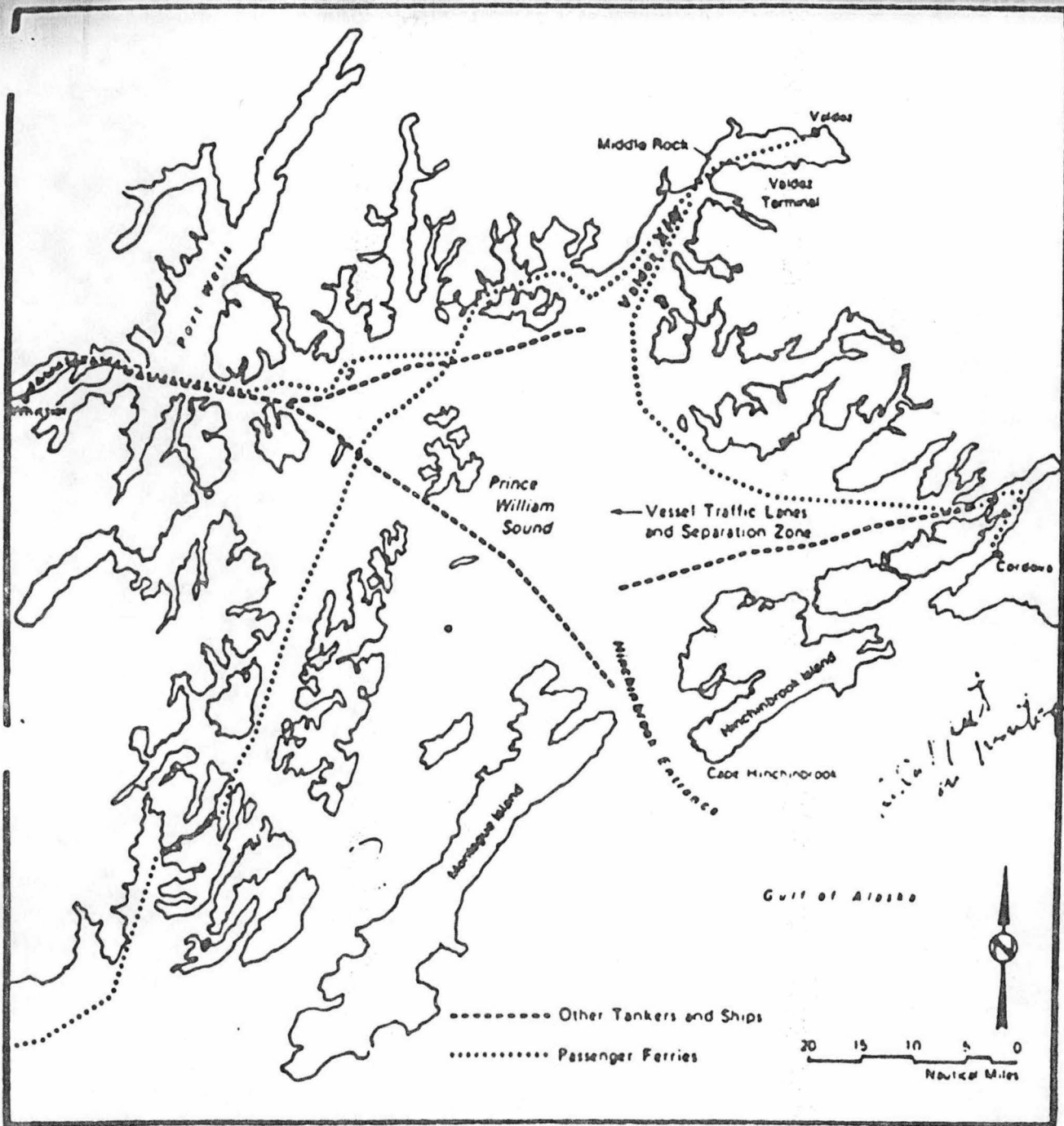
IN-SEASON FISH SPECIES

6-122

Figure 605-13

See Figure:	513-1 Tanner Crab	513-2 Dungeness Crab	513-3 King Crab	513-4 Salmon ^a	513-5 Salmon ^{a,b}	513-6 Salmon ^{b,c}	513-7 Shrimp	513-8 Herring	513-9 Herring Red-on- Kelp	513-10 Halibut	513-11 Ground- fish	513-12 Razor Clam
January	X		X				X				X	
February	X		X				X				X	
March	X		X				X				X	
April	X						X	X	X		X	X
May	X						X	X	X	X	X	X
June 1-15										X	X	X
June 15-30					X					X	X	X
July 1-15					X	X				X	X	X
July 15-31				X		X				X	X	X
August 1-10				X		X				X	X	X
August 10-25						X				X	X	X
August 25-31						X				X	X	X
September		X								X	X	X
October 1-15		X	X				X			X	X	X
October 15-31	X	X	X				X				X	X
November	X	X	X				X				X	
December 1-15	X	X	X				X				X	
December 15-31	X		X				X				X	

^aPurse seine method ^bDrift gill net method ^cSet net method



VESSEL TRAFFIC LANES AND SEPARATION ZONE

Figure 605-14



SPORT FISHING (Major Use Areas)

Figure 605-15

In this section, a brief history, other pertinent information and the potential effects of an oil spill on the following wildlife species (or groups of species) that inhabit Prince William Sound are discussed: salmon, sea otters, clams, birds, herring, crabs, Steller's sea lions, harbor seals, whales, black bears, brown bears and Sitka black-tailed deer. The purpose of this section is to provide personnel with pertinent information on the wildlife species that are most likely to be affected by an oil spill or that will draw the most public attention in the event of an oil spill.

The following species or groups of species are not discussed: most intertidal and benthic invertebrates; plankton; most species of fish; most aquatic plants, including kelp and other algae and eelgrass; and most terrestrial mammals.

In general, there is relatively little information available on one or more aspects of the biology, temporal and spatial distribution, ecological importance and sensitivity to oil for most of the above groups of organisms, even though some such plankton are known to be very important in the structure, function and maintenance of the marine community. In addition, either they have little direct economic value (e.g., most benthic invertebrates) or their populations are not likely to be significantly affected by an oil spill (e.g., terrestrial mammals or plankton), or both.

Additional references which will be used when considering response actions during an oil spill are NOAA's Atlas of Coastal Resources and the Alaska Department of Fish and Game's Alaska Habitat Management Guide. These are available in the Anchorage and Valdez Contingency Centers.

Salmon

Biology: On a long-term average, about 3.5 million salmon enter Prince William Sound each year. Of this total population, approximately 70 percent are pink salmon, 25 percent are chum salmon, 4 percent are sockeye salmon and the remaining 1 percent are coho and chinook (king) salmon. All the salmon species except Chinook enter the Sound to spawn. Since populations of coho and chinook salmon are comparatively small, these two species are not discussed in detail.

Besides being a major source of income for the people living in the Prince William Sound area, pink, chum and sockeye salmon are also important to the Prince William Sound ecosystem. The adults and fry (juveniles) of these species feed on fish and zooplankton (small free-floating animals). In turn, all life-history stages of the salmon, from the egg to the adult, are important sources of food as some time of the year for bears and for a variety of birds, fish, marine mammals, and marine and freshwater invertebrates.

Salmon spawn in most of the streams and rivers that drain into the Sound. There are approximately 168 streams in Prince William Sound that are considered significant salmon producers, i.e., having an annual average spawning population of 2,000 or more fish. These streams sustain approximately 80 percent of the salmon produced in the Sound. This plan located these streams and specifies exclusion actions (Section 404) that will be taken to protect them if threatened by an oil spill. Figure 605-4, 605-5, 605-6 shows areas of salmon fishing.

Since most of the streams are short and swift with little suitable upstream spawning habitat, there is more intertidal salmon spawning in Prince William Sound than in any other place in Alaska.

On the average, intertidal spawning constitutes 50 percent of the total odd-year pink and chum salmon spawning activity and 75 percent of the even-year activity. The remainder of the population spawns upstream of the high tide line. In the intertidal zone, survival of eggs and fry is most successful in the zone between mean high tide and midtide. Below about midtide, the eggs are bathed in salt water much of the time, and above mean high tide, the eggs may be exposed to extreme winter air temperatures.

Pink Salmon: Pink salmon migrate into the streams of Prince William Sound from June to October. When they reach their spawning grounds, the female digs a shallow depression, called a redd, in the gravel of the stream bed. Eggs and milt (sperm) are deposited in the redd and covered with gravel. Both the adult female and the male pink salmon die shortly after they spawn.

Eggs hatch from November to January, and the larvae (young salmon still possessing a yolk sac) stay in the gravel until April, May or June. Immediately after emerging from the gravel, the juvenile fish (fry) move to estuaries at the mouths of the spawning streams where they feed in shallow water, often near shore. They migrate to the sea later in the summer. After spending one year at sea, the pink salmon return to their spawning grounds to begin the cycle again.

Chum Salmon: Chum salmon have essentially the same life history as the pink salmon, except that chum salmon remain at sea from two to six years before returning to the spawning grounds.

Sockeye Salmon: Sockeye salmon spawn from June to September in the inlet and outlet streams of lakes and in the lakes themselves. Like the pink and chum salmon, the female sockeye digs a redd in the gravel of the stream bed or lake bottom. Eggs and milt are deposited in the redd and covered with gravel. Both the adult female and the male sockeye salmon die shortly after they spawn.

The eggs hatch from September to January. The larvae remain in the gravel until April. When the fry emerge from the gravel, they migrate to lakes where they stay for one to four years before moving to the sea. After one to three years at sea, adult sockeye salmon migrate back to their spawning grounds to begin the cycle again.

There are few lake systems within Prince William Sound that are suitable habitat for sockeye salmon; consequently, the population is not large compared to that of pink or chum salmon. Major spawning areas for sockeye salmon in the Sound are Billy's Hole Lake, Esther Passage Lake, Eshamy Lake, Jackpot Lake, Bainbridge Lake and Coghill Lake.

Sea Otters

In 1974, the sea otter population in the Sound was estimated at 5,000 animals, and it appears to be expanding. The species is protected by federal and state laws, as well as by international treaty.

Sea otters are generally distributed throughout the Sound, but the main concentration occurs in a band from Point Nowell and Port Fidalgo to the southern end of the Sound. They are most frequently found in relatively shallow water around the islands and along the mainland of Prince William Sound.

These animals do not migrate and seldom travel long distances unless an area becomes overcrowded and food becomes scarce. They are gregarious and may concentrate in an area, but they do not form herds like many other marine mammals.

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Sea otters spend almost all of their lives in the water, but occasionally come up on shore, especially during storms. Except in unusual circumstances, they never move more than a few yards from the sea.

Unlike seals and sea lions, which have a thick, insulating layer of blubber, the sea otter depends on air trapped in its fur for warmth and buoyancy. If the fur becomes soiled or matted, it loses its buoyant and insulating qualities. Consequently, sea otters spend much of their time cleaning and grooming their fur.

Sea otters feed on fish, sea urchins, rock oysters, crabs, mussels, snails, clams and octopus. They require large amounts of food to remain healthy and are probably an important predator in the Prince William Sound marine ecosystem.

It is believed that sea otters have very few natural enemies and that predation is an insignificant mortality factor in their populations. Killer whales are thought to be the only frequent predator of the species.

Most sea otter pups are born in the late spring or early summer. Mating occurs at all times of the year, however, and pups are born throughout the year. Pups stay with their mothers for about a year, and the female sea otter probably does not mate while tending a pup. Consequently, a mature female has, on the average, only one pup every two years.

Clams

A large proportion of the more than 100 species of clams known to inhabit the waters of Alaska occur in Prince William Sound. However, only a few are abundant enough to be of potential economic value commercially or for personal use. Figure 605-12 shows where the clam fishery is active. The most important species are the razor clam, butter clam, little neck and cockle.

These clams most frequently inhabit the intertidal zone where the substrate is fine sand, silt, small gravel or a combination of these materials. Large populations may live in the subtidal zone to depths of about 60 feet. They burrow into the bottom, leaving only their necks (siphons) protruding above the surface of the sand or mud. When disturbed, clams retract their siphons. The razor clam is also capable of burrowing deeper into the bottom at a rate approaching 2 feet per minute.

Clams feed on plankton and detritus suspended in the water column. The clam draws water and any suspended particles (including oil droplets) in through its siphon, passes it over the gills (which sort out the "food" particles), and passes waste products and water back out through the siphon.

Clams are an important source of food for a variety of marine fish and invertebrates such as starfish, snails (especially moon snails) and crabs. They are also eaten by sea otters and a variety of shorebirds.

Generally, clams spawn after the water temperature exceeds 50° F. Male and female clams release eggs and sperm through their siphons and fertilization of the eggs takes place in open water. The fertilized eggs hatch into larvae that are planktonic and free-swimming. After several weeks, the larvae develop shells and settle to the bottom.

Although clams are abundant, commercial harvests in the Sound in recent years have been quite low. Primarily, razor clams have been harvested for crab bait. Recent low clam harvest is due to the high cost of harvesting and processing the clams, the potentially (and unpredictable) high levels of paralytic shellfish poisoning toxin, and the presence of pollutants, especially *E. coli* bacteria from sewage. Pollutants are a particular problem on the mud flats near Cordova, where commercial harvests of razor clams were once conducted. Near population centers, there are numerous beds of little necks, butter clams and cockles that local residents dig for personal use.

Birds

Prince William Sound is used by waterbirds and shorebirds as a staging and resting area during their annual migration to breeding grounds elsewhere in Alaska. Some linger for several weeks, but most stay in the area for only a few hours to a few days. Common migrants through the Sound include pintails; whistling swans; ruddy and black turnstones; surfbirds; whimbrels; American golden and black-bellied plovers; glaucous-winged gulls, mew and Bonaparte's gulls; white-winged, surf and common scoters; oldsquaws; greater scaups; cormorants; western sandpipers; dunlins; red knots; sandhill cranes; Canada geese; snow geese and arctic terns.

At least 14 species of waterfowl, gulls, terns and other sea birds are known to nest and feed in the Sound during the summer (see Figure 604-1 for a listing). The black-legged kittiwake, Kittlitz's and marbled murrelets, mew and glaucous-winged gulls, arctic tern, pigeon guillemot and tufted puffin are apparently the most common summer breeders in the area. Other birds that frequent the Sound in summer include horned puffins, double-crested cormorants, Bonaparte's gulls, auklets, black oystercatchers and thick-billed and common murre.

Many of the birds that breed and nest in Prince William Sound during the summer maintain colonies on coastal bluffs, rocks, sea stacks, islets and barrier islands above the high tide line. Figure 604-2 is a map of Prince William Sound showing the division of the Sound into sections. These sections are represented by Figures 604-3 through 604-9, showing the locations of seabird colonies. The most common species that use this type of habitat include black-legged kittiwakes, glaucous-winged gulls, arctic terns, pigeon guillemots and common murre. Some species, such as the northern phalarope, breed in marshes. Others, such as Kittlitz's murrelet, nest on glacial moraines or mountain scree. Bonaparte's gulls nest in trees at the heads of bays and fjords in the Sound.

During the fall, Prince William Sound is used heavily by birds migrating south. Numerous waterfowl, gulls, terns and shorebirds feed in tidal areas of the Sound during their fall migration. Severe southeast storms occur frequently in the Prince William Sound area during September and October. These storms hamper the migration of many species, and it is not uncommon for birds that normally migrate offshore to be blown into the Sound.

In late summer and fall, gulls, eagles and fish-eating ducks gather at the many salmon streams and intertidal spawning grounds to feed on salmon. Much of the glaucous-winged and mew gull population in the Sound can be found in and around salmon spawning grounds during the latter half of August and in September.

In the winter, the bird populations are relatively small. The most common winter residents of the Sound include the glaucous-winged and mew gulls, cormorants, murres and the Kittlitz's and marbled murrelets. Shorebirds, including rock sandpipers, dunlins, surfbirds, black turnstones and black oystercatchers frequent the rock shores and reefs of the tidal areas during the winter. Bald eagles, ravens, crows and gulls use the tidal flats and beaches as primary foraging sites. Mallard, greater scaup, common and Barrow's golden-eye, bufflehead, oldsquaw, harlequin ducks and a small population of Canada geese; white-winged, surf and common scoters; mergansers; loons; grebes and cormorants overwinter along the shores of bays and inlets in the Sound.

Herring

Fishable populations of herring can be found throughout much of the Sound as shown in Figure 605-8. However, the major commercial seining areas are Green Island, northwest Montague Island, and the area encompassing Columbia Bay, Heath Island, Glacier Island and Bligh Island. Major herring spawning grounds are the Tatitlek Narrows and nearshore shallow areas of Busby Island; the southern end of Knowles Head; Irish Cove; the eastern side of Naked, Peak and Perry Islands; the northern end of Eleanor Island; the northwestern side of Montague Island and the northeastern tip of Green Island.

Aside from their current and potential economic value, herring constitute an important component of the marine ecosystem. These fish feed on plankton (free-floating, small living plants and animals). In turn, they are an important source of food for various predatory mammals, birds and fish, particularly salmon and halibut.

In Alaska, herring commonly reach sexual maturity in their fourth year and spawn each year after that throughout their lives. The common maximum life span of the species is nine years. Females, on the average, produce 20,000 eggs per year.

Herring spawn in the spring. They generally deposit their adhesive eggs on eelgrass, rockweed, sea girdle and other algae in relatively shallow water below low tide, but they sometimes spawn on submerged trees, rocks, etc. The eggs hatch in 12 to 20 days, depending on the temperature of the water and the larvae remain in shallow, protected waters for six to eight weeks. After the larvae develop into scaled juveniles, the fish begin to collect into small schools and gradually move seaward. By early fall, large schools (as many as one million fish) form and most of them move into deep water.

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Crabs

Tanner (Snow), Dungeness and king (golden, blue and red) crabs are harvested commercially in Prince William Sound as shown in Annex 513. The distribution of these crabs in the Sound is not fully understood. At present, the major king crab fishery is in Sheep Bay, Port Fidalgo, Gravina Bay and the Port Wells area. Most Dungeness crabs are harvested from Orca Bay. Some tanner crabs are taken in Port Fidalgo and Valdez Arm, but most of the fishery is in Orca Bay, Port Gravina and in the southeastern section of the Sound out through Hinchinbrook Entrance. Dungeness crabs may be found in shallow water at the heads of bays, mud flats, etc., but most other crabs favor deeper water for most of their life cycle. Tanner and king crabs occur in shallow subtidal waters as juveniles.

Crabs must molt, or shed their old shells, for growth to occur. They may take as much as three to five years to become sexually mature. After mating, female crabs carry the fertilized eggs until they hatch into small planktonic crab larvae. The larvae are free-swimming and drift with the tides and prevailing ocean currents for one to four months. The larvae go through several molts during the planktonic stage, but they eventually lose their ability to swim, settle to the bottom and take on the appearance of adult crabs.

Crabs are predators and scavengers. In turn, crabs are preyed on by a variety of fish and marine mammals.

Steller's Sea Lions

In 1974, the Steller's sea lion population of Prince William Sound was estimated at 6,500 to 7,500 animals. From about May to late fall, most of the population can be found in six rookeries and summer hauling areas located on the east and west coast of the Sound. In the winter, these animals are often seen in the more sheltered waters of the Sound. Although sea lions are strong swimmers capable of relatively deep dives, they spend most of their time in water less than 50 fathoms deep.

Steller's sea lions feed primarily on fish such as rockfish, sculpin, greenling, sand lance, salmon, herring, halibut and on crustaceans such as shrimp and crab. Like the sea otter, the sea lion has few natural enemies except killer whales, and predation is a relatively insignificant mortality factor in its populations.

Breeding female and mature bulls begin congregating at rookeries in May. Bull sea lions start defending territories and forming harems in late May. Pups are born at the rookeries from late May through June, but primarily during the first two weeks of June. Most females have only one pup, but twins are born occasionally. Most females breed again within a week to ten days after giving birth to their pups. Breeding ends by approximately mid-July; and as winter approaches, the sea lions leave the rookeries for more protected water within the Sound.

Harbor Seals

There are no precise estimates of the harbor seal population of Prince William Sound because of the difficulty counting them. During a survey conducted in June 1974, 5,640 were recorded, but the population is believed to be much larger.

Harbor seals range throughout the Sound. Although they spend most of their time in the water, they occasionally come out on shore on floating pieces of ice from glaciers and on ice shelves that form at the mouths of streams.

Harbor seal pups are born between late May and mid-July with the majority of pups born the first three weeks of June. Birth occurs on sandy beaches, remote reefs and rocks and glacial ice pans. Females generally give birth to only one pup, but twins do occur. Pups are nursed for approximately three to four weeks. The females mate again shortly after they stop nursing their pups.

Harbor seals feed on a wide variety of fish including herring, flounder, eulachon and salmon; mollusks such as octopus and squid; and probably various crustaceans such as shrimp and crab.

Whales

The most common whales found in Prince William Sound are tooth whales such as Dall's porpoises, Pacific harbor porpoises and Pacific killer whales; but baleen whales, especially humpback whales, are also present. All of these species except the humpback whale are year-round residents of the Sound.

An adult Dall's porpoise may reach a length of 5 to 7 feet and weigh about 250 pounds. This porpoise ranges throughout the Sound in groups of 2 to 12 animals in search of small fish, squid and crustaceans. Dall's porpoises do not appear to be particularly wary of human beings and frequently follow boats. They usually do not enter sheltered bays and inlets.

The Pacific harbor porpoise is smaller and shyer than the Dall's porpoise. It is commonly found in bays, inlets, fjords and at the mouths of rivers in Prince William Sound. The harbor porpoise also feeds primarily on small fish, squid and crustaceans.

The Pacific killer whale reaches a length of up to 30 feet. It is common throughout the Sound, particularly in the Bay, Orca Inlet and southern Knight Island Passage. Killer whales generally hunt in groups of 3 to 50, but groups of as many as 100 animals have been observed in the Sound. They normally range throughout the area in search of seals, sea lions, sea otters, porpoises, fish, squid and marine birds.

The humpback whale may reach a length of 30 to 40 feet and a weight of 30 tons. This species is a baleen whale, i.e., instead of teeth, it has coarse, brush-like strips (baleen) that hang from the roof of its mouth. Humpback whales strain water through their baleen, filtering out small aquatic animals, such as shrimp, zooplankton and small fish. Humpback whales may eat as much as 200 pounds of food a day.

Humpback whales spend the summer months in northern seas. In Prince William Sound, they are most frequently sited in open waters such as Port Fidalgo, Port Wells, Perry Passage, Knight Island Passage, Blying Sound and Hinchinbrook Entrance. In the fall, these whales migrate to winter breeding grounds near the equator.

Black Bears

Black bears are common on the mainland of Prince William Sound, especially the western part of the Sound. They occur on some islands but are notably absent from Hinchinbrook and Montague Islands, where brown bears are common. Generally, black bears spend most of their lives within five miles of their birthplace, and males tend to range more widely than females.

Black bears inhabit relatively open forests that contain fruit-bearing shrubs and herbs, grasses, forbs and other sources of food. In spring, grasses, sedges and other early-sprouting, herbaceous plants make up the bulk of a black bear's diet. In summer, berries, insect larvae and carrion become important. In late summer, black bears congregate along salmon streams to gorge themselves on spawning salmon.

Black bears breed from mid-June through mid-July. The young are born in the den in late January or February. Cubs stay with the sow through the next year, spending the winter in her den. The sow separates from the cubs the following spring, when she again breeds.

The exact timing and duration of the black bear's winter denning period varies according to climatic conditions and the physical condition, sex and age of the individual bear. Generally, denning begins in October and extends through early May.

Denning sites are extremely variable. Some bears spend a great deal of energy excavating compartments beneath logs, stumps or rock outcroppings. Others spend the winter with relatively little shelter.

There is a possibility that cleanup crews could come into contact with black bears during exclusion or cleanup operations conducted on salmon spawning streams between August and late October. These bears are normally quite wary of man; however, they have been known to attack humans with no apparent provocation, and they will vigorously defend their cubs and food supplies. Cleanup crews should consider them dangerous and avoid them whenever possible.

Brown Bears

Brown bear populations are found on Hinchinbrook Island, Montague Island and on the mainland from Port Fidalgo eastward. A few brown bears have been reported on Hawkins Island and on the western side of the Sound. Like black bears, brown bears do not range far from their birthplace. Tagging studies have shown that movements beyond 30 miles are unusual.

Unlike the black bear, the brown bear appears to prefer relatively open areas and is often found in extensive meadows or other grassland-like habitats. In spring, grasses, sedges and other early-sprouting, herbaceous plants make up the bulk of their diet; in summer, brown bears feed on berries, insect larvae, small rodents and carrion. In late summer, they congregate along salmon spawning streams to gorge themselves on salmon.

Brown bears breed from May through mid-July, and the cubs are born in the den in late January or February. Most cubs nurse for one or two summers and a few for three summers. Generally, the female separates from the cubs in the spring of their third year, when she again breeds. During the time cubs accompany the sow, maternal instinct is very strong and she will defend her cubs vigorously.

The exact timing and duration of the brown bear's winter denning period varies according to climatic conditions and the physical condition, sex and age of the individual bear. Generally, denning begins in late October and extends through April or early May. Females and young apparently den earlier in the fall and emerge later in the spring than do old males.

A variety of sites may be used for denning. An excavation may be made by the bear, but usually natural shelters between tree roots and under rocks are used. Den sites most often occur on hillsides or high on mountain slopes.

There is a possibility that cleanup crews could come into contact with brown bears during exclusion or cleanup operations conducted on salmon spawning streams between August and late October. These bears may be dangerous and cleanup crews should avoid them whenever possible.

Sitka Black-Tailed Deer

In Prince William Sound, Sitka black-tailed deer are found primarily on the larger islands, e.g., Montague, Hinchinbrook and Hawkins. Over most of their range, Sitka deer are seasonally abundant and constitute an important source of sport and subsistence hunting for residents of the Sound.

During the spring and early summer, Sitka deer follow the receding snowline up mountain slopes, feeding on sprouting shrubs and forbs. By July, most deer are on their summer range in Alpine mountain meadows. With the coming of winter, the deer are forced to move to lower elevations to find food. If the winter is mild, the deer can obtain browse such as blueberry and salmonberry twigs in the forests near the coast. However, if the winter is severe, snow covers this browse even in the densest timber stands. Under these conditions, the deer are forced to move onto open beaches to find food. Usually by the time they do this, they are suffering from malnutrition. On the beach, the only food that is normally available to the deer is kelp and other seaweed, which have no food value for the deer. Consequently, many deer starve to death even with full stomachs.

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Lewis F. Gordon
ASHBURN & MASON
1130 W. Sixth Avenue
Suite 100
Anchorage, Alaska 99501
(907) 276-4331

FILED

MAR 26 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By _____ Deputy
Hon. H. Russel Holland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) Case No. A89-095 Civil
EXXON VALDEZ OIL SPILL LITIGATION) (Consolidated)
_____)

Re: Case No. A89-095

SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS
P-1, P-3, P-11, P-12 AND P-10 IN OPPOSITION TO
ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
AS TO PLAINTIFFS SAID TO HAVE NO PHYSICAL IMPACT OR INJURY

This brief supplemental memorandum is filed on behalf of several of the plaintiffs which the Alyeska defendants' Motion for Judgment on the Pleadings seeks to have dismissed from this litigation on the theory that they are not permitted to sue for "purely economic" injury. These plaintiffs are Sea Hawk Seafoods, Inc.; Sagaya Corporation; Seafood Sales, Inc.; Rapid Systems Pacific, Ltd.; and Alaska Wilderness Sailing Safaris. These plaintiffs adopt, and do not repeat here, the arguments presented in the Joint Memorandum for Plaintiffs in Opposition to Alyeska Defendants' Motion for Judgment on the Pleadings as

SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS P-1 ET AL. IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

1 to Plaintiffs Said to Have No Physical Impact or Injury, which
2 is being filed contemporaneously herewith. The purpose of this
3 supplemental memorandum is to provide the Court with a brief
4 description of the business engaged in by each of these
5 plaintiffs sufficient to show that their claims against the mov-
6 ing defendants could not be dismissed as a matter of law under
7 any applicable standard, State or federal.¹

8 The facts outlined herein were not alleged in detail in
9 the Amended and Consolidated Class Action Complaint
10 ("Complaint") to which these plaintiffs are signatories because
11 such pleading of evidence would unnecessarily and inap-
12 propriately have added to the length of an already long
13 complaint. Proof of these facts would naturally be permissible
14 under the more general allegations of the Complaint, and would
15 more than suffice to require denial of the extraordinary relief
16 of dismissal under the familiar principles outlined in the Joint
17 Memorandum. If it were, however, deemed necessary for each
18 plaintiff to make detailed allegations as to the nature of its
19 injury, this could readily be done by further amendment of the
20 Complaint.

21
22
23 ¹ Dismissal of the claims against the Alyeska defendants
24 would not in any event eliminate these plaintiffs from the
25 litigation because, as noted in the Joint Memorandum, they have
26 claims against the Exxon defendants which could not conceivably
27 be eliminated on the theory of the Alyeska motion.

1 As the Joint Memorandum explains in detail, the motion
2 must be denied as to each plaintiff which raises a factual issue
3 concerning its eligibility for relief under the criteria of
4 either Alaska law or the purely federal maritime law established
5 for the Ninth Circuit in Union Oil Co. v. Oppen, 501 F.2d 558
6 (9th Cir. 1974). In summary, these criteria are, under Alaska
7 law, whether "defendants knew or reasonably should have foreseen
8 both that [these] particular plaintiffs or an identifiable class
9 of plaintiffs [to which they belong] were at risk and that
10 ascertainable economic damages would ensue" from an oil spill in
11 Prince William Sound. Mattingly v. Sheldon Jackson College, 743
12 P.2d 356, 360 (Alaska 1987).² Under purely federal maritime
13 law, the criterion is whether the plaintiffs have alleged "a
14 pecuniary loss of a particular and special nature, limited to
15 the class * * * which they represent," as they do in an oil
16 spill context if they "lawfully and directly make use of a
17 resource of the sea * * * in the ordinary course of their busi-
18 ness." Oppen, 501 F.2d at 570. Although the State and federal
19 criteria are, as the Joint Memorandum shows, essentially the
20 same, the following discussion is keyed more toward the language
21 of Oppen because the movants apparently believe that the purely
22 federal law it states is stricter than Alaska law.

23
24 ² The Alaska Environmental Conservation Act,
25 AS § 46.03.822 et seq., is even broader. See Joint Memorandum
26 pp. 8-9.

26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

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1. Sea Hawk Seafoods, Inc.

Sea Hawk "is an Alaska Corporation whose principal place of business is in Valdez, Alaska. Sea Hawk purchases, processes and resells fish and shellfish harvested in Prince William Sound * * *" (Complaint ¶ 47). Sea Hawk is the largest resident-owned seafood processor in the State and the fourth largest employer in Valdez, employing more than 10 percent of the local workforce on an annual basis and 16 percent on a seasonal basis. Sea Hawk has a single large processing plant at the water's edge in Valdez, and all of the seafood it processes comes from the Prince William Sound area, i.e., the area adversely affected by the EXXON VALDEZ oil spill. It is the fourth largest processor of Prince William Sound seafood, handling some 10 percent of the annual harvest.

It is evident that Sea Hawk's economic well-being is wholly dependent upon the Prince William Sound harvest of fish and shellfish. Economic and transportation barriers preclude its processing seafood from other areas, and its large fixed investment in plant and equipment is not suitable for any other use (as a result, inter alia, of regulatory restrictions imposed by the federal Food and Drug Administration). In fact, the effect of the EXXON VALDEZ disaster in 1989 was to reduce Sea Hawk's processing volume to approximately 25 percent of what it

SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS P-1 ET AL. IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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2. Sagaya Corporation.

Sagaya "is an Alaska corporation whose principal place of business is in Anchorage, Alaska. Sagaya purchases, processes and resells herring roe on kelp harvested in Prince William Sound and is engaged in wholesale and retail sales of fish and shellfish harvested in Prince William Sound. Sagaya also purchases and resells macrocystis kelp for use by roe pounders in Prince William Sound" (Complaint ¶ 48). Sagaya leases and uses Sea Hawk's Valdez plant during the time when herring roe on kelp is processed (which precedes the fisheries which Sea Hawk itself processes). Its position in this regard is, therefore, essentially the same as that of Sea Hawk. During 1989, Sagaya's processing business was nonexistent because the herring roe fishery was closed; it therefore lost all of its potential profits. In addition, Sagaya itself operates a roe pound and a boat (making it in that respect a fisherman outside the purported scope of the Alyeska motion). And it ordinarily deals directly with fishermen as a supplier of kelp; this business also was foreclosed for 1989 by the oil spill.

3. Seafood Sales, Inc.

Seafood Sales "is a Washington corporation whose principal place of business is in Seattle, Washington. Seafood Sales is a wholesale broker of fish and shellfish harvested in

SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS P-1 ET AL. IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

1 Prince William Sound" (Complaint ¶ 49). Seafood Sales deals
2 exclusively in Alaskan fish and shellfish, mostly for the
3 international market. Roughly half of its business in an
4 ordinary year involves fish and shellfish processed by Sea Hawk,
5 and substantially all of Sea Hawk's sales are made through
6 Seafood Sales. Therefore, Seafood Sales stands in Sea Hawk's
7 shoes to a significant extent.

8
9 4. Rapid Systems Pacific, Ltd.

10 Rapid Systems Pacific ("RSP") "is an Alaska Corporation
11 whose principal place of business is in Anchorage, Alaska. RSP,
12 a freight forwarder, transports for hire processed fish
13 harvested in Prince William Sound and processed in Valdez,
14 Alaska" (Complaint ¶ 50). All of Sea Hawk's product is shipped
15 through RSP, as is the product of the second largest processor
16 in Valdez; collectively, they account for 90 percent of RSP's
17 business, with the rest accounted for by other smaller proces-
18 sors. RSP leases large volumes of space on cargo ships between
19 Anchorage and Seattle. Its business is dependent upon the
20 volume of processed fish moving from Valdez because processors
21 elsewhere have direct exclusive arrangements with shipping
22 companies. As a result of the oil spill, RSP lost the majority
23 of its business in 1989 and its volume of shipments was too
24 small to obtain favorable lease rates for shipping space. RSP

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26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

1 operated at a loss in 1989, having been profitable in the
2 preceding years.

3 5. Alaska Wilderness Sailing Safaris
4

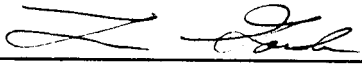
5 Alaska Wilderness Sailing Safaris ("AWSS") "is a sole
6 proprietorship of R. James Lethcoe, Ph.D., a citizen and
7 resident of Valdez, Alaska. Dr. Lethcoe and his wife, Dr. Nancy
8 Lethcoe, are authorities on the natural environment of Prince
9 William Sound. AWSS, whose principal place of business is
10 Valdez, Alaska, operates sailboat tours on Prince William Sound,
11 charters and sells sailboats on Prince William Sound" (Complaint
12 ¶ 51). Its dependence upon the waters and beaches of Prince
13 William Sound is evident. AWSS has reached a settlement with
14 Exxon for its 1989 losses caused by the oil spill, but maintains
15 its claim for future losses.

16 These facts, which would be proved and supplemented at
17 trial, more than suffice to bring each of these five plaintiffs
18 within the coverage of Oppen, and a fortiori within the coverage
19 of the Alaska law of remedies which applies in this litigation.
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26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

1 Respectfully submitted this 26th day of March, 1990.

2
3 ASHBURN & MASON
4 Attorneys for the Above-
5 named Plaintiffs

6 By 
7 Lewis F. Gordon
8 1130 W. Sixth Avenue, Suite 100
9 Anchorage, Alaska 99501
10 (907) 276-4331

11 DICKSTEIN, SHAPIRO & MORIN
12 Kenneth L. Adams
13 James vanR. Springer
14 2101 L Street, N.W.
15 Washington, D.C. 20037
16 (202) 785-9700

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26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
 JUDGMENT ON THE PLEADINGS

SONOSKY, CHAMBERS, SACHSE & MILLER
900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377

Lloyd Benton Miller
Sonosky, Chambers, Sachse
& Miller
900 W. 5th Avenue, Suite 700
Anchorage, Alaska 99501

Liaison Counsel for Consolidated Plaintiffs

Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
the EXXON VALDEZ) Case No. A89-095 Civil
_____) (Consolidated)
THIS DOCUMENT RELATES TO)
ALL CASES)
_____)

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
THIRD JUDICIAL DISTRICT) ss.

ANNE C. SPEILBERG, being first duly sworn, upon oath, deposes and says that she is employed in the offices of Sonosky, Chambers, Sachse & Miller, 900 W. 5th Avenue, Suite 700, Anchorage, Alaska 99501 and that service of JOINT MEMORANDUM FOR PLAINTIFFS IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS SAID TO HAVE NO PHYSICAL IMPACT OR INJURY; SUPPLEMENTAL MEMORANDUM OF (P-278) THE COPPER RIVER FISHERMEN'S COOPERATIVE IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS; SUPPLEMENTAL MEMORANDUM ON BEHALF OF TENDER PLAINTIFFS IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS; SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS P-1, P-3, P-11, P-12 AND P-10 IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION

SONOSKY, CHAM RS, SACHSE & MILLER
900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377

FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS SAID TO HAVE NO PHYSICAL IMPACT OR INJURY; SUPPLEMENTAL MEMORANDUM OF THE USE AND ENJOYMENT CLASS IN OPPOSITION TO ALYESKA DEFENDANTS MOTION TO DISMISS SOME CLAIMS AND IN SUPPORT OF CLASS CERTIFICATION has been made pursuant to Pretrial Order No. 10 (with hand delivery to Mr. Serdahely and Mr. Flynn) and as appropriate to plaintiff counsel postage prepaid on this 26 day of March, 1990.

Anne C. Speilberg
ANNE C. SPEILBERG

SUBSCRIBED AND SWORN TO before me this 26 day of March, 1990.

Betty J. Alexander
Notary Public in and for Alaska
My Commission Expires: 5/16/91

1 otherwise would have been, turning a profitable business into
2 one with a substantial net loss even after certain payments by
3 Exxon.

4 The Sea Hawk processing plant receives fish and
5 shellfish directly from the boats of fishermen and tendermen at
6 the dock adjacent to its plant in Valdez. In addition to this
7 direct physical contact with the sea and boats, Sea Hawk also
8 has close contractual and financial relationships with
9 particular fishermen and tendermen. The company typically has
10 exclusive business arrangements with particular fishermen and
11 tendermen, and provides many of them financial assistance in the
12 form of cash advances or advance purchase orders for equipment
13 and supplies. Thus, Sea Hawk both directly makes use of a
14 resource of the sea and to a substantial extent stands in the
15 economic shoes of fishermen and tendermen. The effects on Sea
16 Hawk have been every bit as direct and foreseeable as those to
17 fishermen; it is obvious that fishermen must sell their fish to
18 processors and processors cannot do business unless they can buy
19 fish. The monumental economic injury Sea Hawk has suffered from
20 the EXXON VALDEZ disaster could not have been more foreseeably
21 "particular and special."

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26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

Honorable H. Russel Holland

FILED

MAR 26 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Kenneth M. Rosenstein, Esq.
LYNCH, CROSBY & SISSON
550 West Seventh Avenue, #1100
Anchorage, Alaska 99501
(907) 276-3222

Richard A. Bersin
Sandrin B. Rasmussen
FRANKLIN & BERSIN
3005 One Union Square
600 University Street
Seattle, Washington 98101-3115
(206) 583-0155

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)	
)	NO. A89-095 Civil
the EXXON VALDEZ)	
)	(Consolidated)
This document relates to)	
Action No: A89-446 Civil)	
)	
The Copper River Fishermen's)	
Cooperative v. Exxon Corporation,)	
et al.)	

(P-278)
**SUPPLEMENTAL MEMORANDUM OF THE COPPER
RIVER FISHERMEN'S COOPERATIVE IN OPPOSITION TO
ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

The Copper River Fishermen's Cooperative ("CRFC"), plaintiff in Cause No. A89-446, opposes the Alyeska defendants' motion for judgment on the pleadings on the grounds stated in the Joint Memo-

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1 random For Plaintiffs¹ and the facts and circumstances set forth
2 below. In moving for dismissal against CRFC, the Alyeska defendants
3 fail to recognize the unique nature of CRFC's claims as a fisher-
4 men's cooperative. Because the cooperative is comprised exclusively
5 of fishermen possessing a common interest in the cooperative's
6 processing and marketing activities on their behalf, the extensive
7 damages to CRFC caused by the oil spill have directly impacted the
8 member fishermen. Consequently, in addition to the reasons stated
9 in the Joint Memorandum For Plaintiffs, CRFC is entitled to maintain
10 claims for economic damages under state and federal law by virtue of
11 its status as a fishermen's cooperative and the motion for dismissal
12 of CRFC's claims must therefore be denied.

13 I.

14 **CRFC IS A COOPERATIVE COMPRISED**
15 **SOLELY OF FISHERMEN WHO DEPEND UPON AND**
16 **DERIVE ECONOMIC BENEFITS FROM THE COOPERATIVE**²

17 CRFC is an Alaska nonprofit cooperative, organized and existing
18 under A.S. 10.15, *et seq.*, and engaged in the business of processing
19 and marketing fish products for its member fishermen. CRFC has its
20 principal place of business in Cordova, Alaska. The cooperative is
21 comprised exclusively of fishermen (numbering approximately 100) who

22 ¹ This title refers to the Joint Memorandum For Plaintiffs
23 in Opposition to Alyeska Defendants' Motion for Judgment
24 on the Pleadings as to Plaintiffs Said to Have No Physical
25 Impact or Injury, dated March 26, 1990.

² Sections I and II of this Supplemental Memorandum summa-
rize certain facts relating to the nature of CRFC's coop-
erative business and its damage claims which the evidence
will establish in this federal court action.

1 are engaged in commercial fishing in Prince William Sound and other
2 waters off the coast of Alaska. Each member purchases one share of
3 the cooperative's capital stock to become a cooperative member.
4 CRFC was formed and continues to exist for the mutual benefit and
5 upon the mutual responsibility of its members who have a substantial
6 interest in combining their own efforts to process, market and sell
7 their fish through the cooperative and obtain the resulting economic
8 benefits (CRFC's Complaint, paragraph 6).

9 CRFC owns and operates a shoreline processing plant and fisher-
10 men's storage facilities in Cordova. CRFC processes, markets and
11 sells salmon caught by its member fishermen, including the following
12 species: reds, kings, chums, pinks and silvers. In addition, CRFC
13 processes and markets halibut and black cod purchased from nonmem-
14 bers. CRFC engages in the following herring production activities:
15 custom processing of seine caught sac-roe herring; purchasing and
16 processing of gillnet caught sac-roe herring; purchasing and pro-
17 cessing of roe-on-wild kelp; and custom processing of roe-on-pounded
18 kelp (CRFC's Complaint, paragraph 20).

19 Pursuant to marketing agreements authorized by AS 10.15.215,
20 the member fishermen of CRFC deliver to the cooperative their salmon
21 and other fish products for processing and marketing through the
22 cooperative. The fishermen do not sell their products to the
23 cooperative. CRFC provides tender services for collecting and
24 transporting fish caught by its members to CRFC. When CRFC receives
25 the fish caught by members at its shoreline processing plant, CRFC

1 then processes, freezes, packs and prepares the fish for shipment.
2 The cooperative markets and sells the members' own fish products as
3 a marketing agent on a nonprofit basis.

4 CRFC receives the gross proceeds of the sale derived from the
5 members' fish products. After deducting the cooperative's costs of
6 marketing fish products (including the costs of handling, process-
7 ing, packaging, storing and selling) and capital funds and other
8 items specified in CRFC's Bylaws, the remainder of the proceeds,
9 described as "margins", are distributed to the fishermen as net
10 proceeds of sale. Members receive a portion of the anticipated net
11 proceeds of sale in advance of the final distribution of margins.
12 The cooperative later distributes the margins accruing during each
13 fiscal year to the fishermen in accordance with the outcome of each
14 pool established by CRFC for the marketing of fish products, and in
15 the same proportion as the business provided by each fisherman.

16 Consistent with the recognized purposes of cooperative enti-
17 ties, significant benefits are derived by CRFC's members from the
18 joint pooling of resources to accomplish processing, marketing and
19 selling of fish products; such benefits could not be obtained if the
20 fishermen transacted business separately. In the broadest sense, a
21 cooperative is an economic association for self help. In a practi-
22 cal sense, it is a voluntary organization comprised of persons with
23 common interests, operated along democratic lines and existing for
24 the purpose of providing services at cost to its members, who supply
25 both capital and business. Packel, *The Organization and Operation*

1 of Cooperatives, p. 1, American Law Institute (4th Ed. 1970), p. 1.
2 Cooperatives are essentially nonprofit enterprises in the sense that
3 their members are not organized to make monetary gain for the
4 cooperatives as legal entities or for themselves as investors.
5 Instead, a cooperative is organized to obtain monetary gains for its
6 members as users of their services. Savage and Volkin, *Cooperative*
7 *Criteria*, FCS Service Report 71, Farmer Cooperative Service, U.S.
8 Dept. of Agric. (1965).

9 The fishermen of CRFC benefit from pooling efforts through a
10 nonprofit cooperative because the necessary tendering, processing
11 and marketing services can be procured at lower costs and with
12 better net returns from the sale of their fish products. The rela-
13 tionship between the cooperative and its members is symbiotic: the
14 cooperative cannot exist without its members; likewise, without the
15 cooperative, the member fishermen cannot obtain the economic bene-
16 fits of joint processing and marketing. That relationship distin-
17 guishes CRFC from other processors impacted by the oil spill who are
18 not organized as cooperatives comprised solely of fishermen, and
19 provides further grounds for denial of the Alyeska defendants'
20 motion for judgment on the pleadings.

21 II.

22 **THE EXXON VALDEZ OIL SPILL CAUSED**
23 **SUBSTANTIAL DAMAGES TO CRFC'S COOPERATIVE**
24 **BUSINESS, THEREBY DAMAGING MEMBER FISHERMEN**

25 CRFC sustained substantial damages to its 1989 salmon and
herring production and other economic losses as a direct result of

1 the EXXON VALDEZ oil spill. CRFC's operations with respect to
2 halibut and black cod were also damaged by the spill. Due to
3 economic losses caused by significant reductions in the volumes of
4 harvested fish and other detrimental effects of the oil spill, CRFC
5 has been unable to cover its operating costs and overhead expenses
6 for the 1989 fishing season. The resulting deficit has eliminated
7 any margins which could otherwise have been paid to fishermen. CRFC
8 remains in a deficit position, and its plans for operations during
9 the 1990 fishing season have been severely impeded. CRFC's finan-
10 cial damages are continuing in nature, threatening the very exis-
11 tence of the cooperative. (CRFC's Complaint, paragraph 20).

12 In the state and federal actions, CRFC has alleged claims³ in
13 its capacity as a cooperative. The individual fishermen who com-
14 prise CRFC have asserted separate, individual claims for their
15 losses of fishing revenue in class action suits and direct actions.
16 Nevertheless, the fishermen also have a vital stake in the outcome
17 of CRFC's lawsuit because CRFC's economic viability and existence as
18 a cooperative have been threatened by damages from the oil spill.
19 The fishermen joined CRFC to arrange for joint processing, marketing
20

21 ³ In the state court action, CRFC asserts claims against
22 Exxon and Alyeska defendants for: (1) strict liability
23 under the Alaska Environmental Conservation Act,
24 AS 46.03.822, *et seq.*; (2) common law claims for strict
25 liability and negligence; (3) misrepresentation claims;
and (4) public and private nuisance claims. In this
federal action, in addition to the claims described above,
CRFC alleges claims against Exxon and Alyeska defendants
for strict liability and negligence under the Trans-Alaska
Pipeline Authorization Act, 43 U.S.C. § 1653.

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for strict liability and negligence under the Trans-Alaska
Pipeline Authorization Act, 43 U.S.C. § 1653.

1 and sale of their fish through the cooperative, to achieve cost
2 savings and other benefits derived from their combined efforts.
3 Since CRFC has been damaged, the individual fishermen who are
4 members of CRFC and who derive economic benefit from its existence
5 have also been damaged, not only with respect to their own individu-
6 al claims for loss of revenue or margins, but also with respect to
7 their mutual interest in processing and marketing fish products
8 through the cooperative.

9 As demonstrated below and in the Joint Memorandum For Plain-
10 tiffs, CRFC's unique claims as a cooperative comprised of fishermen
11 are cognizable under Alaska state law, general federal maritime law
12 and applicable federal statutes. Dismissal of CRFC's claims will
13 destroy the cooperative and permanently damage its member fishermen.
14 Applying the stringent standards for Rule 12(c) motions, Alyeska
15 defendants' motion for judgment on the pleadings must fail as to
16 CRFC. CRFC should be allowed to present evidence demonstrating that
17 the damages to its cooperative processing and marketing business are
18 compensable.

19 III.

20 CRFC IS ENTITLED TO RECOVER FOR
21 ECONOMIC LOSSES SUSTAINED IN ITS CAPACITY AS A
22 COOPERATIVE UNDER ALASKA STATE LAW AND FEDERAL LAW

23 A. CRFC'S INCORPORATION OF THE JOINT MEMORANDUM

24 By this reference, CRFC concurs in and incorporates the argu-
25 ments set forth in the Joint Memorandum For Plaintiffs substantiat-
ing all plaintiffs' claims for economic damages. Specifically,

1 CRFC's claims are cognizable under Alaska law, including the strict
2 liability provisions of Alaska's Environmental Conservation Statute,
3 AS 46.03, et seq., and Alaska's common law of negligence providing
4 for recovery of foreseeable economic damages. Nothing under federal
5 law precludes this court from applying those state remedies.
6 Additionally, general federal maritime law and "TAPAA" are consis-
7 tent with application of the state law remedies allowing recovery
8 for economic losses by CRFC.

9 B. UNDER OPPEN, CRFC IS ENTITLED TO RECOVER ITS ECONOMIC DAMAGES
10 BECAUSE CRFC IS COMPRISED OF COMMERCIAL FISHERMEN

11 In *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), the
12 Court of Appeals concluded that commercial fishermen were entitled
13 to recover purely economic damages and the Alyeska defendants
14 acknowledge the *Oppen* court's holding (see Defendants' Memorandum in
15 Support of Rule 12(c) Motion, pp. 23, 24). In fact, the Alyeska
16 defendants concede that claims for economic damages are allowable
17 here if sought by commercial fishermen (Defendants' Memorandum in
18 Support of Rule 12(c) Motion, p. 24).

19 CRFC is commercial fishermen. It is comprised solely of
20 fishermen and was formed for the purpose of processing and marketing
21 their fish. Without the fishermen, CRFC does not exist and, without
22 CRFC, the fishermen cannot process and sell their own fish. If CRFC
23 ceased to exist, the fishermen would have to contract for the
24 services of a processor and/or marketing agent on a for-profit
25 basis. Utilizing CRFC, the fishermen perform those tasks for
themselves on a non-profit basis and retain greater profits to

1 themselves for their labors.

2 Damages sustained by CRFC also caused damages to the fishermen.
3 The oil spill has severely impacted the economic viability of CRFC's
4 business and diminished the benefits of cooperative membership to
5 the fishermen. The oil spill has substantially reduced the volumes
6 of fish available for processing and marketing by CRFC, thereby
7 reducing revenues and causing a deficit to CRFC. This has prevented
8 CRFC from meeting its overhead expenses and direct costs, and has
9 eliminated any margins which might otherwise have been revolved out
10 to the member fishermen. CRFC remains in a deficit position, and
11 its plans for operations during future seasons are being impeded.

12 CRFC's claims for economic damages are so interrelated to those
13 of its membership, commercial fishermen, that they should fall into
14 the category of damages which are expressly cognizable in a maritime
15 tort action under the *Oppen* court's rule. Consequently, the Alyeska
16 defendants' motion to dismiss CRFC's claims should be denied.

17 C. **CRFC HAS VALID CLAIMS FOR ECONOMIC DAMAGES BASED UPON THE**
18 **COMMON ADVENTURE DOCTRINE ESTABLISHED BY THE SUPREME COURT IN**
19 **SUCARSECO**

20 Under the rule of "common adventure" established in
21 *Aktieselskabet Cuzco v. The SUCARSECO*, 294 U.S. 394 (1935), CRFC is
22 entitled to recover its economic damages suffered as a result of the
23 oil spill. The *SUCARSECO* case arose out of a collision at sea
24 between the vessel TOLUMA and the vessel SUCARSECO. Both vessels
25 were at fault and both were damaged. While repairs were made to the
TOLUMA, her cargo was discharged and stored, then subsequently

1 reloaded and delivered. A general average statement was prepared
2 which apportioned between the owner of the TOLUMA and the cargo
3 owners the expenses and losses incurred as a result of the off-
4 loading of the cargo.

5 The cargo owners brought suit against the owners of the SUCAR-
6 SECO to recover their damages, including the amounts which they had
7 made as general average contributions. The ship owners contended
8 that the liability of the cargo owners to contribute in general
9 average resulted solely from a private contract of carriage, that
10 the SUCARSECO's owners were not a party thereto and that the cargo
11 owners' claim was derivative and not recoverable under the doctrine
12 of *Robins Dry Dock v. Flint*, 275 U.S. 303 (1927).

13 The U.S. Supreme Court disagreed, holding that the cargo
14 owners' damage, arising out of their participation in a "common
15 adventure" with the owners of the TOLUMA, resulted directly from the
16 negligence of the owners of the SUCARSECO. *Id.* at 404. The Court
17 said that the perils suffered and expenses incurred by the cargo
18 owners were common to the adventure and such sacrifices were to be
19 assessed in proportion to their share in the adventure. *Id.* at 401.
20 Thus, the court distinguished *Robins Dry Dock v. Flint* on its facts
21 and specifically allowed the co-adventurers' claims for purely
22 economic damages as a consequence of the maritime tort which, the
23 court said, could or should have been plainly foreseen. *Id.* at 401,
24 404.

25 Here, CRFC and its member commercial fishermen were engaged in

1 a common adventure: processing and marketing the fishermen's fish.
2 The businesses of CRFC and its fishermen are interdependent and they
3 have all sacrificed as a result of the damages incurred from this
4 oil spill in proportion to their share in the adventure. CRFC's
5 right, therefore, to bring a claim for damages does not stand on a
6 theory of subrogation or contract, but it arises directly and
7 foreseeably from the Alyeska defendants' negligence. Under the U.S.
8 Supreme Court's rule of common adventure established in *Sucarseco*,
9 among other grounds, CRFC's claims should not be dismissed.

10 IV.

11 CONCLUSION

12 For the reasons set forth above and in the Joint Memorandum For
13 Plaintiffs, CRFC respectfully requests that the court deny Alyeska
14 defendants' Rule 12(c) motion and allow CRFC the opportunity to
15 prove its entitlement to compensable damages under Alaska and
16 federal law.

17 DATED this 26th day of March, 1990.

18 LYNCH, CROSBY & SISSON

19
20 By Kenneth M. Rosenstein
Kenneth M. Rosenstein

21 FRANKLIN & BERSIN

22
23 By Sandrin B. Rasmussen
Richard A. Bersin
Sandrin B. Rasmussen
24 Attorneys for Plaintiff
25 The Copper River Fishermen's
Cooperative (P-278)

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FILED

1 Lewis F. Gordon
2 ASHBURN & MASON
3 1130 W. Sixth Avenue
4 Suite 100
5 Anchorage, Alaska 99501
6 (907) 276-4331

MAR 26 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By _____ Deputy
Hon. H. Russel Holland

7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ALASKA

9 In re)
10 EXXON VALDEZ OIL SPILL LITIGATION) Case No. A89-095 Civil
(Consolidated)

11 Re: Case No. A89-095

12 SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS
13 P-1, P-3, P-11, P-12 AND P-10 IN OPPOSITION TO
14 ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
15 AS TO PLAINTIFFS SAID TO HAVE NO PHYSICAL IMPACT OR INJURY

16 This brief supplemental memorandum is filed on behalf of
17 several of the plaintiffs which the Alyeska defendants' Motion
18 for Judgment on the Pleadings seeks to have dismissed from this
19 litigation on the theory that they are not permitted to sue for
20 "purely economic" injury. These plaintiffs are Sea Hawk
21 Seafoods, Inc.; Sagaya Corporation; Seafood Sales, Inc.; Rapid
22 Systems Pacific, Ltd.; and Alaska Wilderness Sailing Safaris.
23 These plaintiffs adopt, and do not repeat here, the arguments
24 presented in the Joint Memorandum for Plaintiffs in Opposition
25 to Alyeska Defendants' Motion for Judgment on the Pleadings as

26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

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1 to Plaintiffs Said to Have No Physical Impact or Injury, which
2 is being filed contemporaneously herewith. The purpose of this
3 supplemental memorandum is to provide the Court with a brief
4 description of the business engaged in by each of these
5 plaintiffs sufficient to show that their claims against the mov-
6 ing defendants could not be dismissed as a matter of law under
7 any applicable standard, State or federal.¹

8
9 The facts outlined herein were not alleged in detail in
10 the Amended and Consolidated Class Action Complaint
11 ("Complaint") to which these plaintiffs are signatories because
12 such pleading of evidence would unnecessarily and inap-
13 propriately have added to the length of an already long
14 complaint. Proof of these facts would naturally be permissible
15 under the more general allegations of the Complaint, and would
16 more than suffice to require denial of the extraordinary relief
17 of dismissal under the familiar principles outlined in the Joint
18 Memorandum. If it were, however, deemed necessary for each
19 plaintiff to make detailed allegations as to the nature of its
20 injury, this could readily be done by further amendment of the
21 Complaint.

22
23 ¹ Dismissal of the claims against the Alyeska defendants
24 would not in any event eliminate these plaintiffs from the
25 litigation because, as noted in the Joint Memorandum, they have
claims against the Exxon defendants which could not conceivably
be eliminated on the theory of the Alyeska motion.

26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

1 As the Joint Memorandum explains in detail, the motion
2 must be denied as to each plaintiff which raises a factual issue
3 concerning its eligibility for relief under the criteria of
4 either Alaska law or the purely federal maritime law established
5 for the Ninth Circuit in Union Oil Co. v. Oppen, 501 F.2d 558
6 (9th Cir. 1974). In summary, these criteria are, under Alaska
7 law, whether "defendants knew or reasonably should have foreseen
8 both that [these] particular plaintiffs or an identifiable class
9 of plaintiffs [to which they belong] were at risk and that
10 ascertainable economic damages would ensue" from an oil spill in
11 Prince William Sound. Mattingly v. Sheldon Jackson College, 743
12 P.2d 356, 360 (Alaska 1987).² Under purely federal maritime
13 law, the criterion is whether the plaintiffs have alleged "a
14 pecuniary loss of a particular and special nature, limited to
15 the class * * * which they represent," as they do in an oil
16 spill context if they "lawfully and directly make use of a
17 resource of the sea * * * in the ordinary course of their busi-
18 ness." Oppen, 501 F.2d at 570. Although the State and federal
19 criteria are, as the Joint Memorandum shows, essentially the
20 same, the following discussion is keyed more toward the language
21 of Oppen because the movants apparently believe that the purely
22 federal law it states is stricter than Alaska law.

23
24 ² The Alaska Environmental Conservation Act,
25 AS § 46.03.822 et seq., is even broader. See Joint Memorandum
26 pp. 8-9.

26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

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1. Sea Hawk Seafoods, Inc.

Sea Hawk "is an Alaska Corporation whose principal place of business is in Valdez, Alaska. Sea Hawk purchases, processes and resells fish and shellfish harvested in Prince William Sound * * *" (Complaint ¶ 47). Sea Hawk is the largest resident-owned seafood processor in the State and the fourth largest employer in Valdez, employing more than 10 percent of the local workforce on an annual basis and 16 percent on a seasonal basis. Sea Hawk has a single large processing plant at the water's edge in Valdez, and all of the seafood it processes comes from the Prince William Sound area, i.e., the area adversely affected by the EXXON VALDEZ oil spill. It is the fourth largest processor of Prince William Sound seafood, handling some 10 percent of the annual harvest.

It is evident that Sea Hawk's economic well-being is wholly dependent upon the Prince William Sound harvest of fish and shellfish. Economic and transportation barriers preclude its processing seafood from other areas, and its large fixed investment in plant and equipment is not suitable for any other use (as a result, inter alia, of regulatory restrictions imposed by the federal Food and Drug Administration). In fact, the effect of the EXXON VALDEZ disaster in 1989 was to reduce Sea Hawk's processing volume to approximately 25 percent of what it

SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS P-1 ET AL. IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

1 otherwise would have been, turning a profitable business into
2 one with a substantial net loss even after certain payments by
3 Exxon.

4 The Sea Hawk processing plant receives fish and
5 shellfish directly from the boats of fishermen and tendermen at
6 the dock adjacent to its plant in Valdez. In addition to this
7 direct physical contact with the sea and boats, Sea Hawk also
8 has close contractual and financial relationships with
9 particular fishermen and tendermen. The company typically has
10 exclusive business arrangements with particular fishermen and
11 tendermen, and provides many of them financial assistance in the
12 form of cash advances or advance purchase orders for equipment
13 and supplies. Thus, Sea Hawk both directly makes use of a
14 resource of the sea and to a substantial extent stands in the
15 economic shoes of fishermen and tendermen. The effects on Sea
16 Hawk have been every bit as direct and foreseeable as those to
17 fishermen; it is obvious that fishermen must sell their fish to
18 processors and processors cannot do business unless they can buy
19 fish. The monumental economic injury Sea Hawk has suffered from
20 the EXXON VALDEZ disaster could not have been more foreseeably
21 "particular and special."
22
23
24
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26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

1 2. Sagaya Corporation.

2 Sagaya "is an Alaska corporation whose principal place
3 of business is in Anchorage, Alaska. Sagaya purchases,
4 processes and resells herring roe on kelp harvested in Prince
5 William Sound and is engaged in wholesale and retail sales of
6 fish and shellfish harvested in Prince William Sound. Sagaya
7 also purchases and resells macrocystis kelp for use by roe
8 pounders in Prince William Sound" (Complaint ¶ 48). Sagaya
9 leases and uses Sea Hawk's Valdez plant during the time when
10 herring roe on kelp is processed (which precedes the fisheries
11 which Sea Hawk itself processes). Its position in this regard
12 is, therefore, essentially the same as that of Sea Hawk. During
13 1989, Sagaya's processing business was nonexistent because the
14 herring roe fishery was closed; it therefore lost all of its
15 potential profits. In addition, Sagaya itself operates a roe
16 pound and a boat (making it in that respect a fisherman outside
17 the purported scope of the Alyeska motion). And it ordinarily
18 deals directly with fishermen as a supplier of kelp; this busi-
19 ness also was foreclosed for 1989 by the oil spill.

20 3. Seafood Sales, Inc.

21 Seafood Sales "is a Washington corporation whose
22 principal place of business is in Seattle, Washington. Seafood
23 Sales is a wholesale broker of fish and shellfish harvested in
24
25

26 SUPPLEMENTAL MEMORANDUM FOR PLAIN-
27 TIFFS P-1 ET AL. IN OPPOSITION TO
28 ALYESKA DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

FILED

Charles P. Flynn
BURR, PEASE & KURTZ
810 N Street
Anchorage, Alaska 99501
(907) 276-6100

MAR 26 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Re _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

RE: A89-095, A89-135, A89-136, A89-139
A89-144, A89-238 AND A89-239

RESPONSE OF DEFENDANTS
D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21
TO ORDER NO. 23
(ISSUES REGARDING CLASS CERTIFICATION)

In Defendants' Memorandum in Opposition to the Motions of Certain Plaintiffs for Class Certification ("Defendants' Memorandum"), defendants outlined reasons why the certification of classes, as requested, would create large and unnecessary management problems for the Court and why the alternatives to class certification are administratively superior. In responding to the additional concerns presented in the four questions posed by the Court's March 1, 1990 Order, defendants have found it most efficient to respond first to questions 3 and 4 and then to questions 1 and 2.

RESPONSE TO QUESTIONS 3 AND 4

In their Memorandum, defendants argued to each Court, federal and state, that class actions should not be certified at

BURR, PEASE
& KURTZ
ENGINEERING CORPORATION
810 N STREET
ANCHORAGE, AK 99501
(907) 276-6100

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the present time, and certainly not in accordance with the certification requests presented by the class action plaintiffs. Question 3 inquires how specifically the non-class claims should be handled in the event the position advocated by defendants is adopted by the Court (or if, notwithstanding class certification, large numbers of plaintiffs opt-out). Question 4, on the other side of the coin, asks how a class action specifically would be superior to the management of non-class actions.

The answer to the two questions requires the defendants to present their specific vision of how the cases pending before the two courts may be managed so as to reach a just, efficient and fair disposition, within the shortest feasible time frame. Defendants believe that the following procedure, outlined of course only in the broadest terms within this ten page memorandum, will achieve those ends.

A. Claim Identification.

As demonstrated in Defendants' Memorandum (at pages 7-20), plaintiffs' proposed classes are ill-defined and include many purported claims that are highly dubious under applicable law. Denial of class certification is the superior way to proceed, because it will provide a vital screening function by requiring that those seeking recovery file individual claims for relief. That fact itself will insure that only those who truly believe they have legitimate claims, and significant rights to vindicate, will come forward and participate in the litigation

process.^{1/} Many of those with dubious claims, and those whose claims have been adequately compensated by the Exxon claims process, will not undertake the step of initiating suit.

Accordingly, within a reasonable period of time after the denial of class certification, both federal and state courts will have before them only those claimants who by the process of self-selection have advanced themselves as worthy of the attention of the federal and state judicial systems. This screening advantage will be lost if plaintiffs' ill-defined and overbroad classes are certified.

B. Utilization of the Judicial Process to Select Claims Entitled to Ultimate Adjudication.

Once an identifiable set of claims has been asserted by self-selected claimants, those claims may further be reduced at an early stage through motions based upon the pleadings or upon undisputed facts. One example of such an early motion that may eliminate claims lacking legal foundation is Alyeska's pending motion invoking rules of maritime law to define the limits of permissible recovery.

Eliminating meritless claims through motion practice will be substantially easier if classes are not certified than if they are. Legal defects may be identified far more quickly when plaintiffs are forced to state their cases individually than when they are allowed to lurk within the realm of an amorphous class. Class certification thus not only brings into court many

^{1/} All prospective claimants have received ample notice of their rights and tenders of legal representation. (Defendants' Memorandum at pages 73-74.)

speculative or inappropriate claims in the first place, but impedes the process of eliminating those claims promptly through motion practice.

C. Reducing the Number of Unresolved Claims By an Active and Effective Settlement Process.

It is, of course, a principal function of an effective case management program not only to eliminate dubious or spurious claims, but also to insure that valid claims are compensated as promptly and as finally as possible; and there is no process as prompt and as final as voluntary settlement. In Defendants' Memorandum (at pages 65-73), defendants describe the settlement and alternative dispute resolution program initiated and aggressively pursued by Exxon to this date which has resulted in payments of over \$185 million to over 9,700 individuals and entities, as well as an agreement to pursue alternative dispute resolution methods to achieve full and final settlements. That program is continuing and, it is hoped and expected, will result in the complete voluntary compensation of the bulk of compensable claims entirely outside the judicial process. If, at any time during the course of the litigation, the Court is of the opinion that the program is not succeeding in its aims, judicial assistance to the settlement process through special masters or professional mediators designated by the Court and compensated by the parties could be brought to bear to accelerate the settlement process./2/

2/ Such a settlement program is described in Section 33.27 of the Manual for Complex Litigation, Second (1985), citing In re MGM Grand Hotel Fire Litigation, 570 F. Supp. 913 (D. Nev. 1983). A similar program employing experienced retired judges to conduct

[Footnote continued on next page]

The Exxon settlement procedure, which forms a vital part of the framework for resolving claims in the absence of class certification, threatens to come to a jarring halt once a class is certified. The superstructure of the class will become the main vehicle for settlement, and payments to individuals inevitably will be set back many years while the mechanics of notifying and managing a class becomes the central focus of the litigation.

D. The Ultimate Adjudication of Claims.

The self-selection of litigants, the Exxon claims processing system and the alternative dispute resolution mechanisms it entails, any judicially supervised settlement program, and the early use of motions will eliminate many spurious claims and compensate many valid ones. For those claims that remain, numerous options are available. The precise method is best left to that period near the convening of final pretrial conferences when the exact shape of the problem is best known to the Court and to the litigants. At that time, several alternatives will exist:

The Bellwether or Test Case Trial. The Manual for Complex Litigation, Second, in Section 33.26, discusses the use of the so-called "bellwether" trial. In general, a representative case is tried resulting in liability conclusions which are made specific to factual issues that are common to most or all of the

[Footnote 2/ continued from previous page]

mini-hearings on compensatory damages, followed by an "award" to be accepted or rejected by each plaintiff, was utilized to produce settlements in the Paris Air Crash of March 3, 1974 litigation, MDL No. 172. See also Airline Disaster Litigation Report, 127 F.R.D. 405, describing the resolution of claims from the Air Crash Disaster Near Chicago, Illinois on May 25, 1979, MDL 391.

claims.^{3/} The parties may agree that the results of the bellwether trial will constitute a conclusive adjudication as to such facts; or, if such stipulation cannot be achieved, at least the results will demonstrate the likely adjudication of such facts and constitute a catalyst for settlement of the remaining claims.

Consolidated Trials. By the conclusion of the case management process, it may be possible to identify groups of plaintiffs with shared interests and able to agree upon representation by a single counsel or group of counsel. Under such circumstances, a variety of trial techniques would be possible of consideration.^{4/} For example, by suitable grouping of claimants and the designation of lead trial counsel, a single trial might be feasible to determine liability issues other than causation of damage. Manual for Complex Litigation, Second

3/ See generally 2 W. Schwarzer, A.W. Tashima & J. Wagstaffe, Federal Civil Procedure Before Trial, § 15:108, 15-19; § 15:89, 15-17 (1989). Courts have employed the bellwether trial concept in a wide variety of cases. See, e.g., Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 140 (1972) (noting selection of "bellwether plaintiffs for initial trial purposes" in action alleging violations of the Securities Exchange Act of 1934 and Rule 10b-5); Scott v. Monsanto, 868 F.2d 786, 787-788 (5th Cir. 1989) (district court employed bellwether trial of selected plaintiffs in chemical exposure claim; single trial too burdensome); Allen v. United States, 816 F.2d 1417, 1418 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (noting district court selected and tried certain "'bellwether' claims, in order to find a common framework for the rest"); In re Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1493 (D. Colo. 1989), (bellwether or test case is trial method frequently used where differences between cases prevent consolidated trial); In re Ampicillin Antitrust Litigation, 88 F.R.D. 174, 178 (D.D.C. 1980) ("As an aid to judicial economy and manageability, the Court endorses the bellwether concept.").

4/ For an extensive discussion of the use of coordination procedures in the management of mass accident litigation, see Transgrud, Joinder Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779 (1985).

§§ 33.26 and 22.22; FRCP, Rule 42(b). If liability were established on the part of any defendant, and the ongoing settlement process failed to resolve any of the remaining claims, individual prove-ups of damages could be accomplished, either through group trials or the use of special masters. If by the latter stages of the litigation circumstances should permit it, the specific procedure of a "damages first" trial similar to that presented in the Glacier Bay proposed Case Management Plan might be employed./5/

Voluntary Certification of a Class of Identified Claimants. Defendants have opposed the certification of classes at this time for reasons which are fully apparent from the discussion in Defendants' Memorandum. However, if at a later point in the proceedings specific individuals or entities with compensable claims have been established, and those claimants can agree to organize themselves so that there are no appreciable number of opt-outs, a 23(b)(3) class or classes could be formed for the purpose of conducting a trial on issues which indeed are common to each of the then-identified class members. The fact that certification of indefinable, unwieldy and inappropriate classes was denied at an earlier stage of the proceedings would of course be no impediment whatever to the use of the class device in the future. By the prior identification of compensable claims,

5/ The procedures in that plan are, of course, well known to this Court and are far too detailed to outline in this memorandum. It is apparent that the applicability of such procedures will depend upon events which are now difficult to foresee, so that such a plan is only one possible alternative for the adjudication of this case.

class certification might become an administratively useful tool to accomplish what would be tantamount to a consolidated trial of common issues./6/

RESPONSE TO QUESTION 1

If identical classes were certified in both the federal and state courts, both courts would have jurisdiction over the classes so certified. The State court would, of course, have no jurisdiction to enjoin the prosecution of the federal class actions; and, as a consequence of the Anti-Injunction Act, 29 U.S.C. § 2283, this Court would not at the present stage of the proceedings be likely to be possessed of authority to enjoin prosecution of similar class claims in the State court. Lou v. Belzberg, 834 F.2d 730, 739-41 (9th Cir. 1987), cert. denied, 485 U.S. 993 (1988); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

This result, defendants submit, would be inferior to the case management plan described in Defendants' Memorandum and in the foregoing portions of this memorandum. Managing the broad-gauge classes now proposed would involve an enormous, time-consuming application of judicial resources. The thrust of Defendants' Memorandum is that such difficulties are in essence insuperable and, in any event, are grossly inferior to alternative methods of procedure. The ultimate decertification of classes in the Pruitt litigation (see discussion in Defendants' Memorandum at

6/ It was, in fact, through the use of a voluntary class of identified claimants that the Skywalk litigation in the Federal District Court for the Western District of Missouri ultimately was settled. In re Federal Skywalk Cases, 97 F.R.D. 380 (W.D. Mo. 1983).

pages 4-5) illustrates the management difficulties certain to be encountered.

However, at least the problems of coordination would not be insurmountable if classes were certified in both federal and state court. The issue of dual jurisdiction is one already met by this Court and by the State court by the mutual decision to consolidate the cases and to coordinate them. It requires the exercise of cooperation and comity, but the existence of dual jurisdiction over comparable plaintiffs or classes of plaintiffs is the usual consequence of the federal system and the application of the Anti-Injunction Act.

In the event of ultimate trial, it would be for each Court to determine whether any common proceedings would be possible or whether agreement could be reached on an order of priority in terms of which actions were to proceed first to trial and the impact of any such adjudication upon the interests of comparable class members in the other forum.

RESPONSE TO QUESTION 2

The one situation in which the state and federal cases could not be coordinated would be in the event that classes were certified in one court but not the other; and it is clear that coordination of the state and federal cases is a critical element of effective management of this massive litigation.


At the very least, successful coordination requires that the proceedings in each forum proceed at roughly the same pace. For the reasons discussed in Defendants' Memorandum, the pace of the proceedings will be enhanced, and coordination most efficient, if neither forum accepts at this stage the significant and

time-consuming burdens of class action management. If one forum certifies a class, however, coordination will disappear promptly unless the other forum certifies a class as well. If it fails to do so, the proceedings in the two forums necessarily will proceed at totally disparate paces, will have entirely different problems to confront, and will be impossible to manage on a coordinated basis. Each court, because of the vastly different responsibilities assumed, would inevitably proceed on its separate course, with attendant disruption to the most efficient disposition of all claims arising from the spill.

Accordingly, for the foregoing reasons and for the reasons set forth in Defendants' Memorandum, defendants request that both courts deny the pending certification motions and employ the alternative framework proposed by defendants for the fair, efficient, and manageable resolution of all individual claims.

Respectfully submitted,

BURR, PEASE & KURTZ
CHARLES P. FLYNN

By: 
Charles P. Flynn

2335A:vkk

BURR, PEASE
& KURTZ
PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
(907) 276-6100

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

RE: A89-095, A89-135, A89-136, A89-139
A89-144, A89-238 and A89-239

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Melody Lee Bussey, an employee of Burr, Pease and Kurtz, 810 N Street, Anchorage, Alaska, being first duly sworn, states that on March 26, 1990, service of RESPONSE OF DEFENDANTS D-3, D-9, D-11, D-12, D-14, D19, D-20 and D-21 TO ORDER NO. 23 (ISSUES REGARDING CLASS CERTIFICATION was made on the following:

by regular mail:

Daniel W. Krasner, Esq.
WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ
270 Madison Avenue
New York, NY 10016

BURR, PEASE
& KURTZ
PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
(907) 276-6100

John E. Hoffman, Jr., jEsq.
Henry Weisburg, Esq.
Barbara J. Gould, Esq.
SHEARMAN & STERLING
599 Lexington Avenue at 53rd
New York, NY 10022

by Express Mail:

Jerry S. Cohen, Esq.
Michael D. Hausfeld, Esq.
COHEN, MILLSTEIN, HAUSFELD & TOLL
1401 New York Avenue, N.W.
Washington, D.C. 20005-2113

Melvyn I. Weiss, Esq
Allen Schulman, Esq.
MILBERG, WEISS, BERSHAD,
SPECTHRIE & LERACH
2000 Central Savings Tower
225 Broadway
San Diego, CA 92101-5050

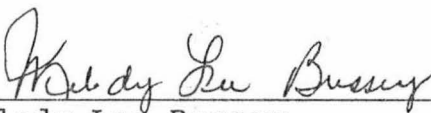
and by hand-delivery to

Lloyd Benton Miller, Esq.
Donald J. Simon, Esq.
SONOSKY, CHAMBERS, SACHSE & MILLER
900 West Fifth Avenue, Suite 700
Anchorage, AK 99501

David W. Oesting, Esq.
DAVIS WRIGHT & TREMAINE
550 West Seventh Avenue, Suite 1450
Anchorage, AK 99501

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

Robert L. Eastaugh, Esq.
DELANEY, WILES, HAYES, REITMAN & BRUBAKER
1007 West Third Avenue, #400
Anchorage, AK 99501



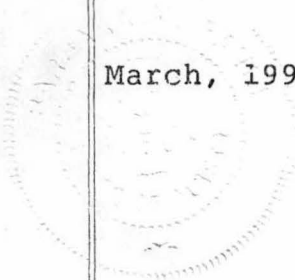
Melody Lee Bussey

BURR, PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
(907) 276-6100

AFFIDAVIT OF SERVICE - 2

2373-1/MAL

SUBSCRIBED and SWORN to before me this 26th day of
March, 1990.



Barbara M. Pauli
NOTARY PUBLIC in and for Alaska
My Commission Expires: 4/18/91

BURR, PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
(907) 276-6100

AFFIDAVIT OF SERVICE - 3

2373-1/MAL

FILED

MAR 27 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

1 SUZANNE C. ETPISON
2 BIXBY, COWAN & GERRY
3 Attorneys at Law
4 705 Second Avenue
5 Cordova, AK 99574
6 AKPLD/9977

Attorneys for Plaintiff P-277

Hon. H. Russel Holland

7
8 UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ALASKA

10
11 In re) NO. A89-095 Civil
12 THE EXXON VALDEZ) (Consolidated)
13 _____)
14 RE: A89-095 Civ

15 P-277'S REQUEST FOR EXTENSION OF TIME TO ADDRESS
16 ORDER No. 23 (ISSUES REGARDING CLASS CERTIFICATION)

17
18 On March 1, 1990, the court requested that parties address
19 the concerns expressed in Order No 23 on or before March 26,
20 1990.

21 Plaintiff herein, P-277, wishes to file a brief to address
22 those concerns, however is compelled to seek permission from
23 the court for an extension of time due to illness of counsel,
24 Richard F. Gerry. This request is necessitated by Mr. Gerry's
25 illness, which did not pass last week as anticipated. In
26 order to address the issues raised by the court's order,
27 counsel below requests an extension of the March 26, 1990

875

1 deadline to March 30, 1990.

2 Dated this 27th day of March, 1990

3
4 BIXBY, COWAN & GERRY

5 By: 

6 SUZANNE C. ETPISON
7 Attorneys for Plaintiff
8 P-277

9
10 O R D E R

11 Plaintiff P-227's request for an extension of time to
12 address issues raised in Order No. 23 is hereby granted.

13 DATED:

14
15 HONORABLE H. RUSSEL HOLLAND
16 JUDGE OF THE DISTRICT COURT
17
18
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- 2 -

PLAINTIFF P-277'S REQUEST FOR EXTENSTION TO ADDRESS ORDER NO. 23