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Anchorage, AK 99501
907/276-6100

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re All Cases

DEFENDANTS' (D-3, D-9, D-11, D-12, D-14, D-19 through D-21) MOTION FOR LEAVE TO FILE OVERLENGTH REPLY MEMORANDUM REGARDING THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

Alyeska defendants (D-3, D-9, D-11, D-12, D-14, D-19 through D-21) and related parties hereby move for leave to file an overlength reply memoranda in support of their Motion for Judgment on the Pleadings. The proposed memoranda are filed concurrently herewith. This motion is supported by the Memorandum submitted herewith.

DATED: April 23, 1990.

BURR, PEASE & KURTZ
Attorneys for Alyeska Defendants
(D-3, D-9, D-11, D-12, D-14, D-19 through D-21)

By _____
Charles P. Flynn

373-45
CPF/lsf

It is so ORDERED

DATED: 5/14/90

United States District Judge

cc: D. Serdahely, D. Ruskin, L. Miller

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	Case A89-095 Civil
the EXXON VALDEZ	)	(Consolidated)
	)	
	)	

RE: ALL CASES

SUPPLEMENTAL REPLY MEMORANDUM OF ALYESKA DEFENDANTS (D-3, D-11, D-12, D-14, D-19, D-20 AND D-21) TO SUPPLEMENTAL MEMORANDUM OF THE USE AND ENJOYMENT CLASS IN OPPOSITION TO MOTION TO DISMISS SOME CLAIMS

2373-45
CPF/lsf

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This Supplemental Reply Memorandum is presented by defendant Alyeska Pipeline Service Co., Inc. and related defendants (D-3, D-11, D-12, D-14, D-19, D-20 and D-21) in response to the brief entitled Supplemental Memorandum of the Use and Enjoyment Class in Opposition to Alyeska Defendants Motion to Dismiss Some Claims and in Support of Class Certification ("Use and Enjoyment Class Memorandum").

The Use and Enjoyment Class Memorandum frankly admits that the Ninth Circuit decisions in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), and Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973), unequivocally bar claims by recreational users for loss of recreational use of natural resources occasioned by a maritime accident. In that supposition, the use and enjoyment plaintiffs unquestionably are correct. These moving defendants rely upon those holdings, among others, in seeking judgment on the pleadings against this group of plaintiffs.

But these plaintiffs then proceed to make the extraordinary argument that the intent of certain elements of Congress in proposing legislation, which failed of passage, should be effectuated through the vehicle of the Interior Department regulations promulgated in 1977 that purported to "interpret" the Trans-Alaska Pipeline Authorization Act ("TAPAA") of November 16, 1973. 43 U.S.C. §§ 1651 et. seq. Then, having contended that such regulations somehow overturn the holdings of the two Oppen cases, plaintiffs urge that there is no conflict between federal and state rules regarding the claims of recreational users.

As has been developed in defendants' principal Reply Memorandum, nothing in TAPAA purports to identify classes of

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claimants or to vest any rights of action in recreational users, particularly when not predicated upon TAPAA and not against those covered by its provisions. The discussion in the Use and Enjoyment Class Memorandum makes that proposition crystal clear.

These plaintiffs explain that approximately two years after the passage of TAPAA, there was concern as to the adequacy of the right of claimants to recover under existing legislation, including, of course, TAPAA. Accordingly, in 1975 a series of proposed bills providing for liability from oil spills was presented to Congress, and these proposed statutes became successively more liberal in expanding the categories of damages recoverable by private claimants.

In 1977 the Department of Justice wrote to the House Committee on Merchant Marine and Fisheries that under existing law "a person who cannot use a pleasure craft in polluted waters or engage in recreational fishing in those waters" has suffered an "inconvenience" that the "courts do not not recognize . . . as constituting a recoverable injury or loss," citing Oppen v. Aetna Insurance Co. According to these plaintiffs, the House of Representatives responded by passing H.R. 6083 for the purpose of altering the rule that "economic and consequential losses are usually not compensable." See discussion in Use and Enjoyment Class Memorandum at 10-24.

The problem is, of course, that none of this prospective legislation was enacted into law. Accordingly, the inference is overwhelming that (i) applicable case authority denied recovery to claimants such as these plaintiffs, (ii) nothing in existing legislation purported to change that case law precluding

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plaintiffs' claims, (iii) Congress considered legislation that would expand the rights of recreational users, (iv) but Congress determined to leave the common law limitations in place by refusing to pass the proposed legislation.

As to the regulations cited, nothing in them purports to define the class of claimants entitled to seek relief under TAPAA. Further, as developed at length in defendants' principal Reply Memorandum, administrative interpretive regulations cannot expand upon the provisions of legislation, and certainly may not import into preexisting legislation the provisions of subsequent proposed legislation that failed to pass. And finally, nothing about the Interior Department regulations can affect in any respect the rights or obligations of those not presenting claims under TAPAA, or those not subject to such claims.

Thus, under clear Ninth Circuit authority establishing principles of maritime law for this jurisdiction, these plaintiffs' claims may not be pursued and, as established in the principal Reply Memorandum, federal maritime law describes the boundaries of permissible claims and claimants arising from the maritime accident at issue here.

DATED: April 23, 1990.

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By: _____
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re All Cases

AFFIDAVIT OF SERVICE BY MAIL
ON BEHALF OF DEFENDANTS D-3, D-9, D-11 through D-12, D-14, D-19 through D-21

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Linda S. Foley, an employee of Burr, Pease and Kurtz, 810 N Street, Anchorage, Alaska, being first duly sworn, states that on April 23, 1990, service of a Supplemental Reply Memorandum of Alyeska Defendants (D-3, D-11, D-12, D-14, D-19, D-20 and D-21) to Supplemental Memorandum of the Use and Enjoyment Class in Opposition to Motion to Dismiss Some Claims has been made upon the counsel of record as follows: Daniel W. Krasner, John E. Hoffman, Melvyn I. Weiss, Jeffrey A. Smyth, Geoffrey Y. Parker, Robert L. Richmond,

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James D. Gilmore, Dick L. Madson, Clifford J. Groh **(by mail)**; Lloyd Benton Miller, David W. Oesting, Douglas J. Serdahely and George N. Hayes **(by hand-delivery)**; and to Jerry S. Cohen **(by Federal Express)** based upon the court's Master Service List of February 13, 1990.

Linda S. Foley

Linda S. Foley

SUBSCRIBED and SWORN to before me this 23rd day of April, 1990.

Nancy E. Krieger

NOTARY PUBLIC in and for Alaska
My Commission Expires: 3-11-93

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Chairman, Ad Hoc Committee
on Class Certification

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

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

CLASS ACTION PLAINTIFFS' (P1, P3, P8-P19, P21-P22, P24-P28, P40-P44, P46, P48, P50, P52, P54-P62, P64-P67, P73-P80, P95-P96, P112-P113, P116, P118, P120, P122, P124, P126, P128, P130, P132, P135-P147, P167-P168, P189, P195, P202-P206, P246-P247, P267) MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT OF RICHARD T. HARVIN

Class Plaintiffs move to strike the Supplemental Affidavit of Richard T. Harvin and the appendix thereto filed by the Exxon defendants on April 19, 1990, in opposition to the motions for class certification.

Previously, defendants Alyeska and Exxon sought leave to file supplemental memoranda, and Judge Shortell, by Order dated April 17, 1990, granted defendants leave to file supplemental memoranda. As stated in Class Plaintiffs' Response to that joint

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motion, filed on April 20, 1990, defendants' did not seek and Judge Shortell's Order did not permit, the filing of additional evidentiary material. In view of Judge Shortell's Order, Class Plaintiffs did not object to defendants' request so long as Class Plaintiffs were permitted to reply, but did object to the filing of additional evidentiary material.

The Supplemental Harvin Affidavit and the 66 pages of exhibits attached thereto are plainly inappropriate. The purported need to respond to new factual material in Class Plaintiffs' reply papers is specious. Class Plaintiffs followed precisely the procedures that had been negotiated with and agreed to by defendants for the disposition of the class motions. Those procedures permitted defendants to conduct extensive written and discovery of all class plaintiffs -- and defendants did so for more than two months -- prior to filing their oppositions to the class motions. Class Plaintiffs' reply papers appropriately addressed the factual and legal arguments raised by defendants. Defendants' attempt to now submit additional factual material is unwarranted and unnecessary. As Judge Holland's Order dated April 20, 1990, permitting class plaintiffs to file documentary evidence with their reply brief, states: "Alyeska and Exxon may address the matter of these documents during oral argument."

Accordingly, Class Plaintiffs respectfully request that the Court strike the Supplemental Harvin Affidavit and the appendix thereto filed by the Exxon defendants.

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DATE: April 30, 1990

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By _____
MELVYN I. WEISS
Chairman, Ad Hoc Committee
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Local Counsel

FILED
JUN 7 1990
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
by _____ Deputy

It is so ORDERED.

DATED: 6/6/90

_____
United States District Judge

cc: D. Serdahely
D. Ruskin
L. Miller

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

	)	No. A89-095 Civil
	)	(Consolidated)
	)	(All Cases)
	)	
	)	**AMENDED MEMORANDUM OF**
In re	)	**FAEGRE & BENSON IN**
	)	**OPPOSITION TO CLASS**
the EXXON VALDEZ	)	**ACTION PLAINTIFFS'**
	)	**MOTION FOR CLASS**
	)	**CERTIFICATION**

Faegre & Benson files this memorandum amicus curiae in opposition to the class action plaintiffs' motion for class certification, pursuant to Order No. 24 of this Court dated April 13, 1990. This memorandum incorporates, with supplementary material, the memorandum of Faegre & Benson on the class certification issue filed on February 22, 1990. As to the general legal principles governing class certification, and the applicability of those principles to this action, Faegre & Benson finds persuasive the arguments contained in the Individual Plaintiffs' Memorandum in Opposition to Class Action Plaintiffs' Motion for Class Certification filed by Bixby, Cowan & Gerry on behalf of plaintiffs Anderson, et al., and adopts those arguments without repeating them. Faegre & Benson wishes to provide additional argument on the suitability of

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this action for treatment as a consolidated action, pursuant to the federal Manual of Complex Litigation.

I. CLASS CERTIFICATION PURSUANT TO RULE 23(b)(3) IS INAPPROPRIATE FOR THIS ACTION.

Certification of commercial fishermen plaintiff classes of purposes of determining liability, compensatory damages, and/or punitive damages is inappropriate under either Fed. R. Civ. P. 23(b)(3), or Alaska Rules of Court Rule 23 (b)(3) in the Exxon Valdez litigation. Most commercial fishermen will opt out of such a class action as is their right under Rule 23(b)(3), making a class action not superior to other forms of managing the litigation.

Faegre & Benson has signed retainer agreements with close to 200 commercial fishermen who have been damaged by the Exxon Valdez oil spill.[1] These fishermen have instructed Faegre & Benson to opt them out of any class certified under Rule 23(b)(3). In connection with the Glacier Bay and the Exxon Valdez oil spills Faegre & Benson attorneys have individually evaluated over 1000 damage claims and have come to the following conclusions:

1) There is a limited universe of commerical fishermen; for example, in two of the most severely affected fisheries, Prince William Sound and Upper Cook Inlet, the potential universe of fishermen plaintiffs numbers between 1200 and 1300;

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1 Faegre & Benson is co-counsel with Robinson, Beiswenger & Ehrhardt, Soldotna, Alaska, with regard to these fishermen.

2) Each of their fishing businesses is unique;

3) Because of their individual circumstances, their damages are unique;

4) Almost every fisherman Faegre & Benson has interviewed has not wanted to be part of a class action.

It is clear now that, with regard to commercial fishermen, the primary issue in litigation will be damages, and it is in the area of damages that the class mechanism breaks down most severely for these claimants. Because of the nature of the Exxon Valdez oil spill, particularly its wide movements, the amount of damage suffered by a given fisherman is unique. Those damages depend not only on the geographic fishery in which a fisherman fished, the species for which he fished, the gear type with which he fished, and the timing of the commercial season(s) that he fished, but also upon his unique fishing abilities. Furthermore, historical catch rates are not a satisfactory statistic by which to determine an individual fisherman's damages. In evaluating damage claims of commercial fishermen in connection with the Glacier Bay and Exxon Valdez oil spills, Faegre & Benson attorneys have become aware of the year-to-year variations in fishermen's operations -- boat, gear, crew, etc. -- that cause fluctuations in earnings above and below historical averages, making statistical treatment of loss inappropriate.

II. IT IS EFFICIENT TO MANAGE THIS LITIGATION BASED UPON INDIVIDUAL NAMED PLAINTIFFS.

Faegre & Benson has experience in conducting complex litigation on behalf of hundreds of individual named plaintiffs. Handling such cases through the vehicle of consolidation is superior to a class action. As lead plaintiffs' counsel in the consolidated case, In re: Glacier Bay, Civ. No. A88-115 (consolidated) (D. Alaska), Faegre & Benson has demonstrated that it is practical to conduct large oil spill litigation without resort to the class action device. Faegre & Benson has also represented several hundred individual plaintiffs in other commercial property damage cases, including opproximately 350 sugar beet growers in western Minnesota. A.W.G. Farms, Inc. v. Federal Crop Ins. Co., 757 F.2d 720 (8th Cir. 1985). Proceeding by consolidation of individual actions protects the right of individual plaintiffs to the counsel of their choice, and assures such plaintiffs of the opportunity to recover from the defendants all damages which they have suffered.

Faegre & Benson presents the following possible management methods by which the Court could facilitate pursuit of the claims of commercial fishermen on a direct action basis:

1. The Court could declare a date certain by which attorneys for direct action commercial fishermen are urged to file complaints, and a date sometime thereafter for the designation of lead and liaison counsel for these direct action plaintiffs;

2. Commercial fishing deckhands' claims could be paid through any amounts recovered by the permit holders for whom they worked, and with whom they have contractual relationships, without designating a separate deckhand class;

3. The claims of fish processors could be handled based on individual named plaintiffs, given their relatively small number, and the variable nature and amount of the damages they suffered; and

4. The claims of cannery workers are susceptible to class determination, and the Court could so rule.

III. CLASS CERTIFICATION PURSUANT TO RULE 23(b)(1) FOR PUNITIVE DAMAGE CLAIMS IS INAPPROPRIATE FOR THE STATE ACTION.

In the Alaska state court action, the class action plaintiffs seek a class certification pursuant to Rule 23(b)(1) for purposes of determining punitive damages. Such a class could be certified without giving individual plaintiffs an opportunity to opt out.

Faegre & Benson strongly opposes any such class certification for purposes of determining punitive damages liability. Certifying such a class with no opt out provision would deny to the almost 200 fishermen represented by Faegre & Benson their right to seek punitive damages proportionate to their individual compensatory damages.

As the memorandum of Bixby, Cowan & Gerry makes clear, absent a situation in which all potential plaintiffs are competing for a share of a limited common fund, neither the

Alaska courts nor the courts of the federal Ninth Circuit have ever certified a class in a personal injury or property damage case under Rule 23(b)(1). The Exxon Valdez case is not a common fund case. The assets of the defendants are sufficient to meet any reasonably probable punitive damages award.

By moving to certify a class pursuant to Rule 23(b)(1) for purposes of punitive damages issues, the class action plaintiffs are not aiding the advancement and rapid conclusion of the litigation. Certifying such a class would deny the individual plaintiffs the right to opt out, raising a severe due process issue given the individualized nature of their claims for damages. Certifying such a class would also lead to an unseemly and unnecessary fight among the plaintiffs for a share of an artificially created common fund. The Court should proceed with punitive damages issues in the same manner by which it should proceed with issues of liability and compensatory damages -- by consolidation of individual actions.

CONCLUSION

For all of the foregoing reasons, the class action plaintiffs' motion for class certification with regard to commercial fishermen should be denied.

Dated: April 27, 1990

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AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota)
) ss.
County of Hennepin)

Mary Jane Sullivan, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 27th day of April, 1990, she served the annexed **Amended Memorandum of Faegre & Benson in Opposition to Class Action Plaintiffs' Motion for Class Certification** on the following attorneys by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office in Minneapolis, Minnesota directed to said attorneys at their last known addresses:

Lloyd Benton Miller, Esq.
SONOSKY, CHAMBERS, SACHSE
& MILLER
900 West Fifth Avenue
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Anchorage, AK 99501

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

Mary Jane Sullivan

Subscribed and sworn to before me this 27th day of April, 1990.

Tammy K. Borchardt
Notary Public

5638P

TAMMY K. BORCHARDT
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires June 28, 1991

Douglas J. Serdahely
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Attorneys for defendant
Exxon Shipping Company (D-2)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: Case No. A89-361 Civil

EXXON SHIPPING COMPANY'S (D-2) ANSWER TO ERNEST W. POOLE'S (P-277) COMPLAINT DATED AUGUST 18, 1989

Defendant Exxon Shipping Company (D-2) ("Exxon Shipping") answers plaintiff's (P-277) complaint as follows:

THE PARTIES

1. Answering paragraph 1, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 1.

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2. Answering paragraph 2, Exxon Shipping admits that Alyeska Pipeline Service Company ("Alyeska") is a Delaware corporation that owns and operates the terminal at Valdez, Alaska and loaded the EXXON VALDEZ with North Slope crude oil on March 23, 1989. Exxon Shipping admits that Alyeska is owned by permittees under the Agreement and Grant of Right-of-Way for the Trans-Alaska Pipeline System ("TAPS"), specifically, Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines (Alaska) Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 2.

3. Answering paragraph 3, Exxon Shipping admits that Exxon Corporation ("Exxon Corp.") is a New Jersey corporation with its principal place of business at 1251 Avenue of the Americas, New York, New York, 10020. Exxon Shipping admits that the principal business of Exxon Corp. is energy, including exploration for and production of crude oil, natural gas and petroleum products. Exxon Shipping admits that Exxon Corp. was the owner

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of the crude oil that was transported on the EXXON VALDEZ, a vessel that has operated upon Alaska waters. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 3.

4. Answering paragraph 4, Exxon Shipping admits that it is a domestic maritime subsidiary of Exxon Corp., separately incorporated in Delaware, and that it has executive offices in Houston, Texas. Exxon Shipping further admits that it is the owner and operator of the EXXON VALDEZ, which has transited Alaska waters. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 4.

5. Answering paragraph 5, Exxon Shipping admits that Exxon Company, U.S.A. ("Exxon USA") is an unincorporated division of Exxon Corp., that its headquarters are in Houston, Texas, and that such division is responsible for the operation of Exxon Corp.'s energy business within the United States. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 5.

6. Answering paragraph 6, Exxon Shipping admits that Joseph J. Hazelwood is a New York resident who was employed by Exxon Shipping as Master of the EXXON VALDEZ, and that his duties

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as Master of the vessel were within the scope of his employment by Exxon Shipping. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 6.

7-8. Answering paragraphs 7 and 8, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 7 and 8.

DEFINITIONS

9-13. Answering paragraphs 9 through 13, Exxon Shipping admits that plaintiff purports to define certain terms. Except as expressly admitted, Exxon Shipping denies the allegations in paragraphs 9 through 13 and further denies that any subsequent use of such terms is necessarily accurate or appropriate.

ALLEGED OPERATIVE FACTS

14. Answering paragraph 14, Exxon Shipping admits, on information and belief, that on Thursday, March 23, 1989, Captain Joseph J. Hazelwood, while ashore at Valdez, Alaska, consumed some alcoholic beverages. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 14.

15. Answering paragraph 15, Exxon Shipping admits that on Thursday evening, March 23, 1989, the EXXON VALDEZ, one of Exxon Shipping's largest vessels, measuring approximately 987 feet in length and weighing 211,469 deadweight tons, left the Port of Valdez, Alaska, the southern terminal facility of TAPS, and was bound for Long Beach, California. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 15.

16. Answering paragraph 16, Exxon Shipping admits that the EXXON VALDEZ's eleven oil tanks were filled with approximately 53 million gallons of North Slope crude oil which had been shipped through TAPS, and that the oil was owned by Exxon Corp. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 16.

17. Answering paragraph 17, Exxon Shipping admits that the EXXON VALDEZ passed through the harbor and Valdez Narrows under the direction of a harbor pilot, Edward Murphy, and that Captain Hazelwood was on the bridge of the vessel when the harbor pilot disembarked in Valdez Arm. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 17.

18. Answering paragraph 18, Exxon Shipping admits that after the pilot disembarked, Captain Hazelwood left the bridge, leaving the Third Mate, Gregory Cousins, and the helmsmen, Robert

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Kagan, on the bridge. Exxon Shipping admits that it employed Messrs. Cousins and Kagan and that their duties as Third Mate and helmsman were within the scope of their employment with Exxon Shipping. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 18.

19. Answering paragraph 19, Exxon Shipping admits that the United States Coast Guard gave the EXXON VALDEZ permission to leave the southbound shipping lane for reasons that include earlier reports that the lane contained ice from a glacier to the northwest. Exxon Shipping admits that the EXXON VALDEZ entered the northbound lane. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 19.

20. Answering paragraph 20, Exxon Shipping admits that the EXXON VALDEZ traveled through the northbound lane and subsequently struck Bligh Reef, which is depicted on charts. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 20.

21. Answering paragraph 21, Exxon Shipping admits that the EXXON VALDEZ was outside the shipping lanes when she struck Bligh Reef, which punctured some of her cargo tanks and damaged a portion of her hull. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 21.

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22. Answering paragraph 22, Exxon Shipping denies the allegations in paragraph 22.

23. Answering paragraph 23, Exxon Shipping admits that the grounding of the EXXON VALDEZ punctured eight of her cargo tanks, discharging approximately 11 million gallons of crude oil into Prince William Sound. Exxon Shipping admits that the spill is the largest oil spill from a single vessel in United States history. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 23.

24. Answering paragraph 24, Exxon Shipping denies the allegations in paragraph 24.

25-26. Answering paragraphs 25 and 26, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 25 and 26.

COUNT I

27. Answering paragraph 27, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 26 as though set forth in full at this place.

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28. Answering paragraph 28, Exxon Shipping admits that "hazardous substance" is defined in AS 46.03.826(4)(B) to include oil.

29. Answering paragraph 29, Exxon Shipping admits that Exxon Corp. owned the oil and that Exxon Shipping had control over the oil immediately prior to its release into Prince William Sound. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 29 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraph 29 apply to any other defendants, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 29.

30. Answering paragraph 30, Exxon Shipping admits that plaintiff's damages, if any, were not caused by an act of war. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 30.

31. Answering paragraph 31, Exxon Shipping admits that AS 46.03.822, if applicable and if not preempted, may impose strict liability upon certain parties for certain damages. Except

as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 31.

32. Answering paragraph 32, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 32.

33. Answering paragraph 33, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 33.

34. Answering paragraph 34, Exxon Shipping alleges that no answer is required and, if an answer is required, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 34.

COUNT II

35. Answering paragraph 35, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 34 as though set forth in full at this place.

36. Answering paragraph 36, Exxon Shipping admits that Exxon Corp. owned the oil and that Exxon Shipping had control over the oil aboard the EXXON VALDEZ immediately prior to its release into Prince William Sound. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 36 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to Alyeska, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 36.

37-39. Answering paragraphs 37 through 39, Exxon Shipping denies the allegations in paragraphs 37 through 39 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to Alyeska, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 37 through 39.

COUNT III

40. Answering paragraph 40, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 39 as though set forth in full at this place.

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41-42. Answering paragraphs 41 and 42, Exxon Shipping denies the allegations insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to any other defendant, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 41 and 42.

43. Answering paragraph 43, Exxon Shipping admits that public records purport to show that Captain Hazelwood has been convicted of driving while under the influence of alcohol. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 43.

44. Answering paragraph 44, Exxon Shipping denies the allegations in paragraph 44.

45. Answering paragraph 45, Exxon Shipping admits that it employed Captain Hazelwood as Master of the EXXON VALDEZ, and Gregory Cousins as her Third Mate, and that the duties of Captain Hazelwood and Mr. Cousins aboard the EXXON VALDEZ were within the scope of their employment. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 45.

46-49. Answering paragraphs 46 through 49, Exxon Shipping denies the allegations in paragraphs 46 through 49 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to any other defendant, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 46 and 49.

COUNT IV

50. Answering paragraph 50, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 49 as though set forth in full at this place.

51-52. Answering paragraphs 51 and 52, Exxon Shipping denies the allegations in paragraphs 51 and 52.

53. Answering paragraph 53, Exxon Shipping denies the allegations in paragraph 53, except that it asserts that the first sentence of paragraph 53 is too vague for Exxon Shipping to formulate a response thereto.

54. Answering paragraph 54, Exxon Shipping denies the allegations of paragraph 54.

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COUNT V

55. Answering paragraph 55, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 54 as though set forth in full at this place.

56-60. Answering paragraphs 56 through 60, Exxon Shipping denies the allegations insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to Alyeska, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 56 through 60 except admits that Alyeska formulated a certain oil spill contingency plan and had certain responsibilities pursuant thereto.

COUNT VI

61. Answering paragraph 61, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 60 as though set forth in full at this place.

62-64. Answering paragraphs 62 through 64, Exxon Shipping denies the allegations insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to Alyeska, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 62 through 64.

COUNT VII

65. Answering paragraph 65, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 64 as though set forth in full at this place.

66-68. Answering paragraphs 66 through 68, Exxon Shipping denies the allegations insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to Alyeska, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 66 through 68.

COUNT VIII

69. Answering paragraph 69, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 68 as though set forth in full at this place.

70-71. Answering paragraphs 70 and 71, Exxon Shipping denies the allegations insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to any other defendants, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 70 and 71.

72. [There is no paragraph 72.]

COUNT IX

73. Answering paragraph 73, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 72 as though set forth in full at this place.

74. Answering paragraph 74, Exxon Shipping denies the allegations insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations apply to any other defendants, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 74.

PRAYER FOR RELIEF

75. Answering plaintiff's prayer for relief, Exxon Shipping denies plaintiff's entitlement to the relief he seeks.

GENERAL DENIAL

76. Exxon Shipping denies each and every other allegation in plaintiff's complaint that was not specifically admitted.

AFFIRMATIVE AND OTHER DEFENSES

1. Independent of any legal obligation to do so, Exxon Shipping and Exxon Corp. are voluntarily paying many claims for economic loss allegedly caused by the oil spill, and incurring

other expenses in connection with the oil spill. Exxon Shipping is entitled to a set-off in the full amount of all such payments in the event plaintiff's claims encompass such expenditures.

2. Numerous persons and entities have filed lawsuits relating to the oil spill, some of whom purport to represent the plaintiff in this action. In the event of any recovery in such other lawsuits by persons whose claims therein are encompassed by plaintiff's claims in this action, Exxon Shipping is entitled herein to a set-off in the full amount of such payments.

3. Some or all of plaintiff's claims for damages may be barred or reduced by the doctrine of comparative negligence or comparative fault.

4. Exxon Shipping is entitled to a set-off to the extent of any failure of plaintiff properly to mitigate damages.

5. Unless otherwise agreed, Exxon Shipping is entitled to a set-off in the amount of any payment received by plaintiff as a result of the oil spill, the containment or clean up of the oil released from the EXXON VALDEZ, or other activities or matters related to the oil spill.

6. Each of plaintiff's theories of recovery fails to state a claim upon which relief can be granted.

7. Exxon Shipping has acted pursuant to government approval, direction, and supervision, and has no liability to plaintiffs for any acts undertaken or omissions with such approval, direction, or supervision.

8. The amount of any liability for the acts alleged is controlled by statute including, without limitation, 43 U.S.C. § 1653(c), and AS 09.17.010, .060 and .080(d).

9. Plaintiff's claims are barred to the extent they would represent recovery by two or more persons or entities for part or all of the same economic loss, and thus would represent a multiple recovery for the same injury.

10. Plaintiff lacks standing to assert certain theories of recovery or to claim or recover damages based on the allegations of the complaint.

11. Plaintiff's claims are based on an alleged maritime tort and therefore are subject to applicable admiralty restrictions, including without limitation, restrictions on granting of injunctive relief and on damages for remote economic loss unaccompanied by physical injury to person or property.

12. Plaintiff's claims for punitive damages are unconstitutional under the United States Constitution including, without limitation, Article 1, Section 8; Amendment V; and Amendment XIV; and the Alaska Constitution including, without limitation, Article I, Section 7; and Article I, Section 12.

13. If punitive damages were to be awarded or civil or criminal penalties assessed in any proceeding against Exxon Shipping relating to the oil spill, such award bars imposition of punitive damages in this action.

14. Certain claims asserted by plaintiff are not ripe for adjudication.

15. Plaintiff fails to satisfy the requirements for injunctive relief.

16. Plaintiff's claims for punitive damages are precluded by the Alaska common law and statutory scheme for civil and criminal penalties relevant to the oil spill.

17. Those portions of AS 46.03 that were enacted after the oil spill constitute an unlawful bill of attainder violative of Article 1, Section 10 of the United States Constitution, and Article I, Section 15 of the Alaska Constitution, and if applied to Exxon Shipping would also violate the due process clauses and contract clauses of the United States and Alaska Constitutions.

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18. Some or all of plaintiff's claims, including claims for punitive damages, are preempted by the comprehensive system of federal statutes, regulations and common law, including criminal and civil penalties, sanctions and remedies relevant to the oil spill, and its scheme relevant to the protection of subsistence interests.

19. The damages alleged, if any, were caused, in part, by the actions of others not joined as defendants herein as to whom a right of contribution or indemnity should exist as to Exxon Shipping. Exxon Shipping may seek leave of Court to join such additional persons as third party defendants on the basis of further discovery.

20. The Fund, established under the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c), may be strictly liable for some or all of the damages alleged by plaintiff. This action should not proceed in the absence of the Fund's joinder as a defendant.

21. Certain theories of relief may not be maintained because those theories are based upon the exercise of the state and federal constitutional rights to petition the state and federal governments with respect to the passage and enforcement of laws.

22. Numerous persons and entities have filed lawsuits against Exxon Shipping relating to the oil spill, some of whom purport to represent the plaintiff in this action. In the event of any judgment or judgments in such other lawsuits against Exxon Shipping and in favor of persons whose claims are encompassed by plaintiff's claims in this action, such judgment or judgments will be res judicata as to plaintiff's claims herein.

WHEREFORE, defendant Exxon Shipping prays for judgment against plaintiff as follows:

1. That plaintiff take nothing by his complaint and be granted no relief, legal or equitable;

2. That the complaint be dismissed with prejudice;

3. That Exxon Shipping be awarded its costs in this action, including attorney's fees; and

4. That the court award Exxon Shipping such other and further relief as it may deem just and proper.

DATED at Anchorage, Alaska this 30th day of April, 1990.

BOGLE & GATES
Attorneys for Defendant
Exxon Shipping Company (D-2)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re)	No. A89-095 Civil (Consolidated)
THE EXXON VALDEZ)	ANSWER OF DEFENDANT D-1 TO COMPLAINT FILED AUGUST 23, 1989 BY P 277

This Document Relates to Action No.:

A89-361

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Exxon Corporation, also erroneously referred to in the complaint as Exxon Co., USA and, for convenience identified in this answer as "Exxon", as its answer to the complaint herein admits, denies and alleges as follows:

As to each and every allegation denied herein for lack of information or belief, Exxon alleges that it is without knowledge or information sufficient categorically to admit or deny the said allegation at this time, wherefore it denies each said allegation using the phrase "denies for lack of information or belief."

Defense to Count I

1. Denies for lack of information or belief each and every allegation of paragraph 1.

2. Denies each and every allegation of paragraph 2, except admits that Alyeska Pipeline Service Co. ("Alyeska") is a Delaware Corporation, that Alyeska is owned by Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, B.P. Pipelines (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation and Unocal Pipeline Company, that the owners of Alyeska are permittees under the Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline and that Alyeska operates the Trans-Alaska Pipeline System, including the terminal facility at the Port of Valdez where the EXXON VALDEZ was loaded with North Slope crude oil on or about

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March 23, 1989.

3. Denies each and every allegation of paragraph 3, except admits that Exxon is a corporation organized under the laws of the State of New Jersey with its principal place of business at 1251 Avenue of the Americas, New York, New York 10020, and that the principal business of Exxon is energy, involving exploration for and production of crude oil, natural gas and petroleum products, and exploration for and mining and sale of coal; and that Exxon was owner of the crude oil being transported on the EXXON VALDEZ.

4. Denies each and every allegation of paragraph 4, except admits that Exxon Shipping Company ("Exxon Shipping") is a Delaware Corporation with its principal place of business in the State of Texas, that Exxon Shipping is the owner of a vessel known as the EXXON VALDEZ which operated, in part, in Alaska waters and that Exxon owns all of Exxon Shipping's stock.

5. Denies each and every allegation of paragraph 5, except admits that Exxon Company, USA is an unincorporated division of Exxon, that its headquarters is at 800 Bell Street, Houston, Texas, and that such division is responsible for the operation of Exxon's energy business within the United States.

6. Denies each and every allegation of paragraph 6, except admits that Joseph Hazelwood is a resident of

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New York, and that Hazelwood was employed by Exxon Shipping at the time of the grounding of the EXXON VALDEZ, and that his duties as Master of the vessel were within the scope of his employment.

7-8. Denies for lack of information or belief each and every allegation of paragraphs 7 and 8.

9-13. Answering paragraphs 9 through 13, inclusive, Exxon admits that plaintiff, for plaintiff's convenience, purports to define certain terms as therein alleged, but denies that any subsequent use of these terms in the complaint is accurate or appropriate.

14. Denies each and every allegation of paragraph 14, except admits that Captain Hazelwood consumed some alcoholic beverages while ashore in Valdez on March 23, 1989.

15. Denies each and every allegation of paragraph 15, except admits that on March 23, 1989, the EXXON VALDEZ, which is approximately 987 feet long and weighing 211,469 deadweight tons, left the southern terminal facility of TAPS, at the port of Valdez, Alaska, bound for Long Beach, California.

16. Denies each and every allegation of paragraph 16, except admits that the EXXON VALDEZ was loaded with approximately 53,000,000 gallons of crude oil, owned by Exxon, which had been shipped from Alaska's North Slope through the

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Trans-Alaska Pipeline.

17. Denies each and every allegation of paragraph 17, except admits that EXXON VALDEZ was navigated under the direction of pilot William Edward Murphy, who disembarked at the pilot station, and that Captain Hazelwood was on the bridge and took over control of the vessel just before pilot Murphy disembarked.

18. Denies each and every allegation of paragraph 18, except admits that Captain Hazelwood left the bridge shortly before midnight, leaving Gregory Cousins, the Third Mate, and Robert Kagan, the Helmsman, on the bridge; and that the performance of their duties was within the scope of their employment by Exxon Shipping.

19. Denies for lack of information or belief each and every allegation of paragraph 19, except admits that the EXXON VALDEZ went into the northbound lane and that it received Coast Guard permission to leave the normal southbound shipping lane for reasons including the reported presence of ice.

20. Denies each and every allegation of paragraph 20, except admits that the EXXON VALDEZ left the northbound shipping lane and subsequently struck Bligh Reef, which reef is depicted on charts.

21. Denies for lack of information or belief each

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and every allegation of paragraph 21, except admits that the EXXON VALDEZ went aground on Bligh Reef causing the rupture of certain of its cargo tanks and damaging a portion of the hull.

22. Denies each and every allegation of paragraph 22.

23. Denies each and every allegation of paragraph 23, except admits that the grounding of the EXXON VALDEZ resulted in the rupture of eight of the vessel's cargo tanks and the discharge into Prince William Sound of approximately 258,000 barrels of crude oil, the largest oil spill from a single vessel in United States history.

24-25. Denies each and every allegation of paragraph 24 and 25.

26. Denies for lack of information or belief each and every allegation of paragraph 26.

27. Answering paragraph 27, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 26 hereof, as if set out in full.

28. Answering paragraph 28, admits that AS 46.03.826(4)(B) defines the term "hazardous substance" as including oil.

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29. Denies each and every allegation of paragraph 29, except admits that Exxon owned the oil and that Exxon Shipping had control over the oil immediately prior to its release into Prince William Sound.

30. Denies for lack of information or belief each and every allegation of paragraph 30, except admits that plaintiff's damages, if any, were not caused by an act of war.

31-33. Denies for lack of information or belief each and every allegation of paragraphs 31 through 33.

34. Answering paragraph 34, Exxon asserts that it is not required to respond to the allegation in said paragraph.

Defense To Count II

35. Answering paragraph 35, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 34 hereof, as if set out in full.

36. Denies the allegations of paragraph 36, except admits that Exxon owned the oil and that Exxon Shipping had control over the oil immediately prior to its release into Prince William Sound.

37-39. Denies each and every allegation of paragraphs 37 through 39.

Defense To Count III

40. Answering paragraph 40, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 39 hereof, as if set out in full.

41-42. Denies each and every allegation of paragraphs 41 and 42.

43. Denies each and every allegation of paragraph 43, except admits that public records purport to show that Hazelwood had been convicted for driving while under the influence of alcohol.

44. Denies each and every allegation of paragraph 44.

45. Denies each and every allegation of paragraph 45, except admits that Gregory Cousins ("Cousins") and Hazelwood were employees of Exxon Shipping Company and that their duties aboard the EXXON VALDEZ were within the scope of that employment.

46-49. Denies each and every allegation contained in paragraphs 46 through 49.

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Defense To Count IV

50. Answering paragraph 50, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 49 hereof, as if set out in full.

51-52. Denies each and every allegation of paragraphs 51 and 52.

53. Denies each and every allegation of paragraph 53 except alleges that the first sentence of paragraph 53 is too vague to be intelligible.

54. Denies each and every allegation of paragraph 54.

Defense To Count V

55. Answering paragraph 55, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 54 hereof, as if set out in full.

56. Denies each and every allegation of paragraph 56, insofar as they relate to Exxon and Exxon Shipping; and denies each and every allegation of paragraph 56 for lack of

information or belief insofar as it relates to Alyeska; except admits that Alyeska had an oil spill contingency plan applicable, in part, to possible oil spills in Prince William Sound and that Alyeska had certain responsibilities in connection with said plan.

57-60. Denies each and every allegation of paragraphs 57 through 60 insofar as they relate to Exxon and Exxon Shipping, and denies for lack of information or belief each and every allegation contained in said paragraphs concerning Alyeska.

Defense To Count VI

61. Answering paragraph 61, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 60 hereof, as if set out in full.

62-64. Denies each and every allegation of paragraphs 62 through 64.

Defense To Count VII

65. Answering paragraph 65, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 64 hereof, as if set out in full.

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66-68. Denies each and every allegation of paragraphs 66 through 68.

Defense To Count VIII

69. Answering paragraph 69, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 68 hereof, as if set out in full.

70-71. Denies each and every allegation of paragraphs 70 through 71.

72. [There is no paragraph 72.]

Defense to Count IX

73. Answering paragraph 73, Exxon realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 72 hereof, as if set out in full.

74. Denies each and every allegation of paragraph 74.

General Denial

75. Denies each and every other allegation in plaintiff's complaint that was not specifically admitted herein.

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Affirmative and Other Defenses

76. The complaint and each count thereof fails to state claims upon which relief can be granted.

77. Exxon is informed and believes that plaintiff lacks standing to claim or recover damages based on the allegations of the complaint.

78. Independent of any legal obligation to do so, Exxon Shipping and Exxon are voluntarily paying many claims for alleged economic loss allegedly caused by the oil spill, and are incurring other expenses in connection with the oil spill. Exxon and Exxon Shipping are entitled to a setoff in the full amount of all such payments in the event that plaintiff's claims encompass such expenditures.

79. Certain persons engaged or employed in connection with activities related to containment and clean up of the oil released from the EXXON VALDEZ were thereby able to avoid or mitigate damage from the interruption of fishery and other activities. Payments received by such persons are a set off against losses, if any, resulting from the interruption of fishery and other activities.

80. To the extent that persons able to mitigate

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damages failed to do so, defendants cannot be held liable to such persons for avoidable losses.

81. Plaintiff's claims for punitive damages are unconstitutional under the United States Constitution, including, without limitation, Article I, Section 8; Amendment V; and Amendment XIV; and the Alaska Constitution, including, without limitation, Article I, Section 7 and Article I, Section 12.

82. The damages alleged in the complaint were caused, in part, by the action of others not joined as defendants herein as to whom a right of contribution or indemnity should exist as to Exxon. Exxon may seek leave of Court to join such additional persons as third party defendants on the basis of further discovery herein.

83. Plaintiff's claims sound in maritime tort and are subject to applicable admiralty limits on recovery of damages for remote economic loss unaccompanied by physical injury to person or property.

84. Numerous persons and entities have filed class action lawsuits against Exxon relating to the oil spill, some of whom purport to represent the plaintiff in this action. In the event of any judgment in such other lawsuits against Exxon and in favor of plaintiff herein, such judgment will be res judicata as to the claims of plaintiff herein.

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85. Numerous persons and entities have filed other lawsuits against Exxon, and various other defendants, and to the extent there is a recovery in said other lawsuits encompassing claims made by plaintiff herein, recovery on the claims herein is barred to the extent that it would represent a multiple recovery for the same injury.

86. Some or all of plaintiff's claims for damages may be barred or reduced by the doctrine of comparative negligence or comparative fault.

87. The amount of liability, if any, for the acts alleged is controlled by statute, including, without limitation, 43 U.S.C. § 1653(c) and AS 09.17.010, .060 and .080(d).

88. If punitive damages were to be awarded or civil or criminal penalties assessed in any other lawsuit against Exxon relating to the oil spill, such award bars imposition of punitive damages in this action.

89. Some or all of plaintiff's claims, including claims for punitive damages, are preempted by the comprehensive scheme of federal common law and federal statutes and regulations, including its system of criminal and civil penalties, sanctions and remedies relevant to the oil spill, and its scheme relevant to the protection of subsistence interests.

90. Plaintiff's claims for punitive damages are

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precluded by the Alaska statutory scheme for civil and criminal penalties.

91. Plaintiff's claims for compensatory relief under state law are preempted by federal statutory and common law schemes for compensatory relief.

92. Certain claims asserted by plaintiff are not ripe for adjudication.

93. Those portions of AS 46.03 that were enacted after the oil spill constitute an unlawful bill of attainder violative of Article I, Section 10 of the United States Constitution and Article I, Section 15 of the Alaska Constitution, and if applied to Exxon would also violate the due process clauses and the contract clauses of the United States and Alaska Constitutions.

94. The Fund established under the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(c), may be strictly liable for some or all of the damages alleged by plaintiffs. This action should not proceed in the absence of the Fund's joinder as a defendant.

95. Numerous persons and entities have filed lawsuits relating to the oil spill, some of whom purport to represent the plaintiff in this action. In the event of any recovery in such other lawsuits by persons whose claims are

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encompassed in this action, Exxon is entitled to a setoff in the full amount of such payments.

96. Exxon and Exxon Shipping have acted pursuant to government approval and direction with regard to the containment and clean-up of the oil spill.

97. Plaintiff fails to satisfy the requirement for the injunctive relief he seeks.

98. Certain theories of relief may not be maintained because those theories are based upon the exercise of the state and federal constitutional right to petition the state and federal governments with respect to the passage and enforcement of laws.

Prayer

WHEREFORE, Exxon prays for judgment as follows:

1. That plaintiff take nothing and be granted no relief, legal or equitable;

2. That Exxon be awarded its costs in this action, including a reasonable attorney fee; and

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3. For such other and further relief as the Court deems just and proper.

DATED: April 30, 1990

Respectfully submitted,

CHARLES W. BENDER
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and

WILLIAM M. BANKSTON
BANKSTON, McCOLLUM & FOSSEY

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	Case A89-095 Civil
	)	(Consolidated)
the EXXON VALDEZ	)	

RE: Case No. A89-361

ANSWER OF DEFENDANT D-3 TO COMPLAINT OF P-277

Defendant Alyeska Pipeline Service Company ("Alyeska") (D-3), for itself alone, responds to plaintiff's Complaint as follows. In so answering, Alyeska speaks only for itself. As to all allegations with respect to other defendants, Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, Alyeska denies them.

THE PARTIES

1. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 and, therefore, denies them, and further denies that it has damaged or is liable to plaintiff in any form or manner.

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2. Alyeska admits and alleges that it is a Delaware corporation owned by seven companies ("Owner Companies"), consisting of Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines (Alaska) Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company, and that these Owner Companies are permittees under the Right-of-Way for the Trans-Alaska Pipeline System ("TAPS"). Alyeska further admits and alleges that it operates the TAPS, including the terminal at Valdez, Alaska, and that the T/V EXXON VALDEZ was loaded with approximately 53 million gallons of North Slope crude oil at the Valdez Marine Terminal on March 23, 1989. Except as so admitted and alleged, Alyeska denies the allegations of paragraph 2.

3-8. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3 through 8 and, therefore, denies them.

9-13. Alyeska admits that paragraphs 9 through 13 purport to define certain terms. Alyeska lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraphs 9 through 13 and, therefore, denies them, and further denies that any use of these terms in the Complaint is necessarily accurate or appropriate.

OPERATIVE FACTS

14. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 and, therefore, denies them.

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15. Alyeska admits and alleges that, on the evening of March 23, 1989, the EXXON VALDEZ left the southern terminal facility of the TAPS, located at the Port of Valdez, Alaska. Alyeska lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph 15 and, therefore, denies them.

16. Alyeska admits and alleges that the EXXON VALDEZ was loaded with approximately 53 million gallons of crude oil which had been transported from Alaska's North Slope through the TAPS. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 16 and, therefore, denies them.

17-26. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 17 through 26 and, therefore, denies them.

COUNT I

(Alaska Environmental Conservation Act)

(Plaintiff v. EXXON, ALYESKA and DOES 1 through 49)

27. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 26, inclusive, of the Complaint as if set forth in full herein.

28. Alyeska admits the allegations of paragraph 28.

29. Alyeska denies the allegations of paragraph 29.

30. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30 and, therefore, denies them.

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31. Alyeska denies the allegations of paragraph 31 and further denies that it has damaged or is liable to plaintiff in any manner or amount.

32. Alyeska lacks knowledge or information sufficient t form a belief as to the truth of the allegations of paragraph 32 and, therefore, denies them.

33. Alyeska denies the allegations of paragraph 33 and further denies that it has damaged or is liable to plaintiff in any manner or amount.

34. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 and, therefore, denies them.

COUNT II

(Common Law Strict Liability)

(Plaintiff v. EXXON and ALYESKA)

35. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 34, inclusive, of the Complaint as if set forth in full herein.

36-37. Alyeska denies the allegations of paragraphs 36 and 37.

38. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38 and, therefore, denies them.

39. Alyeska denies the allegations of paragraph 39 and further denies that it has damaged or is liable to plaintiff in any manner or amount.

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COUNT III

(Negligence)

(Plaintiff v. EXXON, ALYESKA, and HAZLEWOOD)

40. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 39, inclusive, of the Complaint as if set forth in full herein.

41-42. Alyeska denies the allegations of paragraphs 41 and 42.

43-49. Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 43 through 49 and, therefore, denies them.

COUNT IV

(Negligence)

(Plaintiff v. EXXON)

50. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 49, inclusive, of the Complaint as if set forth in full herein.

51-54. These paragraphs do not purport to contain allegations relating to Alyeska, and Alyeska, therefore, is not required to respond to them. In the event that a response were required, Alyeska lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 51 through 54 and, therefore, denies them.

COUNT V

(Negligence)

(Plaintiff v. EXXON and ALYESKA)

55. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 54, inclusive, of the Complaint as if set forth in full herein.

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56-59. Alyeska admits and alleges that it submitted an oil spill contingency plan to the State of Alaska which the State of Alaska, acting by and through its Department of Environmental Conservation, approved on or about June 11, 1987 for a term of three years (the "Contingency Plan"). A portion of the Contingency Plan provided for a response to spills in Prince William Sound (the "PWS Contingency Plan"). The PWS Contingency Plan specified an organizational structure for dealing with oil spills in Prince William Sound. It also provided for the maintenance by Alyeska of certain described response equipment and described a series of guidelines in connection with potential response efforts to certain hypothetical oil spills based upon assumed environmental and other conditions. The terms of the Contingency Plan and the PWS Contingency Plan speak for themselves. Except as so admitted and alleged, Alyeska denies the allegations of paragraphs 56 through 59.

60. Alyeska denies the allegations of paragraph 60, denies that it has damaged or is liable to plaintiff in any amount or manner, and further denies that there are any grounds for an award of punitive damages as against Alyeska.

COUNT VI

(Private Nuisance)

(Plaintiff v. EXXON and ALYESKA)

61. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 60, inclusive, of the Complaint as if set forth in full herein.

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62-64. Alyeska denies the allegations of paragraphs 62 through 64, and further denies that it has damaged or is liable to plaintiff in any amount or manner.

COUNT VII

(Public Nuisance)

(Plaintiff v. EXXON and ALYESKA)

65. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 64, inclusive, of the Complaint as if set forth in full herein.

66-68. Alyeska denies the allegations of paragraphs 66 through 68, and further denies that it has damaged or is liable to plaintiff in any amount or manner.

COUNT VIII

(Negligent Interference with Plaintiff's Prospective Economic Advantage)

(Plaintiff v. EXXON, ALYESKA, and HAZELWOOD)

69. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 68, inclusive, of the Complaint as if set forth in full herein.

70-71. Alyeska denies the allegations of paragraphs 70 and 71, and further denies that it has damaged or is liable to plaintiff in any amount or manner.

72. There is no paragraph 72.

COUNT IX

(Negligent Infliction of Emotional Distress)

(Plaintiff v. EXXON, ALYESKA, and HAZELWOOD)

73. Alyeska adopts and incorporates by this reference its responses to paragraphs 1 through 72, inclusive, of the Complaint as if set forth in full herein.

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74. Alyeska denies the allegations of paragraph 74, and further denies that it has damaged or is liable to plaintiff in any amount or manner.

FIRST SEPARATE AND ADDITIONAL DEFENSE

(Failure to State a Claim)

The Complaint and each purported Claim thereof fail to state a claim against Alyeska upon which relief can be granted.

SECOND SEPARATE AND ADDITIONAL DEFENSE

(Lack of Standing)

Plaintiff lacks standing to assert claims for relief on the grounds alleged in one or more of the causes of action set forth in the Complaint.

THIRD SEPARATE AND ADDITIONAL DEFENSE

(Setoff)

If plaintiff receives payment in full or partial satisfaction of the claims described in this action, and in the event of any recovery against Alyeska herein, Alyeska is entitled to setoff in the full amount of such payments.

FOURTH SEPARATE AND ADDITIONAL DEFENSE

(Release, Accord and Satisfaction)

If plaintiff receives payment in full or partial satisfaction of the claims described in this action and executes releases of such claims, any such payments operate as an accord, satisfaction, and release of such claims, in whole or in part, and any such releases should bar such claims against Alyeska.

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FIFTH SEPARATE AND ADDITIONAL DEFENSE

(Other Actions Pending)

Alyeska is informed and believes, and thereon alleges, that plaintiff has filed, or is a putative member of purported classes in, some or all of the plaintiff's other actions in this Court and in other courts alleging claims for recovery for the damages or injuries alleged herein. Accordingly, Alyeska is entitled to an abatement of this action, or, in the event of any recovery by plaintiff in such other actions as compensation for the damages or injuries alleged herein, to a setoff in the full amount of such recovery.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

(Failure to Mitigate)

Alyeska is entitled to a reduction in any damages that may be awarded against it by virtue of, and to the full extent of, any failure by plaintiff to mitigate damages.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Acts or Omissions of Third-Parties)

Any discharge of oil as alleged in the Complaint was caused solely by the acts or omissions of parties other than Alyeska who were not employees, agents, or otherwise under the control of Alyeska.

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

(Acts at Direction of the Government)

Alyeska has no liability to plaintiff for any acts or omissions undertaken at the direction of governmental

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authorities including, but not limited to, the United States Coast Guard and the Alaska Department of Environmental Conservation.

NINTH SEPARATE AND ADDITIONAL DEFENSE

(Conditions Beyond Control of Defendant)

Alyeska is not liable or otherwise responsible for any injury or damages resulting from any discharge of oil as alleged in the Complaint to the extent that such injury or damage resulted from, or could have been prevented but for, environmental and other conditions beyond the control of Alyeska that hindered, rendered ineffective, or prevented response efforts.

TENTH SEPARATE AND ADDITIONAL DEFENSE

(Acts of Third-Parties and

Conditions Beyond Control of Defendant)

Some or all of any alleged injury or harm resulting from the discharge of oil as alleged in the Complaint were caused solely by a combination of the acts of third-parties (including governmental authorities) and environmental and other conditions beyond the control of Alyeska that hindered, rendered ineffective, or prevented response efforts.

ELEVENTH SEPARATE AND ADDITIONAL DEFENSE

(No Liability for Nuisance)

Alyeska never owned nor operated the T/V EXXON VALDEZ, did not own the oil discharged from the T/V EXXON VALDEZ at the time of or immediately prior to the spill, and never discharged, caused to be discharged, or permitted any discharge of oil as alleged in the Complaint. Therefore, Alyeska cannot be held liable for any claims of nuisance, whether arising under common law or statute.

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TWELFTH SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages Unlawful and Unconstitutional)

The claims herein for punitive or exemplary damages should be denied because the award of such damages herein would be contrary to law and unconstitutional under various provisions of the United States Constitution and the Alaska Constitution including, without limitation, Article 1, Section 7, and Article 1, Section 12.

THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Applicable Law)

Certain claims of plaintiff are barred or limited by the comprehensive system of federal statutes and regulations and by maritime and admiralty law.

FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Contributory Fault)

Plaintiff was himself at fault with respect to the matters alleged in the Complaint, and such contributory fault operates to reduce, in whole or in part, any right to recover herein.

FIFTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Bill of Attainder)

To the extent, if any, that plaintiff seeks to impose liability on Alyeska based upon those portions of AS 46.03 that were enacted after the oil spill, those portions of AS 46.03 that were enacted after the oil spill constitute an unlawful bill of attainder violative of Article 1, Section 10 of the United

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States Constitution, and if applied to Alyeska would also violate the due process clauses of the state and federal constitutions and the contract clause of the United States Constitution.

SIXTEENTH SEPARATE AND ADDITIONAL DEFENSE

(TAPA Fund Liability)

The Fund, established under the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. Sec. 1653(c), may be strictly liable for some or all of the damages alleged by plaintiff. This action should not proceed in the absence of joinder of the Fund as a defendant.

PRAYER FOR RELIEF

WHEREFORE, Alyeska prays judgment against plaintiff as follows:

1. That plaintiff takes nothing by way of his Complaint;

2. That the Complaint be dismissed with prejudice as to Alyeska;

3. For costs of suit herein, including attorneys' fees as available under all applicable statutes and principles of law; and

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4. For such other and further relief as the Court may deem just and proper.

DATED: April 30, 1990

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

IN RE EXXON VALDEZ,	No. A89-095 Civil (Consolidated)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

P-277'S RESPONSE TO ORDER 23

(ISSUES REGARDING CLASS CERTIFICATION)

Pursuant to the Court's Order No. 23, plaintiff P-277 submits the following brief to address the concerns addressed by the court in that Order.

INTRODUCTION

The objectives of any plan to manage multi-party litigation should be to conserve judicial assets and time, to simplify the litigation, to avoid duplication of efforts, to preserve constitutional and other rights of the parties, and to provide as early a resolution of all disputes as possible.

Sometimes, the above objectives can be attained through the use of class actions. This is true when the damages to each individual are relatively small, fairly uniform, and easily quantified. For example, in this matter, the claims of the

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cannery workers may fit those categories. Some of the other groups who have suffered damage here may likewise lend themselves to class action treatment. We do not believe, however, that that is so with the commercial fisherman, landowners, and possibly some of the other groups. In fact, we believe that class treatment would be an impediment to the achievement of the above objectives.

Class action proponents trumpet to the wind the vast difficulties facing the courts in administering these cases. However, although there are a large number of potential claims here the actual issues to be decided are not that many, nor that difficult. The legal issues to be decided are 1) standing to sue, 2) jurisdiction, 3) liability, and 4) damages.

CASE MANAGEMENT

The issues of standing to sue relative to various groups of claimants has already been raised by Alyeska's motions for judgment on the pleadings. This issue is almost fully briefed and will undoubtedly be decided by the court expeditiously in the near future.

Jurisdiction does not appear to be a problem here. Thus far, none of the defendants have contested the jurisdiction of the courts over the persons of the defendants. Early in this case, Exxon made a determination to follow a course of admitting responsibility for damages flowing from the oil spill in Prince William Sound. They have steadfastly followed that course, both judicially and extrajudicially until the present time. They have admitted liability in their pleadings and the highest corporate officers have testified before federal and state legislative bodies and stated to the media that Exxon

recognizes its liability, accepts it, and intends to compensate for it. If after all of that, Exxon should now attempt to change course and deny liability, it would appear that they would run against the reefs of judicial ire, Rule 11, and adverse public opinion.

Thus liability for compensatory damages by the Exxon defendants can here be decided as a matter of law by motion for judgment on the pleadings or by partial summary judgment motions on affidavits if the court finds that such affidavits are desirable. Alaska's strict liability statute, AS 46.01.822, provides that the owner and transporter of petroleum products are strictly liable for injuries and damages caused by the unauthorized release of petroleum. The defendants have admitted in their answers to the complaints that more than 11 million gallons of crude oil was released in Prince William Sound on March 24, 1989, that the release was unauthorized, that the oil was being transported by Exxon Shipping Company, and was owned by Exxon Corporation. Such admissions in the pleadings permit the courts to decide the liability for injuries and damages as a matter of law. Once such an order has been made, it becomes the law of the case for all the consolidated cases and all those subsequently added to the consolidated cases.

We should then very quickly come to the knub of this case, i.e., the questions of causation and quantum of compensatory damages and the questions of liability for and the quantum of punitive damages. It is exactly in these areas that constitutional law concerns begin to come into play. See e.g., the concern of the Court in In Re: Fibreboard, 893 F.2d 706 (U.S.C.A. 5th 1990) in protecting the 7th Amendment rights of

the parties. It is also in these areas that the class approach to this litigation not only does not well serve the litigation but in fact does disservice to it.

If the cases are permitted to continue individually almost all of the compensatory damage issues will be settled between Exxon and the individual claimants or their attorneys. To aid in this process, we suggest that the court immediately instruct the parties to develop Alternative Dispute Resolution systems to resolve issues of compensatory damages without the direct intervention of the court. Once the court has decided the liability for compensatory damages as a matter of law by judgment on the pleadings, there is even more reason to believe that individual negotiation, mediation, or arbitration, will solve most of the problems and afford both sides their constitutional and legal rights. In order to arrive at that quantum of settlement, it will be necessary for the plaintiffs to furnish the defendants with various historical documents dealing with fishing history, etc. to enable each case to be individually evaluated. Only after such individual evaluation would the defendants agree to pay the settlement and the plaintiffs would not be forced to accept any settlements unless they are afforded the individual evaluation and full compensation of their cases.

What happens practically if the court certifies the class, using the fishermen as an example? First, there is the problem of different gear types fishing in different areas for different species of fish. In order to try common issues of fact any class of fishermen would have to be broken down into numerous subclasses. To arrive at the number thereof one need

only multiply the number of different species by the different gear types used for each species and by the number of different areas. This, of course, can be done but does not solve the problem because of opt out provisions in 23(b)(3) classes.

Of course, the court has the power to consolidate the class action subclasses and the opt out fishermen who would otherwise belong to each of the subclasses. But what advantage is then gained by having the class in the first place? Would not such a consolidation result in a conflict between class and non-class over the quantum of damages? Is the jury to be instructed to provide a pool of money to those who did not opt out but to make individual awards to those who did?

Leaving aside the question of opt outs, and assuming that there are none, is class determination the most efficient way to determine damages? Is it the most equitable? And, above all, does it result in the earliest possible compensation to the plaintiffs? We think a review of the methods of arriving at damages in the class scenario will show that all of those questions have to be answered in the negative.

If the plaintiffs are permitted to go forward with their cases as individual cases, all of their individual circumstances come into play. And if any dispute arises over the quantum of damages, it will be between the proper parties, the plaintiff and the defendants. If, on the other hand, the class approach is used and a lump sum settlement or judgment is arrived at, how will the money be divided? Each of the plaintiffs will wish to maximize his or her damages just as they would in the individual treatment of their case. But now such maximization of individual damages can only occur by assuming an adversary

position, not against the defendants, but against all other plaintiffs similarly situated. The question then becomes not how much money will adequately compensate each plaintiff but rather what percentage of a lump sum should each plaintiff get whether or not it adequately compensates the plaintiff.

The court will then be required to set up an entirely new and separate procedure and bureaucracy to distribute the funds. If there are recalcitrant plaintiffs who do not agree to take the share allocated to them by the trustee or other administrator will such plaintiffs be required to sue the trustee or the fund?

One of the most serious problems that arises in attempting to distribute the lump sum payment is delay of distribution to any of the plaintiffs. Since all of the plaintiffs who will participate in the fund must receive an equitable share of the fund it will probably be necessary to accumulate all of the information that would have been necessary to settle the cases individually. No individual could receive their full payment until the court or the trustee was satisfied that all individuals would be compensated proportionately. To resolve all of the internecine disputes between the plaintiffs would undoubtedly take years.

On the other hand, if class certification is not permitted to interfere with the orderly prosecution of these cases, there is little doubt that the defendant is prepared to continue to advance money against the ultimate total compensation due to each plaintiff and to discuss full or partial settlement of each individual case at any time that the required data to evaluate the case is furnished to the

defendant. If settlement is reached, the money can be paid immediately. If disputes remain, they can be referred to ADR processes immediately. In those few cases where the ADR result is rejected by either plaintiff or defendants, the cases may be referred back to the court where they can be consolidated for trial in groups which take into account the area, species and gear type involved in each case. If, as is unlikely, there are sufficient cases for any area, species or gear type to make the trial of all of them in one consolidated action unfeasible then representative cases could be set up for test trials for each fishery. Lead counsel for plaintiffs could be appointed and a trial schedule based upon trials of test groups of fishermen for each fishery could be developed. It would be surprising if the outcome of such test cases did not lead to the settlement of the remaining cases.

Especially in the area of liability for and quantum of punitive damages consolidation of individual cases is far superior to class treatment. The approach suggested by class action proponents of one massive trial of all punitive damages that should be awarded to all of the plaintiffs herein appear impossible without quantifying all compensatory damages in the cases. It is the majority rule and the Alaska rule that punitive damages must bear a reasonable relationship to compensatory damages. Whether they do so or not can only be determined in the class action posed method by quantifying all of the compensatory damages and comparing them to the punitive damages which may be awarded by a jury. The trial, of course, could not therefore be held for many years. It will be many years before the total amount of damages to the environment, to

the fisheries, and to the property is fully known.

Assuming, however, that all of these obstacles could be overcome the court would still be faced with the problem of distribution of the award to the plaintiffs. A whole new bureaucracy for the division of the lump sum would need to be constructed.

All of these problems can be avoided. One trial can be achieved by consolidating all of the cases regardless of the type of claim. The prohibition against trying punitive liability and punitive damage separately can be avoided. The trial can be conducted on the plaintiffs side by trial counsel chosen by the plaintiffs, or in the absence of agreement by all of the plaintiffs, counsel appointed by the court. The evidence on punitive damage liability can be presented one time and one time only. All parties can be bound by the one time decision by use of consolidation.

The prohibition against determining liability and damages in separate trials can be avoided by the procedure used successfully in West Virginia in 375 asbestos cases, and presently being used in the Eastern District of Texas in Judge Parker's court. The jury trying this single case would determine the liability or lack of it of each defendant for punitive damages. The same jury would then determine what relationship those damages bore to compensatory damages suffered by each plaintiff. Assuming the jury found one or more of the defendants liable for punitive damages and found the ratio of those damages to compensatory damages, the court would need no further procedure. After the finding of liability and ratio by the jury, each plaintiff in settlement discussions, in ADR

procedures, and in trial, need only prove up the compensatory damage to which he or she is entitled and those damages would automatically be increased by the amount of punitive damages dictated by the ratio found by the jury. E.g., if the jury should find that punitive damages for a ratio of 2 to 1 to compensatory, once compensatory damages were determined, they need only be trebled and the full award paid in settlement if the case is settled or entered as a judgment if the case is tried.

As a practical matter, cases in which there has been predetermination of a multiplier would be extremely easy for knowledgeable plaintiffs and defense attorneys to settle.

SUMMARY

Plaintiffs suggest that the court deny certification of the fishermen's class and other classes like it where the damages are large and disparate and of the punitive damage class. We suggest this not because of any personal animosity for class actions but because of our deep felt belief that class action treatment of these types of cases is not only unwarranted but counter- productive.

Although these cases are numerous, they must all eventually be dealt with individually either through individual treatment from the beginning or individual consideration at the time of distribution of any joint fund developed. The most expeditious way to do that is to resolve all matters of law that can be resolved. Questions of standing to sue should soon be determined by the court.

Liability for compensatory damages, considering the prior admissions of the defendant, should be resolved by motions for

judgment on the pleadings or motions for partial summary judgment. The determination of compensatory damages should be accelerated through the use of ADR processes which should be established as soon as possible by the courts.

Whether the compensatory damages are decided in any particular case first or whether the liability for punitive damages is decided first should not matter to the final outcome.

Liability for punitive damages should be decided in a single consolidated trial by a jury which also finds what relationship those damages bear to compensatory damages. If a case has been settled for compensatory damages prior to that determination the question of application of any multiplier set by the jury can await the trial of the punitive damage issues without interfering with the settlement. A later jury determination can be applied as a matter of administrative procedure for those prior settled cases.

Those cases which are tried or settled after the determination of punitive liability and the ratio of punitive damages to compensatory can have such administrative application at the time they are settled.

We believe that the above procedure will conserve judicial assets and time, simplify the litigation, avoid duplication of efforts, preserve the constitutional and other rights of the parties, and provide as early a resolution to all disputes as possible.

DATED: April 6, 1990

BIXBY, COWAN & GERRY

By: _____
RICHARD F. GERRY
Attorneys for Plaintiff

AKPLD/9971

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

IN RE EXXON VALDEZ OIL SPILL LITIGATION, This Document Relates to: All Cases	CASE NO. A89-095 Civil (Consolidated)

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Anne E. Howard, upon oath, deposes and states:

1. That I am employed in the law office of Casey, Gerry, Casey, Westbrook, Reed & Hughes.

2. That service of the following has been made upon Lloyd Benton Miller, Sonosky, Chambers, Sachse & Miller, 900 West Fifth Avenue, Suite 700, Anchorage, Alaska 99501 as plaintiffs' liaison counsel pursuant to Pretrial Order No. 9,

and Douglas Serdehely, Bogle & Gates, 1031 W. 4th Avenue, Sui 600, Anchorage, Alaska 99501, as defendants' liaison counsel pursuant to Pretrial Order No. 8, on April 6, 1990 via Federa Express, postage prepaid.

DOCUMENT SERVED:

P-277's Response to Order 23 and Motion to Accept Late Filing.

Anne E. Howard

Anne E. Howard

SUBSCRIBED and SWORN to before me this 6 day of April, 1990.

OFFICIAL SEAL
CLAIR C CUNNINGHAM
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires APR 30, 1992

Notary Public in and for the State of California. My Commission expires: 4/10/92