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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 Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION BY ALYESKA DEFENDANTS FOR LEAVE TO FILE RESPONSE TO AMICUS BRIEF

Alyeska Pipeline Service Company (D-3), George M. Nelson (D-9), Amerada Hess Pipeline Corporation (D-11), ARCO Pipe Line Company (D-12), Mobil Alaska Pipeline Company (D-14), BP Pipelines (Alaska), Inc. (D-19), Phillips Alaska Pipeline Corporation (D-20) and Unocal Pipeline Company (D-21) (the "Alyeska defendants") herewith reply to the memorandum filed by certain plaintiffs in opposition to the motion by the Alyeska defendants for leave to file a response to the amicus brief for the State of Alaska. The proposed response of twenty pages or less is anticipated to be filed with the Court on or before Wednesday, August 22, 1990.

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Plaintiffs opposition is not well taken for at least the following reasons:

1. Regrettably, plaintiffs have totally misrepresented the rules before the United States Supreme Court and other federal courts relating to the filing of amicus briefs and responses to such briefs. The Supreme Court and appellate practice cited by the plaintiffs in their opposition to Alyeska's motion is refuted by the very citation that plaintiffs offer. As R. Stern, E. Gressman, and S. Shapiro in Supreme Court Practice (1986), report:

> It is essential that, in cases before the Court on the merits, the amicus brief comply with the requirement . . . that it be presented, along with the motion if one is necessary, "within the time allowed for the filing of the brief of the party supported." This enables the opposing party to respond to the amicus brief in its answering or reply brief. An amicus may not obtain an extension of time to file its brief, though its time will be extended if the party supported obtains an extension of time to file its briefs.

Id. § 13.13, p. 569 (emphasis added); see Sup. Ct. R. 37.3 ("A brief of an amicus curiae in a case before the Court for oral argument may be filed . . . within the time allowed for the filing of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief.").

The Federal Rules of Appellate Procedure are to like effect: "Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed for the

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party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer." Fed. R. App. P. 29 (emphasis added)./1/

2. The application by the Alyeska defendants for leave to respond to the State's amicus brief is not inconsistent in any respect with their opposition to the filing of a surrebuttal memo by plaintiffs. Rather, it is the consistent position of the Alyeska defendants that, as specified in the rules of this Court, the moving party be permitted to file the ultimate memorandum before the motion is heard.

3. It is the belief of the Alyeska defendants that the Court would benefit from consideration of Alyeska's response to the amicus brief filed by the State of Alaska. The following is a brief summary of significant points and applicable authorities to be included in the Alyeska's response and which should be before the Court.

a. The arguments made by the State regarding the test to be utilized for the "choice" of maritime law are seriously undercut by the decision of the United State Supreme Court on June 25, 1990 in Sisson v. Ruby, ___ U.S. ___, 110

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1/ The Ninth Circuit Rule that State of Alaska cites does not preclude a reply to an amicus, but prohibits the filing of a reply brief by an amicus. See 9th Cir. R. 29-1 ("No reply brief of an amicus curiae will be received.").

S.Ct. 2892, 111 L.Ed. 2d 292, 58 L.W. 4941. The Court there specified sweeping and inclusive tests to be applied for the choice of maritime law as to events occurring on navigable waters, stressed the importance of maritime law to the protection of maritime commerce and emphasized the need for uniform rules of maritime conduct with respect to all activities traditionally undertaken by vessels.

b. The State not only ignores the many applicable authorities cited by Alyeska for the proposition that the Robins Dry Dock rule of proximate causation and duty applies to pollution tort claims, but has also seen fit to misrepresent the legal and factual record before the Testbank court. As will be demonstrated, the plaintiffs in that case did indeed rely upon principles of Louisiana state law, both common law and statutory, which they contended to permit recovery by those suffering economic damages without physical impact. Provisions of Louisiana statutes on that subject are broad in scope. The position of plaintiffs was rejected not because Louisiana law would deny recovery, but rather because uniform principles of maritime law required that plaintiffs' claims be dismissed.

c. Plaintiffs have cited and relied upon a number of decisions regarding the application of state wrongful death rules in maritime cases now conceded to have been aberrational and based upon an original incorrect decision of many years before, holding that maritime law does not provide recovery for wrongful death. Plaintiffs have not advised the

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court that these cases were examined, explained and totally distinguished by District Judge Solomon in the instructive case of Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Ore. 1974). In that case, Judge Solomon held that general maritime law requires a uniform maritime negligence standard of care./2/

d. Plaintiffs' legislative arguments are undercut not only by the legislative analysis already before the Court, but also by the provisions and legislative history of the Trans-Alaska Pipeline System Reform Act of 1990, Section 8102, H.R. 1465, Congressional Record of August 1, 1990, H6256. Analysis of TAPAA itself, other environmental legislation, and legislative history over the years since the enactment of TAPAA, including the 1990 legislation, demonstrates that TAPAA did not purport to provide for an expanded rule of maritime damages, and that efforts to obtain expanded damage definitions such as those advanced by plaintiffs here were unsuccessful over the years, except to the very limited extent permitted by the 1990 Act.

e. The United States District Court for the Central District of California, responding to arguments comparable to those advanced by plaintiffs here, on July 27,

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2/ This requirement of uniformity was ratified by the Ninth Circuit in Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 484, (1979), aff'd sub nom. Scindia Steam Navigation Co. v. De los Santos, 451 U.S. 156 (1981), although a different standard of duty was established.

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1990 issued its order dismissing the plaintiffs' complaint for failure to state a claim in the action of Benefiel v. Exxon Corp. et al. In the course of that order, Judge Gadbois adopted and articulated arguments comparable to those advanced by the Alyeska defendants to this Court.

f. The State concludes its brief with an argument based upon pseudo-syllogistic reasoning, which is in fact sophistry. As the reply brief will demonstrate, the purported syllogism suffers from the fallacy of false enthymematic (unstated) premises.

4. The proposed reply of the Alyeska defendants will flesh out the foregoing points and respond directly to the State's brief. No reason exist to deny to the Alyeska defendants the opportunity to present such arguments or to deny to the Court the additional pertinent authorities, some of which are of very recent origin.

DATED: August 17, 1990

BURR, PEASE & KURTZ
Attorneys for Alyeska Defendants,
(D-3, D-9, D-11, D-12, D-14,
D-19, D-20, D-21)

By [signature]
for Charles P. Flynn

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

ORDER NO. 27

Order on Alyeska Defendants' Motion for Leave to File Response to Amicus Brief

The Alyeska defendants (D3, D9, D11, D12, D14, D19-D21) have filed a motion for leave to file a response to the amicus brief filed by the State of Alaska on July 30, 1990. Plaintiffs oppose the motion.

The State of Alaska filed the amicus brief pursuant to the court's request in Order No. 25. The amicus brief addressed issues relevant to Alyeska's motion for judgment on the pleadings. Oral argument on the motion for judgment on the pleadings is scheduled for September 13, 1990. The Alyeska defendants will

have an opportunity to make a response to the State of Alaska's amicus brief at that time.

Accordingly, the Alyeska defendants' motion for leave to file a response to amicus brief is denied.

DATED at Anchorage, Alaska, this 22 day of August, 1990.

United States District Judge

cc: L. Miller
D. Ruskin
D. Serdahely

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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)
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Re Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

RESPONSE TO AMICUS MEMORANDUM OF THE STATE OF ALASKA BY THE ALYESKA DEFENDANTS (D-3, D-9, D-11, D-12, D-14, D-19 through D-21)

Alyeska Pipeline Service Company (D-3), George M. Nelson (D-9), Amerada Hess Pipeline Corporation (D-11), ARCO Pipe Line Company (D-12), Mobil Alaska Pipeline Company (D-14), BP Pipelines (Alaska), Inc. (D-19), Phillips Alaska Pipeline Corporation (D-20) and Unocal Pipeline Company (D-21) (the "Alyeska defendants") herewith respond to the AMICUS MEMORANDUM OF THE STATE OF ALASKA OPPOSING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS ("State Memorandum").

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I

INTRODUCTION

In the midst of a grave threat to the United States' energy sources in the Mideast, the State urges this Court to declare moribund the Article III authority of the courts of the United States to shape and apply federal rules of maritime law to the maritime transport of Alaskan crude oil to the United States. Instead, this Court is urged to cede its historic authority over maritime tort law to the legislature and courts of the State of Alaska. In support of this proposition the State argues:

- It is the State which has the predominant interest in the maritime transport of oil from Alaska to the United States and thus it is the State which should declare the rules of law applicable to the financial consequences of incidents occurring in the course of that maritime commerce; and

- The United States Congress, by the enactment of certain limited and specifically directed environmental legislation, the Clean Water Act ("CWA")/1/, and the Trans-Alaska Pipeline Authorization Act ("TAPAA")/2/, purported to obliterate the maritime law declared by the United States Supreme Court and the federal court system pursuant to its Article III authority, particularly with respect to the application of that law to the maritime transport of Alaskan crude.

The State assumes that regardless of the maritime nexus of the action, state law applies unless it is

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1/ Clean Water Act of 1977, Pub. L. 95-217, 33 U.S.C. §§ 1281a et seq., with specific reference to § 1321.

2/ Trans-Alaska Pipeline Authorization Act, Pub. L. 93-153, 43 U.S.C. §§ 1651 et seq., with specific reference to § 1653.

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"unconstitutional"; and it is never "unconstitutional" when it provides a broader basis of recovery to plaintiffs. This, the State Memorandum claims, is because "public policy" factors favor recovery in oil spill cases, while rules limiting recovery to a defined and ascertainable ambit are without policy support.

It is upon these dubious arguments, refuted in this memorandum, that the State predicates its plea for the emasculation of federal maritime jurisdiction.

II

THE ISSUE BEFORE THIS COURT IS INDEED ONE OF A CHOICE OF LAW. ONCE FEDERAL MARITIME LAW IS CHOSEN, AS IT MUST BE HERE, STATE LAW IS NOT RELEVANT UNLESS IN SUPPLEMENT TO AND IN HARMONY WITH FEDERAL MARITIME LAW.

A. Federal Maritime Law Is The Law Of Choice; And A Fundamental Purpose Of That Law Is To Ensure Uniformity In Protection Of Maritime Commerce.

The State asserts that the problem here is essentially one of a choice of law, "somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern." (State Memorandum, pp. 3-4, quoting Kossick v. United Fruit Co., 365 U.S. 731, 739.) But the rules applicable to that choice have been articulated by the United States Supreme Court in a series of cases culminating in the decision of Sisson v. Ruby, ___ U.S. ___, 110 S.Ct. 2892, 111 L.Ed. 2d 292, 58 U.S.L.W. 4941 (June 25, 1990).

In Sisson, the Court was confronted with the legal consequences of a fire which erupted in the washer/dryer unit

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of a pleasure vessel docked at a marina on Lake Michigan. The Court of Appeals had construed Supreme Court decisions in Executive Jet and Foremost to limit the application of federal maritime law to incidents in maritime commerce or the application of rules of maritime conduct strictly relating to navigation. The Supreme Court decisively and unanimously rejected such limitations./3/ Maritime law is to be the law of choice whenever:

(i) the occurrence satisfies the "locality" test by occurring with respect to vessels on navigable waters; and

(ii) the occurrence involves either commercial maritime activity or at least a potential hazard to maritime commerce arising out of activity that bears a substantial relationship to traditional maritime activity.

The Sisson Court noted that a fire in a marina unquestionably posed at least a potential disruption to maritime commerce (regardless of the fact that a pleasure boat was involved) and that the element of relationship to a "traditional maritime activity" broadly pertains to any activities traditionally undertaken by vessels, commercial or noncommercial.

In support of its holding, the Court reemphasized the fundamental federal policy of maritime uniformity in protection of maritime commerce:

> The fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce," and we have said that that interest

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3/ The two concurring justices, Scalia and White, would have declared even broader principles of maritime jurisdiction.

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> cannot be fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct." The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

Sisson v. Ruby, 58 U.S.L.W. at 4943, 110 S.Ct. at 2898 (citations omitted).

B. The Robins Dry Dock Rule Is A Principle Of Law Based On Sound National Public Policy.

The State insists that the role of the federal courts in promulgating uniform rules for the protection of maritime commerce may be displaced whenever State law would permit plaintiffs with damage claims against commercial maritime interests to recover from the defendants. How such a policy would accommodate the policy goal of protecting maritime commerce is difficult to comprehend.

In carrying out its Article III mandate to fashion principles of maritime law consistent with the policies most recently articulated in Sisson, the federal courts, from Robins Dry Dock to East River,/4/ and most recently by District Judge Gadbois in Benefiel,/5/ have struck a balance between the

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4/ Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

5/ At the time of its original motion, Alyeska provided to the Court, as Appendix B, the order of the State court in the Benefiel case applying the Robins Dry Dock rule to claims brought against Exxon by consumers of gasoline in California contending that higher prices resulted from the grounding of the Exxon Valdez. After transfer to the United States District Court for the Central District of California, and the service of Alyeska, District Judge Gadbois, on July 27, 1990, issued an order dismissing the case as to all defendants. A copy of that order is attached to this memorandum as Appendix A.

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interests of those who would be compensated and those upon whom liability would be affixed. As developed by the Alyeska defendants in their original moving papers/6/ and in their principal Reply Brief,/7/ the rule requiring physical impact for recovery of consequent and nonspeculative economic damages is designed to achieve "predictability" and "reckonability" and to place a "prudent limitation" on "wave upon wave of successive economic consequences." A contrary rule would require "a staggering commitment of judicial resources" and "a consequent list of increasingly arbitrary, ad hoc decision making at the margins." Permitting recovery for "all foreseeable claims" for purely economic loss could make the defendant liable for "vast sums."

These important principles of federal maritime policy, applicable in a case where maritime law is selected under the tests articulated in Sisson, cannot be stultified by the application of any contrary state law.

C. The State Does Not Appropriately Deal With Applicable Authority Cited By Alyeska; And The Cases Relied Upon By The State Do Not Contradict That Authority.

The State simply ignores the host of directly applicable authority applying federal maritime law, including

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6/ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS D-3, D-9, D-11, D-12, D-14, D-19, D-20 AND D-21) FOR JUDGMENT ON THE PLEADINGS (Docket No. 830), pp. 15-22, citing cases from Robins Dry Dock to East River.

7/ REPLY MEMORANDUM OF ALYESKA DEFENDANTS (D-3, D-9, D-11, D-12, D-14, D-19, D-20 AND D-21) TO JOINT MEMORANDUM FOR PLAINTIFFS IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS (Docket No. 902), pp. 2-9, discussing Testbank in the context of East River and other cases.

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the Robins Dry Dock rule, in spill cases./8/ However, the State does see fit to single out and mischaracterize both the decision and the underlying legal and factual record in the thoughtful and comprehensive Testbank decision.

In attempting to portray Testbank as a Fifth Circuit aberration, the State Memorandum declares that plaintiffs "had little incentive" to argue against the Testbank's court's holding that general maritime law, not Louisiana law, applied to the case. This speculation rests upon the unsupported assertion that state law would similarly have denied plaintiffs' recovery. State Memorandum at 10. From this faulty premise, the State inferred that the Testbank court "had no occasion to consider whether the interests of a state in protecting its coastal environment would be deferred to were the state to decide that the protections of the Robins rule were inadequate." Id.

To the contrary, the Testbank Petition for Certiorari expressly noted that the plaintiffs there alleged their right to recover under state law claims based in negligence, public nuisance for pollution, and violation of an environmental protection statute. The Petition forcefully argued that Louisiana State law could supply the remedies foreclosed by the Robins Dry Dock rule:

8/ These cases are collected by Alyeska in its original Memorandum (cited at fn. 6, supra) at pp. 13-14, 19-22 and in its Reply Memorandum (cited at fn. 7, supra) at pp. 15-18.

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> [W]hen jurisdiction exists in the Federal Courts in a situation where State law is applicable, the Federal Courts may apply the public nuisance law to remedy a wrong to an appropriate plaintiff.
>
> Federal law has not deprived a state cause of action for a public nuisance on navigable waterways. . . . The only impediment to the public nuisance cause of action in this case, then, would be if maritime tort law precludes such a remedy . . . .

Petition for Certiorari at 44-45, attached as Appendix A to the Alyeska Reply Memorandum (emphasis added)./9/

Moreover, the right of private plaintiffs to recover under the state environmental statute was squarely at issue in Testbank:

> Also alleged under Louisiana law were claims that the pollution caused by the collision between the M/V SEA DANIEL AND M/V TESTBANK was proscribed by The Louisiana Environmental Affairs Act of 1980, La. R.S. 30:1051 et seq., [later renumbered 30:2001 et seq.], which created a private right of action in La. R.S. 30:1074 [now 30:2026], and that petitioners were entitled to pursue their damages attributable to the acts in violation of the Louisiana law in the Federal Courts under the provisions of 18 U.S.C. § 1332(a)(2-3).

Petition for Certiorari at 19-20. The Louisiana statute at issue in Testbank, the Louisiana Environmental Affairs Act of 1980, set forth public policy concerns that are mirrored in Alaska legislation. Like Alaska law, it established a right of action for private plaintiffs./10/

9/ Cited at fn. 6, supra.

10/ The applicable provisions of the Louisiana statutes are attached to this memorandum as Appendix B.

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Thus, the Testbank record does not square with the purported history provided in the State Memorandum; and the Fifth Circuit rejected state law not because it would be unhelpful to plaintiffs, but rather because federal maritime law provided the rule of decision.

> Plaintiffs also urge that their economic losses are recoverable as state law claims in negligence, nuisance or under the Louisiana Environmental Affairs Act of 1980. Because established principles of general maritime law govern the issue of recovery in this case, we reject these state law theories.

Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d at 1031 (emphasis added).

In addition to mischaracterizing Testbank, the State relies upon cases which simply do not support its position, and it does so without advising the Court of the unique circumstances of such cases and their subsequent history.

For example, to support an argument that in adjudicating liability for maritime incidents the State may impose a higher duty than would be required under maritime law the State relies upon the wrongful death cases of Hess and Western Fuel./11/ But the wrongful death decisions were thoroughly analyzed and distinguished in Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Ore. 1974). District Judge Solomon pointed out that admiralty courts "have followed the general maritime uniformity principle, except in

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11/ Hess v. United States, 361 U.S. 314 (1960); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

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certain wrongful death cases." (Id. at 1108.) Judge Solomon traced these aberrational cases from The Harrisburg, through Western Fuel and The Tungus to Moragne v. States Maritime Lines, 398 U.S. 375 (1970), which "ended the confusion caused by the application of state laws in maritime death cases" by recognizing a federal maritime wrongful death action, and he "reaffirmed the principle that general maritime law requires a uniform maritime negligence standard of care." (386 F. Supp. at 1108-1110.)/12/ Accordingly, Judge Solomon held that "both general maritime law" and the statute there at issue required "a uniform federal standard of care for negligence actions" and that the state standard was inapplicable. (Id. at 1112.)/13/

Second, the State relies upon a series of regulatory cases which do not concern the Article III authority of the

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12/ The essence of the story was that The Harrisburg Court wrongly concluded that maritime law did not provide a cause of action for wrongful death. As a result, in order to remedy this wrong, the Supreme Court permitted the adoption of state wrongful death provisions. Once it had been decided that state law applied, the question was whether the state law would apply "as is" or subject to various requirements which might be imposed upon it by other provisions of federal maritime law. In a strange brace of decisions in which dissenters in one case lined up with a single member of the majority in another, the result was declared that the state law would apply, warts and all, in the total absence of any federal remedy for wrongful death. It was this strange and unique application of state principles in what otherwise would have been federal maritime cases that was wiped away by Moragne. See discussion in Baer, Admiralty Law of the Supreme Court, 3d Ed., §§ 6-10, pp. 192-204.

13/ This requirement of uniformity was ratified by the Ninth Circuit in Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 484, (9th Cir. 1979), aff'd sub nom. Scindia Steam Navigation Co. v. De los Santos, 451 U.S. 156 (1981), although a different standard of duty was established.

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federal courts to declare and shape maritime tort law, but rather concern the proper ambit of the legislative authority of Congress, the administrative departments of federal government and the states. An example is Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943), a case concerning the application to maritime employers of a state unemployment insurance tax. Justice Black pointed out that the case really had nothing to do with the Article III power of federal courts: "Congress retains the power to act in the field [of taxation], and in the meantime, federal courts have nothing to do with it. No principle of admiralty requires uniformity of State taxation." Id. at 309-310. Other cases not implicating the Article III authority of federal courts over maritime tort law include those applying rules governing emissions from smokestacks (Huron Portland Cement), limitations upon the discharge of ballast water (Chevron U.S.A.), the use of fishing nets (Manchester), and a general environmental regulation act (Portland Pipeline). Askew is such a case, since it concerned a facial challenge to the entire environmental protection act of the State of Florida before any of its liability provisions had been applied either to conflict or not to conflict with the fundamental tenets of maritime law./14/

Rules of proximate cause and duty go to the heart of the very definition of maritime tort. These principles are set

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14/ Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

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by federal courts pursuant to their Article III jurisdiction; they are not legislative, regulatory or tangential procedural requirements/15/ appropriately left to state jurisdiction.

III

CONGRESS HAS ENACTED NO LEGISLATION ABROGATING PRINCIPLES OF FEDERAL MARITIME LAW APPLICABLE TO PLAINTIFFS' CLAIMS AGAINST ALYESKA

The State asserts that two Congressional enactments pertaining to spills of North Slope crude oil at sea, the CWA and TAPAA, so occupy the field as to have obliterated all of Article III federal maritime law. The State so asserts although each act is (i) sharply limited as to parties and subjects covered (the CWA being limited to recovery of certain governmental expenses and TAPAA creating strict liability with a monetary limit against vessel owners and operators and the TAP Liability Fund) and (ii) does not constitute the basis of any cause of action against Alyeska. Alternatively, the State argues that TAPAA's reference to "all damages" evinces federal policy hostile to the Robins Dry Dock rule. Neither claim survives examination.

First, TAPAA itself expressly disclaims any intent to preempt general federal maritime law applicable to claims not directly covered by TAPAA itself. Section 1653(c)(3) explicitly contemplates that claims unpaid under TAPAA "may be asserted and adjudicated" under "other applicable Federal and

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15/ An example would be the state survival of actions found in Just v. Chambers, 312 U.S. 383 (1941) not to be hostile to the characteristic features of maritime law.

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state laws"; and under Section 1653(c)(8) the vessel owner and the TAP Liability Fund may be subrogated to rights of any persons entitled to recover for negligence or unseaworthiness under "applicable state and Federal laws." (Emphasis added.) Similarly, the CWA provides broadly that "[n]othing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from the discharge of any oil . . . ." 33 U.S.C. § 1321(o)(1) (emphasis added).

Second, even had TAPAA not preserved claims under federal law, the limited number of parties and circumstances covered by TAPAA militate against reading into the Act the draconian intent of wiping away all Article III maritime law, leaving the field of maritime torts involving Alaska crude spills exclusively to the State. We have previously demonstrated that TAPAA and the CWA do not supersede federal maritime law as to defendants not covered by the applicable provisions of the statute./16/

Third, the State's broad reading of "all damages" in Section 1653(c) is refuted by the negative implication of Section 1653(a)'s more comprehensive definition of damages for

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16/ Reply Memorandum, cited at fn. 7, supra, pp. 41-46, 53-54.

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spills along the pipeline as opposed to oil spills at sea. Congress' awareness of the distinction is not only evidenced by the more expansive damage provisions in subsection (a), but also by the differing damage provisions in the Outer Continental Shelf Lands Act Amendments of 1978 and the Deepwater Port Act of 1974./17/

Finally, the State's argument is belied by the legislative history of TAPAA both at the time of its enactment and subsequently. The statements of legislators at the time of TAPAA's enactment stress that nothing in the bill (i.e., TAPAA itself) was intended to preempt state law (State Memorandum 17-19); and as indicated above, TAPAA itself makes clear that nothing in its terms is intended to preempt either state or federal law as to claims not directly made under TAPAA.

Subsequently, efforts were made in Congress to expand the type of damages permitted to be recovered under TAPAA. These efforts are chronicled in Section II, pp. 10-27, of the Supplemental Memorandum filed on behalf of the Use and Enjoyment Class/18/ as supported by an elaborate Appendix containing the legislative materials cited./19/ This history discloses that Congress has uniformly recognized that TAPAA

17/ See discussion in Reply Memorandum, cited at fn. 7, supra, at pp. 52-53.

18/ SUPPLEMENTAL MEMORANDUM OF THE USE AND ENJOYMENT CLASS IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION TO DISMISS SOME CLAIMS AND IN SUPPORT OF CLASS CERTIFICATION (Docket No. 873).

19/ Docket No. 873 (Appendix).

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claims are subject to the ordinary rules of maritime law respecting causation, that some members of Congress desired to change such rules legislatively by promulgating a broader damages definition in the Act, but that such attempts uniformly failed of passage./20

Legislative attempts to broaden the damages recoverable under TAPAA culminated with the signing into law on August 18, 1990 of H.R. 1465, the Oil Pollution Act of 1990, Pub. L. 101-380, one element of which was the Trans-Alaska Pipeline System Reform Act of 1990. See 136 Cong. Rec. H 6256-6258 (daily ed. August 1, 1990) for text. By this Act, TAPAA was amended as to all claims arising before enactment of the Reform Act in the following pertinent respect:

> (c) DAMAGES.--Section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)), as amended by this title, is further amended by adding at the end the following new paragraphs:
>
> "(13) For any claims against the Fund, the term 'damages' shall include, but not be limited to--
>
> "(A) the net loss of taxes, revenues, fees, royalties, rents, or other revenues incurred by a State or a political subdivision of a State due to injury, destruction, or loss of real property, personal property, or natural resources, or diminished economic activity due to a discharge of oil; and
>
> "(B) the net cost of providing increased or additional public services during or after removal activities due to a discharge of oil, including protection from fire, safety, or health

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20/ See discussion in Alyeska's Reply Memorandum, cited at fn. 7, supra, pp. 50-51.

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hazards, incurred by a State or political subdivision of a State.

* * *

Section 8102(c), 136 Cong. Rec. H 6256-6257 (daily ed. August 1, 1990).

A provision of this nature was first proposed by Senator Stevens as an amendment to the Senate version of the Oil Pollution Act. (S. 686.) Senator Stevens made clear that the limited addition to the damages recoverable was to be authorized specifically in the light of the grounding of the Exxon Valdez and to overcome a position of the Fund based upon a "court case."

> This is a very limited amendment. It covers only those claims that might be presented against the national fund because of potential claims against the liability fund. There is obviously only one incident that could give rise to such claims, and that is the Exxon Valdez.
>
> In the past year, the managers of the Alaska pipeline liability fund changed their regulations and provided that no longer would damages include the taxes, fees, royalties, rents, and other revenues of a political subdivision that have been lost as a result of a claim that would give rise against the fund. That change made in the regulations of the liability fund was not conveyed to Alaska, was not conveyed to the communities affected.
>
> What this amendment does is it reinstates, effective January 1 of this year, the potential claim of these communities against the Alaska fund, and those claims would be transferred to the national fund. I might say that it is a very remote possibility that there will ever be claims of this kind because, as we know, Exxon has acknowledged liability for the Exxon Valdez disaster, and is in fact now already compensating some of the cities, to a certain extent, for their losses. But there is a question as to whether there is a court decision that somehow or other might hold Exxon not responsible for the

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losses which would give rise for some people to present claims against the Trans-Alaska Pipeline Liability Fund.

135 Cong. Rec. S 10071 (daily ed. August 4, 1989).

On the House side, the amendment was introduced by Representative Miller's proposed legislation, H.R. 3277. (See comments of Representative Miller in 135 Cong. Rec. H 7972 (daily ed. November 2, 1989.) The Background Memorandum of September 20, 1989, prepared for members of the House Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries explained that the purpose of the amendment was to "[b]roaden the scope of oil spill liability to include loss of taxes, revenues, fees, royalties, rents, or other revenues incurred by a political subdivision of the State."/21/

This most recent legislative activity, consistent with the prior legislative history, confirms that Congress' reference to "all damages" did not wipe away, even as to TAPAA claims, the usual maritime limitations imposed by "court cases."

IV

THE STATE'S PARTING SYLLOGISM IS LOGICALLY FLAWED. IT IS BASED UPON FALSE ENTHYMEMATIC PREMISES.

The State fittingly closes its brief with an argument based upon a purported syllogism under which, presumably, "accepting Alyeska's interpretation of TAPAA arguendo, the required conclusion is still that TAPAA's non-preemption clause

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21/ The Background Memorandum is attached to this response as Appendix C.

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preserves Alyeska's right to adopt its own rules of proximate cause." State Memorandum at 22-24. The syllogism is as follows:

> TAPAA recognized that recovery of damages would be subject to some rule of proximate cause.
>
> Congress intended that such rule of proximate cause be the same as under normal maritime law principles -- i.e., Robins Dry Dock.
>
> TAPAA provides that the applicable subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.
>
> Ergo, Congress has specifically authorized state law to be applied to maritime accidents in contravention to fundamental tenets of federal maritime law.

For the syllogistic argument to be valid, all of its premises must be true, including implicit premises which are necessary in order for the argument to be complete. These unarticulated premises are referred to as enthymematic premises./22/ The syllogism presented by the State relies upon at least three such enthymematic premises which are false.

First, it is an unstated premise that the effect of a non-preemption clause in federal legislation is to specifically authorize a state rule of law which conflicts with another principle of federal law. Alyeska's Reply Brief established that the premise is not true; rather, a "savings clause" cannot properly be construed to save state laws which intrude upon

---

22/ Kalish, Montague and Mar, Logic: Techniques of Formal Reasoning, 2d ed. (1980), pp. 1 and 246-7; Walton, Informal Fallacies: Towards a Theory of Argument Criticisms (1987), pp. 2-3, 28-29, 133-137.

federal admiralty law -- they simply ensure that the legislation itself does not unintentionally replace a rule of law that otherwise would be applicable./23/

The second unstated premise is that TAPAA, whatever its rule of proximate causation, necessarily constitutes the whole of federal law applicable to the grounding of the Exxon Valdez. That unstated premise is also false. As developed at length in Alyeska's Reply Memorandum,/24/ TAPAA and the CWA are but elements of a comprehensive web of Article III maritime law and statutory provisions covering spills of Alaska North Slope oil in the course of maritime commerce.

The third unstated premise is that the claim by the plaintiffs against Alyeska is based upon TAPAA and that Alyeska's defenses are based upon TAPAA. Instead, the claims against Alyeska are not based upon TAPAA and Alyeska's defenses are based upon principles of Article III maritime law./25/

As so often is the case, "clever" arguments such as the "even if, arguendo" syllogism advanced by the State do not hold water.

23/ Alyeska Reply Brief, cited at fn. 7, supra, pp. 45-46, citing Pacific Merchant Shipping Ass'n v. Aubrey, 709 F. Supp. 1516 (C.D. Cal. 1989) and Central Montana Elec. v. Administrator of Bonneville Power, 840 F.2d 1472, 1478 (9th Cir. 1988).

24/ Reply Memorandum, cited at fn. 7, supra, pp. 38-54.

25/ Since this fallacy is predicated upon rebutting an argument not made by defendant Alyeska, it is also known as the "straw man fallacy" of "incorrectly or inaccurately attributing a position to an arguer that he does not really accept." Walton, cited supra at fn. 22, pp. 10-11.

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V

CONCLUSION

The State has asked this Court to declare a sweeping and unprecedented abrogation of the authority of the federal judiciary. It has asked nothing less than that the Court declare defunct the totality of Article III of federal maritime law to maritime commerce involving the transport of Alaska oil. To accomplish a goal so destructive to the authority of the federal government in general and to its judicial system in particular, the State should be able to point to clear and explicit Congressional legislation or United States Supreme Court decisions. It has not done so. Thus, the rule of law to be applied in these cases is indeed that of federal maritime law, of which an integral element is the concept of duty and proximate cause enunciated in Robins Dry Dock, East River, Textbank and other applicable cases.

DATED: August 17, 1990

BURR, PEASE & KURTZ
Attorneys for Alyeska Defendants,
(D-3, D-9, D-11, D-12, D-14,
D-19, D-20, D-21)

By _____
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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: ALL CASES

DEFENDANT EXXON SHIPPING COMPANY'S (D-2) NOTICE OF OPPORTUNITY TO RE-EXAMINE ELECTRONIC EQUIPMENT ON THE BRIDGE OF THE EXXON MEDITERRANEAN (FORMERLY EXXON VALDEZ)

On June 29, 1989, and August 3, 1989, the defendant Exxon Shipping Company ("Exxon Shipping") (D-2) notified all parties to this consolidated proceeding that it would be making the T/V EXXON VALDEZ available for inspection by any party, counsel and/or expert after the vessel arrived in San Diego shipyard, but before repair work was undertaken. Several parties requested the opportunity to conduct inspections of the vessel hull and bridge equipment, and those parties conducted extensive inspections during the time period September 1-7, 1989.

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In its August 3, 1989, Re-Notice to Parties of Opportunity to Inspect Vessel, Exxon Shipping also advised all parties.

> [S]ubstantial modifications are presently planned for the bridge of the EXXON VALDEZ. Accordingly, any party and/or expert interested in inspecting the vessel's bridge in its present condition should plan on doing so during the inspection.

The "substantial modifications" of the bridge equipment previously contemplated have not been implemented, however, certain maintenance, modification, and routine repair work has been performed on certain pieces of the bridge equipment in preparation for return to service, since the litigants conducted their inspections of the EXXON VALDEZ last year. The vessel, recently re-named the EXXON MEDITERRANEAN, is scheduled to leave for foreign service in September. Because of the interest expressed by some of the inspecting litigants in the electronic equipment on the bridge of the vessel, Exxon Shipping will make the following bridge equipment available for re-inspection for an appropriate length of time next month:

Harris RF-104 IKW HF Linear Power Amplifier

Raytheon RAYCAS V

Raytheon Mariners Pathfinder Radar

Sperry SRP 2000 Ship Control System

Raytheon DE-740 Digital Fathometer Depth Sounder

AMETEK Doppler "D" Sonar System

Copies of work reports and technical manuals will be available for inspection and copying at the offices of Bogle &

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Suite 600
1031 West 4th Avenue
Anchorage, Ak 99501
(907) 276-4557

Gates, Two Union Square, Seattle, Washington, during the period August 28-31, inclusive. Parties wishing to inspect and/or copy the documents should contact Richard Clinton or Peter Shapiro at (206) 682-5151 to make arrangements.

Exxon Shipping currently estimates that the EXXON MEDITERRANEAN will be available for re-inspection on or about September 8, 1990. In order to enable all interested parties to conduct any reasonable re-inspection of the above-named equipment on the bridge of the vessel, parties are requested to complete and return (on or before August 31, 1990) the form attached hereto as Exhibit A and to indicate thereon: (1) whether they are interested in conducting any such re-inspection; (2) the amount of time needed to perform the re-inspection; (3) the names and addresses of all persons who will be conducting such re-inspection; and (4) a description of any procedures any party wishes to employ in connection with the re-inspection, including any logistic requirements associated with such procedures. For the convenience of all parties, Exxon Shipping further requests that all parties, counsel and experts communicate and coordinate with one another in an attempt to minimize the total number of persons involved and to expedite the re-inspection process.

Once Exxon Shipping has received responses from all interested parties, Exxon Shipping will circulate a proposed

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schedule. Further coordination will be conducted through dire communications between counsel.

DATED at Anchorage, Alaska this 27th day of August, 199

BOGLE & GATES
Attorneys for Exxon Shipping

By: Douglas J. Serdahely

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REQUEST FOR RE-INSPECTION OF THE
EXXON MEDITERRANEAN BRIDGE EQUIPMENT

1. Counsel: Name: _____

Address: _____

Representing: _____

2. Persons in Inspection Party:

(1) _____ (2) _____
Name Name

_____ _____
Title Title

_____ _____
Address Address

(3) _____ (4) _____
Name Name

_____ _____
Title Title

_____ _____
Address Address

3. Estimated time needed for inspection: _____

4. Please attach a description of any procedure intended to be employed in the course of such inspection and any logistic requirements associated with such procedure.

Return completed form to: Richard M. Clinton
J. Peter Shapiro
Two Union Square
601 Union Street
Seattle, WA 98101-2346
(206) 682-5151 (telephone)
(206) 343-9749 (fax)

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Attorneys for Plaintiffs P-139 thru P-144

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re: Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

MOTION TO FILE ADDITIONAL EXHIBITS BEARING ON ROBINS DRY DOCK

Pursuant to Rule 15(d), the Use and Enjoyment Class hereby moves to file additional exhibits to supplement those already appended to its Supplemental Memorandum of March 27, 1990. The Class does so in lieu of seeking to file them at the time the upcoming hearing on Alyeska's Rule 12(c) motion, for which time and opportunity to argue will be limited.

Most importantly, Exhibit No. 1 shows that the Department of the Interior testified in 1977 at the time it promulgated the TAPS Fund regulations that it drafted the regulations "to parallel" comprehensive oil spill legislation that clearly would have abandoned Robins Dry Dock. This exhibit was recently retrieved from a federal documents depository and

was not located previously due to the fact that the Anchorage Law Library does not subscribe to the full Congressional Information Service so as to make hearing records available. A memorandum supporting the filing of these additional exhibits accompanies this Motion.

DATED this 7th day of September, 1990 at Anchorage, Alaska.

ADLER, JAMESON & CLARAVAL
Attorneys for Plaintiffs
P-139 thru P-144

By: _____
Geoffrey Y. Parker

ORDER

This Motion of the proposed Use and Enjoyment Class is hereby _____.

DATED this _____ day of _____, 1990 at Anchorage, Alaska.

_____
Presiding Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of September, 1990, the foregoing document was ~~mailed to:~~ Hand-delivered
- Charles Flynn, Esq.
- Douglas Serdahely, Esq.
- Lloyd Benton Miller, Esq.

By _____
Geoffrey Y. Parker

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re: Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

MEMORANDUM OF THE USE AND ENJOYMENT CLASS IN SUPPORT OF FILING ADDITIONAL EXHIBITS BEARING ON ROBINS DRY DOCK

The exhibits submitted herewith supplement those attached to the Supplemental Memorandum of the Use and Enjoyment Class on Robins Dry Dock issues[1] and support the arguments previously made by the class. Most importantly, Exhibit No. 1 has only become available recently from a federal documents depository. It shows that the Department of the Interior drafted the Trans-Alaskan Pipeline Liability Fund regulations ("TAPS Fund regulations") in 1977 "to parallel" comprehensive oil spill liability legislation then pending in the 95th Congress, just as

[1]See Supplemental Memorandum of the Use and Enjoyment & Class in Opposition to Alyeska Defendants Motion to Dismiss Some Claims and in Support of Class Certification, filed March 27, 1990.

the Use and Enjoyment Class previously argued. Other exhibits submitted herewith show that because the regulations parallel the comprehensive legislation the regulations must be interpreted as allowing recovery for injuries not accompanied by physical impact; again, just or the Use and Enjoyment Class previously argued. Therefore, no disharmony with the federal scheme occurs when state, fault-based, common law or the unlimited strict liability of 46.03.822 et. seq. and Alaska's common law of ultrahazardous activities are applied to both Robins and non-Robins injuries pursuant to TAPAA's waiver of preemption of strict liability and its preservation of state, statutory, and common law remedies. Finally, other exhibits submitted herewith show that once liability for injuries accompanied by or apart from physical impact is found against the vessel owner or operator under TAPAA, the regulations, and the state statute, then joint and several liability for such injuries arises against separate tort-feasors whose actions combine with those of the vessel owner or operator to produce the same, indivisible injuries. Contrary holdings would significantly impair the comprehensive scheme established by TAPAA because the ability of the Fund and Exxon to recover on subrogated claims against third parties would be limited.

A. Supplemental Exhibits Show that the Intent of the TAPS Fund Regulations is to abandon Robins Dry Dock.

On July 30, 1990, the State filed an amicus brief in Federal Court which supports Plaintiffs' arguments that any

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analysis of Robins Dry Dock issues must take into account the waivers of preemption in TAPAA and the Clean Water Act and the definition of "damages" contained in the TAPS Fund regulations at 43 CFR §29.1(e). The Use and Enjoyment Class made similar arguments in its Supplemental Memorandum.

In its amicus brief, however, the State asserted that the definition of "damages" in the TAPS Fund regulations "borrows" from the liability provisions of the 1978 Outer Continental Shelf Lands Act Amendments, 43 U.S.C. §1813. Alaska Amicus Memorandum at 16. The State's assertion contrasts with that of the Use and Enjoyment Class, which states that 43 CFR §29.1(e) and 43 U.S.C. §1813 are alike because they have common origins and were both drawn to parallel the liability provisions of comprehensive oil spill liability legislation pending in the 95th Congress, and not because one was the progeny of the other.[2] This distinction between the respective assertions of the State and the Use and Enjoyment Class has a direct bearing on the necessity for construing the TAPS Fund regulations as a rejection of Robins Dry Dock, which the Defendants erroneously seek to read into the regulations.[3]

---

[2]See Supplemental Memorandum of the Use and Enjoyment Class, pp. 10-24.

[3] It is important to understand the evolutionary line that exists between TAPAA, comprehensive oil spill legislation before Congress in the 1970's, the TAPS Fund regulations, the 1978 OCSLA Amendments, and CERCLA and the Clean Water Act ("CWA") with respect to Robins Dry Dock issues. TAPAA was the first of several superfund-type statutes involving back-up liability funds, expansion of liability to include injuries not recoverable

(continued...)

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[3](...continued)
under Robins, and subrogation when the funds were available to pay private claims. TAPAA and the Deepwater Port Act, 33 U.S.C. §1501, et seq., preceded but contemplated the introduction of comprehensive oil spill liability legislation. See, 33 U.S.C. §1517(a); see also, Conf. Rept. No. 93-924 reprinted in U.S. Code, Cong. & Adm. News, 1973, Vol. 2, p. 2531. The comprehensive legislation included H.R. 14862 (94th Cong.), H.R. 6803 (95th Cong.), and S. 2083 (95th Cong.), the liability provisions of which are attached to the Supplemental Memorandum of the Use and Enjoyment Class filed March 27, 1990 (H.R. 14862 and H.R. 6803), or to this Memorandum (S. 2083). TAPAA served as an initial model for comprehensive legislation. Exhibit 1, infra, at p. 206. These bills, as precursors of CERCLA, were already being referred to as "the superfund". Id., at 209.

Meanwhile, the Trans-Alaska Pipeline was about to commence operation in 1977. So the Department of Interior promulgated TAPS Fund regulations in 1977 that defined damages to parallel the comprehensive legislation. Exhibit 1, infra, p. 208; see also 42 Fed. Reg. 31789 (June 23, 1977) and Supplemental Memorandum of the Use and Enjoyment Class, supra. Failure to pass comprehensive legislation in the 95th Congress resulted in the liability provisions of H.R. 6803 being incorporated into the 1978 Outer Continental Shelf Lands Act Amendments (OCSLA), 43 U.S.C. §1813, which were contemporaneously before Congress. See, Supplemental Memorandum of Use and Enjoyment Class, supra, at 22 and Appendix 7 thereto. The 1978 OCSLA Amendments, at 42 U.S.C. §1813, in turn served as the model for the liability provisions of CERCLA's forerunner, S. 1480 (96th Cong.), which included loss of use of natural resources as a private recovery, see Ohio v. United States, 880 F.2d 432, 451-52 (D.C. Cir. 1989), just as the 1978 OCSLA Amendments (43 U.S.C. §1813) and its predecessors H.R. 6803, H.R. 14862 and S.2083 made loss of use a private recovery, and just as the TAPS Fund regulations, drawn parallel to those comprehensive bills, infra, make loss of use a private recovery.

During the evolution of CERCLA an important change occurred. The insurance industry and Senator Cannon, chair of the Senate Commerce Committee, lobbied against liability for loss of use of natural resources; they alleged that such liability burdened the comprehensive system and insurers with a potentially vast number of claims by recreational users. See, Exhibits 2 and 3 (explanation of Amendment No. 2379 in legislative history of CERCLA, Vol. 3, p. 182). Loss of recreational use value therefore became a public recovery under CERCLA and under the CWA, through the operation of 42 U.S.C. §9651(c). See, 42 U.S.C. §§ 9607(f)(1), 9651(c), 33 U.S.C. §1321(f); and see, 43 CFR §11.83 (loss of use means loss of recreational use value

(continued...)

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Exhibit 1 is the Department of the Interior's testimony and written statement of June 9, 1977 before the Senate Committee on Commerce, Science and Transportation during hearings on the comprehensive oil spill legislation. The Department testified that the TAPS fund regulations which had recently been released in draft in 42 Fed. Reg. 26441 (May 24, 1977) were "carefully drawn within the limits of the Trans-Alaskan Pipeline Act to parallel the proposed comprehensive law." Hearings, Oil Spill Liability and Compensation, Sen. Com. on Commerce, Science & Transportation, 95th Cong., 1st Sess., Ser. No. 95-27, at 206,

---

[3](...continued)
determined by non-market, economic methods). Thus, the pre-CERCLA statutes, regulations and bills (exemplified by 43 U.S.C. §1813, 43 CFR §29.1(e), H.R. 6803, H.R. 14862, and S.2083) made loss of use a private recovery, while CERCLA and the CWA make it a public recovery, as an element of natural resources damages, 42 U.S.C. §9651(c), that must be used to benefit the environment through restoration, replacement, or acquisition of resources, 42 U.S.C. §9607(f), 33 U.S.C. §1321 (f)(4), (5).

Because TAPAA and its regulations are from the pre-CERCLA period in which loss of use is a private recovery, the only way to get any portion of that recovery to benefit the public, as opposed to individuals, is through a class action where the class chooses to put as much of the class recovery as possible toward public environmental benefits. Accordingly, the use and enjoyment class representatives claim "economic" damages for loss of recreational use value, just as such loss of recreational use value is an economic loss under CERCLA and the CWA. See 43 CFR §11.83, U.S. v. Ohio, supra, at 475. If such damages are recovered, the class representatives do not want their individual damages and instead want them, as much as possible, to go to an environmental fund. This posture is in part necessary because neither the State or federal government has sued under the CWA, which is the only scheme available here that statutorily assures any recovery for natural resource injuries (for either loss of use or for injury to the resources) goes to environmental benefits.

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211 (emphasis added).[4] By promulgating a regulatory definition of "damages" parallel to that of the comprehensive legislation, the Department gave effect to the Congressional intent of TAPAA that its liability provisions be harmonized with those of the comprehensive legislation then being considered by House and Senate committees. See Conf. Rep. No. 93-924, supra, at 2531. Such contemporaneous, infra, agency interpretations deserve great weight. E.I. du Pont de Nemours & Co. v. COllins, 432 U.S. 46, 54-55 (1977).

The Department of the Interior's testimony on the origin of the TAPS fund regulations is important for two reasons. First, it proves that the definition of "damages" in the regulations was drawn, consistent with TAPAA's legislative history, from the comprehensive legislation and not the subsequent 1978 OCSLA Amendments. The testimony therefore rebuts Defendants' assertion that the link between the regulations and the comprehensive legislation is tenuous. Second, since the TAPS Fund regulations are drawn to parallel the comprehensive legislation, it is vital to examine how the comprehensive legislation addressed Robins Dry Dock in order to interpret the "parallel" regulations. The exhibits submitted here show that from 1975 when comprehensive legislation was first introduced

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[4] The regulations became final without change. 42 Fed. Reg. 31789 (June 23, 1977). They were amended, immaterially here, at 53 Fed. Reg. 3396 (Feb. 5, 1988), but the 1989 Code of Federal Regulations erroneously cites to 53 Fed. Reg. 3396 as the source of all the TAPS Fund regulations at 43 CFR Pt. 29, instead of as the source of the amendment.

shortly after TAPAA through 1977, when the regulations were adopted, the House, Senate, and the Ford and Carter administrations all sought comprehensive legislation that would allow recovery for injuries absent physical harm.

Exhibit 4 is an excerpt from the May 16, 1977 House Committee report on H.R. 6803 which was the "parallel" comprehensive legislation in the House.[5] Contrary to the Defendants' assertion that the TAPS Fund Regulations incorporate Robins, the House Report states with regard to the parallel comprehensive legislation:

> The claimant need not be the owner of the property injured in order to have standing to bring a claim for lost earnings, as was required at common law. This means, for example, that a worker at a coastal hotel might have standing to bring a claim for damages, even though he owns no property which has been injured by oil pollution.

Hs. Rept. No. 95-340, pt. 1, 95th Cong., 1st Sess., 1977, at 20. A rejection of Robins Dry Dock could hardly be more clear. A similar statement occurs in Hs. Rep. 94-1489, pt. 1, 94th Cong., 2nd Sess., 1976, at 29; see, Appendix 4 to Supplemental Memorandum of the Use and Enjoyment Class.

Similarly, it was equally clear in the Senate that the Carter Administration and the Senate Committee on Commerce, Science and Transportation concurred with the House that the comprehensive legislation would abandon any common law doctrines

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[5] For a copy of H.R. 6803, see Appendix 6 to Supplement Memorandum of the Use and Enjoyment Class, supra.

which allegedly limit damages to those suffering physical or property injury. On June 9, 1977, shortly after the Department of the Interior released its draft regulations but prior to the finalization of those regulations, the Department testified that the comprehensive legislation would provide for compensation of all losses, "particularly for those where property is not adjacent to the water." Exhibit 1, supra, at p. 208. Such language is yet another indication of the express intention to reject Robins. In fact, as early as 1975 the Department of Justice had also testified that the comprehensive legislation would allow damages absent physical injury. See, Exhibit 5 (regarding nonriparian businesses).

Exhibit 6 is an excerpt from the Senate Committee report on S. 2083 which provided for recovery for "any loss of use of natural resources, without regard to ownership of such resources." §7, S. 2083, S. Rept. No. 95-427, 95th Cong., 1st sess., 1977, at 53 (emphasis added). This is further evidence of the intention to abandon Robins.

Thus, it is clear that the drafters of the comprehensive legislation in both the House and the Senate and the Department of the Interior which promulgated the TAPS Fund regulations to "parallel" that legislation were determined to abandon any property injury requirements. Reading Robins into TAPAA and the regulations which give it meaning, as the Defendants endeavor, would contradict the express intent of Congress that TAPAA and the comprehensive legislation be

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harmonized and the express intent of the framers of the regulations and the comprehensive legislation which the regulations were drafted to parallel.

With TAPAA disposing of Robins it becomes clear that state strict liability, fault-based or other tort remedies can be applied to all Defendants, in a manner harmonious with TAPAA, for purposes of Robins and non-Robins injuries, where in total they exceed the $100,000,000 limit of TAPAA. This is evident in four respect from §1653 of TAPAA and its legislative history.

First, in analyzing §1653 it is important to bear in mind that it is remedial legislation. Like the analogous liability provisions of the Clean Water Act, §1653 should be read "charitably in light of the purpose to be served", and is entitled to a liberal construction to accomplish its purposes. See United States v. City of Redwood City, 640 F.2d 963, 968 (9th Cir. 1981) (citations omitted). Such guidance should help this court interpret the waiver of preemption at §1653(c)(9) and other provisions affording application of state law, §1653(c)(3) and (8).

Second, when TAPAA's waiver (that §1653(c) "shall not be interpreted as preempting the field of strict liability or to preclude any state from imposing additional requirements") is given a liberal and charitable construction in light of its legislative history (that the "states are expressly not precluded from setting higher limits or from legislating in any manner not

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inconsistent with" TAPAA),[6] the waiver can only mean that it affirmatively allows application of unlimited, state, statutory and common strict liability law to all injuries accompanied by or apart from physical injury. More specifically, the waiver allows application of unlimited, state common law of ultrahazardous activities, which plaintiffs assert against all defendants, as well as the unlimited strict liability under A.S. §46.03.822 et seq., which plaintiffs assert against the Exxon defendants. To interpret the waiver otherwise - i.e., as saying that §1653(c) does not preempt the field of strict liability law and allows states to impose additional requirements but that maritime law may still preempt recovery for injuries not accompanied by physical harm - renders the waiver fully or partially idle[7] and distorts the intent of Congress in authorizing states to add requirements and legislate in "any manner not inconsistent" with TAPAA. It distorts that intent to mean that Congress only intended to allow states to legislate, set higher limits, or add requirements in manners not inconsistent with maritime law. Congress said "not inconsistent with TAPAA." It did not say "not inconsistent with maritime law." Defendants simply seek to read into the waiver a congressional intent that is opposite to what Congress said.

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[6] Conf. Rep. No. 93-924, supra. at 2531.

[7] It is well established that courts disfavor statutory construction which renders a provision of a statute meaningless surplusage. See Sutherland Stat. Const. §46.6 (4th Ed.).

Third, it is similarly consistent with TAPAA and the Clean Water Act that state law based not only on strict liability but also on negligence, nuisance and trespass may be applied to Robins and non-Robins injuries. TAPAA provides that "[t]he unpaid portion of any claim [not paid by the owner or operator or the Fund] may be asserted and adjudicated under other applicable Federal or state law." 43 U.S.C. §1653(c)(3) (emphasis added). Thus, in light of the liberal construction that must be afforded this provision and the waiver, and since TAPAA applies to Robins and non-Robins claims, the plain meaning of this provision is that the unpaid portion of any claim, whether based on physical injury or not, may be asserted under state tort theories against any and all defendants, including third parties, regardless of whether such theories are based on strict liability, negligence, nuisance, or trespass. To argue that this provision assumes that Robins limits state law recoveries to only certain claims contravenes both the express authorization that any claim may be asserted under state law and the liberal construction afforded.

Further support for this conclusion can be found in the Ninth Circuit's interpretation of the Clean Water Act with respect to third party liability for nor-Robins injuries, as distinct from third party liability under maritime tort. United States v. City of Redwood City, supra, involved the sinking a barge, its discharge of oil, federal cleanup costs and third party liability for those costs where the third parties were not

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vessel owners or operators but were, like the Alyeska defendant, infra, imbued through third party contractual arrangements with a joint and several duty to prevent the negligent sinking of the vessel and its discharge of oil. The United States sued the third parties directly under 33 U.S.C. §1321(g) for negligence, not strict liability, to recover cleanup costs. The third party defendants argued the United States could sue them only in maritime tort. Based on the CWA's preservation, at 33 A.S.C. §1321(h) of other rights, outside the Act, that the United States had against third parties whose actions caused and contributed to the spill, the Ninth Circuit held that §1321(g) affords the United States a separate third party remedy in negligence apart from that of maritime tort. 640 F.2d at 969-970. Although the court did not address the issue, under §1321 the United States' recovery of damages in third party negligence expressly includes non-Robins injuries,[8] whereas under maritime tort the defendants here allege such injuries are not included. The only difference between, on the one hand, the United States' separate non-maritime right of action under §1321(g) to recover in third party negligence for non-Robins injuries, and on the other hand, the preservation of plaintiffs rights to such recoveries against third parties under state theories of negligence, nuisance, trespass and strict liability for ultrahazardous activities is that under §1321(g) the federal right of action is created and

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[8] e.g., loss of recreational use value, 42 U.S.C. §9651(c), 43 CFR §11.83, Ohio, supra, at 474-75.

under §1653(c)(3) and (9) the Plaintiffs' state rights of action are affirmatively allowed. That difference is hardly material. Compare 33 U.S.C. §1321(h) (rights of action preserved) with 43 U.S.C. §1653(c)(3) and (9) (state rights of action allowed) and 33 U.S.C. §1321(g) (right of action created).

Fourth, TAPAA provides that where strict liability is imposed by TAPAA and the damages are caused by the unseaworthiness of the vessel or by negligence [of third parties, infra], the "owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to rights under said laws of any person entitled to recovery" under TAPAA. 43 U.S.C. §1653(c)(8) (emphasis added). As the conferees explained, "The Fund is not precluded from proceeding against the owner or operator of the vessel or other third parties, if either or both were negligent...." Conf. Rep. No. 93-924, supra, at 2531 (emphasis added). Again, the plain meaning is that any person's Robins or non-Robins claim that can proceed under TAPAA can proceed as a subrogated claim under applicable state law.

Because Robins is abandoned for purposes of TAPAA claims and because Exxon and the Fund can proceed against negligent third parties under State or Federal law on any person's subrogated claims for Robins and non-Robins injuries, it follows, a fortiori, that the claimants who assert those injuries must also be able to proceed pursuant to §1653(c)(3) and

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(9) against those negligent third parties under applicable State or Federal law.

Thus, when TAPAA is liberally construed, read as a whole, and read in light of its legislative history and agency interpretation, TAPAA abandons Robins for purposes of claims against the Exxon defendants and the Fund, permits states to do likewise against any or all Defendants in the context of unlimited strict liability, and permits application of state law to Robins and non-Robins claims against all defendants in the context fault based and other state tort theories.

B. Additional Exhibits Show Alyeska and its Owner Companies Recognize and Assume Joint and Several Liability

We now turn briefly to supplemental exhibits that show the Alyeska defendants assume joint and several liability. It is well established in maritime and common law that where the separate and independent acts of several tort-feasors, especially where such acts are negligent, directly combine to produce a single injury, each tort-feasor is jointly and severally responsible for the entire result. The Atlas, 93 U.S. 302, 315 (1876); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 261 n.7 (1979); Miller v. Christopher, 887 F.2d 902, 904 (9th Cir. 1989); CJS, Torts, §35.

Here, Plaintiffs allege that their injuries are caused not only by the acts of the Exxon Defendants but also by the separate acts or omissions of third parties, i.e., Alyeska and the other owner companies, whose acts or omissions include the

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failure to perform joint and several duties of: (1) prevention of oil spills (as they now do with escort vessels) and (2) implementation of contingency plans pursuant to the Federal Pipeline Right-of-Way Agreement and the State Right-of-Way Lease. The Federal Agreement, State Lease and Alyeska's contingency plan impose upon the Alyeska defendants joint and several duties to protect against marine spills and to be prepared to respond to such spills, regardless of ownership of the vessel.

Exhibits 7 and 8 are excerpts from the Federal Agreement and the State Lease. When section 21 and Stipulation 2.14 in the Federal Agreement (section 20 and Stipulation 2.14 in the State Lease) are read together, it is evident that the owner companies are required to recognize their joint and several duties to protect the public and the environment from the effects of marine spillage and to be prepared for and respond to a catastrophic spill in Price William Sound. Among their joint and several duties are the duties to conform to the National Oil and Hazardous Substances Pollution Contingency Plan; to provide for oil spill control, which is defined as including confinement and cleanup, and restoration; and to include "separate and specific techniques and schedules for cleanup of oil spills on land, ... rivers and streams, sea and estuaries." Stipulation 2.14 in Agreement and Lease.

Exhibit 9 is an excerpt from Alyeska's Contingency Plan. It shows that Alyeska, as the agent for the owner companies, and the owner companies recognize and assume the

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foregoing duties, including "to take every reasonable action to prevent oil spills and . . . to minimize environmental damage." It shows further that these duties of prevention and response extend to all vessels carrying TAPS oil, regardless of who owns or operates the vessel.[9]

Finally, this court should assess the consequences of exempting the Alyeska Defendants from liability for non-Robins injuries. The joint and several duties imposed by the Agreement, Lease, and Contingency Plan effectively are such that if Alyeska and the co-owners were exempted from liability for injuries absent physical harm, then the whole system of liability for "all damages" sought by TAPAA would be seriously undermined. This court can easily see the effects of the proposed exemption by merely examining what would occur had this spill originated from a vessel owned by a small company with limited assets, instead of one owned by one of the big eight oil companies that own the pipeline:

(1) The TAPS Fund would be depleted by paying damages for Robins and non-Robins injuries up to the strict liability limit or by pro-rating the damage payments if the total claims exceeded the $100 million limit; see 43 U.S.C. §1653(c)(3), 43 CFR §29.7(c)(2);

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[9] Alyeska's new draft Prince William Sound Tanker Spill Prevention and Response Plan (August 1989) attempts tellingly to limit Alyeska's duty to respond to initial oil spill response and drops any recognition of its liability imposed under the Agreement, Lease and Stipulations thereto. (See, Exhibit 10).

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(2) The Fund could not recover from the owner/operator on its subrogated rights under 43 CFR §29.10 and 43 U.S.C. §1653(c)(8) because the owner/operator would have insufficient assets to cover the Fund's subrogated rights; and

(3) The owner/operator would seek to apportion damages by asserting its rights of contribution against Alyeska and its owners for their failure to perform their joint and several duties to protect against spills by any carrier and to implement the contingency plan that covers all spills of TAPS oil into Prince William Sound regardless of ownership of the vessel. See Edwards at 260 n.8; Miller, supra; Self v. Great Lakes Dredge and Dock Co., 832 F.2d 1540, 1546 (11th Cir. 1987) cert denied, ____ U.S. ____, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988).

The result of such a situation is that the Fund would be reduced to holding valueless subrogated rights against the owner/operator. The only protection the Fund would have is if it can either proceed on subrogated claims against third parties, such as Alyeska and its owners, or benefit indirectly from the owner/operator's assertion of rights of subrogation and contribution. Either case requires that Robins be abandoned not only for damages asserted against the Fund and the owner/operator but also that Robins be abandoned for the same damages asserted against separate tort-feasors, such as the Alyeska and owners, whose actions failed to protect and respond adequately and

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therefore combined with those of the Exxon defendants to produce the same Robins and non-Robins injuries, for which all the Defendants are jointly and severally liable. In other words, once Robins was abandoned by TAPAA and its regulations, the comprehensive system functions effectively only if Robins is equally abandoned for the same non-Robins injuries caused by separate tort-feasors whose acts or omissions combine with those of the owner/operator to produce the same injuries.

DATED this 7th day of September, 1990, at Anchorage, Alaska.

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The undersigned hereby certifies that on the 7th day of September, 1990, the foregoing document was ~~mailed to~~ Hand delivered
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- Douglas Serdahely, Esq.
- Lloyd Benton Miller, Esq.

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OIL SPILL LIABILITY AND COMPENSATION

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 121

TO ESTABLISH A UNIFORM AND COMPREHENSIVE LEGAL REGIME GOVERNING LIABILITY AND COMPENSATION FOR DAMAGES AND CLEANUP COSTS CAUSED BY OIL POLLUTION, AND FOR OTHER PURPOSES

S. 182

TO AMEND THE PORTS AND WATERWAYS SAFETY ACT OF 1972 IN ORDER TO ESTABLISH COMPREHENSIVE LIABILITY AND COMPENSATION FOR DAMAGES FROM OIL SPILLS, AND FOR OTHER PURPOSES

S. 687

TO ESTABLISH A UNIFORM AND COMPREHENSIVE LEGAL REGIME GOVERNING LIABILITY AND COMPENSATION FOR DAMAGES AND CLEANUP COSTS CAUSED BY OIL POLLUTION, AND FOR OTHER PURPOSES

S. 898

ENTITLED "SPILL PREVENTION AND CLEANUP FOR ENERGY TRANSPORTATION SYSTEMS ACT OF 1977"

S. 1187

TO PROVIDE A COMPREHENSIVE SYSTEM OF LIABILITY AND COMPENSATION FOR OIL SPILL DAMAGE AND REMOVAL COSTS, AND FOR OTHER PURPOSES

JUNE 9, 10, AND 20, 1977

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not be of the magnitude that our total imports of oil are. Imports will account for the bulk of the buildup of the comprehensive fund.

Senator MELCHER. One final question and this is what we will have to consider here.

Don't you think it is advantageous to rapidly build up a fund for a liability for this particular oil since this agreement was entered into freely and willingly by the people involved?

Admiral BURSLEY. I would suggest that the important thing that we should look at is getting a comprehensive fund which is uniformly applied.

There may be some transition situations involving the TAPS fund that should be addressed in a somewhat more complex manner than we have proposed. But I think we should keep in mind as our goal a uniform comprehensive system rather than having one system for TAPS, one for deepwater ports, one for Outer Continental Shelf, one for Maine, one for Florida, and so on.

Senator MELCHER. I will make the observation that that particular section of the bill pioneered the whole concept as far as the Congress is concerned. It established liability and established the mechanism of upgrading the fund that can take care of that liability.

It was entered into freely and willingly, maintaining it under the existing law as it will not interfere with what our overall goal is but would rather put into Treasury, in the fund more quickly the necessary funds for a liability that might exist from an oil spill of those particular tankers.

It doesn't do any damage to our overall goal. When the $100 million is reached it too will be reduced if there are no spills that have occurred, the draw on the fund, the amount will be reduced.

It seems fair and equitable for those particular tankers.

Thank you very much.

Senator INOUYE. Admiral, the committee wishes to submit to you several questions of a technical nature for your response.

Thank you for your assistance this morning.

Admiral BURSLEY. Thank you, Mr. Chairman.

Senator INOUYE. Our next witness is Mr. Charles Eddy, the Deputy Assistant Secretary for Energy and Minerals of the Department of the Interior.

Your statement has been received and without objection it will be made part of the record in total.

You may proceed as you wish, sir.

STATEMENT OF CHARLES P. EDDY, DEPUTY ASSISTANT SECRETARY FOR ENERGY AND MINERALS, DEPARTMENT OF THE INTERIOR

Mr. EDDY. Thank you, Mr. Chairman.

I will attempt to summarize in part and read in part. It is a pleasure to be here on behalf of Secretary Andrews and the Administration to discuss the proposed legislation to establish a comprehensive law on oil spill liability and compensation.

As you noted in your opening remarks this is a subject about which there is little overall disagreement. We believe that a system such

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as this is an essential component of a national program to deal with oil spills. It is a major part of the President's oil pollution program which you have had before you for the past few months. The Coast Guard has taken the first regulatory step to implement this program; and this committee's expeditious action in developing tanker safety legislation will assure full long-range implementation of the program.

This legislation recognizes major changes which are taking place in the way we produce and transport oil.

There has been a steady increase as tanker carried imports of oil from overseas. The beginning of tanker shipment between the trans-Alaska pipeline terminal at Valdez and the west coast later this month will add further development. We will likely be constructing deepwater ports to accommodate supertankers.

OCS operations will continue to expand into frontiers in the coming years.

The Interior Department is committed to a leasing schedule that allows time for the needed environmental planning and coordination with States while providing for orderly development of needed oil and gas resources.

We are also committed to strict enforcement of regulations to prevent pollution from the production and transportation of OCS oil and gas.

But even with the best controls some spills will occur, particularly as we enter high risk areas with difficult operating conditions.

The amendments to the OCS Lands Act being considered by the Congress would establish a separate fund and liability system to compensate victims of OCS related spills.

While the provisions of this proposal in general are similar to the Administration's proposed comprehensive legislation, we greatly prefer comprehensive legislation to enactment of a liability and compensation system in the OCS bill.

We believe a vastly better approach is for Congress to move expeditiously to enact a comprehensive, national law.

A similar problem exists with the liability provisions for the oil that will start to flow through the transAlaskan pipeline later this month. The department will have final regulations for the TAPS liability fund in place by that time. These regulations have been carefully drawn within the limits of the Trans-Alaskan Pipeline Act to parallel the proposed comprehensive law. This fund and others would be absorbed by the comprehensive fund if S. 1187 is enacted. We support this change.

It has been said that we do not need comprehensive, national legislation for oil damages and that existing State and Federal law is adequate. We strongly disagree with this position. The OCS and TAPS legislation illustrate the problem. The two are inconsistent in their terms, particularly in their liability limits and ease of recovery for plantiffs.

Much of our work in developing this comprehensive bill was based on work that Congress put into its development of the TAPS Act. We incorporated many of its provisions.

In response to some of the questions asked of the last witness, the

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... of Transportation administer this pro-

comprehensive system is substantially stronger in three major ways than the system in the Trans-Alaskan Pipeline Act.

First there is a $200 million limit as opposed to a $100 million limit on the fund, but if liability exceeds that $200 million limit the fund is free to borrow up to whatever level is necessary. This applies from the start. Even if the fund does not reach its full limit, there will be unlimited funds immediately available to compensate for damages.

Two, stricter limits of liability are imposed under the proposed comprehensive bill.

Third, there is a more expeditious claim system which should allow quicker and easier compensation of oilspill victims. We have attempted in drafting the regulations under the TAPS Act to provide the most expeditious claims system. We are doing that within some constraints which will be removed by the comprehensive legislation.

In addition there are other federal liability fund laws. The Deep Port Act and the Federal Water Pollution Control Act. Add to these two international agreements which affect recovery of damages. These domestic and international laws establish strict liability for oil spills, although with conflicting terms. All of them limit the liability of certain polluters and establish separate funds to pay the costs of cleanup and damages not paid by the polluter.

If we looked at the State laws in drafting the Administration bill and we attempted to learn from their experience and incorporate as many of the new damages they recognized and which we felt were reasonable.

Taken as a whole the various Federal and State laws provide a patchwork of differing and sometimes conflicting systems of compensation for oilspill damages. Their obvious lack of uniformity will encourage attempts to avoid liability through subterfuge, or by raising jurisdictional questions. Equally significant, some types of oil discharges and some types of pollution are not covered, so a damaged party may find recovery impossible or harm to the environment will go uncompensated.

Further, most of the compensation funds are based on a tax on oil. Duplication of taxation places an unnecessary burden on consumers. In short, whether and how much a damaged party can recover depends on where and by whose oil he happens to be harmed.

I would like to highlight another fundamental issue basic to understanding the problem—the frequency and magnitude of oil spills. It is extremely difficult to predict the number and volume of discharges of oil by sources that the proposed comprehensive oil liability system covers. As the attached table shows, we know that there are a very large number of polluting incidents which give rise to compensable damages: and that operations which historically have contributed to oil spills are predicted to increase significantly.

According to USCG data, the total number of reported polluting incidents reached a high of 13,966 in 1974. While the total number dropped in 1975, the total volume increased by ⅓ to 24 million gallons. A very large portion of the volume in oil pollution occurred in inland areas. This shows that we face a pervasive national problem, not one related simply to oceans and beaches.

It is particularly important that unknown sources are thought to be responsible for about ⅓ of the polluting incidents and the volume of oil discharged. These are spills for which damages other thad cleanup are not compensable under existing law.

S. 1187 would replace the current fragmented, overlapping, and inadequate systems of Federal and State liability laws with a single nationwide framework. There are two major departures from present law.

First: All natural resource damages which can be proven will be compensated. The common law allows recovery for some natural resource losses and a few jurisdictions now specifically provide for such compensation.

Second: Existing law does not compensate for most economic losses relating to a spill, particularly for those people whose property is not adjacent to the water. S. 1187 provides a formula for compensating such losses.

Other features would improve the existing law:

First: Tank vessel liability of $300 per gross tons with no ceiling should provide an inducement to safer operations.

Second: Uniform strict liability.—Damages will be compensated without the need to prove fault, reducing legal costs and court workloads, and simplifying the task of proving a claim.

Third: An administrative claims adjudication system will expedite the payment of claims, and avoid much of the expensive and time consuming process of court action prior to getting paid.

Fourth: An unlimited fund constituted with a base of $200 million assures that damages greater than the polluters' limits of liability—or abilit to pay—will be compensated.

Fifth: Compensation will be paid for damages where it is impossible to identify the polluter, an impossibility under existing law.

Sixth: There will be immediate access to the fund for an assured source of money for all oil cleanup operations.

In summary, when compared with the existing legal system, S. 1187 will provide significant advantages by assuring fuller compensation for a wider range of damage from oil spills.

It offers greater protection to individuals who may be damaged and greater protection for the environment. S. 1187 should also offer effective incentives for more efficient operation. We strongly support the concept of comprehensive oilspill legislation and we urge the Congress to move expeditiously in enacting such legislation.

I will be pleased to answer any questions.

Senator INOUYE. Will you provide for the record regulations involving the trans-Alaskan pipeline fund?

Mr. EDDY. Yes; they are to be published soon and I will provide them in final form as soon as they are ready.[1]

Senator INOUYE. Does the Department support a comprehensive bill rather than liability provisions in the new Outer Continental Shelf bill?

Mr. EDDY. Yes; we do.

Senator INOUYE. Do you have any questions, Senator Melcher?

[1] The material had not been received at press time.

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Senator MELCHER. Am I to gather, Mr. Eddy, that you are going to recommend a decrease in the amount of 5 cents per barrel for the trans-Alaskan shippers?

Mr. EDDY. That would be the practical effect of implementation of comprehensive system. It would do several things.

One: We would be building up a larger fund to which all citizens would have access on a more rapid basis since it is based on fees on all oil imported or moved by water.

Mr. MELCHER. Won't the rapid buildup for the tankers that go to Valdez to the west coast, won't that provide more protection for the overall fund?

Mr. EDDY. This will certainly provide a base on which to build a larger fund. We will collect this fee immediately and build up to that $100 million rapidly, and that will give us an immediate and needed working base for the larger fund.

Senator MELCHER. Isn't that advantageous to the fund and to everybody else?

Mr. EDDY. Certainly.

Senator MELCHER. I see no reason to change it then.

Mr. EDDY. Given the timing of events, we may well have a good percentage of the Alaskan fund already in place. It is conceivable that we would have reached the $100 million limit and the fee would have been cut off. We would simply incorporate that fund into the superfund.

Senator MELCHER. Well, you seem to think, if I understood correctly, that we are going to have oil pulling in there pretty soon.

Mr. EDDY. We understand that to be the case.

Senator MELCHER. Didn't you say sometime in July?

Mr. EDDY. That is the present schedule, conceivably later this month.

We expect to have our liability regulations in place by the end of this month.

Senator MELCHER. Well, have they satisfactorily completed the hydrotesting?

Mr. EDDY. I cannot answer that at this point. I would be glad to provide that for the record.[1]

Senator MELCHER. Whatever it is, you people are there running the show. We are not going to have any oil there until you say go.

Mr. EDDY. That is correct.

Senator MELCHER. I don't know how long it takes them to fill the pipeline and how long it takes after you have the oil flowing through before the reach this first figure of 600,000, if that is their first figure.

At any rate, it isn't incompatible with the goal that you support, to leave that 5 cent a barrel standing as is until such time as they have reached $100 million limit of the TAPS fund, is it?

Mr. EDDY. It is not incompatible with the protection objectives of our bill, but it is incompatible with the terms of the bill and the need for uniformity. We wish to eliminate, as soon as possible, the multiplicity of funds. Uniformity is a substantial benefit to both

[1] The material had not been received at press time.

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protected parties and to potentially liable parties. On the other hand, nothing is lost by switching from the TAPS fee and TAPS fund to the fees and fund provided under the comprehensive bill. A greater measure of protection will be provided, to a broader class of persons, including TAPS claimants, by the larger $200 million fund. Moreover, by providing a much broader base of collections, the comprehensive fund will fill faster than the TAPS fund, even with a smaller fee. No special benefits will be conferred on TAPS shippers. They will simply be treated the same as other responsible parties under the comprehensive system.

Senator MELCHER. It is not hard to do in drafting the legislation?

Mr. EDDY. It would not be difficult from a drafting standpoint; however, when we are talking about having a uniform collection and protection system, it would be easier for both fee collection and claim purposes to have uniformly applicable standards and procedures.

Senator MELCHER. That will be automatic when you reach the $100 million limit on the TAPS liability fund, won't it?

Mr. EDDY. In our bill, that would be automatic when the bill takes effect, whether before or after the $100 million limit is reached.

Senator INOUYE. Thank you very much, Mr. Secretary.

[The statement follows:]

STATEMENT OF CHARLES F. EDDY, ACTING DEPUTY ASSISTANT SECRETARY, DEPARTMENT OF THE INTERIOR

Mr. Chairman, Members of the Committee: It is a pleasure to be here to discuss proposed legislation to establish a comprehensive law on oil spill liability and compensation. This legislation is an essential component of a national system to deal adequately with oil pollution resulting from the production, transportation and processing of oil. On March 18 the President, with the full support of the Interior Department, announced a comprehensive program to reduce maritime oil pollution. The Coast Guard has taken the first regulatory steps to implement this program. And this Committee took expeditious action in developing tanker safety legislation which would assure full, long range implementation of the President's program.

A major part of the President's program is the proposed comprehensive Oil Pollution Liability and Compensation Act of 1977 (S. 1187) which you now have before you. This bill had its origins in the recognition by the Senate that compensation for oil pollution damages is a national problem. A technical report to the Congress by the Justice Department and other agencies as directed by the Deepwater Port act was published by this Committee. It provided the basis for the bill submitted by the President. It is appropriate that the Senate is taking action to implement that study.

The importance of this legislation is brought home by the fact that some major changes in the way we produce and transport oil are taking place. These developments are likely to increase the possibility of major oil spills and smaller but incrementally significant spills affecting oceans, seacoasts, bays and harbors. These are:

The steady increase in tanker-carried imports of oil from overseas;

Expansion of drilling on the Outer Continental Shelf;

The beginning of tanker shipments between the Trans-Alaskan Pipeline terminal at Valdez and the West Coast; and

The likelihood of construction of deep water ports to accommodate supertankers.

OCS operations will continue to expand into frontier areas in the coming years. The Interior Department is committed to a leasing schedule that allows time for the needed environmental planning and coordination with states while providing for orderly development of needed oil and gas resources. We are also committed to strict enforcement of regulations to prevent pollution from

the production and transportation of OCS oil and gas. But even with the best controls some spills will occur, particularly as we enter high risk areas with difficult operating conditions.

The Amendments to the OCS Lands Act being considered by the Congress would establish a separate fund and liability system to compensate victims of OCS related spills. While the provisions of this proposal in general are similar to the Administration's proposed comprehensive legislation, we greatly prefer comprehensive legislation to enactment of a liability and better compensation system in the OCS bill. We believe a vastly better approach is for Congress to move expeditiously to enact a comprehensive, national law.

A similar problem exists with the liability provisions for the oil that will start to flow through the Trans-Alaskan Pipeline later this month. The Department will have final regulations for the TAPS liability fund in place by that time. These regulations have been carefully drawn within the limits of the Trans-Alaskan Pipeline Act to parallel the proposed comprehensive law. This fund and others would be absorbed by the comprehensive fund if S. 1187 is enacted. We support this change.

It has been said that we do not need comprehensive, national legislation for oil damages and that existing state and federal law is adequate. We strongly disagree with this position. The OCS and TAPS legislation illustrate the problem. The two are inconsistent in their terms, particularly in their liability limits and ease of recovery for plaintiffs. In addition, there are two other federal liability and fund laws: The Deepwater Port Act and the Federal Water Pollution Control Act. Add to these two international agreements which affect recovery of damages. These domestic and international laws establish strict liability for oil spills, although with conflicting terms. All of them limit the liability of certain polluters and establish separate funds to pay the costs of cleanup and damages not paid by the polluter.

Moreover, various state laws provide different degrees of liability and compensation for oil damages. Generally, most states rely on the common law of negligence. However, an increasing number of states have established statutory strict liability for certain classes of oil damages; and some states have carved out new classes of compensable damages.

Taken as a whole, these arrangements provide a patchwork of differing and sometimes conflicting systems for compensation for oil spill damages. Their obvious lack of uniformity will encourage attempts to avoid liability through subterfuge, or by raising jurisdictional questions.

Equally significant, some types of oil discharges and some types of pollution are not covered, so a damaged party may find recovery impossible—or harm to the environment will go uncompensated. Further, most of the compensation funds are based on a tax on oil. Duplication of taxation places an unnecessary burden on consumers.

In short, whether and how much a damaged party can recover depends on where and by whose oil he happens to be harmed.

Before discussing how the proposed legislation improves this situation, I would like to highlight another fundamental issue basic to understanding the problem—the frequency and magnitude of oil spills.

It is extremely difficult to predict the number and volume of discharges of oil by sources that the proposed comprehensive oil liability system covers. As the attached table shows, we know that there are a very large number of polluting incidents which give rise to compensable damages; and that operations which historically have contributed to oil spills are predicted to increase significantly.

According to Coast Guard data, the total number of reported polluting incidents reached a high of 13,966 in 1974. While the total number dropped in 1975, the total volume increased by one-third to 24 million gallons. The bulk of polluting incidents in recent years, around 85%, took place in ocean coastal areas; however, a very large portion of the *volume* of oil pollution occurred in inland areas. For example, in 1973 the largest volume of pollution, about 60% was in river areas. Beaches accounted for only about 5% of the total reported pollution by volume. In 1974, ports were subjected to 34% of the volume of spills, non-navigable areas 26%, rivers 18% and beaches 16%. This shows that we face a pervasive national problem, not one related simply to oceans and beaches.

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It is particularly important that unknown sources are thought to be responsible for about one-third of the polluting incidents and the volume of oil discharged. These are spills for which damages other than cleanup are not compensable under existing law.

S. 1187 would replace the current fragmented, overlapping and inadequate systems of federal and state liability laws with a single nationwide framework. There are two major departures from present law. First, all natural resource damages which can be proven will be compensated. The common law allows recovery for some natural resource losses and a few jurisdictions now specifically provide for such compensation. Through its uniform nationwide system the proposed legislation would assure that all citizens who depend economically on natural resources would be expeditiously compensated for natural resource damage on behalf of their citizens. This money could then be used to mitigate the damages or to substitute other comparable resources.

Second, existing law does not compensate most economic losses relating to a spill, particularly for those people whose property is not adjacent to the water. S. 1187 provides a formula for compensating such losses.

Other features would improve the existing law:

1. Tank vessel liability of $300 per gross tons with no ceiling should provide an inducement to safer operations.

2. Uniform strict liability. Damages will be compensated without the need to prove fault, reducing legal costs and court workloads, and simplifying the task of proving a claim.

3. An administrative claims adjudication system will expedite the payment of claims, and avoid much of the expensive and time-consuming process of court action prior to getting paid.

4. An unlimited fund constituted with a base of $200 million assures that damages greater than the polluters limits of liability—or ability to pay—will be compensated.

5. Compensation will be paid for damages where it is impossible to identify the polluter, an impossibility under existing law.

6. There will be immediate access to the fund for an assured source of money for all oil cleanup operations.

In summary, when compared with the existing legal system, S. 1187 will provide significant advantages by assuring fuller compensation for a wider range of damage from oil spills. It offers greater protection to individuals who may be damaged and greater protection for the environment. S. 1187 should also offer effective incentives for more efficient operation. We strongly support the concept of comprehensive oil spill legislation and we urge the Congress to move expeditiously in enacting such legislation.

I will be pleased to answer any questions.

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markup by the committee during the markup of the bill, and it was the unanimous decisions of the committee at that time not to include any such provisions.

The House has already acted on this bill, Mr. President. And I am chagrined to report that provisions on joint rate surcharges and cancellation, even more harmful, have been included in the House bill.

The House and Senate will go to conference soon to iron out the differences in the two bills. This is our last chance to make the changes necessary in the Senate bill.

I recognize, Mr. President, that there is considerable interest in retaining some language on joint rates in the final bill. The House bill has a surcharge provision. Let us in the Senate knock it out of our bill so that the conferees will be able to discuss the questions of equity for farmers; equity for small businesses; and equity for rural America.●

Mr. CANNON. Mr. President, the amendment offered by Senator ZORINSKY and Senator EXON would strike the joint rate surcharge provision in S. 1946.

This is a provision that was carefully studied by the committee during the hearing process. Initially, the Commerce Committee did not make changes in the joint rate area. However, shortly before S. 1946 came to the floor, a substantial number of major railroads worked out a compromise. Since it was at that time (and continues to be) my view that effective rail reform legislation must address this important issue, I proposed a joint-rate surcharge provision along the lines of the compromise agreement; the amendment was adopted by the Senate on April 1, when we passed the rail bill by an overwheming vote.

I was very pleased that this amendment was adopted, since it goes a long way toward resolving the very difficult joint-rate issue. At the same time, I recognized that not all parties affected by the provision had time to fully study the matter.

For that reason, I offered assurance to my colleagues that appropirate changes would be made as we proceeded to the conference process. In the interim, the House has made a considerable number of changes in the provision—primarily to provide more adequate protection to short-line railroads and shippers. I am convinced that the compensatory joint-rate relief provision in the House bill (section 201 of H.R. 7235) represents a substantial improvement over section 218 of S. 1946.

Nevertheless, many of my colleagues have expressed concern with the House provision. Should further changes be warranted, they are afraid the Senate conferees might not have necessary flexibility, for example, if they wished to make changes in the light-density provision where both bills have similar wording and the same traffic figure: 3,000,000 gross ton-miles of traffic per mile.

While I believe we could find a way to handle the issue in conference if further changes in the surcharge provision are warranted, I do recognize and understand the very serious concerns of a number of my colleagues. Accordingly, I will agree to accept an amendment which will strike the joint rate provision of S. 1946 (title I of the amendment I have offered).

I would stress, however, the crucial need for a surcharge provision in the final legislation. I am accepting this amendment to insure that Senate conferees have flexibiilty to consider the matter further and to recommend such further changes as may be warranted.

Mr. LEVIN. Mr. President, I am pleased to join Senators ZORINSKY and EXON as a cosponsor of their amendment to S. 1946, the railroad deregulation bill. The Senate bill, as reported out of the Committee on Commerce, Science, and Transportation, maintained the status quo with respect to joint rate surcharges. When the bill reached the Senate floor, however, Senator CANNON introduced an amendment on joint rates which the Senate approved. This would strike that section, in part because of the concerns expressed that the section does not provide adequate protection from discriminatory pricing practices to short-line railroads.

Mr. President, when Senator CANNON introduced the amendment on joint-rate surcharges on April 1, 1980, he stated:

I am aware that not all the railroads have had an opportunity to fully study the joint rate proposal and that there is some opposition to the language on the part of some carriers. But, as I said to my colleague earlier, I want to offer my assurance that appropriate changes can and will be made as we proceed to the conference process and that we try to satisfy the legitimate concerns of most everybody.

Since that time, representatives of many of Michigan's short-line railroads have brought to my attention their concerns about the joint-rate surcharge section, which they believe could place in jeopardy many short-line railroads throughout the country because it provides the larger railroads with the ability to cancel or increase a joint rate without the concurrence of other carriers. I believe that the amendment offered by Senators ZORINSKY and EXON will provide the conferees with the flexibility they need in order to expand upon the protections provided in the House railroad deregulation bill.

The PRESIDING OFFICER. The Senator from Alaska.

Mr. STEVENS. Mr. President, it is my understanding that this was agreed to by the ranking member (Mr. PACKWOOD).

Mr. CANNON. The Senator is correct. It has been cleared with him.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (UP No. 1619) was agreed to.

● Mrs. KASSEBAUM. Mr. President, I rise in support of Chairman CANNON's decision to strike the surcharge provisions of the Senate rail bill. As you will recall, Mr. President, I made a similar motion during the Senate's original consideration of S. 1946.

I believed then, and I believe now, that the Senate provisions could have some very detrimental effects on agricultural interests. The House provisions are an improvement, but significant problems remain, particularly with regard to light-density lines which crisscross much of the Midwest.

I believe that removal of this section will give us the flexibility in the conference to fashion a provision generally satisfactory to all parties, and I appreciate the chairman taking this step.●

Mr. CANNON. Mr. President, I ask unanimous consent that Senator DOLE be added as a cosponsor to the Zorinsky amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CANNON. Mr. President, I ask unanimous consent that Senator LEVIN be added as a cosponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the motion that the Senate agree to the amendment of the House with the amendments (UP No. 1618 and UP No. 1619) of the Senate.

The motion was agreed to.

Mr. CANNON. Mr. President, I move that the Senate request a conference with the House on the disagreeing votes of the two Houses and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to and the Presiding Officer appointed Mr. CANNON, Mr. LONG, Mr. EXON, Mr. PACKWOOD, and Mrs. KASSEBAUM conferees on the part of the Senate.

THE "SUPERFUND" BILL

Mr. CANNON. Mr. President, the Senate Committee on Commerce, Science, and Transportation has been examining with great concern S. 1480, the Environmental Emergency Response Act of 1980, which was reported by the Environment and Public Works Committee on July 11, 1980. This legislation would establish a mechanism for clean up of and compensation for damages resulting from releases of hazardous substances and would impose joint, several, and strict liability on those involved. I am strongly in support of the goals of this legislation. Senator RANDOLPH and the Senate Environment and Public Works Committee deserve credit for responding to these important societal concerns.

However, there is no doubt that, as the bill is presently drafted, it impacts greatly on the jurisdictional interests of the Senate Commerce Commitee in the areas of interstate commerce regulation, transportation and common carriage, and oceans and marine activities. As presently drafted, S. 1480 would have grave implications in these areas.

Since S. 1480 clearly affects areas within its jurisdiction, the Commerce Committee held 2 days of hearings on September 11 and 12 to explore the transportation and other commerce aspects of the bill. The committee received much revealing testimony from the Department of Transportation and the Environmental Protection Agency, the various transportation modes, shipper and manufacturing groups, insurance representatives, the U.S. Chamber of Commerce, representatives of the oil and natural gas

about the soundness of certain provisions in the bill in light of their potentially detrimental effect on transportation and commerce.

A principal concern raised by S. 1480 relates to the establishment of broad and unlimited liability. Numerous groups have testified before the committee that S. 1480 in fact would cause severe economic disruption. The Hartford Insurance Co., Crum & Forster Insurance Co., the American Insurance Association, and the National Association of Insurance Brokers all have informed the committee that in their view S. 1480 is uninsurable, particularly in view of the fact that the bill does not contain a dollar limit on liability. The Department of Transportation has testified in this regard that the insurance problems engendered by this liability would be particularly acute for the small railroads in this country. The Environmental Protection Agency testified in support of a dollar limit. Without any such limit, the liability exposure is potentially enormous.

These problems associated with unlimited liability are compounded by the uncertainty of coverage stemming from the broad scope of allowable damages for loss of natural resources, property loss, and economic loss, which could be collected by an unlimited group of claimants, and by the uncertain limits on removal costs which could be recovered pursuant to broad, unfettered Presidential authority to take "remedial action" as appropriate. In addition, S. 1480 would set up difficult apportionment procedures whereby anyone who is found liable could only seek apportionment and contribution after all claims have been paid. While strict liability may be advisable as a matter of policy to insure due care and compensation for damages, it is essential that unlimited liability does not create the greater risk of uninsurability.

Transporter, shipper, and manufacturing groups also have stated that this legislation would have enormous inflationary impacts and that it is anticompetitive. They argue that many small transporters and shippers would be forced out of the marketplace due to their inability to meet the financial responsibility requirements of S. 1480. It is clear that such a result would be in direct conflict with the Airline Deregulation Act of 1978 and the Motor Carrier Act of 1980, both of which were passed by Congress in an effort to increase competition in the transportation industry.

Other key problems in S. 1480 relate to its breadth and ambiguity. The bill states that the "transportation" of hazardous substances is an "ultrahazardous" activity. In view of the broad and virtually unlimited definition of hazardous substances, what effect will such a statement have on the future regulation of, or liability for, such activity?

Representatives of transportation, shipper, manufacturing, and insurance groups all have testified that many of the provisions in the bill are so vague as to invite substantial litigation and are [illegible] to impose unnecessary and burdensome regulatory requirements. For example, "facility" covers any storage container, any equipment, or any area where a hazardous substance has been placed or otherwise come to be located. These terms are not defined anywhere in the bill, and the potential coverage of a vast array of products is staggering. Any "release," which means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, or dumping from a facility into the environment, triggers all of the detailed and significant reporting and liability provisions of the bill. It is essential that the coverage and meaning of these terms be fully clarified before we can responsibly act on this legislation.

S. 1480 contains no exclusion for consumer products. Therefore, it has been suggested that this would mean that an individual consumer is subject to strict, joint, and several liability for a "release" from any product that contains one of the numerous hazardous substances listed on pages 24 to 28 of the Senate Environment and Public Works Committee report. While staff has been informed that such a result was not intended, the term "facility" as it is presently defined would include consumer products, and the report does not in any way clarify that this term does not include consumer products. An amendment will be offered to clarify this matter.

"Environment" is not a defined term in the bill. The State Department has informed the committee that such a term thus could mean "global environment," thereby extending the provisions of S. 1480 beyond the United States or any area where it could assert jurisdiction. Therefore, S. 1480 threatens to have potentially grave foreign policy implications by appearing to provide authority for the United States to assert jurisdiction over foreign vessels and foreign nationals in a manner inconsistent with general principles of international law and specific U.S. treaty obligations.

S. 1480 establishes a fund for compensation of damages and cleanup costs. The Commerce Committee has clear jurisdictional interests in the use of this fund when such use is otherwise funded pursuant to the committee's authorizing jurisdiction. Moneys in the fund can be used for actions relating to damage assessment, restoration of natural resources, and investigation of and enforcement as a result of hazardous substances releases. These matters are specifically under the authority of the National Oceanic and Atmospheric Administration and the Coast Guard, over which the committee has authorizing jurisdiction. In the interest of efficient and coordinated oversight of these, and any other, groups within its jurisdiction, the Commerce Committee must be in a position to review the adequacy of their funding.

Mr. President, the Commerce Committee has followed closely the evolution of this "superfund" legislation. As early as February 21 of this year, Senator PACKWOOD and I wrote a letter to Senator RANDOLPH, the chairman of the Public Works Committee, in which we expressed support for the efforts of his committee in this regard. In addition, we requested sequential referral to the Commerce Committee for a time certain in light of the many areas covered by the proposed legislation within the jurisdiction of the Commerce Committee. At that time, the Public Works Committee was not willing to agree to a referral, claiming that they were working solely on a staff working draft.

In July, after S. 1480 was reported by the Public Works Committee, we again wrote the committee requesting referral and reiterating our multitudinous jurisdictional concerns, only to be once again refused. Our most recent correspondence with the Public Works Committee, dated August 22, 1980, included one last request for sequential referral and also set forth in detail many of the specific matters within the Commerce Committee's jurisdiction which are impacted by S. 1480. This letter received the same negative response on the issue of referral.

Mr. President, I strongly support the goal of making our environment safer from pollution by hazardous substances, but this goal must be carried out carefully in order not to have unintended and potentially disastrous impacts on the commerce of this country. Thus, even without formal referral, the Commerce Committee continues to examine the bill and remains concerned about these and many other concerns. Although the Senate Environment and Public Works Committee has introduced amendments to address some of these concerns, the amendments still do not address some of the most significant problems with the bill. Therefore, I have instructed staff to work on amendments, for introduction on the floor, which would respond to these problems.

Mr. President, I am hopeful that favorable consideration of these amendments by the Environment and Public Works Committee and the Senate will facilitate favorable consideration of S. 1480 during the 96th Congress.

For the benefit of my fellow Members, I have included for the RECORD a few representative letters received by the Commerce Committee in conjunction with its hearings, which relate to the many concerns within the committee's jurisdiction. They are from the following groups:

American Farm Bureau Federation;
Crum & Forster Insurance Cos.;
American Insurance Association;
Department of State;
Transportation Association of America;
Association of American Railroads;
American Trucking Associations, Inc.;
American Institute of Merchant Shipping; and
American Nuclear Energy Council.

Mr. President, I ask unanimous consent that these letters be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

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AMERICAN FARM BUREAU FEDERATION,
Washington, D.C., September 11, 1980.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The American Farm Bureau Federation is a general farm organization representing more than 3.2 million member families in 49 States and Puerto Rico. Many Farm Bureau members use chemicals in crop and livestock production that would be classified as hazardous materials as defined in S. 1480. We are concerned that S. 1480, as reported by the Senate Environment and Public Works Committee, could have a serious effect on agricultural technology and production.

For purposes of discussion, we wish to divide the provisions of S. 1480 into three parts: (1) clean-up of waste disposal sites; (2) emergency federal response to hazardous materials spills; and (3) creation of a new liability scheme that would impose strict liability on the manufacturers and handlers of hazardous materials, including every farmer and rancher in the United States who uses pesticides as a part of the food and fiber production process.

Our principal concern with the bill involves the liability scheme provisions.

S. 1480 declares the transportation, storage, and use of hazardous materials to be an "ultrahazardous activity" subject to the liability provisions of S. 1480. Most farmers purchase pesticides, transport them home, and store them until the time of use when they are again transported to the site of application. The bill, at this time, specifically excludes field application from the liability scheme, although the farmer would be held strictly liable at all other times. We also suggest that any such exclusion granted by Congress could be subject to removal in the future.

We have not been able to quantify the magnitude of a farmer's financial exposure under this liability scheme; however, a couple of examples will serve to illustrate the potential problems if this bill becomes law.

A farmer, transporting pesticides in a farm truck, could be involved in an accident totally beyond his control. If the pesticide containers ruptured and the chemical spilled, the farmer would become liable for clean-up costs, any real or personal property loss, any loss or destruction of natural resources, and so on.

If a farmer stores chemicals on his farm prior to field use, in a manner prescribed by EPA, and a trespasser enters the property causing injury to himself, others, or the environment, the farmer would be liable.

If a farmer loads his tractor mounted spray tanks and must across a country road to reach his field, and is struck by an automobile, the farmer would be liable for any chemical-caused damages.

Recently, farmers in the midwest used a pesticide registered by EPA to protect corn from soil borne insects. Soybeans were planted in the fields the following year. Residuals of the pesticides were absorbed by the soybeans and eventually found their way into poultry feed, resulting in the condemnation of several million chickens ruled unsafe for consumption. The pesticide had been registered by the Federal EPA as safe for use on corn. The growers followed EPA use directions. No one anticipated the problem, nor can the blame for the subsequent problem be ascribed to an individual or company. The pesticide, of course, was disallowed, However, if this bill had been law, virtually every corn/soybean farmer involved in the production of that poultry feed would have been liable.

The committee bill provides a narrow exemption for the field application of pesticides. We do not believe a narrow exemption from a bad provision makes the provision any better. We urge deletion of the joint and several strict liability scheme from this bill.

The bill envisions three principal sources of funding. The fund would initially be built from a tax on industry and from appropriated funds. However, the fund would be replenished with additional monies recovered from parties, sued by the U.S. Justice Department, after initial payment for damages by the fund. This latter provision was intended to pit the Justice Department against major companies. The practical application of the provision, however, would subject any business—big or small—and individual farmers, to the force of virtually uncontestable litigation, should an accident occur.

Further, the industry tax will not be paid by big business, as envisioned by the bill, but instead be passed through as a cost of production to the consumer of the product—the farmer buying the pesticide.

We encourage this committee to amend S. 1480 in order to make it a responsible bill that addresses the legitimate problem of abandoned hazardous waste disposal sites and clarifies federal authority to respond to hazardous materials spills. The remainder of the bill should be deleted.

Sincerely,

VERNIE R. GLASSON,
Director, National Affairs Division.

CRUM & FORSTER INSURANCE COS.,
Washington, D.C., September 10, 1980.

Re S. 1480, The Environmental Emergency Response Act.

Hon. HOWARD W. CANNON,
Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Crum & Forster Insurance Companies, the Nation's 14th-ranked group of property-casualty insurers, are major writers of the kind of liability insurance that S. 1480 would virtually compel owners and operators of many hazardous substances disposal facilities or sites to buy in order to establish evidence of financial responsibility.

As eager as we are to make a market for those subject to the bill's requirements, we do not believe that the liability scheme established by S. 1480 is insurable. We are concerned that enactment of the bill in its current form will impose on many owners and operators an obligation they will be unable to fulfill through the purchase of insurance.

To be insurable, an event must be reasonably predictable both as to the frequency with which it occurs and as to the severity of losses it produces. S. 1480, in our view, makes the prediction of loss frequency and severity nearly impossible. Many of the legal rules it establishes, the categories of loss it makes compensable, and the classes of claimants it makes eligible for recovery, are entirely new, rendering past experience meaningless for purposes of estimating future costs (and, hence, premiums).

Unless major changes are made in S. 1480, we would strongly recommend that it not be enacted. As much as we appreciate the desirability of compensating the victims of hazardous substance releases into the environment, we believe there must be a better balance between this objective and the interests of owners and operators (and their insurers) than S. 1480 now strikes.

First, with respect to the legal framework in which losses are to be compensated, S. 1480 abandons all current and time-tested rules of liability in favor of an untried concept of joint, several and strict liability (section 4(a)) whose unfamiliarity is compounded by its retroactive applicability.

"Owner or operator" is defined in section 2(b)(15)(A) to "include the person who owned or operated or otherwise controlled activities at such facility or site *immediately prior to (its) abandonment or at the time of any discharge . . .*" (emphasis supplied). Section 4(a) subjects such owners and operators and "any person who *at the time of disposal of any hazardous substance* owned or operated any facility" to joint, several and strict liability for the universe of damages resulting from a discharge. The exceptions to this retroactivity in subsections 4(n)(1)–(3) are cold comfort, since they apply only to damages and releases occurring "wholly" before a specified date.

Thus, S. 1480 would apply entirely new statutory liabilities to actions taken and contracts made years, even decades, ago under traditional common law standards. We and other insurers would become subject, under contracts long since terminated, to liability exposures we never agreed to assume and could not possibly have foreseen, and the extent of our liability would be determined not according to the legal rules and the state of the waste disposal art at the time we entered into our contracts, but under an untried formula that would strip us and our former insureds of virtually all defenses.

We know it would be unfair, and we believe it would be unconstitutional, for the Congress to change the rules for hazardous substances liability retroactively as well as prospectively. We would not hesitate to challenge such a law if, pursuant to it, we were to be ordered to pay millions of dollars on behalf of former insureds for legal liability that did not exist when the actions involved were taken, and for which we collected no premium.

The strict liability dragnet in S. 1480 is so broad as to sweep within it any person who at any time had even the remotest connection with a facility or site, and to require that person to pay the entire damages from a discharge before he can seek either limitation or apportionment of his liability from the parties actually responsible for the damages (see section 4(f)(3)). From an insurer's perspective, this provision alone creates a contingent liability so enormous as to defy calculation, and would likely make it extremely difficult for persons utilizing disposal sites to obtain insurance protection.

The scope of the definition of "facility" in section 2(b)(9) of S. 1480 is so broad as to include farmers' tiny ponds and drainage ditches as well as massive commercial chemical dumps. No attempt is made to discriminate among "facilities" on the basis of their capacity, loss history or risk potential.

Thus, a farmer would be subject to the same one year's imprisonment or $10,000 fine that would be levied against a chemical dump operator for his failure to notify EPA of "the existence of (his) facility or site" and "the amount and type of any hazardous substances to be found there," and subject to the same *absolute* and *unlimited* liability for damages resulting from any subsequent discharge or lease (see section 3(a)(4)(A)).

We must ask if it is truly the desire of Congress to impose on a farmer who may have a pesticide residue in his pond or drainage ditches the draconian requirements set out in S. 1480. If not, surely some distinction should be drawn between those facilities which pose relatively little risk of environmental harm and those which pose a greater risk. Absent such distinctions, the owners of farms, motor vehicles and other onshore facilities will face a Hobson's choice: they will either be unable to obtain insurance protection against liability arising under S. 1480; or they will be able to obtain it only at prices reflecting the huge exposure the bill creates for even the smallest facility.

Ironically, the bill places no limit on the liability of any person subject to it, but permits any insurer acting as a guarantor of such a person under the bill's financial responsibility requirements (section 7) to escape liability by excluding, through restrictive endorsement, coverage for subrogation

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claims of the Hazardous Substance Response Fund (see section 6(b)(3)(E)). If a guarantor were to deny direct liability, forcing claimants to proceed against the Fund, and also excluded subsequent subrogation claims, the entire burden of the subrogated claim would rest on the insured. We doubt seriously that any reputable insurer would enter into such a contract, but point out that the bill contemplates the use of insurance policies as evidence of financial responsibility while permitting insurers to exclude liability by restrictive endorsement.

Second, the categories of loss that S. 1480 makes compensable are in many instances either entirely new or so broadly defined as to defy quantification. We do not believe that insurers will be able to accurately price coverage for unfamiliar or unquantifiable kinds of losses. Unless the elements of compensable loss are more precisely defined and limited, we believe they will further discourage insurer participation in the market for risks subject to S. 1480.

"Damages" are specified in section 2(b)(8) to include both "economic loss" and damages for "personal injury." The latter presumably would include such non-economic losses as pain and suffering, loss of consortium, etc., which are extremely difficult to estimate in advance. Non-economic losses typically constitute 60 per cent of automobile liability insurance payments, and, if permitted under S. 1480, would substantially increase the costs imposed by the bill. For example, would "psychic trauma" induced by disclosure of an orphan dump site next door to an established residential neighborhood constitute the sort of "personal injury" compensable under the bill?

"Remedial action" could, subject solely to Presidential discretion, impose on a discharger pursuant to section 4(a)(1)(A) such potentially staggering costs as "permanent relocation of residences, businesses and community facilities" and "the provision of permanent alternative drinking water supplies" (see section 2(b)(1)). Determination as to whether such costs are reasonable or necessary is entirely out of the hands either of the discharger or his insurer, but his liability for them is virtually absolute.

There is no requirement in section 4(a)(2)(B) that "loss of use of real or personal property" result from damage to the property itself, as is currently required under insurance contracts. Does this mean that a family is entitled to recover damages for loss of use of an island retreat if the bridge to the island is closed after a truck carrying a hazardous substance has overturned?

Similarly, there is no requirement in either sections 4(a)(2)(D) (loss of use of natural resources) or 4(a)(2)(E) (loss of income or earning capacity) that the claimant derive any income from either the natural resources or the property damaged. Does this mean that a weekend fisherman denied his sport on a contaminated local lake is eligible for recovery of damages? Does it mean that a gas station owner whose traffic to and from the same lake declines is entitled to seek compensation? If so, there is no end to the theoretical universe of damages that can be conjured up (bait suppliers to the fishermen, auto parts dealers with the gas stations, etc.).

We would also like to point out that S. 1480, in defining "release" (section 2(b)(16)), repeals the Price-Anderson Act's $560 million limitation on public liability arising out of a nuclear incident by providing that a "release" does not include "nuclear material . . . to the extent such release is covered by financial protection required" under the Price-Anderson Act. Thus, once the Price-Anderson limits have been reached, unlimited recovery would be permitted under S. 1480. We do not think it is sound public policy to bury an implied repeal of a major statute in the definitions section of an apparently unrelated 91-page bill.

Third, the classes of claimants that S. 1480 makes eligible for recovery of damages are nowhere, except with respect to loss of tax and other revenues and of natural resources by governments, limited. The impossibility of measuring the numbers of claims that might result from a given incident increases the likelihood that insurers will avoid exposures created by S. 1480.

Much of the imprecision in the classes of claimants eligible for recovery derives from similar imprecision (noted above) in the bill's description of compensable losses. We believe that a new section, specifying which classes of persons are eligible for recovery of which category of damages, would greatly improve this bill.

For example, recovery for "loss of use of real or personal property" (section 4(a)(2)) should be limited to those whose property is actually damaged by a release, discharge, or disposal.

Similarly, only those who derive a major portion of their livelihood from natural resources should be eligible to recover for loss of use thereof, and only those whose income-producing property is damaged should be able to seek damages for loss of income or profits or impairment of earning capacity (see sections 4(a)(2)(D) and (E)).

We would be pleased to work with your Committee and its staff in an effort to create an Environmental Emergency Response Act that better balances the interests of those victimized by hazardous substances discharges with those of potential dischargers and their insurers. We do not want to surrender yet another market to the taxing power of the Federal Government without working to make S. 1480 an insurable venture for ourselves and our competitors.

Sincerely yours,

LESLIE CHEEK III,
Vice President, Federal Affairs.

AMERICAN INSURANCE ASSOCIATION,
Washington, D.C., September 17, 1980.

Re S. 1480, the Environmental Emergency Response Act.

Hon. HOWARD W. CANNON,
Committee on Commerce, Science, and Transportation, U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR CANNON: The American Insurance Association (AIA) is a trade association of 152 stock, property and casualty insurance companies. If S. 1480 is enacted, the member companies of AIA will be the principal domestic source of liability insurance for onshore facilities to service the liability system established in the bill.

S. 1480 currently provides for a five year period following enactment of the bill during which financial responsibility (FR) requirements are not obligatory. FR requirements will then be phased-in over a period of 3 to 6 years. Without the provision of insurance, owner/operators who cannot self-insure will not be able to meet the financial responsibility certification requirement mandated by the bill.

The American Insurance Association opposes enactment of S. 1480 in its current form. The liability system created by S. 1480 presents an enormous liability exposure and for many insurers would represent an uninsurable risk.

The establishment of levels and categories of insurance coverage by federal legislative mandate is a serious problem for the insurance industry. The demand for insurance coverage to service federal liability systems may exceed the industry's capacity to provide protection. Legislation which imposes levels of financial responsibility on owner/operators as a prerequisite for doing business transforms insurance from a consumer product to a societal necessity. The supply of insurance to service a liability system which responds to toxic discharges and hazardous waste disposal is not perfectly elastic. It is largely a function of and limited by the general condition of the United States and foreign primary insurance and reinsurance markets, the competing demands for capacity from a variety of other insurance risks, and the specific economics of the risk of catastrophic loss associated with S. 1480.

The current limitations on pollution liability insurance are a result of public policy, rapidly developing common law liability theory, potential magnitude of loss associated with toxic waste and hazardous discharges, and the inevitable legal ambiguities of casual relationship and multiple causation associated with disease-related injuries.

The independent development of federal tort law concepts which would nationally codify the most advanced common law theories and add presumptions which are common to compensation systems but *not* liability systems will further impede the development of an insurance market for pollution liability.

"Superfund" legislation introduces broad new categories of claimants and compensable damages which will make risk assessment extremely difficult until a data base is generated through claims experience under the liability system. During this initial period insurers would be in the uncomfortable position of basing their rates more on conjecture than on responsible judgment supported by hard data.

Elements of concern which could preclude the development of an insurance market are as follows:

UNMEASURABLE CATEGORIES OF COMPENSABLE

The definition of "damages" and the ambiguity in sections 4(a)(2) A–D result in a lack of clarity with respect to whether "damages for . . . personal injury" includes non-economic loss such as pain and suffering. With respect to the latter subsection, it is not clear whether the specification of what is included in "all damages" implies that elements not listed (*e.g.*, pain and suffering) are therefore not included. The phrasing "economic loss or loss due to personal injury" would suggest that non-economic loss is included, although the ensuing list does not specify any non-economic losses.

The element of non-economic loss is the most unpredictable and the most easily manipulated portion of damages. If the bill intends to permit recovery for non-economic loss, it should clearly specify it. If recovery for such loss is permitted, it would further discourage insurer participation.

CLAIMANT STANDING

We are concerned with section 4(a)(1)(A)(2)(E) because the phrase "loss of income or profits or impairment of earning capacity" is totally unqualified as to the percentage of income a claimant must derive from damaged property or resources in order to be eligible for an award.

Neither does it qualify the time period over which such damages may be claimed. Without such qualifications, the subsection has the potential for allowing youthful claimants to seek lifetime income replacement awards, regardless of how little of their income was derived from the damaged property or resources and regardless of their ability to obtain other employment.

PRESUMPTIONS

Section 6(e)(2) and (3) provides for a rebuttable presumption in favor of "any determination or assessment of damages for . . . natural resources" and further directs that assessment should be made by the Administration's environmental agencies. The presumption would give extraordinary evidentiary weight to damage assessment concepts and assumptions which have not been fully developed or recognized by the courts or legal academicians. The presumption will

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sources claims and reducing assessments nearly impossible.

CLAIMS SETTLEMENT PERIOD

S. 1480 currently provides for a period of 15 days for settlement of claims between claimants and owner/operators (and their guarantors).

Proper assessment of damages in speculative areas of liability such as loss of use of natural resources or loss of income cannot be made in a period of less than 120 days. Many cases which could be settled would be referred to the court or the Fund, not because the fact are contested, but because proper damage appraisal is impossible.

A period of 120 days also may be needed to designate the proper defendant. Locating the source of the discharge in situations involving vessels and offshore facilities will normally be easy due to the spiller's location. However, in situations involving onshore facilities, facilities may be grouped together or evidence of damage may device over a long period of time, making designation of defendant more difficult.

RETROSPECTIVE APPLICATION OF LIABILITY

"Owner or operator" is defined in section 2(b)(15)(A) to "include the person who owned or operated or otherwise controlled activities at such facility or site immediately prior to (its) abandonment or at the time of any discharge. . . ." Section 4(a) subjects such owners and operators and "any person who at the time of disposal of any hazardous substance owned or operated any facility" to joint, several and strict liability for the universe of damages resulting from a discharge. The exceptions to this retroactivity in subsection 4(n)(1)–(3) are inadequate because they apply only to damages and releases occurring "wholly" before a specified date.

S. 1480 would apply the most advanced common law theories of liability coupled with rebuttable presumptions in the areas of natural resources assessment and medical injuries to fact situations which took place and insurance contracts which were made years ago. Premiums collected for insurance contracts for pollution liability terminated years in the past were based on common law theories of liability such as negligence, trespass, nuisance and riparian rights. If the occurrence which results in alleged liability is continual, insurers which provided pollution liability coverage years ago may be subjected to the liability concepts in S. 1480.

MODIFICATIONS TO THE PRICE-ANDERSON ACT

S. 1480's definition of release appears to remove the $560 million limitation on owner/operator liability arising out of a nuclear incident. Section 2(b)(16) provides that a "release" does not include "nuclear material . . . *to the extent* (emphasis added) such release is covered by financial protection required by" the Price-Anderson Act. The above language could also be interpreted in a fashion which would apply the liability concepts of S. 1480 to nuclear incidents.

JOINT AND SEVERAL LIABILITY

In adopting a joint and several, strict liability theory, S. 1480 would permit a claimant to collect the entire award for damages from one defendant before that particular defendant can seek contribution from the remaining defendants. This approach creates a potential unforeseen liability for owner/operators and makes the process of underwriting and pricing a risk extremely difficult. A risk's individual potential for pollution liability becomes meaningless when he can be sued for an entire loss although he was only one of a number of participants.

FINANCIAL RESPONSIBILITY REQUIREMENT FOR ROLLING STOCK

Section 7(b)(2) provides for FR requirements for rolling stock of $300 per gross ton, or $5 million, whichever is greater. This FR requirement would be "in addition to those in existing law". The recently enacted "Motor Carrier Act of 1980" mandates FR requirements of $5 million for transportation of extremely hazardous materials and $1 million for transportation of other hazardous materials. The S. 1480 requirement for rolling stock would be in addition to the FR requirements in the Motor Carrier Act, thereby creating an intolerable burden on commercial automobile insurers.

In reviewing the basic criteria for determining insurability of losses as delineated by Commercial Liability Risk Management and Insurance, the difficulty in underwriting pollution insurance for hazardous discharges becomes evident.*

LOSSES MUST BE DEFINITE IN TIME, PLACE, AND AMOUNT

Many pollution losses cannot be pinpointed as to time and place, nor to any one source. They are attributable to prolonged misuses or exposures by many sources. For example, it would be almost impossible to determine whether, and to what extent, illnesses or property damages are solely attributable to an insured. Another difficulty would be to prove that the actual cause of some diseases—emphysema for example—is the air pollution. Such diseases can be caused by other factors, such as smoking, or working in a hazardous industry. Multiple causes of loss could pose causation problems, even when a pollution incident is sudden and accidental.

LOSSES MUST BE ACCIDENTAL IN NATURE

Without question, some of the pollution that culminates in damage is willful or done with flagrant disregard to its possible effects. Also, some acts are intentional, but the results are unforeseen. A typical example is the dumping of mercury into streams and rivers, an occurrence that went on for a number of years. It was thought that mercury would sink and do no harm. However, it was subsequently discovered that mercury so disposed of would produce another harmful substance.

LOSSES SHOULD NOT HAVE AN UNMANAGEABLE CATASTROPHE POTENTIAL

Pollutants and contaminants are obviously capable of producing catastrophic results. Whether the catastrophe potential of pollution liability can be managed now or in the future is not yet clear but the severe consequences of an error in making this judgment justify some caution on the part of insurers.

THERE SHOULD BE A LARGE NUMBER OF HOMOGENEOUS EXPOSURE UNITS

In order that losses may be predicted accurately, there should be a large number of homogeneous exposure units—i.e., similar type businesses or organizations in order to permit satisfactory predictions of the losses that will be incurred by firms that are actually insured. There also should be a substantial volume of credible loss experience and an acceptable means of forecasting significant increases in future losses. It would seem that there are ample numbers of similar firms interested in purchasing pollution liability insurance if the price is reasonable. Nonetheless, it is still a difficult task to predict the frequency and severity of insurable pollution liability losses for those who would constitute the insured group.

LOSSES SHOULD BE MEASURABLE IN TERMS OF MONEY

Measuring the dollar costs of property damage, bodily injury, sickness, death, loss of earning power, and loss of consortium and other such intangibles is sometimes difficult, though it is not impossible in the context of most types of legal liability. However, in some pollution cases, as mentioned earlier, it may well be impossible to determine the proper portion of a total dollar loss that was caused by a particular insured. There may be many causes involved, as well as many different polluters. Moreover, additional problems will surely arise if insurers are required to pay damages for such things as the aesthetic and/or enjoyment value of recreational areas or lakes.

INSURANCE MUST BE ECONOMICALLY FEASIBLE

If the statutory goals of curbing water, air, noise, and thermal pollution are met in the future, and if anti-pollution control devices and other effective techniques are implemented on a widespread basis, perhaps pollution liability insurance will become more readily available at economically feasible premiums. At present, however, these are not the realities. Pollution costs are enormously high and appropriate insurance is difficult to obtain, especially for premiums prospective buyers would pay.

In discussing the priority of importance insurers attach to the bill's "defects", it must be emphasized that it is difficult and perhaps misleading to establish such a priority because it fails to recognize that the concepts in S. 1480 interrelate with and thereby exacerbate each other. Enactment of S. 1480 in its current form will create an immediate availability and/or affordability of insurance problem as owner/operators attempt to obtain insurance protection from the risks presented in the bill's liability system. The availability problem will be acutely felt when FR requirements for onshore facilities become a prerequisite of doing business. Although insurers can avoid prospective liability by refusing to service S. 1480's liability system, insurers may not be able to avoid retrospective application of the liability system to existing claims. Accordingly, the American Insurance Association opposes passage of S. 1480.

Respectfully submitted,

JAMES L. KIMBLE, *Counsel.*

DEPARTMENT OF STATE,
Washington, D.C., September 15, 1980.

Hon. HOWARD W. CANNON,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR CANNON: I understand that the Senate Commerce Committee recently held hearings in regard to S. 1480, the Environmental Emergency Response Act. Since the Department of State was not called as a witness at those hearings, I wish to take this opportunity to express our serious concern regarding this legislation.

The Administration and the Department of State have for several years supported the concept of a comprehensive system of liability and compensation for oil spill damage and removal. We further believe in the desirability of similar legislation for damage occasioned by hazardous substance spills. Due to a number of policy and legal questions it has been an extremely difficult task to establish a unified scheme of liability and compensation for pollution caused both by oil and hazardous substances. We are, therefore, pleased to note that H.R. 85, the Comprehensive Oil Pollution Liability and Compensation Act, as reported by the House Committee on Public Works and Transportation adds to the original bill dealing only with oil spills a similar system for hazardous substances and merges these two systems into a single piece of legislation.

In particular, the Department is gratified to note that the jurisdictional and liability regimes established under H.R. 85, as amended, are consistent both with the prevailing international jurisdictional regime (partic-

*Requisites for insurability were excerpted from Commercial Liability Risk Management and Insurance, Volume II, ch. 11 "Special Liability Exposures and Their Treatment."

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97th Congress
2d Session

COMMITTEE PRINT

ORIGINAL

A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510

TOGETHER WITH

A SECTION-BY-SECTION INDEX

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[From the Congressional Record, Sept. 24, 1980, pp. S13364-S13367]

LIABILITY FOR CLEANUP OF INACTIVE HAZARDOUS WASTE DISPOSAL SITES

AMENDMENTS NOS. 2374 THROUGH 2388

(Ordered to be printed and to lie on the table.)

Mr. CANNON submitted 15 amendments intended to be proposed by him to the bill (S. 1480) to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.

Mr. CANNON. Mr. President, today I am submitting a number of amendments to S. 1480, the "superfund" bill. Last Thursday, I made a statement on the floor which discussed some of the problems in S. 1480, particularly as they relate to the jurisdiction of the Senate Committee on Commerce, Science, and Transportation. At that time, I asked that certain letters be included in the RECORD which would further explain some of these problems (printed in the RECORD for September 18, at S12916). The amendments which I am submitting today respond to some of the concerns of the Commerce Committee developed as a result of its hearings and review of this important legislation.

Due to the extremely tight timeframe within which the committee has examined S. 1480, we have not had an opportunity to consider the bill or these amendments formally in committee session. However, the amendments do respond to many of the concerns with the bill that were raised at our hearings, and I am submitting them today in the interest of expeditious consideration of S. 1480 prior to adjournment. The committee welcomes any specific comments on the amendments from interested persons.

S. 1480 as presently drafted is unnecessarily broad and unclear as to its coverage [Sec. 101]. In this regard, one of my amendments would define the scope of the applicability of this act to insure that jurisdiction over foreign vessels and nationals is not inappropriately allowed.

Another amendment would modify the definition of "hazardous substances" so as not to include any substance which might cause harm, no matter how significant, to any organisms under any circumstances, and would limit that definition to substances that have been designated as hazardous [Sec. 101(14)]. The term "pollutant or contaminant," undefined in the bill, would be clarified by an amendment to relate the term to the clean-up authority of the President [Sec. 104(a)(2)]. The requirement that records be retained in perpetuity would be modified to grant the President authority to issue more practical regulations in this area [Sec. 103(d)].

Also, there is an amendment to clarify that the limitations on liability already mandated under the Price-Anderson Act for nuclear incidents will not be modified by S. 1480 [Sec. 101(22)].

I am particularly concerned about the broad application of certain provisions to transportation and commerce and the burdens which such application would impose. Accordingly, one of my amendments would exclude consumer products from the definition

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On page 23, line 20, strike "transportation".

On page 24, line 4, strike "sections." and insert in lieu thereof "actions: *Provided however*, That this subsection shall not apply to the transportation of any hazardous substance.".

EXPLANATION

This amendment clarifies the meaning of "transport" and "transportation" as used in this Act, and it eliminates the applicability to transportation of the new information gathering provision in Section 3(d). The new authority granted to the Environmental Protection Agency and the states under section 3(d) is duplicative of and inconsistent with the current authority of the Department of Transportation in regulating hazardous materials transportation.

AMENDMENT No. 2376 [Secs. 101(14), 103(b), 108(a), 107(j), and 104(a)(2)]

On page 8, line 9, strike all after "this" through the end of line 23 and insert in lieu thereof the following:

"Act."; and on line 7 of such page, insert "and" immediately before "(F)" therein.

On page 15, lines 11 and 12 and lines 18 and 19; page 16, lines 4 and 5 and lines 22 and 23; page 18, lines 7 and 8; and page 83, line 3, strike the words "(other than as defined in section 2(b)(13)(G) of this Act)".

On page 38, strike lines 1 through 12 and on line 13 redesignate subsection "(n)" as subsection "(m)".

On page 12, line 2, strike "and", and on page 13, line 22, strike "amended." and insert in lieu thereof the following: "amended; and

"(19) the term 'pollutant or contaminant' means any substance with respect to which the President exercises authority under section 3(c)(1) of this Act, other than a hazardous substance."

EXPLANATION

S. 1480 in Section 2(b)(13) contains a two-tier definition of hazardous substance. The first tier, Section 2(b)13(A)–(F), would define a hazardous substance as any substance designated under certain specified lists. Section 2(b)(13)(G) is a "catch-all" which would define a hazardous substance to include virtually any substance that could cause damage, however slight, to any organism under any circumstances. This extreme breadth of definition is unnecessary for any purpose under the Act, since section 3(c)(1)(B) of S. 1480 provides that the President is authorized to respond to a release of a "pollutant or contaminant" only when there is an imminent or substantial danger to the public health or welfare. Accordingly, this amendment would strike Section 2(b)(13)(G) and all reference thereto. This amendment also clarifies that for purposes of this Act, a "pollutant or contaminant" is any substance, other than a defined hazardous substance, with respect to which the President decides to exercise his response authority under Section 3(c)(1)(B).

AMENDMENT No. 2377 [Sec. 107(a)]

On page 26, line 8, strike "all" and insert in lieu thereof "the following".

On page 26, line 10, strike "disposal, including—" and insert in lieu thereof "disposal.".

On page 26, strike lines 14–15 and lines 19–21.

On page 27, line 2, strike "resources;" and insert in lieu thereof "resources if the claimant derives at least 25% of his earnings from activities which utilize such property or resources;".

EXPLANATION

Section 4(a)(2) of S. 1480 provides for recovery of damages, which result from a release under the Act, "including" seven specified types of damages. The specified damages in the Act are not to be treated as an inclusive list, and unspecified damaged are potentially recoverable. Given the joint, several, and strict liability scheme established in the bill, it is essential that the types of damages recoverable be specified in order to provide a degree of certainty and predictability. Without such predictability, insurers have indicated that the risks created by the bill would be uninsurable. This amendment would limit the damages recoverable to those specifically enumerated in the Act.

In addition, section 4(a)(2) of S. 1480 currently would impose liability for the loss of use of any property or natural resources and for any loss of income from such use resulting from a release of hazardous substances. These provisions vastly expand the number of potential claimants under the bill and would place claimants with relatively insignificant claims on a par with claimants with urgent need for recovery. For example, under the current provision, a sports fisherman using a pond that has been polluted would be entitled to compensation on the same basis as a claimant needing compensation for medical expenses. This amendment would eliminate these less significant claims from the scope of the bill and focus the liability scheme on the claimants with the most serious claims. In addition, the amendment would permit compensation for loss of income from the use of property or resources only if 25 percent of the claimant's income is derived from such use. This amendment would not affect the common law rights of those affected by this amendment. This amendment is consistent with the approach to damages taken by the Outer Continental Shelf Lands Act Amendments of 1978.

AMENDMENT No. 2378 [Sec. 101(9)]

On page 7, line 4, immediately before the semi-colon therein, insert the following: ", but such term does not include consumer products."

On page 13, line 22, insert the following new paragraph:

"(19) the term 'facility' as used in the phrase 'facility or site at which hazardous substances are stored or disposed of', or any similar phrase, shall not include any motor vehicle, rolling stock, pipeline or aircraft engaged in transportation.".

EXPLANATION

S. 1480 defines the term "facility" broadly to include such things as "any equipment" and "any storage container," which could easily include consumer products. Such an interpretation of this term would lead to excessive notification and liability coverage by the Act. This amendment would explicitly clarify that the term "facility" does not include consumer products for the purposes of this Act.

In addition, this amendment will clarify that transportation facilities shall not be treated as facilities storing hazardous substances, which would trigger the notification provisions of S. 1480, if they are holding hazardous substances as part of the transportation process.

AMENDMENT No. 2379 [Sec. 306 (a) and (b)]

On page 91, after line 21, add the following new section:

"TRANSPORTATION

"SEC. 13. (a) Each hazardous substance which is listed or designated as provided in section 2(b)(13) of this Act shall, within ninety days after the date of enactment of this Act or at the time of such listing or designation, whichever is later, be listed as a hazardous material under the Hazardous Materials Transportation Act.".

"(b) A common or contract carrier shall not be liable under Section 4 of this Act for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the designation under Subsection (a) of this section.".

EXPLANATION

The problem of identification of hazardous substances is a very real one for carriers. Although they are subject to the liability provisions and clean-up responsibilities under S. 1480, unless the hazardous substance is required to be identified as such on shipping documents, a carrier may not even know that he is transporting a hazardous substance. Tariff publication of safety requirements is based on DOT regulations and the best way to ensure that hazardous substances are identified as such when offered for transportation is to have them listed in the Hazardous Materials Table and certain entries required on shipping papers. This problem existed with regard to the Environmental Protection Agency's (EPA) regulation of the transportation of Section 311 hazardous substances, and hazardous wastes, and the solution involved listing of these materials by DOT.

Since identification via some indication of shipping documents is the key to a carrier knowing he is transporting hazardous substances, there may be some delay

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 95-
1st Session } { 340 Part 1

OIL POLLUTION LIABILITY AND COMPENSATION ACT

MAY 16, 1977.—Ordered to be printed

Mr. MURPHY of New York, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 6803 which on May 2, 1977, was referred jointly to the Committee on Merchant Marine and Fisheries and the Committee on Public Works and Transportation]

The Committee on Merchant Marine and Fisheries to whom was referred the bill (H.R. 6803) to provide a comprehensive system of liability and compensation for oilspill damage and removal costs, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 4, line 22, strike out "blonging" and insert the word "belonging".

On page 9, line 7, strike "The" and insert in lieu thereof "Subject to the provisions of 202(b), the".

On page 16, line 10, strike "action." and insert in lieu thereof "section."

Page 17, line 4, strike "negligenc," and insert in lieu thereof "negligence,".

On page 24, line 16, strike "Act." and insert in lieu thereof "Act, and shall submit an interim report on his study within three months of the date of enactment of this Act.".

On page 41, line 7, immediately after "(b)" insert "(1)"— and, following line 16, insert the following:

(2) The Secretary of the Interior shall certify to the Secretary the total amount of the claims outstanding against the Trans-Alaska Pipeline Liability Fund at the time the trans-

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section (a) must be read in conjunction with subsection (b), which describes those parties who have standing to bring the claims for the various damages that are set out in subsection (a).

"Removeal costs" is a recoverable economic loss, as provided under subsection (a)(1). Subsection (b)(1) provides that any claimant may recover removal costs. To create an incentive for maximum participation in cleaning up, foreign claimants are permitted to recover these costs even if the conditions imposed by subsection (b)(6) are not met. The owners or operators of a vessel or a facility, involved in an oil pollution incident, have limited standing. The owner or operator who undertakes the clean-up of an oil spill may assert a claim against the fund for the cost of such an undertaking if he either has a defense to liability under section 104(c)(1) or 104(c)(2) or is entitled to a limitation of liability under section 104(b). In the latter case, where entitled to limitation, his right to claim is limited to the excess cost incurred above the limitation to which he is entitled. The purpose of this provision, in relation to owners and operators, is two-fold. First, it removes any disincentive that the owner may have in undertaking the clean-up, based on the liability issue, and second, it serves as an encouragement for him to continue his clean-up activities even after his limitation of liability has been reached, by affording him a basis for compensation of the cost of clean-up in excess of his limitation. A guarantor involved would have the same rights, as subrogee to the owner or operator.

When property, as defined in section 101(z), is in some way injured by oil pollution, two avenues of relief are provided. Under subsection (a)(2), recovery for the injury to, or destruction of, that property is permitted, and, under subsection (a)(3), recovery for economic loss that results from being unable to use such property is permitted. Any United States claimant may bring claim under these two theories of recovery in accordance with subsection (b)(2).

Damages for, injury to, and destruction of, natural resources under subsection (a)(4), may be claimed only by the President, as trustee of those natural resources over which the Federal Government has jurisdiction, or by a State for natural resources under its jurisdiction. The jurisdiction of the Federal government specifically includes resources over which it has exclusive management authority such as those covered by the Fisheries Conservation and Management Act of 1976. The jurisdiction of a State extends to those resources within the State's boundaries which, though not in fact belonging to the State, may be held in trust by the State for the benefit of its citizens or otherwise managed or controlled by the State. The standing to bring such a claim is conferred in subsection (b)(3). An example would be a State's claim against a discharger for injury to a coastal State park. Compensation paid for damages under subsection (a)(4) must be used to restore the damaged natural resource or to acquire similar resources.

A separate theory of recovery in connection with natural resources is provided under subsection (a)(5) for those parties who suffer an economic loss because they are unable to use a natural resource injured by oil pollution. Standing for claiming such a loss is conferred on any United States claimant by subsection (b)(2).

The provisions of subsection (a)(6) allow recovery for loss of earnings due to injury of property or natural resources. In order to acquire

standing to bring a claim under subsection (b)(4) for lost earnings, the claimant must derive at least 25 percent of his earnings from economic activity which utilizes the injured property or natural resources. The claimant need not be the owner of the property injured in order to have standing to bring a claim for lost earnings, as was required at common law. This means, for example, that a worker at a coastal hotel might have standing to bring a claim for damages, even though he owns no property which has been injured by oil pollution.

When injury to real or personal property occurs and the injury causes a reduction in tax revenue derived from that property, a State or local jurisdiction is given standing under subsection (b)(5) to assert a claim for one year's loss of revenue, attributable to such reduction.

Under subsection (b)(6), foreign claimants, as defined in section 101 (g) and subject to the limitations in section 101(n)(3), are given rights comparable to United States claimants, provided they meet certain conditions. First, it should be borne in mind that oil pollution, as defined in section 101 (n)(3), has a particular meaning for foreign claimants. Only oil pollution in the navigable waters of the United States or in the territorial sea or adjacent shoreline of the foreign country gives rise to a claim. Furthermore, under this subsection there are four prerequisites to assertion of a claim by a foreigner. All four prerequisites must be met. Where oil pollution occurs in a foreign country, the claimant must be a resident of the country where the oil pollution occurred. The claimant must not have been compensated through some other means for his loss. The discharge which resulted in oil pollution must have occurred in United States navigable waters or from certain activities under the control of the United States. Lastly, the recovery must be authorized by treaty or executive agreement, or the country involved must provide a comparable remedy for United States claimants in similar situations. In the case of oil being transported from the trans-Alaska pipeline to the continental United States, conditions as to location of the discharge need not be satisfied where the oil is discharged, even outside United States navigable waters, at any time before it is brought ashore into a United States port. This provision substitutes for a similar provision in section 204(c) of the Trans-Alaska Pipeline Act, repealed by section 202(a) of this Act.

Subsection (b)(7) authorizes the Attorney General to act on behalf of a group of claimants and to consolidate their claims. This clause is designed to expedite the settlement of claims under section 107. Aside from consolidating the settlement of claims, through the negotiation process, it is contemplated that the Attorney General would also be authorized to bring a class action in accordance with the Federal Rules of Civil Procedure.

Subsection (c) effectively suspends the rights of a claimant to bring a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure until 60 days have passed from the time when the Secretary of Transportation identifies the source of oil pollution under section 106. This suspension of rights to bring a cause of action is consistent with section 107, the claims settlement section, which encourages the negotiations to proceed for at least 60 days before resort to the court

OIL POLLUTION LIABILITY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COAST GUARD AND NAVIGATION

OF THE

COMMITTEE ON MERCHANT MARINE AND FISHERIES HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST AND SECOND SESSIONS

ON

H.R. 9294 and H.R. 10969

BILLS TO PROVIDE A COMPREHENSIVE SYSTEM OF LIABILITY AND COMPENSATION FOR OIL SPILL DAMAGE AND REMOVAL COSTS, TO IMPLEMENT THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE AND THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, AND FOR OTHER PURPOSES

H.R. 10363

A BILL TO ESTABLISH A UNIFORM AND COMPREHENSIVE LEGAL REGIME GOVERNING LIABILITY AND COMPENSATION FOR DAMAGES AND CLEANUP COSTS CAUSED BY OIL POLLUTION OF THE MARINE ENVIRONMENT, AND FOR OTHER PURPOSES

H.R. 10756

A BILL TO ESTABLISH A UNIFORM AND COMPREHENSIVE LEGAL REGIME GOVERNING LIABILITY AND COMPENSATION FOR DAMAGES AND CLEANUP COSTS CAUSED BY OIL POLLUTION, AND FOR OTHER PURPOSES

OCTOBER 29, NOVEMBER 4, 12, 18, DECEMBER 2, 4, 16, 1975, AND JANUARY 29, 1976

Serial No. 94-21

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Mr. RAYMOND. We undoubtedly would have to expand our setup procedure to collect at inland locations where there might be refineries or terminals.

Mr. HEYWARD. There is another question in connection with the movement of oil by pipeline in the inland parts of the United States. Would that oil be subject to fees, or would it be subject to fees only where it might threaten navigable waters? And, if so, how far away from the navigable waters would it have to be?

Mr RAYMOND. I would like to defer to Mr. Doyle.

Mr. DOYLE. I believe that they can advise Treasury that certain pipelines or refineries or other facilities need not pay any fees, because I am assuming they do not operate in the matter, possibly, to contaminate navigable waters.

Therefore, I believe that most of the inland lines would not be subject to paying fees of this nature.

Mr. BIAGGI. Mr. Forsythe?

Mr. FORSYTHE. No questions.

Mr. BAGGI. There will be no further questions.

Thank you very much for your contributions, and obviously if you have some change of language, we would appreciate a memorandum to this committee.

Mr. TAYLOR. Thank you.

Mr. DOLVE. Thank you.

Mr. BIAGGI. The next witness is Mr. Walter Kiechel, Acting Assistant Attorney General for Land and Natural Resources Division of the Department of Justice.

STATEMENT OF WALTER KIECHEL, JR., ACTING ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY BRUCE RASHKOW, CHIEF, MARINE RESOURCES, AND MARTIN GREEN, LEGISLATIVE ASSISTANT

Mr. KIECHEL. Mr. Chairman, I am Walter Kiechel, Jr., Acting Assistant Attorney General for Land and Natural Resources Division of the Department of Justice.

Mr. Chairman, I am accompanied here to my left by Mr. Bruce Rashkow, Chief of Marine Resources Section of the Land and National Resources Division, and to my right by Mr. Martin Green, Legislative Assistant for that Division.

I have submitted copies of my statement and would ask that it be made a part of the record.

Mr. BIAGGI. Without objection, so ordered.

[Statement referred to follows:]

STATEMENT OF WALTER KIECHEL JR., ACTING ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

The Department of Justice is pleased to respond to the request of this Committee for testimony relating to H.R. 9294, a bill "To provide a comprehensive system of liability and compensation for oil spill damage and removal costs, to implement the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and for other purposes."

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Until recently few, if any, laws had been enacted, either by the Federal Government or the States, which sought specifically to address the problem of oil pollution of our waters. However, with the increasing use of petroleum products in our society and the consequent increase in such pollution both the Federal Government and the States began to act. Thus, in the last 5 years, Congress has enacted the Federal Water Pollution Control Act, 86 Stat. 816, 33 U.S.C. 1301, *et seq.*, the Trans-Alaska Pipeline Act, 87 Stat. 584, 43 U.S.C. 1651, *et seq.*, and most recently the Deepwater Port Act of 1974, 88 Stat. 2126, 33 U.S.C. 1501, *et seq.* The States have also begun to act, *e.g.*, Florida Statutes Annotated §§ 376.11 *et seq.* (1974); Maine Revised Statutes Annotated, Title 38, §§ 541, *et seq.* (supp. 1973). This activity has resulted in a patchwork of sometimes conflicting provisions of both State and Federal law relating to liability for discharges of oil into our waters. Recognizing the hardships to the victims of soil pollution from ocean-related sorces as well as to those liable under the various acts for such pollution resulting from this patchwork of laws, Congress in the Deepwater Port Act of 1974 directed the Attorney General, in cooperation with various governmental bodies, to study this matter and make recommendations for legislation to provide a comprehensive system of liability.

Congress in proposing this study and requesting recommendations stressed that the Attorney General should address the means of ensuring fair and expeditious compensation to the victims of pollution without imposing unreasonable financial burdens on the persons involved in the activities associated with the discharges which result in pollution. Pursuant to the directive of Congress, the Department of Justice conducted a comprehensive evaluation of existing domestic laws, state and Federal, and international laws, agreements or treaties pertaining to liability. The Attorney General submitted his report to Congress on July 3, 1975. (At the request of the Senate Committee on Commerce and the National Ocean Policy Study that report had been published by the Government Printing Office.) H.R. 9294 is consistent with the conclusions and recommendations contained in that report and for that reason the Department wishes to place itself on record before your Committee as supporting the enactment of this bill.

This legislation would help protect our environment by establishing strict liability for all oil pollution damages. Thus, the bill would make an identifiable discharger of oil liable to a claimant in all instances except where the discharge was caused by an act of God or act of war or where the gross or willful negligence of the claimant contributed to the injury. § 105. The establishment of such a standard of strict liability should provide strong economic incentives for operators to prevent spills. Moreover, the bill would establish the rights of claimants to recover from the fund established in Title I in cases where it is impossible to identify the source of the spill. §§ 103, 109, 110. Except with respect to some foreign claimants, that fund would be liable for pollution damage in all instances except where it resulted from an act of war or where the gross or willful negligence of the claimant contributed to the injury. § 106.

Equally important, the bill will provide relief for many oil-related damages which in the past went uncompensated. Thus, the bill would clarify the rights of some claimants to recover compensation and recognize, for the first time, such rights in other claimants. For example, individuals whose real or personal property was not affected by the oil but whose businesses suffer a loss of profits will be able, under appropriate circumstances, to recover compensation. § 103. In effect, the bill would permit a recovery for most damages which are expected to result from oil pollution.

However, although the bill would constitute an exclusive remedy for the injuries for which it permits recovery, it would not impair the rights of claimants otherwise to seek damages for injuries not covered by the bill, such as personal injuries and pain and suffering. It would seem that the discharger could not rely upon the limitations otherwise established in the bill to limit his liability for these injuries. Moreover, it is possible under these circumstances that dischargers might be subject to litigation in state courts, above and beyond any litigation under the bill, for these injuries. Such multiple litigation if it arises could result in considerable confusion.

In addition to defining liability for oil spills, H.R. 9294 would establish a uniform system for settling claims. The methods and procedures for appraisal and settlement of claims under the bill will be similar for all dischargers and all claimants. § 110. Consequently, a claimant will not be subject to a different standard because of the location of the spill.

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Calendar No. 387

95TH CONGRESS
1st Session
SENATE
REPORT
No. 95-427

OIL POLLUTION LIABILITY AND COMPENSATION

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2083

TO ESTABLISH A SINGLE, COMPREHENSIVE LEGAL REGIME GOVERNING LIABILITY AND COMPENSATION FOR DAMAGES AND CLEANUP COSTS CAUSED BY OIL POLLUTION AND FOR OTHER PURPOSES

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(3) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping into the marine environment of quantities of oil determined to be harmful pursuant to regulations issued by the Administrator of the Environmental Protection Agency; and

(4) "owner or operator" means any person owning, operating, or chartering by demise, a vessel.

[(n) (1) The Attorney General, in cooperation with the Secretary, the Secretary of State, the Secretary of the Interior, the Administrator of the Environmental Protection Agency, the Council on Environmental Quality, and the Administrative Conference of the United States, is authorized and directed to study methods and procedures for implementing a uniform law providing liability for cleanup costs and damages from oil spills from Outer Continental Shelf operations, deepwater ports, vessels, and other ocean-related sources. The study shall give particular attention to methods of adjudicating and settling claims as rapidly, economically, and equitably as possible.

[(2) The Attorney General] shall report the results of his study together with any legislative recommendations to the Congress within 6 months after the date of enactment of this Act.]

TEXT OF S. 2083, AS REPORTED

A BILL To establish a uniform and comprehensive legal regime governing liability and compensation for damages and cleanup costs caused by oil pollution, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Oil Pollution Liability and Compensation Act of 1977".

SEC. 2. DECLARATION OF POLICY.

(a) FINDINGS.—The Congress finds and declares the following:

(1) The transportation, production, and handling of oil in, on, or near the navigable waters of the United States and the adjacent high seas create environmental risks, and may impair the rights of shoreline property owners and harm the general health and welfare of citizens of the United States.

(2) The damages and cleanup costs resulting from oil pollution are matters of major national concern.

(3) Existing law with respect to liability and compensation for oil pollution damages and cleanup costs is inconsistent, inadequate, incomplete, inefficient, and inequitable.

(4) The legal rules applicable to oil pollution liability and compensation need to be rationalized and reformed to assure that adequate and timely compensation is available for oil pollution from all sources.

(b) PURPOSES.—It is the purpose of the Congress in this Act to—

(1) enact a comprehensive national law governing oil pollution liability and compensation;

(2) maximize the incentive for all persons producing, transporting, or handling oil to take all steps necessary or appropriate to prevent the discharge of oil;

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operator, or insurer of the vessel or facility which is the source of the discharge of oil involved shall be liable to the claimant for interest on the amount paid in satisfaction of the claim for the period from the date upon which the claim was presented to such owner, operator, or insurer to the date upon which the claimant is paid, inclusive, less the period, if any, from the date upon which the owner, operator, or insurer offers to the claimant an amount equal to or greater than that finally paid in satisfaction of the claim to the date upon which the claimant accepts that amount, inclusive. However, if such owner, operator, or insurer offers to the claimant, within 60 days after the date upon which the claim was presented, or after the date upon which advertising was commenced pursuant to section 9, whichever is later, an amount equal to or greater than that finally paid in satisfaction of the claim, then such owner, operator, or insurer shall be liable for the interest provided in this paragraph only from the date the offer was accepted by the claimant to the date upon which payment is made to the claimant, inclusive.

(2) The interest provided for in paragraph (1) shall be calculated by the Secretary at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less, obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.

(h) ADJUSTMENT OF LIMITS.—The Secretary shall, from time to time, report to the Congress on the desirability of adjusting the limits of liability contained in this section. In considering any such recommendation, the Secretary shall publish any proposed recommendation in the Federal Register and provide 30 days for any interested party to submit comments.

(i) INSURANCE STUDY.—The President shall conduct a study to determine (1) whether adequate private oil pollution insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under this section, and (2) whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions. The President shall submit the results of his study, together with his recommendations to the Congress, within one year after the date of enactment of this Act, and shall submit an interim report to the Congress on this study within 3 months after the date of enactment of his Act.

(j) PROHIBITION.—No indemnification, hold harmless, or similar agreement shall be effective to transfer from the owner or operator of a vessel or facility, to any other person, the liability provided for under this Act, other than as specified under the provisions of this Act.

SEC. 7. RECOVERABLE DAMAGES.

Damages for economic loss resulting from a discharge of oil may be recovered under this Act for each of the following items of loss:

(1) The value of any loss of any real or personal property damaged or destroyed.

(2) The value of any loss of use of any real or personal property.

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(3) The value of (A) any loss of any natural resources damaged or destroyed, or (B) any loss of use of any natural resources, without regard to ownership of such resources.

(4) Any loss of income or impairment of earning capacity resulting from any damage to or destruction of real or personal property, or natural resources.

(5) Any loss of tax, royalty, rental, or net profits share revenue by the Federal Government or any State or local government, for a period of not to exceed 1 year.

SEC. 8. SUBROGATION.

(a) GENERAL.—Any person, including the fund, who pays compensation pursuant to this Act to any claimant for damages or cleanup costs resulting from an incident, shall be subrogated to all rights, claims, and causes of action for such damages and cleanup costs such claimant has under this Act or any other law.

(b) ACTION TO RECOVER.—Upon request of the Secretary, the Attorney General shall commence an action on behalf of the fund, to recover any compensation paid by the fund to any claimant pursuant to this Act, and, without regard to the limitation of liability provided for in section 6(b), all costs incurred by the fund by reason of the claim, including interest, administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any owner, operator, or insuror, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the fund, for the damages for which the compensation was paid.

SEC. 9. CLAIMS PROCEDURES.

(a) IN GENERAL.—The Secretary shall prescribe, and may from time to time amend, regulations for the filing, processing, settlement, and adjudication of claims under this Act, including uniform procedures and standards for the appraisal and settlement of claims against the fund.

(b) NOTIFICATION.—The person in charge of a vessel or facility, which is involved in an incident, shall immediately notify the Secretary of the incident as soon as he has knowledge thereof. Notification received pursuant to this subsection, or information obtained by the exploitation of such notification, shall not be used against any such person or his employer in any criminal action, other than an action involving prosecution for perjury or for giving a false statement.

(c) IDENTIFYING THE SOURCE OF AN INCIDENT.—When the Secretary receives information, pursuant to subsection (b) or otherwise, of an incident which involves a discharge of oil, the Secretary shall, where possible—

(1) identify the source of such discharge; and

(2) immediately notify the owner, operator, and insurer, of the vessel or facility which is the source of such discharge of such identification.

(d) ADVERTISEMENTS.—(1) If the source of a discharge of oil, identified by the Secretary under subsection (c), is a private vessel or facility, then the owner, operator, or insurer of such vessel or facility shall, within 15 days after being notified by the Secretary of such

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Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline *between* The United States of America *and* Amerada Hess Corporation, ARCO Pipe Line Company, Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Petroleum Company, Sohio Pipe Line Company, and Union Alaska Pipeline Company

Stip. 1.13.1.

Post the Right-of-Way against hunting, etc.—Stip. 1.14.1.

Restore survey monuments, etc.—Stip. 1.16.2.

Take measures to protect health and safety; abate hazards—Stip. 1.20.

Provide for environmental briefings—Stip. 2.1.1.

Remove waste—Stip 2.2.6.2.

Stabilize disturbed areas—Stip. 2.4.2.2.

Remove temporary fill ramps—Stip 2.4.3.2.

Seed and plant disturbed areas—Stip 2.4.4.1.

Dispose of excavated material—Stip. 2.4.5.

Provide for uninterrupted movement and safe passage of fish—Stip. 2.5.1.1.

Screen pump intakes—Stip. 2.5.1.2.

Plug, stabilize abandoned water diversion structures—Stip 2.5.1.3.

Construct levees, etc.—Stip. 2.5.1.4.

Construct new channels—Stip. 2.5.2.2.

Protect Fish Spawning Beds from sediment; construct settling basins—Stip 2.5.2.3.

Repair damage to Fish Spawning Beds—Stip. 2.5.2.4.

Assure big game passage—Stip. 2.5.4.1.

Remove certain debris—Stip. 2.7.2.5.

Dispose of slash (where "otherwise directed.")—Stip. 2.7.2.8.

Take certain mitigation measures—Stip. 2.8.1.

Restore disturbed areas—Stip. 2.12.1.

Stabilize slopes—Stip. 2.12.2.

Dispose of certain materials—Stip. 2.12.3, Stip. 2.12.4.

Remove equipment and supplies—Stip. 2.12.5.

Clean up, repair, if Oil or other pollutant is discharged—Stip. 2.14.4.

Inspect welds—Stip. 3.2.2.3.

Inspect Pipeline System construction—Stip. 3.2.2.4.

Perform seismic monitoring—Stip. 3.4.2.3.

Construct stilling basins; stabilize pool sides—Stip. 3.6.2.1.

Provide Oil spill containment structures—Stip. 3.11.1, Stip. 3.11.2.

19. Liens

A. Each Permittee shall, with reasonable diligence, discharge any lien against Federal Lands from any failure or refusal on its part to pay or satisfy any judgment or obligation that arises out of or is connected in any way with the construction, operation, maintenance or termination of all or any part of the Pipeline System.

B. However, Permittees shall prevent the foreclosure of any lien against any title, right, or interest of the United States in said lands.

C. The foregoing provisions of this Section shall not be construed to constitute the consent of the United States to the creation of any lien against Federal Lands or to be in derogation of any prohibition or limitation with respect to such liens that may now or hereafter exist.

20. Insolvency

If at any time there shall be filed by or against any Permittee, or any guarantor furnishing a guaranty in accordance with the provisions of Section 15 hereof, in any court of competent jurisdiction, a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of the Permittee's or such guarantor's property, or if any Permittee, or any such guarantor, makes an assignment for the benefit of creditors or takes advantage of any insolvency act, and, in the case of an involuntary proceeding, within sixty (60) days after the initiation of the proceeding the Permittee or such guarantor fails to secure a discontinuance of the proceeding, the Secretary may, if the Secretary so elects, at any time thereafter, declare such to be a breach of this Agreement by the Permittee or, in cases involving a guarantor, the Permittee for which the guaranty was furnished.

21. Breach; Extent of Liability of Permittees

A. The liabilities and obligations of each Permittee under this Agreement are joint and several except that the liabilities and obligations of each Permittee are several under the following Sections: 2.D (Purpose of Grant; Limitation of Use to Permittees), 3 (Transportation of Oil), 8 (Use Charge for Right-of-Way), 12 (Reimbursement of Department Expenses), 13.C (Damage to United States Property; Repair, Replacement or Claim for Damages), 14 (Indemnification of United States), 15 (Guaranty), 18 (Right of the United States to Perform), 19.A (Liens), 20 (Insolvency), 22 (Transfer), 32 (Release of

Permittees (Agreements Among Permittees), 34. (Access to Documents), 41 (Authority to Enter Agreement), Stipulation 1.4 (Common Agent), and Stipulation 1.10.1 (Completion of Use); *provided, however*, that as to any obligation to pay money to the United States, each such Permittee shall not be liable for any greater portion thereof than an amount which is equal to the product of the total obligation or liability when multiplied by a fraction, the numerator thereof being the individual Permittee's interest in the Right-of Way at the time of the breach (such interest being expressed as a percentage for purposes of the numerator), and the denominator therof being the aggregate of all of the interests in the Right-of-Way that were held by all of the Permittees at the time the obligation becomes due and payable (the aggregate of such interest being expressed as a percentage for purposes of the denominator).

22. Transfer

A. Permittees, and each of them, shall not, without obtaining the prior written consent of the Secretary, Transfer in whole or in part any right, title or interest in this Agreement or the Right-of-Way. Any such Transfer other than with respect to an Involuntary Passage of Title, without in each instance obtaining the prior written consent thereto of the Secretary, shall be absolutely void, and, at the option of the Secretary, shall be deemed to be a breach of this Agreement by each Permittee so violating this Agreement.

B. Any Involuntary Passage of Title with respect to any right, title or interest in this Agreement or the Right-of-Way that shall be attempted or effected without in each instance obtaining the prior written consent thereto of the Secretary shall, to the extent permitted by law, be voidable at the option of the Secretary, and, in addition, at the option of the Secretary, shall be deemed to be a breach of this Agreement by the affected Permittee; *provided, however*, that nothing in this subsection shall be deemed to prohibit, or to limit in any way, the exercise of any right or option of the United States under Section 20 of this Agreement.

C. With respect to any Transfer that shall relate to this Agreement or the Right-of-Way, the Transferor, the Transferee and the guarantor or guarantors, if any, of the Transferee shall apply for the Secretary's written consent to the Transfer by filing with the Secretary all documents or other information that may be required by law or regulation, this Agreement or any other agreement, permit, or authorization of the United States relating to the Pipeline System or any part thereof and, upon request from the Secretary, such other documents and information as may be relevant to the Secretary's determination.

D. Before the Secretary acts in connection with an application for his consent with respect to the Transfer of an interest in the Right-of-Way, the Transferee shall demonstrate, to the satisfaction of the Secretary, that the Transferee is capable of performing all of the liabilities and obligations of the Transferor relating to the interest to be transferred. In considering an application for such consent, the Secretary shall make a determination, in accordance with Section 28(j) of the Mineral Leasing Act of 1920, as amended, concerning: (1) the technical capability of the Transferee, and (2) the financial capability of the Transferee, or of the Transferee together with, if any, its proposed guarantor or guarantors as approved by the Secretary, to perform all of the liabilities and obligations of the Transferor relating to the interest to be transferred.

E. In connection with any Transfer, the Secretary may request the right to audit and/or inspect, in whole or in part, the pertinent books, records, accounts, contracts, commitments, and property of the Transferee and of the proposed guarantor or guarantors, if any, of the Transferee, at the sole expense of the Transferor, which expense shall be paid to the United States upon completion of the inspection and/or audit and before the Secretary acts in connection with the application for his consent to the Transfer. If any such request shall be refused such refusal shall be deemed to be a sufficient reason for the Secretary to withhold his consent to the pertinent Transfer. The Transferee and its guarantor or guarantors, if any, shall consent in writing to the provisions of this subsection when applying for the consent of the Secretary.

F. The Secretary, shall not unreasonably withhold his consent to any Transfer hereunder, but may withhold or revoke his consent to any Transfer if:

(1) At the time of, or before, the consummation of the Transfer, there shall have oc-

EXHIBIT D

Stipulations for the Agreement and Grant of Right-of-Way for the Trans-Alaska Pipeline

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ficer may impose such other requirements as he deems necessary to protect aesthetic values.

2.11. Use of Explosives

2.11.1. Permittees shall submit a plan for use of explosives, including but not limited to blasting techniques, to the Authorized Officer in accordance with Stipulation 1.7.

2.11.2. No blasting shall be done under water or within one quarter (¼) mile of streams or lakes without a permit from the Alaska Department of Fish and Game, when such a permit is required by State law or regulation.

2.12. Restoration

2.12.1. Areas disturbed by Permittees shall be restored by Permittees to the satisfaction of the Authorized Officer as stated in writing.

2.12.2. All cut and fill slopes shall be left in a stable condition.

2.12.3. Materials from Access Roads, haul ramps, berms, dikes, and other earthen structures shall be disposed of as directed in writing by the Authorized Officer.

2.12.4. Vegetation, overburden and other materials removed during clearing operations shall be disposed of by Permittees in a manner approved in writing by the Authorized Officer.

2.12.5. Upon completion of restoration, Permittees shall immediately remove all equipment and supplies from the site.

2.13. Reporting of Oil Discharges

2.13.1. A discharge of Oil by Permittees into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in violation of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1321 *et seq.* and the regulations issued thereunder, or in violation of applicable laws of the State of Alaska and regulations issued thereunder, is prohibited. Permittees shall give immediate notice of any such discharge to: (1) the Authorized Officer; and (2) such other Federal and State officials as are required by law to be given such notice.

2.13.2. Permittees shall give immediate notice of any spill or leakage of Oil or other pollutant from the Pipeline, the Valdez terminal facility, or any storage facility to: (1) the Authorized Officer; and (2) such other Federal and State officials as are required by law to be given such notice. Any oral notice shall be confirmed in writing as soon as possible.

2.14. Contingency Plans

2.14.1. It is the policy of the Department of the Interior that there should be no discharge of Oil or other pollutant into or upon lands or waters. Permittees must therefore recognize their prime responsibility for the protection of the public and environment from the effects of spillage.

2.14.2. Permittees shall submit their contingency plans to the Authorized Officer at least one-hundred and eighty (180) days prior to scheduled start-up. The plans shall conform to this Stipulation and the National Oil Hazardous Substances Pollution Contingency Plan, 36 F.R. 16215, August 20, 1971, and shall: (1) include provisions for Oil Spill Control [1]; (2) specify that the action agencies responsible for contingency plans in Alaska shall be among the first to be notified in the event of any Pipeline System failure resulting in an Oil spill; (3) provide for immediate corrective action including Oil Spill Control and restoration of the affected resource; (4) provide that the Authorized Officer shall approve any materials or devices used for Oil Spill Control and shall approve any disposal sites or techniques selected to handle oily matter; and (5) include separate and specific techniques and schedules for cleanup of Oil spills on land, lakes, rivers and streams, sea, and estuaries.

2.14.3. Prior to Pipeline start-up, such plans shall be approved in writing by the Authorized Officer, and Permittees shall demonstrate their capability and readiness to execute the plans. Permittees shall update as appropriate the plans and methods of implementation thereof, which shall be submitted annually to the Authorized Officer for his written approval.

2.14.4. If during any phase of the construction, operation, maintenance or termination of the Pipeline, any Oil or other pollutant should be discharged from the Pipeline System, the control and total removal, disposal and cleaning up of such Oil or other pollutant, wherever found, shall be the responsibility of Permittees, regardless of fault. Upon failure of Permittees to control, dispose of, or clean up such discharge, the Authorized Officer may take such measures as he deems necessary to control and clean up the discharge

[1] As used in this Stipulation 2.14.2, Oil Spill Control is defined as: (1) detection of the spill; (2) location of the spill; (3) confinement of the spill; and (4) cleanup of the spill.

at the full expense of Permittees. Such action by the Authorized Officer shall not relieve Permittees of any responsibility as provided herein.

3. TECHNICAL

3.1. General

3.1.1. The following standards shall be complied with in design, construction, operation and termination of the Pipeline System.

3.2. Pipeline System Standards

3.2.1. General Standards

3.2.1.1. All design, material and construction, operation, maintenance and termination practices employed in the Pipeline System shall be in accordance with safe and proven engineering practice and shall meet or exceed the following standards:

(1) U.S.A. Standard Code for Pressure Piping, ANSI B 31.4, "Liquid Petroleum Transportation Piping System."

(2) Department of Transportation Regulations, 49 CFR, Part 195, "Transportation of Liqiuds by Pipeline."

(3) ASME Gas Piping Standard Committee, 15 Dec. 1970: "Guide for Gas Transmission and Distribution Piping System."

(4) Department of Transportation Regulations, 49 CFR, Part 192, "Transportation of Natural and Other Gas by Pipelines: Minimum Federal Safety Standards."

3.2.1.2. Requirements in addition to those set forth in the above minimum standards may be imposed by the Authorized Officer as necessary to reflect the impact of subarctic and arctic environments. If any standard contains a provision which is inconsistent with a provision in another standard, the more stringent shall apply.

3.2.2. Special Standards

3.2.2.1. The design shall also provide for remotely controlled shutoff valves at each pump station; remotely controlled mainline block valves (intended to control spills); and additional valves located with the best judgment regarding wildlife habitat, fish habitat, and potentially hazardous areas.

3.2.2.2. All practicable means shall be utilized to minimize injury to the ground organic layer.

3.2.2.3. Radiographic inspection of all main line girth welds and pressure testing of the Pipeline shall be conducted by Permittees prior to placing the system in operation.

3.2.2.4. Permittees shall provide for continuous inspection of Pipeline System construction to ensure compliance with the approved design specifications and these Stipulations.

3.2.2.5. Welder qualification tests shall be by destructive means, except that operators of automatic welding equipment for girth welding of tank seams shall be tested by radiography in accordance with ASME Boiler and Pressure Vessel Code, Section 9, Subsection Q-21(b).

3.2.2.6. Lightning protection shall conform to the requirements of ANSI C5.1—1969, "Lightning Protection Code—1968."

3.2.3. Standards for Access Roads

3.2.3.1. Design, materials and construction practices employed for Access Roads shall be in accordance with safe and proven engineering practice and in accordance with the principles of construction for secondary roads for the subarctic and arctic environments.

3.2.3.2. Permittees shall submit a layout of each proposed Access Road for approval by the Authorized Officer in accordance with Stipulation 1.7.

3.2.3.3. Access Roads shall be constructed to widths suitable for safe operation of equipment at the travel speeds proposed by Permittees.

3.2.3.4. The maximum allowable grade shall be 12 percent unless otherwise approved in writing by the Authorized Officer.

3.3. Construction Mode Requirements

3.3.1. The selection of the Construction Mode (elevated or buried) shall be governed by the following criteria: (1) There shall be an unobstructed air space of at least two feet between the pipe and ground surface; or (2) There shall be no greater heat transfer from the pipe to the ground than results from the use of an unobstructed air space of at least two (2) feet between the pipe and ground surface; or (3) Below the level of the pipe axis the ground shall consist of competent bedrock, soil naturally devoid of permafrost, or if frozen, of Thaw-Stable Sand and Gravel.[2] Above the level of the pipe axis other materials may be present but it must be shown that they will remain stable under all credible conditions; or (4) Results of a detailed field exploration program and analysis indicate that pipe rupture and major terrain

[2] Thaw-Stable Sand and Gravel is defined as material meeting the following requirements: (a) Material lies within the classes GW, GP, SW, and SP, (Unified Soil Classification) but with up to 6% by weight passing the #200 U.S. standard sieve; if an inorganic granular soil contains more than 6% fines than the #200 sieve, its thaw-stability must be justified. (b) There is no excess (segregated or massive) ice. (c) Thawing of the material *in situ* will not result in excess pore-pressure.

EXHIBIT NO. 7

Right-of-Way Lease for the Trans-Alaska Pipeline between The State of Alaska and Amerada Hess Corporation, ARCO Pipe Line Company, Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Petroleum Company, Sohio Pipe Line Company, and Union Alaska Pipeline Company

notices, Lessees, or their respective agents, employees, contractors or subcontractors (at any tier), shall fail or refuse to perform any action required by this Lease or by the Pipeline Coordinator under this Lease, the State shall have the right, but not the obligation, to perform any or all of such actions at the sole expense of Lessees. Prior to delivery of any such demand, the Pipeline Coordinator shall confer with the Lessees, if practicable to do so, regarding the required action or actions that are included in the demand. The Pipeline Coordinator shall submit to Lessees a statement of the expenses incurred by the State during the preceding quarter in the performance by the State of any required action and the amount shown to be due on each such statement shall be paid by Lessees. Lessees may dispute whether the work involved was justified and the reasonableness of the specifications for, and the cost of, such work.

20. Breach; Extent of Liability of Lessees

The liabilities and obligations of each Lessee under this Lease are joint and several, except that the liabilities and obligations of each Lessee are several under the following sections:

Section 1 Grant of Right-of-Way

2 Duration of Right-of-Way

3 Rental

4 Common Carrier

5 Interchange of Oil

6 Books, Accounts and Records; Access to Property and Records

7 Connections for Delivery

8 Connections for State-Owned Oil

9 Compliance with State Laws and with Regulations and Orders of the Alaska Pipeline Commission

10 Damage or Destruction of Leasehold or Other Property

11 Transfer, Assignment, or other Disposition

12 Appointment of Agent for Service of Process

13 Indemnification of the State; Liabilities or Damages Arising where there is Concurrent Use

14 Liability and Property Damage Insurance, Security, Undertaking or Guaranty

15 Lands Condemned under AS 38.35.130

18 Reimbursement of State Expenses

19 Right of the State to Perform

22 Duty of Lessees to Prevent or Abate

28 Local Hire

29 Release of Right-of-Way

30 Forfeiture of Lease

31 Agreements among Lessees

35 Remedies Cumulative; Equitable Relief

39 Authority to Enter Agreements

42 Binding Effect of Covenants

Stipulation 1.4

Stipulation 1.10.1

Provided, however, that as to any obligation to pay money to the State, each Lessee shall not be liable for any greater portion thereof than the amount of the total liability multiplied times the percentage of its undivided interest in the Right-of-Way at the times the liability was incurred.

21. Valdez Terminal Facility

Lessees shall afford representatives of the United States Department of the Interior full and free access at all times to the Valdez Terminal site for the purpose of enforcing the stipulations of the United States Department of the Interior at the facility.

22. Duty of Lessees to Prevent or Abate

a. Lessees shall prevent or, if the procedure, activity, event or condition already exists or has occurred, shall abate, as completely as practicable, using the best practicable technology available, any physical or mechanical procedure, activity, event or condition, existing or occurring at any time (1) that is susceptible to prevention or abatement;

EXHIBIT NO. 8
PAGE 3 of 5

EXHIBIT A

STIPULATIONS FOR THE RIGHT-OF-WAY LEASE FOR THE TRANS-ALASKA PIPELINE

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PAGE 4 of 5

to: (1) the Pipeline Coordinator; and (2) such State and Federal officials as are required by law to be given such notice. Any oral notice shall be confirmed in writing as soon as possible.

2.14. Contingency Plans

2.14.1. It is the policy of the Department of Natural Resources that there should be no discharge of Oil or other pollutant into or upon lands or waters of the State. Lessees must therefore recognize their prime responsibility for the protection of the public and environment from the effects of spillage.

2.14.2. Lessees shall submit their contingency plans to the Pipeline Coordinator at least one hundred eighty (180) days prior to scheduled start-up. The plans shall conform to this Stipulation and shall: (1) include provisions for Oil Spill Control 1/; (2) specify that the action agencies responsible for contingency plans in Alaska shall be among the first to be notified in the event of any Pipeline failure resulting in an Oil spill; (3) provide for immediate corrective action including Oil Spill Control and restoration of the affected resource; (4) provide that the Pipeline Coordinator shall approve any materials or devices used for Oil Spill Control and shall approve any disposal sites or techniques selected to handle oily matter; and (5) include separate and specific techniques and schedules for cleanup of Oil spills on land, lakes, rivers and streams, sea, and estuaries.

2.14.3. Prior to Pipeline start-up, such plans shall be approved in writing by the Pipeline Coordinator, and Lessees shall demonstrate their capability and readiness to execute the plans. Lessees shall update as appropriate the plans and methods of implementation thereof, which shall be submitted annually to the Pipeline Coordinator for his written approval.

2.14.4. If during any phase of the construction, operation, maintenance or Termination of the Pipeline, any Oil or other pollutant should be discharged from the Pipeline, the Valdez terminal facility, or any storage or refueling facility or equipment, the control and total removal, disposal and cleaning up of such Oil or other pollutant, wherever found, shall be the responsibility of Lessees, regardless of fault. Upon failure of Lessees to control, dispose of, or clean up such discharge, the Pipeline Coordinator may take measures as he deems necessary to control and clean up the discharge at the full expense of Lessees. Such action by the Pipeline Coordinator shall not relieve Lessees of any responsibility as provided herein.

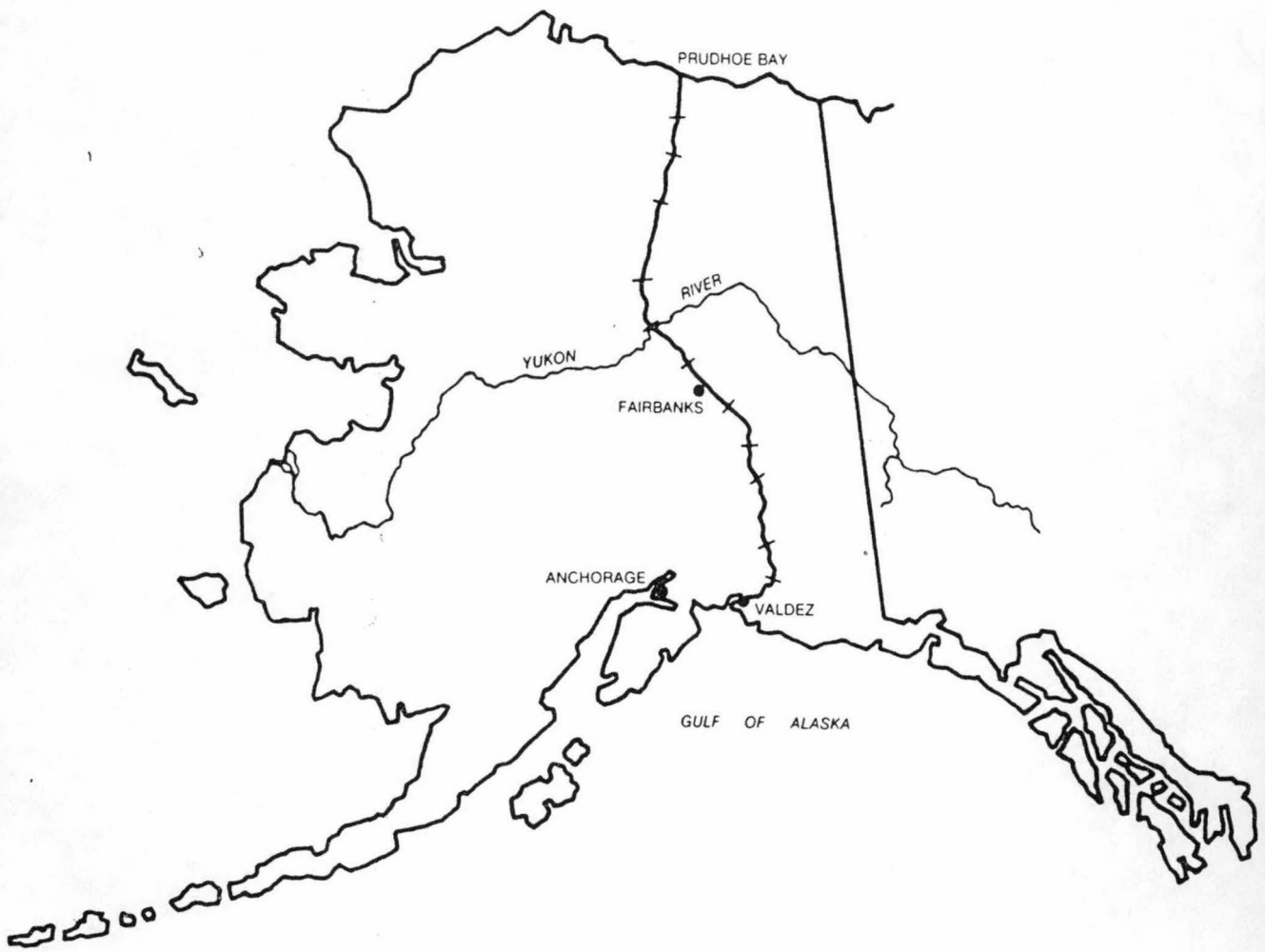
1/ Oil Spill Control is defined as (1) detection of the spill, (2) location of the spill, (3) confinement of the spill, and (4) cleanup of the spill.

EXHIBIT NO. 8
PAGE 5 of 5

OIL SPILL CONTINGENCY PLAN

GENERAL PROVISIONS

JANUARY 1987



Alyeska pipeline SERVICE COMPANY

EXHIBIT NO. 9

PAGE 1 OF 5

100 INTRODUCTION

The Alyeska Pipeline Service Company has prepared Oil Spill Contingency Plans which include:

48-Inch pipeline from Pump Station 1 to the Valdez Terminal, including associated mainline pump stations and facilities.

Crude Oil Storage and other terminal facilities at Port Valdez.

Prince William Sound, including Valdez Arm.

A training program for personnel will be carried out, including periodic practice drills. The Plan will be reviewed at least annually to consider improvements developed during training and practice sessions, as well as to incorporate new techniques and equipment proven to be worthwhile in the industry.

101 PURPOSE

The objective of the Alyeska Oil Spill Contingency Plan is to minimize damage to environment and assure the safety of the public and employees in the event of an oil spill from company facilities. To accomplish these objectives, the resources of Alyeska Pipeline Service Company are organized in a preplanned manner to ensure rapid and effective response to any oil spill emergency. This manual outlines the techniques which will be in accordance with state-of-the-art oil spill cleanup technology.

102 ALYESKA POLICY

It is the policy of the eight owner companies, constituting the Permittees under the Federal Right-of-Way Grant and the Lessees under the State Right-of-Way Lease and represented by their agent, Alyeska Pipeline Service Company, to take every reasonable action to prevent oil spills and, if they occur, to minimize environmental damage. Alyeska will comply with relevant pollution laws for the protection and conservation of environmental resources.

Alyeska policy shall comply with Alaska Statute Title 46, and 18 AAC 75, and the National Oil and Hazardous Substances Pollution Contingency Plan, and any revisions thereof, as issued by the Council on Environmental Quality (CEQ) under the authority of the Federal Water Control Act, as amended (Public Law 92-500). Alyeska Policy and these plans are intended to be written and executed so as to comply with the Grant and Agreement of Right-of-Way and the Right-of-Way lease with the United States of America and the State of Alaska, respectively. Alyeska Pipeline Service Company will ensure the National Contingency plan is followed during any spill event.

Alyeska employees and contractor personnel are expected to take all precautions to prevent oil spills and are to report immediately to their supervisors if they observe any oil spill, regardless of size. Failure to report spills and acts of negligence which result in oil spills by employees or contractors will be cause for disciplinary action or discharge.

Alyeska Pipeline and Terminal Superintendents will be directly responsible for adopting every reasonable measure for the protection and conservation of land, vegetation, wildlife, air and water resources along the pipeline corridor and impacted areas. Alyeska will maintain full responsibility and control in the event of an oil spill unless a government agency specifically notifies Alyeska they have assumed responsibility and control. Mutual coordination will be maintained at all levels.

Alyeska will maintain an Environmental Protection Department to support the Pipeline and Terminal Superintendents and to advise, coordinate and implement resources protection and conservation activities. That department is also responsible for ensuring that training is effectively conducted and that the updated plans include the most recent information available.

Every effort shall be made to enhance communication and understanding with civic groups, conservation organizations, universities and the general public through publications, speakers, exhibits, technical demonstrations and the news media.

Alyeska Pipeline Service Company has designed the Trans-Alaska Pipeline System for zero spillage. However, in order to be prepared for rapid and effective response should any spillage occur, the General Provisions, The Valdez Terminal, Prince William Sound and the Pipeline Section Plans have been prepared to:

Ensure rapid and accurate detection and location of oil spillage.

Detail specific operational procedures to minimize spill volume.

Provide for containment and cleanup procedures to minimize spread of spill.

Outline effective cleanup, rehabilitation and restoration procedures for affected areas.

Furnish public safety and notification procedures.

Specify procedures for notification and cooperation with applicable government authorities.

Containment and Cleanup

The containment and cleanup of oil spills along the Trans-Alaska Pipeline System, at Port Valdez and in Prince William Sound will be given priority to prevent and/or minimize the amount of oil reaching sensitive areas.

Chemical Treatment

Dispersants will not be used without prior consultation and approval from the State of Alaska, Department of Environmental Conservation and appropriate federal agencies. Alyeska's policy will be to follow the restrictions on the use of dispersants for oil spill control as given in the National Oil and Hazardous Substances Pollution Contingency Plan (July, 1982 and any revisions thereof). Specifically, dispersants will be utilized only when their use will:

Prevent or substantially reduce hazard to human life or substantial hazard of fire to property.

Prevent or substantially reduce hazards to any major element of the populations of vulnerable species of waterfowl, wildlife and vegetation.

Result in the least overall environmental damage by expediting cleanup.

Personnel Training, Emergency Drills and Field Exercises

Regularly scheduled training programs will be conducted to ensure that all personnel assigned to the Oil Spill Task Force are thoroughly familiar with their duties and the operation of oil spill contingency equipment.

Training and instruction of Oil Spill Task Force personnel, including frequent drills, will be carried out at the Anchorage Headquarters, Pump Stations, and Valdez Terminal to maintain maximum familiarity with all aspects of the Oil Spill Contingency plans. The objectives of this training program are:

To assure that Alyeska personnel are ready for effective handling of foreseeable oil spill emergencies.

To maintain the Plans as fully operable working documents.

To inform Task Force team members of their respective duties and communications procedures.

To ensure familiarity with the use of all equipment.

To update the Plans to reflect state-of-the-art capability.

To modify Plans in the light of information gained from the field exercises and actual experiences.

Full-scale, company-wide field exercises will be held at least once per year to insure overall readiness for response to large-scale oil spills and to assure that communications will be rapid and effective.

Liability, Authority and Responsibility

Alyeska Pipeline Service Company and the Owner Companies recognize and assume the liabilities and responsibilities imposed upon them under the various federal and state statutes and regulations, the Federal Right-of-Way, the State Right-of-Way Lease and the applicable stipulations incorporated therein. It is to be noted that cleanup operations within the areas of liability and the responsibility so imposed will be conducted by Alyeska as Agent for the Owner Companies and will be conducted in such a manner as to not require assumption of control of such cleanup operations by federal or state officials under the applicable statutes, regulations, agreements or stipulations.

Summarily, Alyeska will direct cleanup operations of spills resulting from:

Trans-Alaska Pipeline operations, including spills within the Right-of-Way or related facilities under the ownership or control of Alyeska or the Owners.

Marine Terminal At Valdez.

Operation, involving tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System, occurring at the Valdez Terminal, in Port Valdez, Valdez Arm or Prince William Sound.

Alyeska Pipeline Service Company will not assume direction of cleanup operations of oil spills ocurring at or from facilities operated by parties not directly involved with the Trans-Alaska Pipeline System, or spills of unknown origin. However, upon becoming aware of such spill(s), Alyeska will promptly notify the proper government agencies of the spill and promptly enter into cleanup operations of spill(s) of other parties of those of unknown origin if the person or agency responsible: a) requests assistance in the undertaking of the cleanup operation, b) guarantees all costs, and c) retains direction of the cleanup operations.

Regardless of the source of the spill, however, none of the above instructions will be understood to preclude Alyeska personnel from taking any containment actions necessary to prevent oil from entering a stream, an environmentally sensitive area or a potential hazardous area when, in the opinion of the Supervisor on the scene, such action is necessary to protect the public interest.

In the event of a third party chemical spill and Alyeska personnel are requested to assist, the Safety Director should be notified to contact the Chemical Transportation Emergency Center (CHEMTREC) in Washington, D.C. CHEMTREC provides a 24-hour, collect call service (202-483-7616) to provide advice for those at the scene of emergencies, then promptly contacts the shipper of the chemical involved for more detailed assistance and appropriate follow-up.

Notifying Government Agencies

All oil spills will be reported to the following federal and state agencies:

Alaska State Department of Environmental Conservation (ADEC)

Federal Branch of Pipeline Monitoring (BLM)
Alaska State Department of Natural Resources (DNR)
United States Coast Guard (spills in waters of the United States) (USGS)

Spills of 50 barrels or more from the pipeline and pipeline accidents will also be reported to the United States Department of Transportation, Office of Pipeline Safety.

Paragraph 400 gives details of reporting procedures.

Participation and Assistance

Alyeska Pipeline Service Company will encourage and participate in efforts to form cooperatives to which the proper government agency may direct requests for assistance in cleaning up oil spills of unidentified origin or those declared to be inadequately handled. This assistance may take the form of research and development, advisory and training activities, furnishing of equipment and materials, and actual cleanup of such spills.

Oil Spill Prevention

Prevention of oil spills is a prime objective in the design and operation of the Trans-Alaska Pipeline System. To assist in accomplishing this objective, Alyeska personnel will periodically:

Review Operating Procedures — All pipeline-operating procedures will be critically reviewed with respect to the prevention of oil spills.

Conduct Inspection of Pipeline Facilities — All pipeline facilities will be inspected periodically to determine potential sources of oil spills and remedial measures to be taken when necessary.

Train Personnel — Pipeline and Terminal operating personnel will participate in formal training sessions to ensure complete familiarity with pipeline facilities, operating procedures, and contingency response procedures and equipment.

Design of New Facilities — Implementation of new facilities and improvement of existing facilities will be examined from an oil spill viewpoint.

103 CONCEPT OF PLAN

The Alyeska Oil Spill Contingency Plan consists of the General Provisions, Valdez Terminal Plan, Prince William Sound Plan and 12 Section Plans. These Section Plans delineate specific response actions for spills detected between pump stations, including Contingency Area Plans within each section which give response actions for pipeline spills within specific drainages. The Valdez Marine Terminal Plan delineates specific response actions for spills detected at the Valdez Terminal and/or Port Valdez. The Prince William Sound Plan delineates specific response actions for spills in Prince William Sound, including Valdez Arm.

This manual covers the General Provisions common to each Section Plan, the Valdez Terminal Plan and the Prince William Sound Plan. The Section Plans contain specific information relevant to the individual Sections. A Section may contain one or more Contingency Area further divided into segments representative of specific drainage characteristics within the Contingency Area. The pump stations and any other permanently connected facility to the pipeline are also covered in the Section Plans. The Valdez Terminal Plan and Prince William Sound Plan contain specific information relevant to the areas covered in the individual plans.

Alyeska's Oil Spill Contingency Plan has been prepared for distribution to supervisory, operating, contractor and agency personnel. The Plan defines, as clearly as possible, specific immediate response actions to:

Alert specific supervisory personnel assigned responsibility for actions.

Prince William Soun
Tanker Spill Preventio
& Response Pla

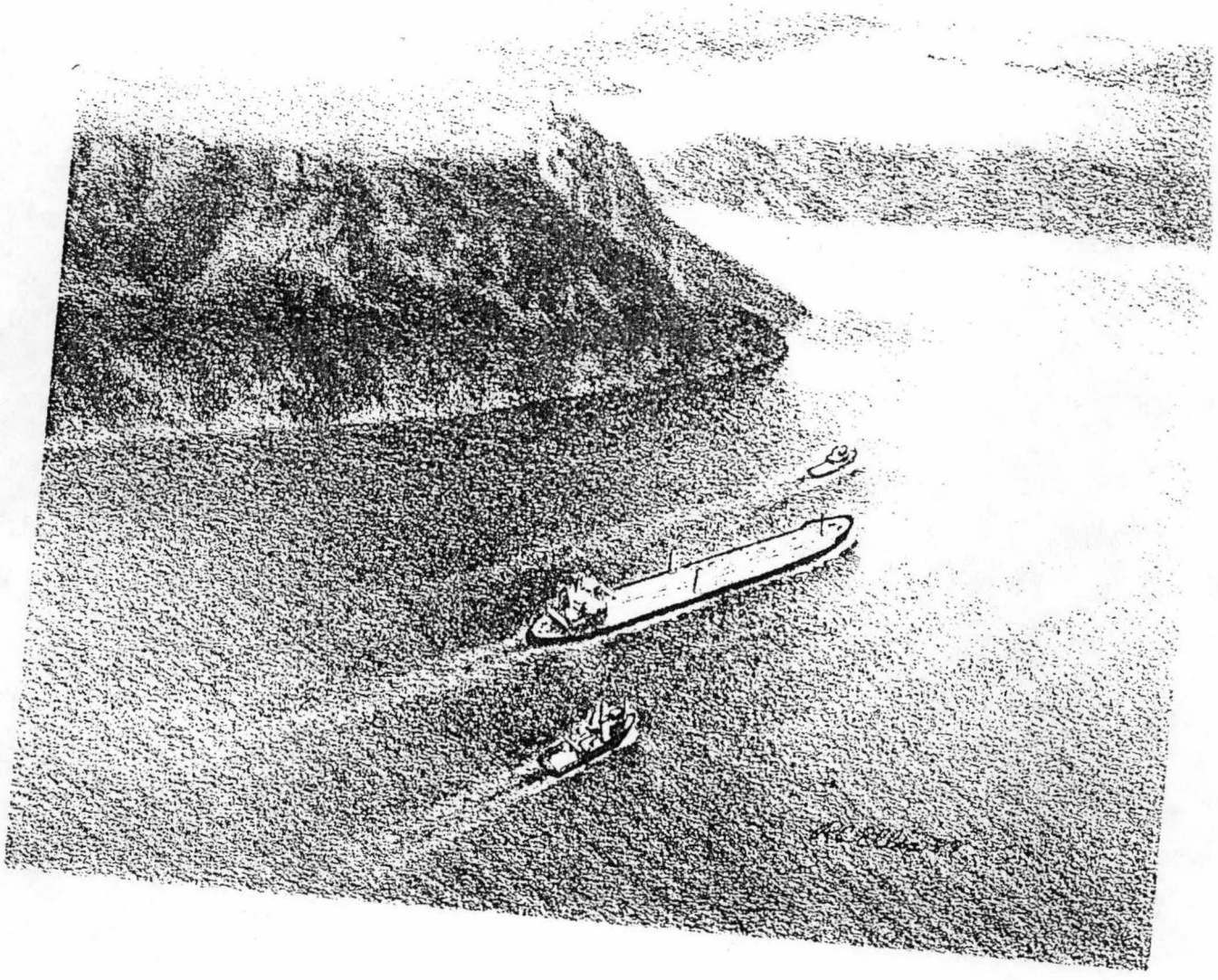


EXHIBIT NO. 10
PAGE 1 of 2

Alyeska pipeline
SERVICE COMPANY

TANKER SPILL PREVENTION AND RESPONSE PLAN FOR PRINCE WILLIAM SOUND

100 INTRODUCTION

Alaska law requires each tank vessel ("tanker" or "vessel") loading oil at the Valdez Marine Termi ("Terminal") to have a vessel Oil Spill Contingency Plan approved by the Alaska Department Environmental Conservation (ADEC). This Tanker Spill Prevention and Response Plan for Prince Willi Sound ("Plan") has been designed and developed to be included in such oil spill contingency pla Alyeska will offer to provide initial oil spill response services as described in this Plan as a spill respon contractor to owners, operators or charterers of such vessels to assist them in meeting their contingen plan obligations. It is anticipated that ADEC will require such owners, operators or charterers to include or part of this Tanker Plan in the contingency plans that they submit to ADEC for approval.

101 SCOPE

As defined herein, this Plan covers oil discharges from vessels calling at the Terminal (hereinafter "spill whose owners, operators or charterers have entered into a contract with Alyeska to provide oil s response services in accordance with this Plan ("contracting vessel"). All spills that originate in the P Area as defined below, or that originate outside the Plan Area and progress or threaten to progress into t Plan Area, will be covered. If a spill occurs in the Plan Area, the Plan will continue to apply should the s progress outside the Plan Area to anywhere in Alaska state waters or lands. In this document "Plan Ar means (a) Prince William Sound, defined as the area described in 18 AAC § 75.700(6); and (b) state wat outside and adjacent to the entrance to Prince William Sound located between (i) a line drawn due so from Point Whitshed on the Alaska mainland at position 60° 26' 7"N, 145° 52' 7"W to the three-mile limit state waters and (ii) a line drawn due south from a point on the western end of Montague Island at posit 59° 50' 2"N, 147° 54' 4"W to the three mile limit for state waters.

102 PURPOSE AND SUMMARY

The purpose of this Plan is to define the organization, strategies, equipment and manpower for oil s prevention, preparation and initial oil spill response in the Plan Area. This Plan incorporates the Incid Command System (ICS), covering the entire range of response activities, from initial containment recovery strategies to near-shore protection, on-shore cleanup, and waste disposal.

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Attorneys at Law
705 Second Avenue
Cordova, AK 99574
AKPLD/9963

Attorneys for Plaintiff

Honorable H. Russel Holland

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

IN RE: EXXON VALDEZ This Document Relates to: All Cases	No. A89-095 Civil (Consolidated) P-277'S REPLY MEMORANDA IN SUPPORT OF MOTION FOR CONSIDERATION OF SUPPLEMENTAL AUTHORITY

P-277 responds briefly to class action proponent's opposition to their motion for consideration of supplemental authority. Rule 77(n) of the Alaska Rules of Court expressly addresses citation of supplemental authority. As the motion for a b(1) class affects plaintiff's presently before this court, it is appropriate that supplemental authority be brought to the Federal Court's attention, as well as the State Court's. Plaintiff P-277 has complied with Alaska Rules of Court, Rule 77(n) in submitting supplemental authority

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without argument or explanation. Plaintiff would be remiss in its obligations to the court had P-277 not brought this newly discovered pertinent authority to the court's attention.

DATED: September 7, 1990 CASEY, GERRY, CASEY, WESTBROOK, REED & HUGHES

By: _____
RICHARD F. GERRY
Attorneys for Plaintiff

AKPLD/9963-3

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

IN RE EXXON VALDEZ OIL SPILL LITIGATION,	)	CASE NO. A89-095 Civil (Consolidated)

RE: ALL CASES

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 the Court's Master

Service List dated July 24, 1990 and Douglas Serdehely, Bogle & Gates, 1031 W. 4th Avenue, Suite 600, Anchorage, Alaska 99501, as defendants' liaison counsel pursuant to the Court's Master Service List dated July 24, 1990 via Federal Express, postage prepaid.

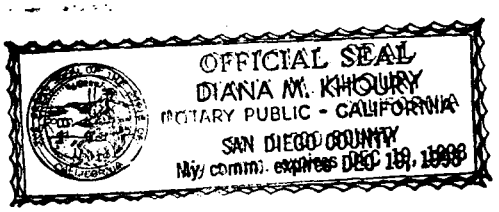
DOCUMENT SERVED:

P-277's Reply Memorandum in Support of Motion for Consideration of Supplemental Authority

Anne E Howard

Anne E. Howard

SUBSCRIBED and SWORN to before me this 7th day of September, 1990.



Diana M Khoury

Notary Public in and for the State of California. My Commission expires: 12/19/93

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

ORDER NO. 28

Granting P-277's Motion
to Consider Supplemental Authority

Plaintiff P-277 filed a motion for the court to consider a document entitled: "Do Class Actions in Mass Toxic Torts Mix?", as supplemental authority for P-277's opposition to the motion for class certification. The class action plaintiffs objected that the filing was not authorized by the rules and is patently unfair. P-277 filed a reply.

The motion is granted.

DATED at Anchorage, Alaska, this 18 day of September, 1990.

United States District Judge

cc: D. Ruskin
L. Miller
D. Serdahely

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

Attorneys for Defendant
Exxon Shipping Company (D-2)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

NOTICE OF FILING OF WRITTEN AGREEMENT BETWEEN EXXON SHIPPING COMPANY (D-2) AND THE TRANS-ALASKA PIPELINE LIABILITY FUND (D-4)

This Court entered an order dated September 13, 1990 establishing a supplemental briefing schedule to allow plaintiffs and defendants an opportunity to indicate whether they concur with the Court's conclusions announced in the order. In order to facilitate the discussion of pertinent issues in the briefs, defendant Exxon Shipping Company hereby gives notice to both the

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Court and counsel of the existing agreement between Exxon Shipping Company and the Trans-Alaska Pipeline Liability Fund. A copy of the agreement is attached.

Dated at Anchorage, Alaska this 25th day of September, 1990.

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

By Douglas J. Serdahely

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AGREEMENT BETWEEN EXXON SHIPPING COMPANY

AND THE TRANS-ALASKA PIPELINE LIABILITY FUND

This Agreement is made between Exxon Shipping Company (hereinbelow referred to as "ESC") and the Trans-Alaska Pipeline Liability Fund (hereinbelow referred to as the "Fund").

WITNESSETH:

WHEREAS, ESC and the Fund desire to discharge in an expeditious and reasonable manner their obligations pursuant to the Trans-Alaska Pipeline Authorization Act (hereinbelow referred to as the "Act") with respect to claims for damages caused by the EXXON VALDEZ oil spill of March 24, 1989; and

WHEREAS, pursuant to the Act, up to $100 million is to be made available to pay claims allowable under the Act (hereinbelow referred to as "Allowable Claims"), with respect to which ESC, as owner and operator of the EXXON VALDEZ, is liable for $14 million and the Fund is liable for claims in excess of that amount; and

WHEREAS, ESC has established several claims-handling offices in Alaska, which already have made payments on claims; and

WHEREAS, it is anticipated that Allowable Claims in excess of $14 million will be filed as a result of the March 24, 1989 oil spill; and ESC has so informed the Fund and maintains that the Fund should remain responsible for Allowable Claims in excess of $14 million; and ESC desires to handle claims and to make certain payments to claimants for damages arising from said oil spill; and

WHEREAS, the Fund is prepared to fulfill its obligations under the Act but, because it has determined that the total of Allowable Claims may exceed $100 million, it will be necessary, pursuant to 43 C.F.R. Section 29.7(c), for the Fund to withhold payments on Allowable Claims for a period of 24 months so that claims will be proportionately reduced prior to payment; and

WHEREAS, ESC and the Fund desire to coordinate the resolution of claims and to avoid any significant disruption of and delay in the handling and payment of Allowable Claims without waiting for expiration of the 24-month period;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and intending to be legally bound hereby, ESC and the Fund agree as follows:

I. DEFINITIONS

Unless otherwise expressly defined herein by the phrase "(hereinbelow referred to as)," all terms shall have the same meanings as in the Act or in the regulations implementing the Act, 43 C.F.R. Part 29, effective March 7, 1988 (hereinbelow referred to as the "Implementing Regulations").

II. CLAIMS HANDLING BY ESC

A. The personnel presently handling claims on behalf of ESC, including Exxon Risk Management personnel, ESC-shareholder representatives and employees of Crawford & Company, (hereinbelow referred to as "Claims Personnel") shall continue to administer all claims, and ESC shall have sole responsibility for the evaluation, payment or rejection of such claims, subject to the Fund's right to evaluate independently all claims submitted to it pursuant to the Act and pursuant to Sections III and IV of this Agreement. ESC shall notify the Fund from time to time of the identity of the Claims Personnel responsible for supervising claims handling. The Claims Personnel shall administer all claims in conformity with the claims-handling requirements of Section 29.9 of the Implementing Regulations and the Procedures for Settling Claims attached hereto as Exhibit I (hereinbelow referred to as "Procedures for Settling Claims"). The Claims Personnel shall also display and

make available for distribution in each claims office an explanation generally in the form set forth in Exhibit II attached hereto. ESC shall bear the entire cost of such Claims Personnel.

B. Until $14 million in payments have been made on Allowable Claims, the Claims Personnel shall administer all claims on behalf of ESC. Once the Fund confirms that $14 million has been paid, or has been acknowledged by ESC as payable, on Allowable Claims, and subject to the provisions of Section IV hereinbelow concerning claims against the Fund, the Claims Personnel shall administer all claims in lieu of the Fund and ESC shall make payments in lieu of the Fund on Allowable Claims without regard to the proportionate reduction that would have been required to be made by the Fund pursuant to the Act and the Implementing Regulations. The Claims Personnel and ESC, respectively, shall continue to provide such administration in lieu of the Fund and to make such payments in lieu of the Fund until all claims submitted within the 24-month period set forth in the Implementing Regulations for submission of claims pursuant to the Act (hereinbelow referred to as the "Submission Period") have been administered or until termination of claims handling pursuant to Section VI hereinbelow, whichever occurs first. ESC shall promptly notify the Fund in writing when all claims submitted to it within the Submission

Period have been administered. Nothing contained herein shall limit the right of ESC to utilize the services of the Claims Personnel to administer any claims on its behalf at any time.

C. ESC and the Fund shall confer prior to the issuance by either party of any public statements or representations concerning the administration of claims in lieu of the Fund, including advertisements required by the Implementing Regulations, provided that the Fund may publish and distribute notice in the general form and content attached hereto as Exhibit II.

D. Nothing in this Agreement is intended to create any agency relationship between the Fund and ESC.

III. AUDIT AND REVIEW OF CLAIMS BY THE FUND

A. Once $14 million has been paid, or has been acknowledged by ESC as payable, on claims administered by the Claims Personnel and until termination of claims handling under Paragraph B of Section II hereinabove, ESC shall reproduce for the Fund's review, on a reasonable basis, all information and documents in the hard-copy claims files assembled by the Claims Personnel in the handling of any claims on which a payment determination has been made. In addition, ESC shall provide the Fund periodically (on a daily basis insofar as practicable)

with a computer diskette in a mutually agreeable format which shall contain the following information: Claimant name, adjuster code, claim number, claim type, date of claim, social security or federal tax-identification number, claimant address and telephone number, claimant demand, fishing permit numbers (if appropriate), fishing areas (if appropriate), and the amount and date of payment, if any, made by ESC, and any other information mutually determined by the parties to be included. On a monthly basis the Fund shall provide ESC with an evaluation (including the possible evaluation that further information is required) of each claim paid by ESC and identified on the claims listings during the prior month and for which a copy of the hard-copy claims file has been provided to the Fund.

B. The Fund shall initially audit and review such information and documents in order to confirm that $14 million has been paid or is payable by ESC on Allowable Claims. Thereafter, the Fund shall audit and review the information and documents provided to it by ESC, as it deems appropriate.

IV. CLAIMS AGAINST THE FUND

A. ESC shall have the Claims Personnel administer claims in lieu of the Fund and shall make payments in lieu of the Fund on Allowable Claims under Section II hereinabove so that persons submitting claims may continue to have their claims evaluated and, as appropriate, paid without waiting for expiration of the Submission Period. To the extent that claims have been processed in conformity with Section 29.9 of the Implementing Regulations and the Procedures for Settling Claims, including the obtaining of any of the documents required in Paragraph G.1.(c) of the Procedures for Settling Claims, ESC shall be deemed, to the extent not prohibited by law, to be subrogated to, and shall have the right, as it deems appropriate, to seek an assignment by each claimant of, all rights, claims and causes of action that such claimant had or may have against the Fund pursuant to the Act, including the right to release the Fund for payments made pursuant to the Act. Accordingly, ESC shall have the right, as either a subrogee hereunder or an assignee, to submit at any time during the Submission Period to the Fund for payment pursuant to Paragraphs B through D of this Section any claims that ESC has paid in lieu of the Fund and any claims still being administered by ESC at the time of such submission.

B. The Fund shall not be called upon by ESC to make any payments on Allowable Claims prior to the conclusion of the Submission Period. As soon as practicable, but not later than six months after the conclusion of such period or of the termination of ESC's claims handling hereunder, whichever occurs later, the Fund shall advise ESC in writing as to which of the individual claims within the following classes submitted to the Fund it has determined, pursuant to review and audit, are Allowable Claims and the amount to be paid by the Fund on each such claim: 1) any claims submitted by ESC under Paragraph A of this Section; 2) any claims asserted pursuant to the Act and denied in whole or in part by the Claims Personnel; and 3) any claims asserted pursuant to the Act and not administered by the Claims Personnel. ESC may contest under Section VII any determination by the Fund as to particular claims or amounts to be paid.

C. The total of all payments made by the Fund on claims hereunder (this does not include interest, if any, payable under Paragraph B of Section V of this Agreement) shall not exceed $86 million. To the extent that the total amount of Allowable Claims payable by the Fund and described in Paragraph B of this Section exceeds $86 million, each such claim shall be reduced proportionately, including claims submitted by ESC under Paragraph A of this Section.

D. Except as otherwise provided in this Paragraph, the Fund shall pay to ESC the amounts of claims specified in Paragraph B, Clause (1) of this Section, as adjusted by the provisions of Paragraph C of this Section. The Fund shall make such payments within 30 days of: 1) ESC's acceptance of such amounts; or 2) for each claim with respect to which ESC has contested the Fund's determination, the obtaining of a final determination not subject to further appeal or review. Should the Fund have commenced, pursuant to Paragraph B of Section V of this Agreement, a court proceeding against ESC to determine, among other things, the Fund's right of subrogation, if any, against ESC under the Act, it may decline to make any payment to ESC under this Paragraph until such proceeding shall have been finally concluded, including the obtaining of a final determination not subject to further appeal or review.

E. In addition, should the Fund, by performing under this Agreement, subsequently be held liable by final judgment not subject to further appeal or review to make payments on Allowable Claims not taken into account by the Fund in making its determination under Paragraphs B through D of this Section, ESC shall promptly reimburse the Fund for the amount by which the payments to ESC by the Fund would have been further proportionately reduced had such court-imposed payments initially been taken into account.

V. SUBROGATION UNDER THE ACT AND RESERVATION OF RIGHTS

A. The Fund fully reserves any right of subrogation it may have under the Act and the Implementing Regulations and otherwise with respect to payments made by it, or payable by the Fund to ESC under Paragraph B of Section IV on Allowable Claims handled by the Claims Personnel in lieu of the Fund, because of damage caused by the unseaworthiness of the vessel or the negligence of the owner or operator; and ESC fully reserves all of its rights to contest such claims, including any allegations of unseaworthiness or negligence. Nothing in this Agreement shall limit whatever rights the Fund or ESC may have, outside of this Agreement, to assert any claim in subrogation or otherwise under the Act or otherwise against any person, including ESC and the Fund, respectively.

B. Should the Fund desire to decline to make payment to ESC under Paragraph D of Section IV of this Agreement, it shall bring an action in the U.S. District Court for the Southern District of New York to determine, among other things, the Fund's right of subrogation against ESC under the Act. ESC will submit to jurisdiction and venue as provided in this Paragraph and, in any action brought pursuant to this Paragraph, ESC will not raise or assert any defense that it might

otherwise (ve asserted based on the p sage of time. Any action brought under this Paragraph may be commenced by the Fund at any time from the effective date of this Agreement but must be commenced no later than six months after the expiration of the Submission Period or of the termination of ESC's claims handling hereunder, whichever occurs later. If, as a result of an action brought by the Fund under this Paragraph, the Fund is entitled to recover from ESC an amount that exceeds the amount owed by the Fund to ESC pursuant to Paragraph D of Section IV, ESC shall pay the difference to the Fund. If, as a result of an action brought by the Fund under this Paragraph, the amount owed to ESC pursuant to Paragraph D of Section IV exceeds the amount, if any, the Fund is entitled to recover as a result of such action, the Fund shall pay the difference to ESC with interest as provided herein. Any such difference owed to ESC shall bear interest from the date payment would have been made to ESC pursuant to Paragraph D of Section IV had the Fund not commenced proceedings under this paragraph. Interest will be paid at the "all-in" rate earned on the assets of the Fund during the period involved, provided, however, that interest shall not be paid to the extent disallowed for any reason by final judgment not subject to further appeal or review. (The "all-in" rate is the sum at the end of the period involved of interest and gains or losses, realized or not, based on market

values, d[illegible] ded by the fair market va[illegible] of the Fund's invested assets at the beginning of the period involved, such rate to be computed on an annualized basis.) All payments under this Paragraph shall be made in full within 10 days of the conclusion of any action brought by the Fund under this Paragraph.

VI. TERM OF AGREEMENT AND TERMINATION OF CLAIMS HANDLING

This Agreement shall remain in effect unless terminated pursuant to Paragraph B of Section VIII, provided, that if either ESC or the Fund reasonably believes it is no longer feasible to carry out this Agreement, the authorized representatives of the parties shall meet and confer, following which the claims handling provided by Section II may be terminated by either ESC or the Fund upon written notice to the other party 60 days prior to the effective date of such termination. Upon the effective date of termination of claims handling, ESC shall no longer administer or pay any claims in lieu of the Fund.

VII. RESOLUTION OF DISPUTES

Any disputes between ESC and the Fund over issues within the scope of the this Agreement and not addressed in Paragraph B of Section V of this Agreement shall be resolved by a binding dispute-resolution procedure to be mutually agreed

upon by ESC and the Fund or, failing such agreement, by litigation.

VIII. MISCELLANEOUS PROVISIONS

A. This Agreement may not be assigned or transferred by either party without the prior written consent of the other party. Should the rights and obligations of a party be transferred by operation of law to a successor entity, such entity shall provide the other party prompt written notice of such transfer and shall execute, upon the request of the other party, such documents of acknowledgement and assumption of obligations under this Agreement as may be reasonably requested by the other party.

B. This Agreement is not intended to, and shall not, create any rights or confer any benefits upon anyone other than the parties hereto, and their respective assigns and successors, if any, as provided in Paragraph A of this Section. No third person may claim any right or interest in or under this Agreement. Nothing in this Agreement shall limit in any manner the rights of the parties to amend, modify, terminate, discharge or cancel this Agreement at any time upon their subsequent mutual agreement, whether or not such subsequent agreement involves any additional consideration or forbearance, as

set forth in a formal written agreement subscribed to by both parties.

C. This Agreement embodies the entire agreement of the parties with respect to the subject matter herein and supersedes any prior understandings and agreements among the parties with respect to the subject matter herein.

D. This Agreement shall be construed and enforced in accordance with and governed by the laws of the State of New York without giving effect to the principles of conflicts of law thereof. Any suit or proceeding brought in connection with the enforcement of this Agreement shall be brought in the U.S. District Court for the Southern District of New York. Each of the parties to this Agreement agrees to submit to jurisdiction and venue as provided in this Paragraph.

E. For all purposes under this Agreement, including notification, consultation and payment, the authorized representative of ESC shall be Richard L. Green and the authorized representative of the Fund shall be Edwin H. Powell, or such other persons as ESC or the Fund, respectively, shall designate in writing to the other party from time to time.

IN WITNESS WHEREOF, this Agreement has been signed by the authorized representatives of the parties this 23 day of June, 1989.

EXXON SHIPPING COMPANY

By: _____

(representative)

TRANS-ALASKA PIPELINE LIABILITY FUND

By: _____

(representative)

EXHIBIT I

I. PROCEDURES FOR THE APPRAISAL AND SETTLEMENT OF CLAIMS ARISING FROM THE SPILL OF OIL FROM THE M/V EXXON VALDEZ

A. When a Claim May be Presented.

1. Claims for damages arising from the spill of oil from the M/V EXXON VALDEZ on March 24, 1989 ("Claims") are currently being processed by Exxon Shipping Company ("ESC"). Such Claims shall be considered as being administered by ESC in lieu of the Trans-Alaska Liability Fund ("The Fund") when $14 million in Claims constituting damages within the definition of the Trans-Alaska Pipeline Authorization Act (the "Act") have been paid, or have been acknowledged by ESC as payable.

2. Claims submitted to the Fund prior to the time limitation for submission of Claims will, in the Fund's discretion, be forwarded to the contact person designated by ESC.

3. Any Claim that is received by the Fund after the time limitation for submitting Claims will be denied. See Part II, Section H.

B. Who May Present A Claim.

1. A Claim may be presented by the damaged party, his duly authorized agent, his assignee, his successor in interest, or his subrogee.

2. The Claims of a subrogor and a subrogee for damages arising out of the same incident constitute a single Claim.

3. Each subrogee and his successor in interest must substantiate his interest or right to file a Claim by appropriate documentary evidence.

C. Determination of Compensation and Definition of "Damages."

1. Unless otherwise prescribed by statute, or implementing regulations, compensation for damages is determined in accordance with these guidelines and shall be available only for damages as defined by 43 C.F.R. Section 29.1(e) which is set out at length as follows:

> "Damage" or "damages" means any economic loss, arising out of or directly resulting from an incident, including but not limited to:
>
> 1. Removal costs;
>
> 2. Injury to, or destruction of, real or personal property;
>
> 3. Loss of use of real or personal property;

4. Injury to, or destruction of, natural resources;

5. Loss of use of natural resources; or

6. Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence hunting, fishing and gathering opportunities.

2. If the property has been or can be economically repaired, the measure of damages is the actual or estimated net cost of the repairs necessary to restore the property to substantially the condition which existed immediately before the incident. Damages so determined may not, however, exceed the value of the property immediately prior to the incident less the value thereof immediately after the incident. To determine the actual or estimated net cost of repairs, the value of any salvaged parts or materials and the amount of any net appreciation in value (betterment) effected through the repair is deducted from the actual or estimated gross cost of repairs, and the amount of any net depreciation in the value of the property is added to such gross cost of repairs, provided such adjustments are sufficiently substantial in amount to warrant consideration.

3. If the property cannot be economically repaired, the measure of damages is the value of the property

immediately before the incident less the value thereof immediately after the incident.

4. Loss of use of damaged property which is economically reparable may, if claimed, be included to the extent of the reasonable expense actually incurred for appropriate substitute property, but only for such period as is reasonably necessary for repairs, and provided that idle substitute property of the claimant was not employed. When substitute property is not obtainable, other competent evidence such as rental value, if not speculative or remote, may be considered. When substitute property is reasonably available but is not obtained and used by the claimant, loss of use is not payable.

5. Lost income directly resulting from the spill except to the extent income gained from other activities offsets the loss, is allowable as damages, less any saved expenses.

6. Punitive damages, interest, court costs, attorneys' fees, or other similar charges are not allowable as elements of damage.

D. Form of Claim.

1. Claims must be in writing and must contain the information required by 43 C.F.R. Section 29.9, which is the basis for this Section D and Section E below.

2. The information required in Paragraph D.1. must show the name, address, and telephone number of the claimant. If a Claim is submitted by an agent, the agent must provide the name and address of the claimant; the name, address and telephone number of the agent; and evidence of the agent's authority to present the Claim.

3. If the cause of the claimant's loss or damage is not apparent by the nature of the Claim, then Claims submitted to ESC or the Fund should include a statement of the circumstances, if known, causing the loss or damage claimed and should include the date and location of the occurrence. Attachments to the Claim should include, if available or obtained, copies of statements of witnesses, accident or casualty reports, photographs and drawings, and statements and proofs of loss submitted to insurers. The Claim should include a detailed listing of damages incurred, categorized according to the type of damage involved, and applicable documentation supporting the damages claimed.

E. Proof of Damages.

1. Claims for injury to or destruction of real or personal property, including removal costs, should be documented by:

(a) An itemized statement or invoice covering removal cost or the cost to repair or replace the damaged or destroyed property. Where such property has not been repaired or replaced, the claimant should provide an itemized estimate of the cost to repair or replace it made by a disinterested and competent third party. Where appropriate, an additional repair estimate may be requested.

(b) Where appropriate, an appraisal or survey report detailing the scope of the damage sustained, prepared by a disinterested and competent person familiar with the subject matter of the report.

2. Claims for loss of use of or extra expenses incurred during the period of repairs or replacement of damaged real or personal property should be supported by statements or documents showing:

(a) The date the property was damaged.

(b) The name and location of the repair facility.

(c) A description of all repairs performed segregating any work performed for the owner's account and not attributable to the incident involved, and the costs thereof.

(d) The date and place where the property was returned to service after completion of repairs and an explanation, if applicable, of any delay.

(e) If substitute property was rented or leased by the claimant as a replacement for the damaged property during the time of its repair, an explanation as to the necessity for renting or leasing such substitute, and invoices detailing the costs incurred with respect thereto, the time and use and nature thereof, and a statement detailing costs incurred that would have been similarly incurred by the claimant in utilization of his property.

(f) If the property was employed at the time of damage, or would have been employed, the claimant must submit a financial statement or other documentation of operating expenses that were, or would have been, incurred. This should include all wages and bonuses that would have been paid during the period of employment, the value of the fuel that would have been consumed during the period of

employment, the value of consumable stores that would have been consumed during the period of employment, and all the costs of operation which would have been incurred including, but not limited to, license and parking fees, personal expenses, harbor fees, wharfage, dockage, shedding, stevedoring, towing, pilotage, inspection, tollage, lockage, anchorage and mooring, grain elevation, storage and customs fees.

(g) Claims for extra expenses incurred by claimant for any reason in connection with the incident causing damage to the claimant should be supported by a statement detailing the nature of the extra expenses incurred and invoices detailing the amount of such expenses.

(h) Evidence of income for the period of repairs for three years preceding the date of alleged loss.

3. Claims for loss of profits or impairment of earning capacity resulting from the claimant's inability or reduced ability to use a natural resource directly resulting from the oil spill incident should be accompanied by:

(a) If not apparent by the nature of claimant's Claim, a description of the natural resource that claimant was unable to use, in whole or in part, supported by, when appropriate:

- photographs in those cases where the claimed damage is visible,
- reference to an order of a governmental agency restricting a particular use of the natural resource, or
- an engineering report where the claimed damage relates to the claimant's inability to use the natural resource for industrial purposes.

(b) A statement of the claimant's past profits or earnings over three years immediately prior to the oil spill supported by, where appropriate:

- receipts
- financial statements
- tax returns
- fish tickets
- affidavits from employers
- contracts
- bank statements
- other evidence of income.

(c) A statement of the claimant's expenses over the three years immediately prior to the oil spill supported

by, where appropriate, statements or documents identifying the following:

- wages and bonuses paid to employees
- cost of fuel used
- the cost of consumable stores and equipment
- all other costs of operation.

(d) Where appropriate, a statement of other income or earnings received from other activities during the period when the claimant was unable to use the natural resource made the subject of the Claim.

4. Claims for injury or destruction of natural resources shall be documented by:

(a) a description of the natural resource injured or destroyed, supported by:

- photographs in those cases where the claimed damages is visible,
- reference to an order of the federal, state, provincial or municipal health department forbidding a particular use of the natural resource, or
- an engineering report where the claimed damage relates to the claimant's inability

to use the natural resources for individual purposes

(b) Appraisals, surveys and scientific studies conducted to determine the extent of damages and to identify the actions to be taken to restore the natural resources to their condition prior to the loss.

(c) Cost of restoration should be supported by invoices, bills or other similar documentation.

5. Claims submitted by an agent of, a subrogee of, an assignee of or a successor in interest to the damaged party must be supported in the same manner as required of the party who sustained the damage. Documentary evidence of payment to a subrogor does not constitute evidence of liability of ESC or the Fund or conclusive evidence of the amount of damages. ESC and/or the Fund will make independent determinations on the issues of fact and law upon the available evidence.

F. Effect of Other Payments to Claimants.

The total amount to which the claimant and his subrogees are entitled will be computed as follows:

The total of the loss or damage suffered less any payment the claimant has received from any joint tort

feasor or such joint tort feasor's insurer, or from any other source.

G. Settlement of Claims.

1. When ESC and/or the Fund has determined that a Claim should be approved in full or in part:

(a) the Claimant will be notified of the determination;

(b) the Claim shall be submitted to the appropriate disbursing office after the settlement offer is accepted by the claimant;

(c) ESC will obtain from a claimant who accepts a settlement offer either a written acknowledgment of receipt of funds, substantially in the form attached hereto, or a partial or full release.

2. When a Claim is determined to be without merit, the claimant will be notified in writing.

3. If a claimant demonstrates a basis for ESC or the Fund to reconsider the merits of his claim, ESC and/or the Fund may, in their discretion, review the claim, applying the same principles and procedures as are applicable when Claims are initially presented. ESC or the Fund shall

notify the claimant in writing if it decides not to reconsider the Claim.

4. Any claimant aggrieved by ESC's or the Fund's decision on a claim may seek review of the decision in the appropriate Federal District Court.

H. Time Limitation.

No Claim may be presented, nor any action be commenced, for damages recoverable under the Act and regulations promulgated pursuant to it unless that Claim is presented to, or that action is commenced against the vessel owner, operator or their guarantor or against the Fund, as to their respective liabilities, on or before March 24, 1991.

I. Discretion of ESC and the Fund.

1. The Claims Procedures set out herein are intended as guidelines for the thorough but expeditious handling of Claims. The variety of claims presented, as well as the individual circumstance of each claimant, suggest that it will not be possible in every case to obtain all of the information and documentation set out in the Procedures. In evaluating and paying Claims ESC and the Fund shall have the discretion to accept less or different information and/or documentation than is set out in these

Procedures, so long as they have reasonably satisfied themselves that sufficient information and/or documentation has been submitted to fairly evaluate a Claim.

2. ESC has advised the Fund that it will pay Claims without regard to the proportionate reduction required by the Act. These Procedures shall not be construed to limit ESC's ability to pay Claims without regard to proportionate reduction or to require ESC to strictly apply the definition of "Damages" contained in 43 C.F.R. Section 29.1(e) and these Procedures. Any payments for damages beyond those enumerated in 43 C.F.R. 29.9 shall not constitute allowable Claims against the Fund.

FUNDS RECEIPT AND CLAIMS CREDIT

The undersigned claimant has made a claim against Exxon Shipping Company, and other entities and persons, arising out of the grounding of the M/V EXXON VALDEZ on March 24, 1989, and the resulting oil spill (the "Incident"). Claimant has represented that he/she/it has incurred losses because of the cancellation of the 1989 _____ season in the Prince William Sound.

In consideration of the sum of _____ Dollars ($_____) paid to the undersigned, receipt of which is hereby acknowledged, claimant agrees that the full amount of this payment will be a credit and offset toward all claims claimant may have against Exxon Shipping Company, Exxon Corporation, Exxon Company, U.S.A., Exxon Pipeline Company, and all of Exxon's affiliates and subsidiaries, Alyeska Pipeline Service Company and all of its owner companies, their employees, agents, and insurers, the M/V EXXON VALDEZ, its officers and crew, and the Trans-Alaska Pipeline Liability Fund (collectively "Exxon").

Claimant and Exxon agree that this agreement does not release any of claimant's damage claims against Exxon and is not any admission or evidence of wrongdoing or negligence by Exxon.

Claimant and Exxon, in order to avoid litigation costs, also agree to continue discussions and attempt to resolve all of claimant's claims arising out of the Incident. In the event claimant and Exxon cannot reach a resolution on all or any one of claimant's claims, claimant and Exxon will use best efforts to agree (if necessary, with court assistance) upon a claims resolution process(es), such as the use of a master(s), mediator(s) or arbitrator(s). Claimant and Exxon may also elect to employ different methods to resolve different claims.

DATED this _____ day of _____, 1989.

_____

Claimant: _____

Address: _____

_____

Telephone: _____

_____

Exxon Representative

_____

Claimant's Representative

013:PCD0234X89 061389b

EXHIBIT II

NOTICE TO PERSONS MAKING CLAIMS AGAINST
THE TRANS-ALASKA PIPELINE LIABILITY FUND
AS A CONSEQUENCE OF THE EXXON VALDEZ OIL SPILL

This notice is being given by the Trans-Alaska Pipeline Liability Fund (hereinafter referred to as "the Fund") which was established by an Act of Congress, Public Law 93-153, Title II, Section 204, appearing at 43 U.S. Code Section 1653. Under the Act establishing the Fund, the owner and operator of the vessel which discharges oil is obligated, without a showing of fault or negligence, to pay $14 million with respect to claims for injury, with the Fund thereafter responsible to pay the next $86 million with respect to claims.

Should total claims filed as a consequence of a spill exceed $100 million, the Act requires that payment with respect to the claims be reduced proportionately. The unpaid portion of any claim may be asserted against the responsible party pursuant to other applicable state or federal law. The total obligation of the Fund with respect to any one incident is limited by statute to $86 million.

Because the Fund's liability is limited to $86 million, the Fund may decline under the implementing regulations to make any payment until all claims are submitted during the two-year claim period. 43 Code of Federal Regulations, Part 29.

Representatives of Exxon Shipping Company (hereinafter referred to as "ESC") are currently engaged in the processing of claims as a consequence of the EXXON VALDEZ spill pursuant to the statutory obligation of the operator and owner of the vessel to pay $14 million with respect of the spill. In order to facilitate claims handling and avoid duplication and delay where feasible, the Fund has entered into an agreement with ESC whereby ESC will initially act as claims representative for the Fund with respect to the Fund's obligation to pay up to $86 million with respect to claims asserted as a result of the spill. ESC may at its option make payment in full on claims approved by it. Such practice goes beyond the obligations of the Fund under the Act. The Fund has received no assurance and makes no representation or prediction as to whether ESC will continue paying claims as they are approved and in full or whether ESC may later determine to suspend payments and/or to pay only on a pro rata basis.

The Fund is publishing this notice to advise all potential claimants with respect to the EXXON VALDEZ oil spill that the fact that some claimants may be paid upon claim approval and in full by ESC should not be understood to mean, and does not constitute any representation or commitment by the Fund, that future claimants will continue to be paid prior to the expiration of the two-year claim submission period and/or will be paid in full. Should ESC cease its current practice or withdraw from its

arrangements with the Fund, it is anticipated that the Fund would follow the procedure set forth in the implementing regulations and would cease all payments with respect to claims until the end of the two-year submission period and thereafter pay claims only proportionately if the total amount claimed exceeds the $100 million limit as currently appears likely.

Any person having questions with respect to the foregoing should contact the Fund c/o Mr. Albert F. Dugan, Jr., of Hull and Cargo Surveyors, Inc., Valdez Airport Terminal, Airport Road, Suite 203, P. O. Box 128, Valdez, Alaska 99686, telephone number (907) 835-5995 and (907) 835-5996. The Fund can discuss its obligations to make payments under the Act and will provide information concerning claims procedures in effect at the time of inquiry. It cannot provide legal advice or counsel of any kind to any claimant.

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

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: ALL CASES

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
: ss.
THIRD JUDICIAL DISTRICT)

Joy C. Steveken, being duly sworn, upon oath, deposes and says: that she is employed as a legal secretary in the offices of Bogle & Gates, 1031 West 4th Street, Suite 600, Anchorage, Alaska 99501; that she has hand served Notice of Filing of Written Agreement Between Exxon Shipping Company (D-2) and the Trans-Alaska Pipeline Liability Fund (D-4) 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, Liaison Counsel, section (2),

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dated December 22, 1989, and courtesy copies sent, on September 25, 1990 via hand delivery or U.S. Mail, postage prepaid, to the following attorneys:

David W. Oesting, Esq.
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550 West Seventh Avenue
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Milberg, Weiss, Bershad, Specthrie & Lerach
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New York, New York 10119

Joy C. Steveken

Joy C. Steveken

SUBSCRIBED AND SWORN to before me this 25th day of September, 1990.

Notary Public for Alaska
My Commission Expires: 5-11-93

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Attorneys for Defendant D-4
The Trans-Alaska Pipeline Liability Fund

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A 89-95 CIV
the EXXON VALDEZ	)	
	)	(Consolidated)

Re: ALL CASES

MOTION OF DEFENDANT D-4, TRANS-ALASKA PIPELINE LIABILITY FUND, TO FILE SEPARATE BRIEF

COMES NOW Defendant D-4, TRANS-ALASKA PIPELINE LIABILITY FUND, and moves this Court for leave to file a separate brief from other Defendants on the issues raised by this Court's September 13, 1990 Comments Preliminary To Ruling on Plaintiffs' Motion To Certify Class Action, and Alyeska's Motion To Dismiss. In its comments, the Court invited Defendants to file a single brief on October 8, 1990.

If final, the Court's preliminary ruling would require all parties injured by the Exxon Valdez oil spill to proceed through an administrative process with the FUND before pursuing litigation in state or federal court. The Court's ruling contemplates a central role for the FUND in resolving claims and involves considerations unique to the FUND, and not in common with other Defendants. In this light, we believe the Court would benefit from briefing by the FUND concerning how its claim determination processes will fully and fairly meet the Court's objectives that is separate from the brief presented by the other Defendants to the litigation.

Accordingly, the FUND requests leave of this Court to file a separate brief on October 8, 1990, when the other Defendants file their single, consolidated brief.

LAW OFFICES OF
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ANCHORAGE, ALASKA 99503
(907) 272-6474

RESPECTFULLY SUBMITTED this 27 of September, 1990.

WILMER, CUTLER & PICKERING

Attorneys for Defendant D-4

Trans-Alaska Pipeline Liability Fund

By David A. Devine
A. Stephen Hut, Jr.

GROH, EGGERS & PRICE

Attorneys for Defendant D-4

Trans-Alaska Pipeline Liability Fund

By David A. Devine
Clifford J. Groh, Sr.

By David A. Devine
David A. Devine

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I HEREBY CERTIFY that a copy of the foregoing was personally served, on the 27 day of September, 1990, on:

Lloyd Benton Miller, Esq.
Sonosky, Chambers, Sachse & Miller
900 West Fifth Avenue
Suite 700
Anchorage, AK 99501,
Liaison Counsel for Plaintiffs;

David W. Oesting, Esq.
Davis Wright Tremaine
550 West Seventh Avenue
Suite 1450
Anchorage, AK 99501,
Co-Lead Counsel for Plaintiffs; and

is so ORDERED

DATED: 10/1/90

United States District Judge

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

Douglas J. Serdahely, Esq.
Bogle & Gates
1031 West Fourth Avenue
Suite 600
Anchorage, AK 99501,
Liaison Counsel for Defendants;

AND FURTHER CERTIFY that a copy of the foregoing was served by mail, on the 27 day of September, 1990, on:

Jerry S. Cohen, Esq.
Cohen, Milstein, Hausfeld & Toll
1401 New York Avenue, N.W.
Suite 600
Washington, D.C. 20005,
Co-Lead Counsel for Plaintiffs; and

Melvyn I. Weiss, Esq.
Milberg, Weiss, Bershad, Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10119,
Member, Plaintiffs' Law Committee.

David A. Devine

LAW OFFICES OF
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P-928-1-1

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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

P1; P3; P8-12; P13-15; P16-18; P19; P21; P22; P24-28; P30-39; P40-41; P42; P43-44; P46; P48; P50; P52; P54-62; P64-67; P73; P74-76; P77; P78-80; P81-94; P95; P96; P97-111; P112; P113; P118; P120; P122; P124; P126; P128; P130; P132; P135-138; P139-144; P145; P146-147; P165-166; P167; P168; P170-188; P189; P195-196; P202-206; P246-247; 267-277

PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANT D-4, TRANS-ALASKA PIPELINE LIABILITY FUND, TO FILE A SEPARATE BRIEF

Over the course of the past two weeks, the more than 95 law firms representing all of the plaintiffs, including the sovereign State of Alaska, in this litigation have worked diligently to

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incorporate their responses to the federal court's Comments of September 13, 1990 into a "single supplemental brief," pursuant to the court's explicit instructions. Oral Comments of Hon. H. Russell Holland at 8, 9. Plaintiffs perceive no reason why the relatively few defendants should not be held to the same standard.

Respectfully submitted this 28th day of September, 1990, at Anchorage, Alaska.

DAVIS WRIGHT TREMAINE
Co-Lead Counsel

By: _____
David W. Oesting

COHEN, MILSTEIN, HAUSFELD & TOLL
Co-Lead Counsel

By: Jerry S. Cohen

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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

ANNE C. SPEILBERG, being first duly sworn, upon oath, deposes and says that she is employed in the offices of Sonosky, Chambers, Sachse & Miller, 900 West 5th Avenue, Suite 700, Anchorage, Alaska 99501 and that service of:

PLAINTIFFS' MEMORANDUM IN RESPONSE TO THE FEDERAL COURT'S COMMENTS OF SEPTEMBER 13, 1990 and PLAINTIFFS' OBJECTION TO MOTION OF DEFENDANT D-4, TRANS-ALASKA PIPELINE LIABILITY FUND, TO FILE A SEPARATE BRIEF

was personally served upon the following individuals on the 28th day of September, 1990:

Charles P. Flynn
BURR, PEASE & KURTZ
810 "N" Street
Anchorage, AK 99501

Douglas J. Serdahely
BOGLE & GATES
1031 West 4th Ave., Suite 600
Anchorage, AK 99501

Anne C. Speilberg
ANNE C. SPEILBERG

SUBSCRIBED AND SWORN TO before me this 28th day of September, 1990.

Margaret A. Bunker
Notary Public in and for Alaska
My Commission Expires: 2-13-92

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