3-6-00

Rebecca,

This folder goes in the RPWG Admin Record. These comments go in "Section U" under "Public Comments to Federal Register Notice, July 31, 1991".

We have copies / placeholders for these in the public version here. These are the originals.

Let me know if you have any trouble with this.

Will help

Connie

1-12-2000

Carrie -

I found these in a recycled folder ...

help!!!

Rebecca

.X12

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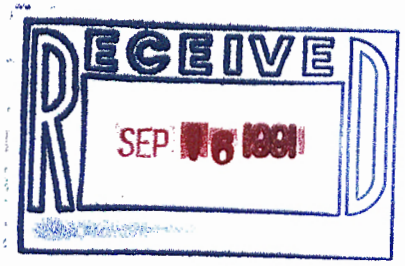
RPWG
(u)

EXXON SHIPPING COMPANY
POST OFFICE BOX 1512 • HOUSTON, TEXAS 77251-1512 "EXXSHIP HOUSTON"

A. ELMER
PRESIDENT

September 13, 1991



Secretary
Restoration Planning Work Group
Oil Spill Restoration Planning Office
437 "E" Street, Suite 301
Anchorage, Alaska 99501

Gentlemen:

This letter and the attached document constitute Exxon Shipping Company's (ESC) response to the 1991 Exxon Valdez Restoration Studies and Work Plans released July 31, 1991, by the EPA and the State of Alaska.

ESC's commitment to restoration has been consistently demonstrated by its cooperative work with both state and federal agencies in association with the unprecedented cleanup effort over the past three summers. As a result of this cleanup effort, aided by natural processes, restoration is clearly well advanced. With respect to human resource services (e.g. boating, fishing, tourism), which are the principal focus of the natural resource damage assessment (NRDA) process, evidence of recovery is extremely strong.

In spite of our sincere concern for restoration, we do not believe that the studies and projects described in the subject plan are supportable; their need is not demonstrated and they fail to satisfy sound common-sense and legal standards. Moreover, they fail to meet the Trustee Council's own restoration objectives, which were described in the Restoration Planning section of the 1990 State/Federal NRDA and Restoration Plan.

The governmental NRDA and restoration planning process fails to implement legally required cooperative identification and implementation of justifiable restoration programs. As a party potentially responsible for restoration costs, ESC continues to be excluded from meaningful participation in defining restoration needs. ESC has once again been asked to comment on nearly completed studies which are justified only by unsupported assertions of injury by the Trustees and which ignore the obvious, rapid pace of natural recovery. The net result is a poorly focused and ineffective process.

ESC remains willing to jointly discuss the Trustee's findings and to work together to develop an appropriate and justifiable restoration plan for the spill-affected area. If you wish to further explore the content and timing for a meeting to address these goals, please contact G. A. Lock (713-656-9680).

Sincerely,

A. Elmer

EXXON SHIPPING COMPANY REVIEW COMMENTS
ON THE
1991 EXXON VALDEZ RESTORATION STUDIES AND WORK PLANS

Introduction

On July 31, 1991 the U.S. Environmental Protection Agency (EPA) and the State of Alaska announced the availability of the 1991 Exxon Valdez Restoration Studies and Work Plans ("1991 Restoration Study Plan"). The Federal Register notice (56 FR 36150) pertaining to this document indicated that it is a follow-up to the earlier draft 1991 Restoration Work Plan ("Draft Plan") and provides 1) detailed study plans for restoration science studies and 2) detailed work plans for restoration implementation projects. It also stated that the timing of the Federal Register notice was such that all of the studies, with the exception of one (Study #11 - "Pre-Spill and Post-Spill Concentrations of Hydrocarbons in Sediments and Mussels at Intertidal Sites in Prince William Sound"), were already underway. Nevertheless, comments were solicited from interested parties for the stated purpose of reviewing progress during 1991 and developing proposals for 1992.

Current Process is Counterproductive

The current process is a sharp departure from the common-sense approach defined by the regulations.

The statutes and regulations controlling the Natural Resource Damage Assessment (NRDA) process clearly require that studies and work undertaken by the resource Trustees focus on the restoration of injured natural resources. The 1991 Restoration Study Plan must therefore be judged by its ability to identify justifiable restoration needs and meaningful restoration alternatives which satisfy legal requirements. The current Department of Interior (DOI) Type B NRDA regulations incorporate a common-sense procedure for identifying and implementing restoration programs. This procedure includes the following steps:

1) Documenting the nature, extent, and location of the injuries to natural resources and the associated reduction in service levels.

2) Identifying how restoration might be practicably achieved either by natural recovery or intervention using proven technology.

3) Assessing the cost effectiveness of various restoration alternatives, including natural recovery, relative to the expected benefits.

4) And finally, deciding what additional data are required to finalize the restoration program.

The process utilized by the Restoration Planning Work Group (RPWG) to-date has deviated markedly from these regulatory and common-sense principles. After almost three years of intense and costly study, the Trustees have made only unsupported assertions about injuries with no scientific analysis of the progress or rate of natural recovery. Hence the current studies have not determined that any biota require restoration beyond that provided by natural recovery. The current proposals rely on developing new science, as opposed to relying on proven technology, and only one of the projects even attempts a cost benefit analysis. Therefore, the program simply consists of attempts to accumulate new data without scientific support or direction for the effort.

The current process deviates from the Trustee Council's own restoration objectives.

The Trustee Council defined five restoration objectives in the 1991 State/Federal Natural Resource Damage Assessment and Restoration Plan for the Exxon Valdez Oil Spill. The stated objectives were:

1) "Identify or develop technically feasible restoration options for natural resources and services potentially injured by the EVOS (Exxon Valdez Oil Spill)."

2) "Determine the nature and pace of natural recovery of injured resources, and identify where direct restoration measures may be appropriate;"

3) "Incorporate an approach to restoration that where appropriate, focuses on recovery of ecosystems rather than on the individual components of those systems;"

4) "Identify costs associated with implementing restoration activities, in support of the overall natural resources damage assessment process;"

5) "Encourage, provide for, and be responsive to public participation and review during the restoration planning process."

In developing and implementing the 1991 Restoration Study Plan, the RPWG has clearly not adhered to the objectives defined by the Trustee Council. The emphasis is on development of new technology. The rate of natural recovery is virtually ignored, thereby circumventing the fundamental test of whether restoration programs may be needed. The studies are basically species specific rather than oriented toward the larger ecosystem, ignore cost benefit considerations, and the opportunity for meaningful public participation continues to be absent. It is inexplicable how the restoration program could have strayed this far from the Trustee Council's objectives.

Restoration can be best addressed by cooperation with the Potentially Responsible Parties (PRP).

Restoration needs can be best defined and implemented by sharing with the PRP results of the more than $100 million in NRDA studies to-date and jointly assessing the implication of the findings and the state and role of natural recovery. In this regard, Exxon Shipping Company (ESC), as a PRP, remains willing to discuss jointly the Trustee's findings and to work together to

develop an appropriate and justifiable restoration plan for the spill-affected area.

Evidence of Natural Recovery is Dramatic

The rapid pace of restoration and the overall health of the ecosystem are evident.

Consistent with a common-sense approach to restoration, it is essential to understand not only the nature of the injuries but also the progress and extent of natural recovery for the habitats and the wildlife those habitats support, and the human services they provide. For the spill-affected area, the principal habitat is provided by the waters of PWS and the GOA.

- The overall water column quality in PWS and GOA has been consistently excellent. In his report[1] entitled "Water Quality in Prince William Sound and the Gulf of Alaska", Dr. Jerry Neff concluded that:

  > "Concentrations of petroleum hydrocarbons in the water column of Prince William Sound and the Gulf of Alaska, even in the month immediately after the spill, have consistently remained below concentrations of crude oil hydrocarbons that have been demonstrated in laboratory and field studies to be toxic to or produce sublethal effects in organisms living in the water column."

  Having found no likely pathway for exposure Dr. Neff went on to say that:

  > "Therefore, harmful effects, if any, of the spill on water column organisms in 1989 and 1990 are expected to be quite isolated, and result in little or no damage at the populations or community levels. There is no reason to expect that there will be any harmful long-term effects of the remaining oil in 1991 or beyond on water column

organisms, including commercially important herring and salmon populations."

Significantly, Dr. Neff's predictions have been borne out by fisheries results from both 1990 and 1991.

- Fish, the primary recreational and commercial resource of the region, are abundant and healthy. The excellent water quality has obviously contributed to the highly successful PWS purse seine sac-roe herring (8300 tons) and record pink salmon (44.7 million) catches in 1990. These catches underscored not only the purity of the water column but also the robust health of the PWS fisheries, in general. The 1991 purse seine sac-roe herring catch to-date (11,924 tons) further demonstrates the health and vitality of this particular species. This is the second largest catch ever recorded; 44% larger than the 1990 catch and 62% larger than the average harvest from 1980 through 1990 (excluding the 1989 closure).

  Although it is difficult to estimate what the final 1991 commercial pink salmon harvest will be, the total, including surplus fish subsequently dumped at sea, will likely be second only to the all time record set in 1990. Negative market factors have contributed to the difficulty in assessing the true run strength; primarily because of a worldwide overabundance, depressed prices, and inadequate domestic processing capability. In spite of these factors, over 35 million pink salmon had been harvested as of September 9, 1991.

  Numerous observers have also noted strong returns of wild stocks, which is evidence of the health and vitality of native fish stocks throughout the region.

- A dramatic, rapid, and inexorable decrease in oil coverage of shorelines has been well documented by joint shoreline surveys. The state and federal governments and Exxon jointly surveyed shorelines in the Spring of each year to develop summer clean-up programs. Based on the latest joint survey (MAYSAP), conducted just prior to the 1991 cleanup operation, less than 2% of the entire shoreline within PWS still had any visible traces of surface oiling (this covers all categories including wide, moderate, narrow and very light; with very light comprising about 70% of the total). The MAYSAP survey also revealed that only about 0.3% of GOA shorelines retained any visible signs of oiling (in this case over 90% in the very light category).

  The 1991 cleanup program targeted these specific areas, as directed by the Federal On-Scene Commander (FOSC) with guidance from the Technical Advisory Group (TAG) composed of representatives from the State of Alaska, USCG, NOAA, and Exxon. These operations, combined with another winter of storm activity, will inevitably result in an even further, significant reduction in shoreline oiling by the Spring of 1992.

- The remaining oil is primarily subsurface, does not impact human use, and does not pose a threat to the environment. With almost all visible signs of the spill gone, attention has focused on the isolated areas where subsurface oil remains beneath the shorelines. In 1990, NOAA and state scientists thoroughly considered whether it was desirable to remove this remaining oil. NOAA's "Net Environmental Benefit Assessment"[2] concluded that the remaining oil poses little risk to wildlife.

  The MAYSAP survey clearly delineated the locations of the remaining subsurface oil. The data indicates that it occurred in only 0.4% of the total shoreline area surveyed in 1991 in PWS and 0.04% in GOA. Under the direction of the state and federal governments, the 1991 clean-up program considered each of these locations. Work was deemed necessary on less than one-half of those segments where the subsurface oil exceeded a light

residue. All directed work was completed on these locations by July 20, 1991.

- Intertidal biota are thriving, indicating a healthy habitat. Perhaps the most telling evidence of the excellent quality of the water and shoreline habitat is the extensive recovery of intertidal biota. Key species of plants and animals, as defined by the MAYSAP participants, were observed in great abundance and diversity throughout PWS and GOA. Even in those isolated areas where oil remnants can be found, MAYSAP confirmed that recolonization is very well progressed.

  With particular reference to the flora and fauna of the intertidal communities in both PWS and GOA, in early 1991 NOAA[3] reported to the Coast Guard:

  > "The NOAA monitoring program indicates that even where there is direct contact with weathered oil, intertidal organisms have shown extensive recovery."

  This is hardly a picture of continuing injury to the resources, but rather one of rapid and advanced recovery.

- The aesthetics of the spill-affected area have been essentially restored. Recreational-use statistics testify to the continued attraction and natural beauty of the area. The only remaining concerns are limited to a few, isolated, protected shores which have essentially no impact on the overall enjoyment of the area. A recent article in the Anchorage Times[4] (August 28, 1991) reported:

  > "Tourism in Valdez bounced back to pre-1989 levels this summer as visitors streamed into the mountain-ringed seaport looking for alpine panoramas instead of oily rocks."

This finding is borne out by cruise ship bookings, which typically frequent southeast and southcentral Alaska destinations. An article in the Dec. 10, 1990 issue of Travel Weekly[5] stated:

> "Cruise line officials unanimously agreed that the 1990 Alaska season was extraordinarily successful, and they predicted that 1991 would meet with even better success."

Even former Alaska Governor Steve Cowper, recognizing a continual increase in statewide tourism, decided to reduce the money in the state budget allocated for tourism marketing by 40%. His reason was reported in a July 23, 1990 by the Associated Press[6].

> "State tourism is at the upper limit of the number of people that can be handled by facilities."

More recent statistics suggest that continued growth in the tourism industry has been evident in 1991 as well. For instance, an article in the August 19, 1991 issue of The Christian Science Monitor[7] quoted an Alaskan Division of Tourism specialist as saying:

> "The Alaska Division of Tourism expects this summer's tourist visits to exceed by 10 percent last summer's record of 630,000, says Pete Carlson, development specialist for the division."

With such positive tourism results, for the state as a whole and for Prince William Sound in particular, it is clear that recreational uses of the region are unimpaired.

Injury Claims are Unsupported

The RPWG has failed to provide information needed to document its assertions of injury. Through 1991, the Trustee Council has either completed, or is in

the process of completing, NRDA studies costing about $100 million. In spite of the vast amount of data represented by these studies, the only results that have been released by the federal government to-date to justify the proposed restoration studies and work plans is the "Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill", 56 FR 14687, (April 11, 1991) which was prepared by the federal natural resource Trustees and EPA, ("Summary of Injuries"). That "Summary of Injuries" presented only unsupported assertions and was based on admittedly preliminary information. Consequently, comments are being solicited by the RPWG on restoration studies and work plans for which the degree of injury to the subject resources is based solely on assertions, devoid of any documented scientific evidence.

Potentially Reasonable Proposals Lack a Sound Basis

A few of the restoration proposals may be reasonable if adequately substantiated and could be worthy of further consideration. This assumes that: 1) spill-related injury can be clearly demonstrated, 2) intervention be shown to be preferable to natural recovery, and 3) some cost effective restoration action could be identified. Given the lack of supporting information provided by the RPWG, it is difficult to conclusively assess the reasonableness of any of the proposals. However, those which could possibly fit this category include the following:

Public Information: The public information work plan (Project #2) has as its objective the development and distribution of information to the public to inform them how they can help the resources recover naturally from the spill. Providing the public with such information could 1) directionally reduce the human-induced stress on spill-affected resources if some deviation from normal practice is warranted and 2) notify the public that utilization of recovered resources could resume. However, to qualify as a reasonable restoration alternative the information provided to the public should be accurate and objective. In this regard, the "Summary of Injuries" is an inappropriate basis since it is based solely

on admittedly preliminary data and speculative assertions. Second, information on the acute, initial impact of the spill is far less relevant than an accurate portrayal of the current state of the environment. Finally, clear explanations should be provided as to which human-use activities are to be precluded beyond those restrictions which are already in place (without respect to any oil spills) in state and federal regulations; an example is the avoidance of haulout areas during pupping. Given the excellent state of the environment, it would seem more appropriate to reassure users to continue their enjoyment of the area rather than to further constrain their use.

Restoration Survey for Wild Salmon: The restoration survey for wild pink and chum salmon (Project #3) is intended to identify fisheries enhancement techniques for fish stocks potentially impacted by the spill. If the RPWG's claims as to the spill's impact on wild salmon can be substantiated with documented scientific evidence, and natural recovery has not or will not occur in a reasonable time frame, then a review of fisheries enhancement techniques for wild salmon and the identification of potential restoration projects would be logical in principle.

It is hard to believe, however, that wild stocks could have been substantially impacted by the spill. Even if impacts had occurred, the enhanced escapements due to the fishery closure in 1989 and the extremely strong returns in 1990 and 1991 have unquestionably accelerated the natural recovery process.

Spawning Channel: The construction of a spawning channel for chum salmon in Pigot Bay (Project #3), on the surface, appears to be a reasonable restoration activity, assuming that evidence of injury can be substantiated. However, the RPWG has failed to provide any documented evidence of injury to chum salmon nor any assessment of natural recovery. Being outside of the spill-affected area, this project is a replacement alternative (actually restoration of habitat lost during the 1964

earthquake). It is highly doubtful that the project would satisfy any reasonable cost/benefit criterion. The number of fish produced is admittedly small and a small percentage of them would be actually harvested through recreational or commercial fisheries.

Dolly Varden and Cutthroat Trout: The proposed study for Dolly Varden and Cutthroat Trout (Study #7) has as its potential restoration objective the redirection of recreational fisheries away from impacted streams. The redirection of fisheries represents a logical approach towards enhancing the natural recovery process for impacted streams. However, the potential for spill-related injury to these two species is extremely unlikely because oil never entered their freshwater spawning habitats. The sensitive reproductive stages for both Dolly Varden and Cutthroat Trout occur only in freshwater, and both species show only minimal utilization of the marine environment impacted by the spill. Furthermore, if the by-catch (incidental take) associated with the commercial salmon fisheries is substantial, the incremental benefits of redirecting the recreational fishery would be marginal.

Coastal Habitat Monitoring: The coastal habitat monitoring study (Study #10) employs what, under some circumstances, could be a sound approach to monitoring of natural recovery -- comparison of oiled versus non-oiled areas. However, it is implausible that the acquisition of additional monitoring data is needed given the Trustee Council's extensive NRDA studies of this particular subject and NOAA's[3] own very positive assessment of the rapid natural recovery of the intertidal biota. Additionally, the study will not likely lead to any meaningful restoration alternative. For example, in the Draft Plan the RPWG recognized that pro-active restoration of rockweed is not technically feasible, and yet this study focuses on rockweed as one of its key species to monitor.

It is obvious from the above discussion that, although each of these studies and work plans may offer a reasonable approach to restoration, key evidence to support the assertions of injury is either omitted or non-existent and the status of natural recovery has been completely disregarded.

Many Studies and Plans are Unwarranted

Many of the proposed studies and work plans fail simple, common-sense and legal principles. At a minimum, restoration studies and work plans must be reasonably justified within the context of natural recovery. As explained previously, natural recovery, the "no-action restoration alternative", has been both rapid and effective.

Additionally, the use of proven technology is a prerequisite to the justification of restoration activities. The intent of Congress, and the focus of the NRDA regulations, was to provide for the timely and effective restoration of impacted resource services by relying on proven technology; it was definitely not to perpetuate basic research and the development of new, but unproven, scientific techniques.

Restoration activities must also satisfy rational cost/benefit trade-offs. In this regard, the RPWG has not met its obligation to look beyond the present science studies as to how the data will logically be used to identify and justify restoration needs. Even if potential restoration needs were to be identified, it is unlikely that the pace of natural recovery can be enhanced significantly relative to the cost of the restoration activity required to achieve a marginal benefit.

Finally, although monitoring studies are a logical stepping stone in assessing the rate of natural recovery and the likely benefits of restoration, the monitoring programs must be purposeful and logically connected to a spill-related injury and a meaningful restoration alternative.

Examples of monitoring studies proposed by the RPWG which do not meet these common-sense criteria are given below:

Harbor Seals: The lack of proven methods for harbor seal restoration is best evidenced by the fact that nothing was done in the years prior to the Valdez spill to counteract what had been a prolonged population decline. Although further study of harbor seal behavior and habitat (Study #1) might ultimately result in better management techniques, such studies develop new science rather than relying on proven technology for restoration.

The RPWG also failed to consider the impact of Native hunting in spill-affected areas. It is highly likely that Native take has and will continue to put much greater pressure on the local seal populations than the spill itself.

Killer Whales: In the case of killer whale monitoring (Study #2), there is no documented evidence of spill-related injury, the monitoring technology is not proven, and the RPWG has not established that data from this study is needed to identify a practicable restoration approach, if one is even required. It is well known that this particular species has suffered at the hands of commercial fishermen because it preys on long-line fisheries[8]. Members of the AB pod in particular have been involved and it has been reported that "some fishermen were retaliating by shooting the animals." In fact, 3 of 8 members of the AB pod reported missing by the end of 1986 were known to have "been wounded by gunshot in 1984/85." It would appear that stricter enforcement of the marine mammal protection act as it pertains to killer whales and commercial fisheries could be warranted -- but not as part of a restoration plan for alleged injuries due to the Valdez spill.

Sea Otters: Improving the government's ability to count sea otters (Study #3) has no utility in identifying restoration alternatives. Present

census techniques are adequate for the purpose of relative population estimates for oiled and non-oiled areas. Further, the study plan inappropriately implies that the spill is the only factor which influences sea otter population density and distribution.

Marbled Murrelets: The identification of habitats utilized by marbled murrelets (Study #4) fails to properly reflect the actual level of injury due to the spill and the likely status of natural recovery. According to Piatt and Lensink[9], only 612 marbled murrelets carcasses were collected from a summer population that easily exceeds 100,000 in PWS alone, and as many as 1,000,000 in the GOA[10]. Furthermore, the RPWG admits that this species is extremely scattered during the breeding season so that any restoration plan which proposed an alteration of logging patterns would not likely satisfy any reasonable cost/benefit criteria (too few marbled murrelets per acre of timber).

Harlequin Ducks: The analysis of harlequin duck breeding habitat (Study #5) fails to properly reflect the information available from the subsistence sampling program[11] that was conducted jointly by NOAA, the Alaska Department of Fish and Game, and Exxon. These ducks eat intertidal marine invertebrates. The results of the subsistence sampling program in conjunction with the excellent water quality and NOAA's own findings relative to the health of the intertidal biota raise serious questions regarding the justification for this study. Furthermore, the cost benefit questions raised for the marbled murrelet study are equally applicable to this study as well.

Black Oystercatchers: The study intended to examine the feeding ecology and reproductive success of black oystercatchers (Study #6) suffers from the same shortcomings as the harlequin duck study since these species utilize the same food source. It is also of interest to note that this study is, in essence, an extension of the 1989 NRDA shorebird study, which was not funded in the Trustees' 1990 NRDA program nor in their 1991

program. The strong implication is that the Trustees had concluded further study was not warranted.

Coded Wire Tagging: The salmon coded-wire tagging study (Study #8) ostensibly will develop information to better manage the mixed stock salmon fishery. It is an extension of the NRDA fish study #3 and there is no explanation as to how this data will augment or replace data from that study. As noted earlier, spill-related impacts on wild stock have not been substantiated and the current rate of return strongly suggests recovery has occurred even if there was an initial impact.

This study appears to be an attempt to better manage the wild stock given the impacts due to the introduction of the PWS hatcheries. In a recent article (August 23, 1991), the Alaska Commercial Fisherman[12] reported that:

> "There is growing evidence that increased hatchery production may be harming wild stocks and confounding the management of mixed salmon fisheries in Alaska."

It went on to say that:

> "...biologists are beginning to speculate that there may no longer be enough carrying capacity in the ocean to adequately feed the dramatically increased hatchery and wild runs of the past decade."

In citing two Alaska Department of Fish and Game (ADF&G) papers submitted to an international conference in Vancouver it reported:

> "One of the ADF&G papers examined the interaction of hatchery and wild stocks in PWS, Cook Inlet and Kodiak. It linked increased hatchery production with decreased fish weight in those areas."

It is obvious from these findings that impacts on the wild stock of salmon are not uniquely related to the Valdez spill.

Salmon Escapement: Escapement enumeration of pink salmon (Study #9) is very similar to Fish Study #1 in the 1991 NRDA Plan. Like the coded-wire tagging study it will develop management information on wild stock survival; and like the coded-wire tagging study it suffers from the same deficiencies enumerated above. Furthermore, the assertions of injury are inconsistent with the extremely strong stock returns in 1990 and 1991.

Hydrocarbon Monitoring: Monitoring studies would seem to be a logical part of restoration. However, once human services are restored and biologic activity is proceeding in an unimpaired manner, their only virtue is their contribution to scientific understanding. Given the Trustees' expenditure of $100M on previous related injury studies, further monitoring is superfluous.

With respect to human services, further monitoring of hydrocarbons in mussels (Study #11) is pointless given the findings of the subsistence sampling program[11] that was mentioned earlier. This sampling program found no problems with shellfish, except for those collected from the very few obviously oiled areas. Even then, the risks of consumption were found to be extremely low.

With regard to biological effects, NOAA found no evidence of residual oil causing sublethal effects by progressing up the foodchain. Results from NOAA's 1990 Shoreline Monitoring Program[13] noted that:

> "Chemical analyses of tissues from selected intertidal organisms indicated accumulation of hydrocarbons from the environment but no evidence of magnification through predator-prey interactions."

Thus, the governments' own findings contradict the need for this study.

Tidal Marshes: The tidal marshes (Study #12) affected in Prince William Sound are not the traditional tidal marshes associated with small plants and animals (i.e. wetlands). The affected tidal marshes tend to be peat bogs with minimal vegetation. Restoration steps would almost certainly be an extension of the cleanup effort which was determined to be detrimental by the French spill expert, Bernard Fichaut. Cleanup operations were examined by Fichaut and he concluded further work would undoubtedly do more harm than good[14]. This conclusion is supported by data from the Amoco Cadiz oil spill that show that oiled marshes are better left alone and should not be cleaned up. Cleanup and restoration activities were actually found to have delayed recovery of oiled marshes by an additional 2-3 years[15].

Legal and Regulatory Deficiencies

The Study and Work Plans have not corrected the deficiencies contained in the draft 1991 Restoration Work Plan.

In addition to the technical deficiencies with the proposed studies and work plans, the RPWG's implementation of the restoration planning process continues to contain legal and regulatory deficiencies as well.

ESC's comments on the Draft Plan (filed on April 12, 1991) noted, among other things, that the Draft Plan failed to contain information vital to understanding and evaluating the proposed restoration activities, such as the nature and extent of the resource injuries which justify active restoration measures or why the proposed restoration activity is the preferred restoration alternative. ESC's comments also noted that the Draft Plan did not incorporate nor follow the restoration planning procedures set forth in the DOI NRDA regulations, such as selecting the cost-effective alternative and limiting restoration activities to restoration of the injured resources to their baseline service levels. These deficiencies and the others noted in ESC's comments have not been addressed or corrected in the 1991 Restoration

Study Plan. Consequently, ESC reiterates and incorporates by reference its comments on the Draft Plan.

The proposed studies and work plans are inconsistent with the DOI NRDA regulations for determining restoration needs.

The proposed studies and work plans continue the pattern of departing from both the procedural and substantive requirements of the DOI NRDA regulations. Moreover, the Federal Register notice stated that the RPWG has evaluated each study and taken into account seven factors. Since these evaluations are not contained in the July 31, 1991 notice or the 1991 Restoration Study Plan, ESC cannot determine if the RPWG's evaluation of these projects is consistent with the DOI regulations. However, as noted elsewhere in these comments, several of the proposed studies and work plans appear to be inconsistent with the simple, common-sense evaluation principles contained in the current regulations as well as the Trustee Council's own standards.

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3. NOAA; "NOAA Review of Status of Prince William Sound Shorelines Following Two Years of Treatment by Exxon"; In: March 15, 1991 letter to RADM D. E. Ciancaglini by D. M. Kennedy.

4. "Two Years After Spill, Tourists Flock to Valdez"; by Doug Ford; Anchorage Times; August 28, 1991.

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RECEIPT

L&M COURIER INC.

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G. William Frick
Vice President and
General Counsel

September 12, 1991

Secretary, Restoration Planning Work Group
c/o Oil Spill Public Information Center
645 G Street
Anchorage, AK 99501

Re: 1991 Restoration Science Studies and Work Plans for the Exxon Valdez Oil Spill, 56 Fed. Reg. 36150 (July 31, 1991)

Dear Trustee Council Members:

The American Petroleum Institute (API) has reviewed the referenced studies and work plans on which the Trustees have invited public comment. API is a national trade association whose corporate and individual members are engaged in all facets of the petroleum industry. API's members therefore have a direct interest in the appropriateness of restoration studies and projects developed by public trustees for injured natural resources.

The costs of such studies and projects ultimately provide the basis for liability claims against responsible parties for natural resource injuries. Thus, whether a proposed study plan or restoration project affords an appropriate foundation for the imposition of liability hinges on its connection to a demonstrated injury and on whether it will contribute efficiently to its recovery. With that test in mind, and with respect to the studies and restoration projects on which comments have been sought, API is simply unable to comment meaningfully. This inability to properly comment is due to the Trustees' refusal to adequately describe the nature and extent of underlying injury to those resources which are the subject of its studies and plans.

In that regard, the Trustees state their intention "to seek costs for [these] restoration projects from responsible parties." 56 Fed. Reg. at 36150. API submits that this statement reflects the Trustees' approach since its efforts commenced in 1989 -- which assumes the legal "responsib[ility]" of a party for the multitude of plans and projects it has conceived. API submits that the Trustees' assumption that a "responsible party" exists with respect to their ambitious scientific study agenda is premature at best. Absent the Trustees' demonstration of injuries to natural resources caused by the Exxon Valdez Oil Spill (EVOS) and the cost-efficient contribution of their proposed restoration projects to the

recovery of those resources, the "responsibility" of any party is purely a matter of speculation.

The Trustees' failure to offer a qualitative rationale for these studies and plans, in terms of documenting underlying natural resource injuries, calls into question whether public comments have been solicited in good-faith. This questioning is reinforced by the Trustees' stated fact that "all of the studies described below are now underway." 56 Fed. Reg. at 36150. The Trustees' promise that comments "will be considered as the Trustee Council reviews the progress of these studies in 1991 and develop proposals for 1992" simply does not reverse API's impression that the public's participation and views have not and will not materially influence the assessment in this case. Id.

In frank terms, since the Trustees convened in 1989, each phase of this assessment has been shrouded in secrecy and conducted prior to the solicitation of the public's view of the marginal information released for its scrutiny. API submits that the Trustees' denial of meaningful public participation in this process and, in particular, its exclusion of the potentially responsible party, has resulted from its early decision to pursue a process culminating in litigation.

No one can dispute, however, the unfortunate and counterproductive consequences of this strategy. It has failed to produce the expeditious implementation of prudent environmental restoration measures in Prince William Sound. API maintains that the Trustees pursuit of an open and cooperative process, driven by (and therefore defensible on grounds of) scientific realities, would have better served the Trustees' and the public's shared environmental goals. The process embraced by the Trustees in this case has fostered polarization and precluded the early and cooperative settlement of liabilities. API continues to endorse the participatory model prescribed in the current regulations of the Department of the Interior, 43 C.F.R. Part 11, as most likely to promote the expeditious restoration of natural resources in the aftermath of an environmental incident.

In addition, although the Trustees assert that with respect to each study or project they have evaluated technical feasibility and the prospect for success, costs relative to the degree of injury and potential restoration outcome, and the likelihood of natural recovery, they offer slight evidence of their analyses in this regard. For example, Study 10 ("Monitoring Coastal Habitats at Herring Bay") ignores the natural recovery that has already occurred. Only one project, Project 3 ("Pigot Bay Chum Salmon

Spawning Channel Work Plan") offers any discussion of costs and benefits. Study 3 ("Population Assessment of the Prince William Sound Sea Otter Population") would develop new census and monitoring techniques, a pursuit which does not appear to have been properly assessed in accordance with the factors described above. In fact, many of the studies described would examine or develop new scientific techniques and the collection of scientific information which is not relevant to or explained in terms of achieving restoration of natural resources injured by the EVOS. The Work Group offers no linkage of its studies to any corresponding restoration projects which it may have conceived. Thus, a foundation for the imposition of liability with respect to the conduct of those studies is lacking.

Finally, API seriously questions whether the restoration which has resulted from natural recovery in Prince William Sound has been fully acknowledged by the Work Group in its deliberations. In general, compensation is available only for the costs of those restoration projects which will address the recovery which nature itself has not been able to rapidly achieve. This case involves a coastal and marine environment where the forces of natural recovery have, in fact, accomplished extensive restoration. The trustees' cursory consideration of the natural recovery in this case could jeopardize the plausibility of any subsequent liability claim they might assert.

In conclusion, API shares in the Trustees' ultimate goal of achieving a complete recovery of the rich abundance of natural resources in Prince William Sound. API also appreciates the Trustees' scientific and legal challenges in assessing natural resource damages. However, neither API, nor any of its members, will waive the Trustees' obligation of accountability to the public and to the potentially responsible party in this natural resource damage assessment. That accountability requires, at the very least, that the Trustees demonstrate that their studies and restoration projects are being pursued in a cost-effective manner (taking into account natural recovery) and will address documented injuries caused by the EVOS. The API submits that this obligation of accountability has not been satisfied and is long overdue.

Sincerely,

G. William Frick

G. William Frick
Vice President, General
Counsel and Secretary

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G. William Frick
Vice President and
General Counsel

September 12, 1991

Secretary, Restoration Planning Work Group
c/o Oil Spill Public Information Center
645 G Street
Anchorage, AK 99501

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