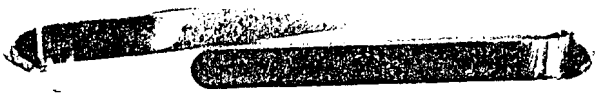

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. EXXON CORPORATION and EXXON SHIPPING COMPANY, Defendants.	NO. A90-015 CR O R D E R (Motions to Dismiss)

Defendant Exxon Corporation (Corporation) filed six separate motions to dismiss. One motion is to dismiss all five counts of the indictment "insofar as they attempt to charge offenses based on vicarious liability." The remaining five motions are each directed at obtaining dismissal of specific counts.

Defendant Exxon Shipping ("Shipping") filed six separate motions to dismiss. Two motions were directed at

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dismissing Count One. Two motions were directed at dismissing Count Four. One motion was directed at Count Two, and one motion was directed at Count Three. There was no motion directed at dismissing Count Five.

Corporation's Motion to Dismiss
All Counts--Vicarious Liability

Corporation moved, under Rules 12(b) and 7, Federal Rules of Criminal Procedure, to dismiss all counts insofar as they attempt to charge offenses based on vicarious liability. One basis is that the indictment fails to charge an offense because there is no legal or factual basis for imposing vicarious liability on a parent corporation for the alleged acts of a wholly-owned subsidiary, such as defendant Exxon Shipping. The other basis is that each count fails to contain a statement of essential facts constituting a basis for imposing vicarious liability.

The Government responded that the indictment states an offense for each count in that the indictment tracks the language of the statutes charged. The Government contends that it does not need to allege its theories of liability in the indictment. The Government characterizes Corporation's motion to dismiss as an inappropriate attempt for adjudication of the facts.

The superseding indictment states, at pages 2-3:

> 7. At all times pertinent to this indictment, EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON CORPORATION.

As a basis for this allegation, the indictment specifically alleges: (i) that Corporation was the sole shareholder of Shipping; (ii) that Shipping had a single director who reported to Exxon USA, a division of Corporation; (iii) that after its incorporation, Shipping took over the functions of the marine department of Exxon USA; (iv) that the primary purpose of the marine department had been to transport petroleum products for Exxon USA; (v) that Corporation or its affiliates were the source of all of Shipping's initial assets and personnel; (vi) that Corporation continues to be the primary source of capital for Shipping; (vii) that Shipping operated oil tankers, including the Exxon Valdez, for the benefit of Corporation; (viii) that Corporation guaranteed the debt issued by Shipping to build the Exxon Valdez; (ix) that Shipping's headquarters were in the same Houston, Texas, office building that housed Exxon USA's headquarters; (x) that Corporation provided all the computer, medical, accounting, administrative, and legal services used by Shipping; (xi) that Corporation set policies for Shipping regarding capital expenditures, personnel, employee compensation, alcohol abuse, and contracting; (xii) that the president of Shipping reported to a vice-president of Exxon USA; and (xiii) that all major investments by Shipping were subject to the approval of Corporation.

While the allegations indicate that Corporation and Shipping are closely related, no specific allegation was made

that Shipping is the agent or alter ego of Corporation. The allegations that were made could have supported either an agency theory or an alter ego theory or both theories. The Government is not required to allege its theory of the case so long as the essential facts necessary to apprise a defendant of the crime charged are alleged. United States v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982). Nevertheless, due to the complex and unusual nature of this case, the court previously determined that the Government should reveal its theory of liability as to Corporation. Consequently, in the bill of particulars filed on July 31, 1990, the Government stated that Corporation was liable for the acts of Shipping because Shipping was Corporation's agent. The Government also alleged that Corporation was liable for the acts of Shipping as a "person" under the statutes charged because Corporation controlled Shipping's policy determinations and operating structure as if Shipping were just another internal department of Corporation. The primary benefit of the bill of particulars was to clarify that the Government was not pursuing an alter ego theory. At oral argument, the Government again confirmed that it will not claim that Shipping was the alter ego of Corporation.

The criteria for measuring the sufficiency of an indictment being challenged are as follows:

> These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what

> he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

Russell v. United States, 369 U.S. 749, 763-764 (1962) (citations omitted); accord United States v. Buckley, 689 F.2d 893, 896 (9th Cir. 1982). Rule 7(c), Federal Rules of Criminal Procedure, under which Corporation brings its motion to dismiss, requires that the indictment be a "plain, concise and definite written statement of the essential facts constituting the offense charged." The courts have construed Rule 7(c) to require little more than that the indictment give the defendants sufficient notice of the crime. Buckley, 689 F.2d at 899 n.5. Under Rule 12(b), Federal Rules of Criminal Procedure, which Corporation also relies on for its motion, an indictment may be dismissed where there is an infirmity of law in the prosecution, but not where a determination of facts is required that should have been developed at trial. United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987).

As to the Government's agency theory, the existence or extent of any agency relationship is a question of fact for the jury. Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938).

Corporation's submission of evidence with its motion supports the Government's position that questions of fact are involved.[1]

Criminal liability may be imposed upon a business entity for acts or omissions of its agents within the scope of their employment. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972). Congressional intent to impose such criminal liability can be implied from the purpose of the legislation involved. Id. The acts which Corporation is charged with violating are all environmental protection acts. The Ninth Circuit stated, in finding an implied intent to hold corporations criminally liable for their agents' violations of the Sherman Act:

> With such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.

Hilton Hotels Corp., 467 F.2d at 1005. There are equally important public interests at stake with respect to protection of the environment. The same conclusion is necessary regarding the acts alleged violated in this case. Corporation may be held criminally responsible for the acts of its agent.

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[1] Exhibit A, Shipping's Navigation & Bridge Organization Manual; Exhibit B, Shipping's Delegation of Authority Guide; Exhibit C, Corporation's 1989 Annual Report; and Exhibit D, Corporation's 1986 Annual Report.

It does not matter that Shipping was a corporation which was organized in good faith and was not a sham. "[T]he interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement." Anderson v. Abbott, 321 U.S. 349, 362-363 (1944) (shareholders of bank-stock holding company held liable for statutory assessment on shares of insolvent national bank in portfolio of holding company).

Likewise, the Government's "person" theory turns on questions of fact as to whether Shipping is so controlled by Corporation that it is just a "part" of Corporation's vertically integrated petroleum business. If it is established that Shipping is just a "part" of Corporation, then Shipping's actions could be considered to be those of Corporation.[2]

There is no legal infirmity in the indictment which would require dismissal under Rule 12(b). For purposes of Rule 7(c), the indictment gives Corporation sufficient notice that it is charged for the acts of Shipping due to the existence of a relationship, however characterized, between Corporation and Shipping. The indictment specifies the factual basis for that relationship. Therefore, the motion to dismiss all counts

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[2] As stated above, the Government disclaims an alter ego theory. This argument and the facts which surround it are a part of the Government's agency theory. The Government expressly confirmed the latter at oral argument.

insofar as they attempt to charge offenses based on vicarious liability is denied.

Corporation's Motion to Dismiss
Count One (Clean Water Act)

Corporation moved to dismiss Count One, brought under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 & 1319, to the extent that it is alleged to be directly liable. Corporation adopted Shipping's motions to dismiss Count One on the issues of failure to charge an offense and of lack of fair notice.[3] In addition, Corporation contends there is no basis in the indictment for charging Corporation with violation of the CWA due to negligence of its policy-making, medical, or law departments. Corporation further contends that the indictment, as expanded by the bill of particulars, does not allege facts sufficient to charge Corporation with discharging a pollutant. Corporation also contends that the CWA does not impose "direct statutory liability" on a parent corporation for acts of its subsidiaries.

The Government responded that Corporation's arguments rely on issues of fact. The Government states that the failures of the medical, legal, and employee relations departments to evaluate and monitor were the proximate causes of the CWA violation. The Government repeats its argument from the vicarious liability motion to dismiss that Corporation is

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[3] Those issues will be addressed under Shipping's motion.

directly liable under the CWA because Shipping is an integral part of Corporation's vertically integrated petroleum business.

The indictment does not allege any actions or omissions of the medical, legal, or policy-making departments of Corporation. Therefore, there are no factual allegations to support the proximate cause theory. The allegations of such actions by Corporation departments appeared in the bill of particulars. However, a bill of particulars cannot save an invalid indictment. Russell, 369 U.S. at 770. Furthermore, the date of the crime charged in the indictment is March 24, 1989. The dates of the departmental acts alleged in the bill of particulars are years previous to March 1989.

The indictment does allege sufficient facts to support the "direct statutory liability" theory that Shipping is part of Corporation's vertically organized business. The CWA states that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). If Corporation is determined to have exercised sufficient control over Shipping, Corporation could be held liable for Shipping's actions.

Corporation's motion to dismiss Count One is denied because Count One of the indictment alleges the essential elements of the crime charged and sufficiently apprises Corporation of what it must defend against. The allegations made in the bill of particulars regarding the medical, legal, or policy-making departments do not change the sufficiency of the

indictment. This motion to dismiss is not the proper vehicle to rule on the admissibility of evidence regarding the acts of the medical, legal or policy-making departments of Corporation.

Corporation's Motion to Dismiss
Count Two (Refuse Act)

Corporation moved to dismiss Count Two, brought under the Refuse Act, 33 U.S.C. §§ 407 & 411, to the extent that it is alleged to be directly liable. Corporation adopted Shipping's motion to dismiss Count Two on the issue of failure to charge an offense.[4] Corporation's additional grounds for the motion were the same as those advanced for Count One: (i) no basis for charging Corporation with the alleged acts of its policy-making, medical, or legal departments; (ii) the indictment, as expanded by the bill of particulars, does not allege facts sufficient to charge Corporation with an offense under the Refuse Act; and (iii) the Refuse Act does not impose "direct statutory liability" on Corporation.

The Government's response was, likewise, identical to its response for Count One: (i) questions of fact are raised; (ii) failures of certain Corporation departments were the proximate cause; and (iii) Shipping is an integral part of Corporation's vertically integrated business.

Under Count Two, the indictment alleges no acts or omissions of any Corporation department. Therefore, there are

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[4] That issue will be addressed under Shipping's motion.

no factual allegations to support the proximate cause theory. The dates of departmental acts alleged in the bill of particulars are years prior to the March 24, 1989, date alleged in the indictment. As in Count One, however, the allegations made in the bill of particulars do not render the indictment insufficient.

The Refuse Act imposes liability on "[e]very person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation." 33 U.S.C. § 411. The indictment makes no allegation that Corporation "knowingly" aided, abetted, authorized, or instigated any violation. However, whether Corporation acted to violate the Refuse Act is a question of fact.

Corporation's motion to dismiss Count Two is denied because the essential elements of the crime are alleged and Corporation is sufficiently apprised of what it must defend against.

Motion to Dismiss Count Three
(Migratory Bird Treaty Act)

Corporation moved to dismiss Count Three, brought under the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703 & 707a, and 50 C.F.R. § 21.11, to the extent that it is alleged to be directly liable. Corporation adopted Shipping's motion to dismiss Count Three on the issue of failure to charge an

offense.[5] Corporation's additional grounds for the motion were the same as those advanced for both Counts One and Two: (i) no basis for charging Corporation with the alleged acts of its policy-making, medical or legal departments; (ii) the indictment, as expanded by the bill of particulars, does not allege facts sufficient to charge Corporation with an offense under the MBTA; and (iii) the MBTA does not impose "direct statutory liability" on Corporation.

The Government's response was, likewise, identical to its response for Counts One and Two: (i) questions of fact are raised; (ii) failures of certain Corporation departments were the proximate cause; and (iii) Shipping is an integral part of Corporation's vertically integrated business.

As with Counts One and Two, the indictment alleges no acts or omissions of any Corporation department. Therefore, there are no factual allegations to support the proximate cause theory. The dates of departmental acts alleged in the bill of particulars are years prior to the March 24, 1989, date alleged in the indictment. As in Counts One and Two, however, the allegations made in the bill of particulars do not render the indictment insufficient.

The indictment does allege sufficient facts to support the "direct statutory liability" theory as applied to the MBTA.

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[5] That issue will be addressed under Shipping's motion.

The MBTA states that "it shall be unlawful at any time, by any means or in any manner, to ... kill ... any migratory bird." 16 U.S.C. § 703. If Corporation's control over Shipping is determined to be sufficient, Corporation could be held liable for Shipping's actions which caused migratory birds to be killed.

Corporation's motion to dismiss Count Three is denied because the essential elements of the crime are alleged and Corporation is sufficiently apprised of what it must defend against.

Corporation's Motion to Dismiss
Count Four (Ports & Waterways Safety Act)

Corporation moved to dismiss Count Four, brought under the Ports & Waterways Safety Act ("PWSA"), 33 U.S.C. § 1232(b)(1), and 33 C.F.R. § 164.11(b), to the extent that it is alleged to be directly liable. Corporation adopted Shipping's motion to dismiss Count Four on the issues of failure to charge an offense and for an election due to the duplicitous nature.[6] In addition, Corporation contends that the indictment, as expanded by the bill of particulars, fails to allege the essential element of willful and knowing misconduct by Corporation. Corporation further contends that the PWSA and its regulations do not impose "direct statutory liability" on a parent corporation for acts of its subsidiaries.

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[6] Those issues will be addressed under Shipping's motion.

While the Government responded specifically to Counts One, Two, and Three, any response directed at Count Four was buried in the general objections made. In view of the fact that the Government stated in the bill of particulars that no Corporation officer or employee was alleged to have violated the PWSA, the Government's response appears to be focused on the "integral part of Corporation's vertically integrated business" theory. Basically, the Government argues that Shipping functions as an "employee", and that Corporation cannot avoid responsibility for Shipping's actions by drawing internal corporate boundaries.

The PWSA holds liable "[a]ny person who wilfully and knowingly violates this chapter or any regulation issued hereunder." 33 U.S.C. § 1232(b)(1). The indictment alleges that both Corporation and Shipping willfully and knowingly failed to ensure that the wheelhouse was competently manned, even though the bill of particulars states that no Corporation officer or employee violated the regulation. However, since the indictment also alleges a close relationship between Shipping and Corporation, the relationship, if proved, is sufficient to attribute those willful and knowing acts to Corporation. The relationship is a question of fact.

Corporation's motion to dismiss Count Four is denied because the indictment alleges the essential elements of the crime charged and Corporation is sufficiently apprised of what

it must defend against. The allegation made in the bill of particulars does not render the indictment insufficient.

Corporation's Motion to Dismiss
Count Five (Dangerous Cargoes Act)

Corporation moved to dismiss Count Five, brought under the Dangerous Cargoes Act ("DCA"), 46 U.S.C. § 3718(b), and 46 C.F.R. § 35.05-20, to the extent that it is alleged to be directly liable. Corporation contends that the indictment, as expanded by the bill of particulars, fails to allege the essential element of willful and knowing misconduct by Corporation in violation of the DCA. In addition, Corporation contends that the DCA and its regulations do not impose "direct statutory liability" on a parent corporation for acts of its subsidiaries.

In view of the fact that the Government stated in the bill of particulars that no Corporation officer or employee was alleged to have violated the DCA, the Government's response appears to be focused on the "integral part of Corporation's vertically integrated business" theory. The Government argues that Shipping functions as an "employee", and that Corporation cannot avoid responsibility for Shipping's actions by drawing internal corporate boundaries.

The DCA holds liable "[a] person willfully and knowingly violating this chapter or a regulation prescribed under this chapter." 46 U.S.C. § 3718(b). The indictment alleges that both Corporation and Shipping willfully and knowingly caused

incompetent persons to be employed on a tanker vessel, even though the bill of particulars states that no Corporation officer or employee violated the regulation. However, since the indictment also alleges a close relationship between Shipping and Corporation, the relationship, if proved, is sufficient to attribute those willful and knowing acts to Corporation. The relationship is a question of fact.

Corporation's motion to dismiss Count Five is denied.

Motion to Dismiss Count One
--Failure to Charge an Offense

Shipping moved to dismiss Count One for failure to charge an offense. Count One is based on section 301 of the Clean Water Act ("CWA"), 33 U.S.C. § 1311, which makes unlawful the discharge of any pollutant from any "point source" into waters of the United States unless authorized pursuant to the provisions of the CWA. Section 301 is enforced through section 309 of the CWA, 33 U.S.C. § 1319.

Shipping contends that Count One rests upon the erroneous premise that accidental oil spills caused by negligent operation of vessels are subject to criminal prosecution under section 309(c) of the CWA. Shipping further contends that while the "discharge of a pollutant" from a "point source" is prohibited by sections 309(c) and 301(a) of the CWA, oil is not a pollutant under the CWA and the Exxon Valdez, designed solely as a means of transporting cargo oil, was not a point source under the CWA.

The Government responded that oil is a pollutant for purposes of the CWA and that the Exxon Valdez is a point source under the CWA. Furthermore, the Government responded that the civil liability provisions of section 311 of the CWA, 33 U.S.C. § 1321, which addresses oil and hazardous substance liability, do not preempt criminal liability for oil spills under section 309 of the CWA.

The CWA provides, at section 301(a):

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

The parties agree that the exceptions listed in section 301(a) have no bearing on this case. The parties focus their disagreement on the meaning of the word "pollutant". Section 502(6) of the CWA defines "pollutant":

> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to faciliate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such

> injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6).

While the Government argues that this definition includes oil, it fails to designate which term in the definition encompasses oil. In its reply, Shipping speculated that the Government might have meant to include oil under "industrial waste". In United States v. Hamel, 551 F.2d 107, 110 (6th Cir. 1977), the Government argued that gasoline could be subsumed under "biological materials" in section 1362(6). The court in Hamel noted the potential applicability of the phrase "chemical wastes" in section 1362(6). Hamel, 551 F.2d at 110 n.3.

None of the terms defining pollutant are defined themselves. Industrial waste, biological materials, and chemical waste are all broad enough terms to include oil. At the very least, oil is an organic chemical. Shipping argues, however, that it is not a "waste", which is also an undefined term. One definition of waste is: "damaged, defective, or superfluous material produced during or left over from a manufacturing process or industrial operation". Webster's Third New International Dictionary (Unabridged) at 2580 (1981). That definition is further defined to include: fluid allowed to escape without being utilized. Id. Under that definition, an oil spill is chemical waste. See United States v. Hamel, 551 F.2d 107 (6th Cir. 1977) (gasoline was held to be a pollutant

under the CWA although the court reached that conclusion by incorporating the broad proscription of the Refuse Act of 1899, 33 U.S.C. § 407, into the CWA); In re Chevron USA, Inc., No. IX-FY88-54, slip op. (Environmental Protection Agency, May 3, 1990) (Government's Response in Opposition, Exhibit 2) (spill of jet fuel from pipeline was determined to be violation of section 301(a) of the CWA). In United States v. Standard Oil Company, the Supreme Court refused to distinguish between waste oil and valuable oil for purposes of the prohibitions of the Refuse Act, 33 U.S.C. § 407.

> Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant.

384 U.S. 224, 226 (1966). This court reaches the same conclusion with respect to the CWA.

An additional point of disagreement between the parties is whether the Exxon Valdez is a "point source". Section 301(a) of the CWA refers to "the discharge of any pollutant". Section 502(12) of the CWA defines that phrase:

> (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source ....

33 U.S.C. § 1362(12).

The term "point source" is also defined in section 502 of the CWA.

> (14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigation agriculture.

33 U.S.C. § 1362(14).

Despite Shipping's arguments that EPA regulations exclude vessels from National Pollutant Discharge Elimination System ("NPDES") coverage under the CWA, there is nothing in the wording of the CWA to indicate such a conclusion. "Point source" is defined to expressly include vessels, and no distinction is included in that definition to exclude any vessel based on the use that is made of the vessel. Every identifiable point that emits pollution is a point source which must be authorized by a NPDES permit issued by EPA. United States v. Tom-Kat Development, 614 F. Supp. 613, 614 (D. Alaska 1985).

> The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States. It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution.

> We believe it contravenes the intent of FWPCA [CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point.

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). The Exxon Valdez has to be considered a point source within the definition of the CWA.

Shipping's last argument is that the comprehensive terms of section 311 of the CWA show that Congress intended it to be the exclusive source of regulation under the CWA for oil spills. Section 311 of the CWA is a lengthy section which specifically addresses oil and hazardous substance liability. 33 U.S.C. § 1321. With the exception of the criminal penalty imposed in subsection 311(b)(5) for failure to report a discharge of oil or other hazardous substance, the liability imposed in section 311 is civil.

There is no language in section 311 to indicate that section 311 preempts the civil or criminal liability imposed in section 309 of the CWA. The CWA regulates oil pollution under two separate schemes. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 490 n.9 (9th Cir. 1984), cert. denied, 471 U.S. 1140 (1985). The first is found in section 311 (33 U.S.C. § 1321) and the second is the NPDES permit system found in sections 301 and 402 (33 U.S.C. §§ 1311 & 1342). Id. Section 311(b)(6)(E) merely provides: "[c]ivil penalties shall not be assessed under both this section and section 1319 [section 309 of the CWA] of this

title for the same discharge." 33 U.S.C. § 1321(b)(6)(E). The court in United States v. Hamel concluded that section 311 did not preempt the criminal penalties of section 309.

> Although in contrast § 1321 [section 311 of the CWA] explicitly defines "oil" as within its coverage along with "hazard- ous substances", [footnote omitted] we do not believe that that specificity of definition alone indicates that § 1321 was intended to be the sole Congressional ex- pression on oil discharges. The language of § 1321 indicates that a primary concern is to arrange for the removal of oil spills in navigable water, § 1321(c), with the liability for the costs of removal assessed against the discharger. § 1321(f) . . . . the primary concern is the preservation of the environment, not the imposition of criminal penalties. However, the existence of criminal sanctions outside of the section is explicitly acknowledged. To further cooperation and "to facilitate the mitigation of pollution damage", [citation omitted], notification of an oil spill by a discharger or "exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." § 1321(b)(5).

Hamel, 551 F.2d 107, 111-112 (6th Cir. 1977).

Shipping's motion to dismiss Count One for failure to charge an offense, which was adopted by Corporation, is denied as to both defendants.

Shipping's Motion to Dismiss
Count One--Lack of Fair Notice

Shipping moved to dismiss Count One on the ground that it fails to provide fair notice of the allegedly negligent conduct elemental to the offense charged as required by the Sixth

Amendment and by Rule 7(c)(1), Federal Rules of Criminal Procedure. Count One charges that on March 24, 1989, Shipping negligently caused pollutants to be discharged from a point source into navigable waters without a permit, in violation of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1).

Shipping contends that Count One is fatally flawed because it fails to specify any particular negligent acts or omissions. Shipping argues that paragraph 14 of the superseding indictment, which contains the charging language, does not describe the negligent conduct that caused the discharge. Shipping states that paragraph 11 is the only possible indication of negligent conduct. Paragraph 11 says, in substance: (1) the ship left the designated shipping lanes; (2) the master left the ship's bridge; (3) the ship then proceeded under the direction of an officer who lacked the required Coast Guard certification for pilotage in Prince William Sound; and (4) the ship was proceeding under the direction of a helmsman who was incompetent at performing his assigned duties. Shipping focuses on the fact that the indictment does not actually say that the conduct referred to in paragraph 11 constitutes the negligence underlying Count One.

Shipping further contends that the allegations of specific instances of negligence presented by the Government as particulars cannot be implied from Count One of the superseding indictment. Shipping states that if this motion is denied, it

plans to move in limine to exclude from proof all allegations of negligence falling outside the scope of paragraphs 11 and 12.

The Government responded that Count One more than sufficiently sets forth the facts necessary for Shipping to prepare its defense.

Shipping received adequate notice of the charge alleged in Count One.

> An indictment is sufficient if it contains the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy.

United States v. Buckley, 689 F.2d 893, 896 (9th Cir. 1982), cert. denied, 460 U.S. 1086 (1983). Count One provides: the identity of the defendants and their relationship to one another (paragraphs 1-7); that at all relevant times Shipping employed the personnel aboard the Exxon Valdez who were responsible for the operation, direction, and control of the ship (paragraph 8); that on March 23, 1989, the Exxon Valdez, carrying 53 million gallons of crude oil, departed from the designated shipping lanes in Prince William Sound which are used by ships entering and leaving the Port of Valdez (paragraphs 9-10); that after such departure, the master left the ship's bridge and placed control of the vessel under the direction of an officer lacking the requisite certification and a helmsman who was known by Shipping to be incompetent at performing his assigned duties (paragraph 11); and that, on March 24, 1989, the Exxon Valdez ran aground

on Bligh Reef, a know navigational hazard, and discharged more than 10 million gallons of crude oil into the Sound (paragraph 12). Paragraph 14 contains the charging language which tracks the critical language of the statute and makes the allegation that the discharge was the result of negligent conduct. There is no real question that Count One states the elements of the offense intended to be charged, and sufficiently apprises Shipping of what it must be prepared to meet. Russell v. United States, 369 U.S. 749, 763 (1962).

However, Shipping's arguments regarding the facts alleged as particulars may be well taken. The particulars provided by the Government by letter dated April 18, 1990, are as follows:

> Count One
>
> The negligent conduct that forms the basis of the charge, and which is attributable to each of the defendants, includes the following:
>
> 1. Exxon Corporation's and Exxon Shipping's failure to exercise due care, by promulgating and implementing policies that permitted employees suffering from alcohol abuse problems to hold safety-sensitive positions.
>
> 2. The failure of Exxon Corporation and Exxon Shipping, through the omissions of the medical and legal departments of Exxon USA and the managers of Exxon Shipping, to evaluate Joseph Hazelwood's fitness for duty upon completion of his treatment for alcohol abuse in 1985, and to properly monitor and evaluate him from that time until March 2, 1989.

3. Exxon Shipping's failure to relieve Joseph Hazelwood from his position as a tanker master after company managers received notice on several occasions in 1988 and February 1989 that he continued to abuse alcohol.

4. Joseph Hazelwood's consumption of alcohol on March 23, 1989.

5. Joseph Hazelwood's absence from the bridge of the Exxon Valdez during a critical maneuver on March 23 and 24, 1989, leaving the bridge undermanned and under the control of an inexperienced officer who lacked the required pilotage certification, and of an incompetent helmsman.

6. The decision by managers of Exxon Shipping to assign Robert Kagan to serve as an able seaman aboard the Exxon Valdez, despite their knowledge that he was incompetent to hold that position.

7. Gregory Cousin's failure to exercise due care in executing a critical maneuver by the Exxon Valdez.

8. Robert Kagan's failure to exercise due care in executing a critical maneuver by the Exxon Valdez.

Items 1 through 3 regarding personnel policies, actions by the medical and legal departments, and Shipping's failure to relieve Hazelwood after notice of his alcohol abuse are probably outside the scope of the indictment because that conduct occurred years before the conduct alleged in the indictment. A motion in limine may be warranted as to this proof.

Shipping's motion to dismiss Count One for lack of fair notice, which was adopted by Corporation, is denied as to both defendants.

Shipping's Motion to Dismiss
Count Two--Failure to Charge an Offense

Shipping moved to dismiss Count Two for failure to charge an offense. Count Two charges a violation of the Refuse Act, 33 U.S.C. §§ 407 & 411. Shipping's motion is based on two separate grounds. First, Shipping contends that the criminal enforcement provisions of the Refuse Act have been entirely superseded by the oil spill provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1321. Second, Shipping contends that the Refuse Act does not impose strict liability on a vessel owner and, therefore, the indictment must allege that the offense was committed with the vessel owner's privity and knowledge.

The Government responded that the Refuse Act is fully enforceable and that it imposes strict liability on shipowners who violate the statute.

The 1972 amendments to the CWA, which added the oil spill provisions in 33 U.S.C. § 1321, also included a savings clause at 33 U.S.C. § 1371. Section 1371(a) is applicable to this issue and provides as follows:

> This chapter shall not be construed as (1) limiting the authority or function of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the the Act of March 3, 1899 (30 Stat. 1112) [Refuse Act]; except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to

> section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

The Government argues that section 1371(a)(1) means that other laws and regulations which may govern the same conduct as the CWA remain fully enforceable as long as they are not inconsistent with the statute.

Violation of the Refuse Act, 33 U.S.C. §§ 407 & 411, is a strict liability crime. United States v. Hamel, 551 F.2d 107, 113 n.9 (6th Cir. 1977); United States v. Ashland Oil Inc., 705 F. Supp. 270, 276 (W.D. Pa. 1989). Section 1319 (CWA section 309) provides a harsher penalty for the discharge of oil with the added burden on the Government of proving scienter. Hamel, 551 F.2d at 113 n.9. The court in United States v. Hamel concluded that section 1319 was, therefore, not inconsistent with the Refuse Act. Id. In United States v. Ashland Oil, Inc., 705 F. Supp. 270 (W.D. Pa. 1989), criminal charges were pursued under both the Refuse Act and the CWA. Compare United States v. Dixie Carriers, Inc., 462 F. Supp. 1126, 1130 (E.D. La. 1978), aff'd., 627 F.2d 736 (1980) (Refuse Act and CWA were found to be incompatible only "on a narrow, isolated point--recovery of the full amount of the actual costs of cleaning up an oil spill.")

Subsection (a)(2)(B) of the saving clause, 33 U.S.C. § 1371(a)(2)(B), has also been held to explicitly preserve the Refuse Act. United States v. Rohm & Haas Co., 500 F.2d 167, 170 n.1 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975); United

States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556, 559 (N.D. Ill. 1973). The Senate Report for the Federal Water Pollution Control Act Amendments of 1972 specifically stated: "[t]he Administrator retains, without qualification, the authority presently available under the Refuse Act to prosecute for unlawful discharges." S. Rep. No. 414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3730.

The 1972 amendments to the CWA do not preempt the criminal penalties available under the Refuse Act.

Shipping's second ground is that the Refuse Act was not intended to impose liability upon shipowners absent a showing that they, not the master or crew, caused the discharge. Section 411 states, in part:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor ....

33 U.S.C. § 411. The Government argues that Count Two is sufficient even though Shipping is not alleged to have knowledge or scienter, because under the wording of section 411 the Government may proceed against a corporation either for violating section 407 or for "knowingly" aiding, abetting, authorizing, or instigating a violation of section 407. Count Two of the superseding indictment alleges that Shipping violated section 407, not that it aided, abetted, authorized, or instigated a violation.

Shipping's argument that the Refuse Act should be construed consistently with admiralty principles that hold vessels in rem, but not shipowners, strictly liable for the acts of a crewmember is not applicable to criminal violations which are governed by statute.

Count Two is sufficiently alleged in the superseding indictment. Shipping's motion to dismiss, which Corporation adopted, is denied as to both defendants.

Shipping's Motion to Dismiss
Count Three--Failure to Charge an Offense

Shipping filed a motion to dismiss Count Three for failure to charge an offense. Count Three charges a misdemeanor violation of the MBTA. Shipping contends that Count Three must be dismissed because it fails to allege scienter in that it did not allege that Shipping killed migratory birds "unlawfully or intentionally".

Shipping argues that the MBTA imposes criminal liability without proof of mens rea only where a defendant: (1) intentionally engages in conduct designed to kill migratory birds or to profit from their sale, or (2) has intentionally released toxic substances in areas where it knew or should have known they could pose a significant threat of killing migratory birds. Shipping maintains that the MBTA does not impose strict criminal liability in a case such as this where there was no intentional release of toxic substances.

The Government responded that the MBTA is a "public welfare" statute which imposes criminal liability without proof of fault in order to protect important public interests. The Government argues that intent is not an element of the misdemeanor violation of the MBTA.

Shipping is charged with violating 16 U.S.C. § 703, which provides that except as permitted by regulations "it shall be unlawful at any time, by any means or in any manner" to kill any migratory bird. The misdemeanor criminal penalties for violation of section 703 are provided in 16 U.S.C. § 707(a), which reads as follows:

> (a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provision of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

The language of section 707(a) does not impose a scienter requirement, nor have the courts read one into it. In sharp contrast are the felony provisions contained in section 707(b), which provide:

> (b) Whoever, in violation of this subchapter, shall knowingly--
>
> (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

> (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

The court in United States v. Reese, 27 F. Supp. 833, 835 (W.D. Tenn. 1939), determined that Congress deliberately omitted scienter as an essential element of the misdemeanor offense. Other courts have held that the MBTA is a strict liability statute without a scienter requirement for the misdemeanor offense. See United States v. Van Fossan, 899 F.2d 636, 639 (7th Cir. 1990); United States v. Rollins, 706 F. Supp. 742, 745 (D. Idaho 1989).

Count Three of the superseding indictment charges that from March 24, 1989 through November 9, 1989, crude oil discharged from the Exxon Valdez into Prince William Sound and beyond, and that from March 24, 1989 until September 25, 1989, Shipping killed migratory birds without being permitted to do so, in violation of the MBTA. That is sufficient for purposes of the motion to dismiss.

In United States v. Rollins, 706 F. Supp. 742, 745 (D. Idaho 1989), the court ruled that the MBTA was unconstitutionally vague as applied to a defendant who inadvertently killed geese which ate alfalfa in a field defendant had sprayed with pesticides. The court there ruled that under the facts of that case, which were that the field was not a known feeding area for geese, the MBTA did not give fair notice as to

what constituted illegal conduct so that that defendant could conform his conduct accordingly. Id. at 745. At this point, no such ruling could be made in this case. Whether Shipping had fair notice that the MBTA would be violated by an oil spill from a tanker[7] or whether Shipping was powerless to stop the violation are questions of fact that must be determined at trial.

Shipping's motion to dismiss Count Three, which Corporation adopted, is denied as to both defendants.

Shipping's Motion to Dismiss
Count Four--Failure to Charge an Offense

Shipping moved to dismiss Count Four for failure to charge an offense. Count Four charges that Shipping and Corporation knowingly and willfully violated 33 C.F.R. § 164.11(b)(1988), a regulation enforced under the PWSA, which requires the "owner, master, or person in charge" of a vessel to ensure that the wheelhouse of the vessel is constantly manned by competent persons while underway. In voluntary particulars provided in a letter dated April 5, 1990,[8] the Government stated "[r]egarding Count Four, the persons who were incompetent to direct and control the movement of the Exxon Valdez are Joseph Hazelwood, Gregory Cousins, and Robert Kagan."

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[7] The Government raised this issue of fact by submitting the Final Environmental Impact Statement for the Trans-Alaska Pipeline as Exhibit 1 to its response.

[8] Attachment 1 to Shipping's Motion to Dismiss Count Four or Require an Election (Clerk's Docket No. 60).

Shipping contends that Count Four should be dismissed because the cited regulation, 33 C.F.R. § 164.11(b), has no application to the assignment of a helmsman's (Kagan) duties aboard a vessel. Shipping argues that a helmsman's duties are addressed by 33 C.F.R. § 164.11(j), for violation of which Shipping is not charged. Shipping further contends that 33 C.F.R. § 164.11(b) describes duties that must be discharged by the master or person in charge of a vessel, not the vessel owner. Shipping argues that it cannot otherwise be liable for the actions of the master.

The Government responded that the plain language of the charged regulation refutes Shipping's arguments.

The Government is correct. The regulation, 33 C.F.R. § 164.11(a) and (b), states as follows:

> The owner, master, or person in charge of each vessel underway shall ensure that:
>
> (a) The wheelhouse is constantly manned by persons who:
>
> (1) Direct and control the movement of the vessel; and
>
> (2) Fix the vessel's position;
>
> (b) Each person performing a duty described in paragraph (a) of this section is competent to perform that duty;

The vessel owner is expressly one of the persons listed as being responsible for compliance. The fact that the regulation states "owner, master, or person in charge" does not relieve the owner of any responsibility.

Section 164.11(j) requires the owner, master, or person in charge to have a competent helmsman in the wheelhouse at all times. It states as follows:

> (j) A person whom he has determined is competent to steer the vessel is in the wheelhouse at all times.

33 C.F.R. § 164.11(j)(1988). A decision on whether a person who steers the vessel (helmsman) is also a person who directs and controls the movement of the vessel for purposes of section 164.11(a) will turn on questions of fact.

Shipping also argues that the ordinary attribution doctrine for corporate employees is inapplicable because Coast Guard regulations make the master, not the vessel owner, responsible for compliance with 33 C.F.R. § 164.11(a) & (b). Nothing in the PWSA, other regulations, or maritime law exempts vessel owners from the operation of the ordinary doctrine of corporate criminal liability which imputes the actions of an agent to his principal. Nothing in 33 C.F.R. § 164.11 does either.

Shipping's motion to dismiss Count Four for failure to charge an offense, which Corporation adopted, is denied as to both defendants.

Shipping's Motion to Dismiss
Count Four or To Require an Election
Due to the Duplicitous Nature

Shipping moved to dismiss Count Four or to require an election on the grounds that Count Four, as supplemented by

particulars, is impermissably duplicitous. Count Four charges that Shipping and Corporation knowingly and willfully violated 33 C.F.R. § 164.11(b) (1988), a regulation enforced under the PWSA, which requires the "owner, master, or person in charge" of a vessel to ensure that the wheelhouse of the vessel is constantly manned by competent persons while underway. In voluntary particulars provided in a letter dated April 5, 1990,[9] the Government stated "[r]egarding Count Four, the persons who were incompetent to direct and control the movement of the Exxon Valdez are Joseph Hazelwood, Gregory Cousins, and Robert Kagan."

Shipping contends that Count Four is duplicitous in that it consolidates, in one count, between three and six separate violations of the regulation, 33 C.F.R. § 164.11(b). The duplicitousness results from Shipping being charged both as the vessel owner and as a result of the actions taken by its agent, Captain Hazelwood, for failing to ensure that each of the three named persons was competent to perform his duties. Shipping argues that as a result, its rights to a fair trial and a unanimous jury verdict will be prejudiced.

The Government clarified that it sought criminal liability imposed against Shipping, as the vessel owner, for assigning Hazelwood and Kagan to the Exxon Valdez with full

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[9] Attachment 1 to Shipping's Motion to Dismiss Count Four or Require an Election (Clerk's Docket No. 60).

knowledge that they were not competent to perform their duties, and against Shipping for Hazelwood's action, within the scope of his employment, in leaving Cousins in the wheelhouse with full knowledge that Cousins was legally incompetent to navigate Prince William Sound alone.[10] The Government only seriously contested that Count Four is duplicitious at the hearing. In the briefing, the Government merely responded that Shipping failed to meet its burden of proving that its Sixth Amendment right to a unanimous jury verdict has been or will be jeopardized. The Government suggested that a specific unanimity instruction to the jury is available to cure any potential prejudice to Shipping.

Duplicity, as the term applies to indictments, is the joining of two or more distinct and separate offenses in a single count. United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). Charging two offenses in one count of an indictment is contrary to Rule 8(a), Federal Rules of Criminal Procedure, which provides that an indictment contain "a separate count for each offense." United States v. Aguilar, 756 F.2d 1418, 1420 n.2 (9th Cir. 1985).

> One vice of duplicity is that a jury may find a defendant guilty on a count without having reached a unanimous verdict on the commission of a particular offense. This may conflict with a defendant's Sixth Amendment rights and may also prejudice a subsequent double jeopardy defense.

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[10] Government's Response to Shipping's Motion to Dismiss Count Four for Failure to Charge an Offense, at 13 (Clerk's Docket No. 74).

United States v. UCO Oil Co., 546 F.2d at 835. A single count of an indictment should not be found impermissibly duplicitous whenever it contains several allegations that could have been stated as separate offenses, but only when the failure to do so risks unfairness to the defendant. United States v. Margiotta, 646 F.2d 729, 733 (2d Cir. 1981).

It is more likely than not that the complexity in Count Four will prejudice Shipping. Not only is the Government alleging that three separate crew members were incompetent, but it is also alleging that Shipping is liable in two different capacities, that of vessel owner and that of an agency principal. As potentially complicated as Count Four could appear to a jury, it would risk unfairness to Shipping, and possibly a non-unanimous verdict, to deny the motion entirely. However, dismissing Count Four is too harsh a remedy since election is an acceptable alternative. United States v. Aguilar, 756 F.2d 1418, 1423 (9th Cir. 1985).

Shipping's motion to dismiss Count Four, which Corporation adopted, is denied. Shipping's alternative motion to require an election is granted. The Government is granted until November 13, 1990, within which to designate, through the use of a bill of particulars (or amendment to the existing bill of particulars), which capacity Shipping will be prosecuted under for purposes of Count Four.

Summary

All six motions to dismiss filed by Corporation are denied. All six motions to dismiss filed by Shipping are also denied. Shipping's alternative motion to require an election in Count Four is granted. The Government has until November 13, 1990, within which to make its election.

DATED at Anchorage, Alaska, this 27 day of October, 1990.

United States District Judge

cc: M. Davis
J. Clough
R. Bundy
P. Lynch
C. Matthews