No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX VOLUME FOUR [Pages 1495 - 1582]

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Petition for Writ of Certiorari Filed August 20, 2007
Certiorari Granted October 29, 2007

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APPENDIX Z

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JOSEPH HAZELWOOD	)
	)
Defendant.	)
	)

Case No. 3AN-S89-7217 Cr.
Case No. 3AN-S89-7218 Cr.

VERDICT I

We, the jury, find the defendant, Joseph Hazelwood ,_____, Not Guilty of criminal
guilty / not guilty
mischief in the second degree as charged in the indictment.

DATED at Anchorage, Alaska, this 22nd day of March, 1990.

/s/
Foreman of the Jury

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH HAZELWOOD)
)
Defendant.)
)

Case No. 3AN-S89-7217 Cr.
Case No. 3AN-S89-7218 Cr.

VERDICT II

We, the jury, find the defendant, Joseph Hazelwood ,_____, Not Guilty of operating
guilty not guilty
a watercraft while under the influence of intoxicating liquor as charged in Count I of the information.

DATED at Anchorage, Alaska, this 22nd day of March, 1990.

/s/
Foreman of the Jury

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH HAZELWOOD)
)
Defendant.)
)

Case No. 3AN-S89-7217 Cr.
Case No. 3AN-S89-7218 Cr.

VERDICT III

We, the jury, find the defendant, Joseph Hazelwood ,_____, Not Guilty of reckless endangerment as charged in Count II of the information.
guilty / not guilty

DATED at Anchorage, Alaska, this 22nd day of March, 1990.

/s/
Foreman of the Jury

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs

EXXON CORPORATION AND EXXON SHIPPING COMPANY,

Defendant.

No. A90-015 CRIMINAL

CHANGE OF PLEA
OCTOBER 8, 1991
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PROCEEDINGS

October 8, 1991

THE CLERK: All rise. His Honor the court, the United States District Court for the District of Alaska is now in session. The Honorable H. Russell Holland presiding. Please be seated.

THE COURT: Good morning ladies and gentlemen. We have set this morning the consideration of a proposed change of plea in case A90-15 Criminal, the United States of America v. Exxon Corporation and Exxon Shipping Company.

We also have for consideration civil cases A-91-82 and 83, which are respectively, United States of America v. Exxon Corporation and State of Alaska v. Exxon Corporation. Because these matters are interrelated, we will be considering both

of them at the same time.

Those of you who are standing in the back, I understand this is an uncomfortable situation. We took a hard look at whether we should move somewhere else in the building this morning, and it's kind of a push. If we move to another courtroom, we haven't got room for the attorneys that need to participate in this matter. And if we stay here it is uncomfortable for some of you. I'm afraid the facts of life are that I need these lawyers this morning somewhat more than I need the audience. We appreciate your all being here and your interest in this matter, but I think it best if we stay here where the lawyers have sufficient room to maneuver and work.

In preparation for today's hearing, I have considered a number of filings that have been made by the parties. We received a Notice of Intent to Change Plea on behalf of Exxon Corporation and Exxon Shipping Company. We've received and considered a proposed plea agreement with appendices. We've received a government memorandum in aid of sentencing. We received a joint sentencing memorandum on behalf of Exxon Corporation and Exxon Shipping Company. We've received a joint memorandum in support of the agreement and consent decree, which is proposed for cases A91-82 and 83 civil.

I have received a couple of pieces of miscellaneous correspondence, which are substantially of the same ilk as the public comment that we took earlier, and that hasn't been available to all counsel. With that introduction, let's take appearances, first from the government, if you please.

MR. DEMONACO: Yes. Your Honor, for the government, the Assistant Chief, Environmental Crime Section. To my right is Barry M. Hartman, who is the Acting Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice. And to his right is Charles E. Cole, Attorney General, State of Alaska. To Mr. Cole's right is Mark Davis. He is a Special Assistant United States Attorney for the district of Alaska. And behind us here at counsel table, we have Gregory Linson, who is with the United States Department of Justice, Environmental Crime Section; Eric Nagle; Mark Harmon, likewise, trial attorneys, U.S. Department of Justice, Environmental Crime Section. William Brighton, who is the Assistant Chief of the Environmental Enforcement Section of the United States Department of Justice, who is the lead counsel of the civil litigation. And to his right is Greg Tillary, who is with the State of Alaska, Attorney General's Office.

THE COURT: Mr. Lynch?

MR. LYNCH: Your Honor, for Exxon Corporation, Mr. Edward J. Lynch and Charles W. Matthews; Exxon Corporation John Clough and Patrick Lynch. And present in court today is Mr. Rawl, Chairman and Chief Executive Officer of Exxon Corporation.

MR. NEAL: May it please the court. James F. Neal, representing Exxon Shipping Company. With me is Mr. Bob Bundy. And present in court today is the president of Exxon Shipping Company, Mr. Agustus Elmer.

THE COURT: Inasmuch as the defendants have

filed a notice of their intent to change plea, we will proceed directly to the confirmation of that intent. As I did previously, I would like to take up Exxon Corporation first.

Would you administer the oath to Mr. Rawl, please.

(Oath administered)

MR. RAWL: I do.

EXAMINATION OF MR. RAWL

BY THE COURT:

Q Mr. Rawl, inasmuch as you have been placed under oath, I need to instruct you that you must answer the questions I put to you truthfully. If you should fail to do so, you could possibly be prosecuted for perjury. Do you understand that?

A I do, Your Honor.

Q Would you tell me your age, please, sir?

A Sixty-three years old.

Q And what is the extent of your formal education?

A I've got a B.S. degree in Petroleum Engineering.

Q What is your position with Exxon Corporation?

A I'm the Chairman of the Board and Chief Executive Officer.

Q Now, we have previously received and filed corporate resolutions having to do with your authority to be here and speak for your

company this morning. To your personal knowledge, sir, are those resolutions still in effect?

A I believe we have another resolution, Your Honor, which . . .

Q Might I have that, please.

(Please)

MR. LYNCH: If Your Honor will give me a moment, I'll get them out of the briefcase.

THE COURT: Sure.

(Pause)

THE COURT: The resolution appears to be satisfactory, and it will be filed with the clerk of the court. I'm satisfied that Mr. Rawl is authorized to proceed in this matter.

Q Mr. Rawl, have you received and reviewed a copy of the charges which were brought against Exxon Corporation in a federal grand jury indictment?

A Yes, Your Honor, I have.

Q Have you reviewed those charges with counsel?

A Yes, sir, I have, Your Honor.

Q Do you understand the charges?

A Yes, I do.

Q Do you have any questions about them?

A No, Your Honor, I do not.

Q Are you entirely satisfied with the representation that Exxon Corporation has

received from counsel in the course of these proceedings?

A Yes, Your Honor, I am.

Q. Have you personally reviewed the terms and conditions of the proposed plea agreement which is dated September 26, 1991?

A Yes, Your Honor, I have.

Q Have you reviewed that agreement with the attorneys?

A Yes, Your Honor, I have.

Q And on behalf of the corporation, are you in accord with all of the terms and conditions of that plea agreement?

A Yes, Your Honor, I am.

Q Do you understand that confirmation of that plea agreement could conceivably have an impact on civil litigation that is pending against Exxon Corporation?

A Yes, Your Honor, I do understand that.

Q Mr. Rawl, has anyone made any promises or entered into any agreements about the disposition of this case -- the criminal case -- other than what appears in the plea agreement?

A No, Your Honor, they have not.

Q Has anyone threatened you or coerced you in any way to induce you to execute that agreement on behalf of the corporation?

A No, Your Honor, they have not.

Q The plea agreement contains certain

information concerning Count III of the Indictment, Mr. Rawl. That's the count that charges a violation of the Migratory Bird Treaty Act. That information has been reviewed by me. That information was supplemented at the last hearing we had with the following information that I would like to recite to you at this time, for the purpose of seeing whether you agree with it or not.

At that time I was told that approximately 11 million gallons of crude oil were spilled from the Exxon Valdez on March 24, 1989. That thereafter that oil entered Prince William Sound in the Gulf of Alaska. I was told that as of September 20, 1989, 36,429 dead migratory birds were collected at various locations in the Sound and in the Gulf of Alaska. I was told that 22 migratory birds were selected as representative samples of the total number of birds collected, and that these were examined by the United States Fish and wildlife pathologists, who determined the causes of death.

If this matter were to go to trial, the government would contend that it could prove that Exxon Corporation spilled oil from the Exxon Valdez, and that that oil killed the 22 migratory birds.

Now, do you have any disagreement with those factual representations?

MR. LYNCH: Your Honor, if I may respond.

THE COURT: Mr. Lynch.

MR. LYNCH: I think that the statement read last time indicated that the oil was spilled, owned by Exxon Corporation, but that Exxon Corporation did not spill the oil. And with that clarification, the basis of the plea is that the oil was being carried by Exxon Shipping Company under contract when the freight was spilled, and owned by Exxon Corporation.

THE COURT: Actually, Mr. Lynch, I was reading from the transcript of that last hearing. But I accept that modification, that the oil was owned by Exxon Valdez -- was owned by Exxon Corporation, inasmuch as it is consistent with my other knowledge of the case.

Q (Mr. Rawl by The Court:) Mr. Rawl, with that modification, do you have any disagreement with the facts as they have been recited here?

A No, Your Honor, I don't.

THE COURT: Again, at the previous hearing Mr. DeMonaco recited for us that the maximum fine under the Migratory Bird Treat Act is a fine of $10,000.00, subject to possible augmentation under the Alternative Fine Act. And it is a matter of some contention, I think, still, whether that Alternative Fine Act does or doesn't apply.

Mr. Lynch, I understand that question is being laid aside, is that correct?

MR. LYNCH: That's correct, Your Honor, under the terms of the agreement.

Q (Mr. Rawl by The Court:) For you, Mr. Rawl, I need to ask: do you understand that if Exxon were to go to trial it could possibly be exposed to not just the $10,000.00 fine, but possibly to a very substantial augmentation of that fine, based upon losses that were occasioned in connection with the Valdez accident. Do you understand that?

A Yes, Your Honor, I do.

Q Two other aspects of sentencing need to be brought to your attention at this time, Mr. Rawl. This is a case where the court will be considering a restitution requirement, and certain obligations to undertake to provide for the restoration of Prince William Sound following the Valdez accident.

You need also to be aware of the fact that I am required by law to impose a special assessment in this case in the amount of $25.00 per misdemeanor count. I believe that item is not mentioned in the plea agreement. Do you understand that you are subject to a $25.00 special assessment?

A Yes, Your Honor, I am.

Q As I indicated previously, although this case occurred after the passage of the law which gave rise to the sentencing guidelines, as a practical matter, this case is being handled more or less outside of the guidelines, because at the present date there are no guidelines promulgated by the Federal Sentencing Commission, which apply to environmental crimes. However, I will be having substantial reference to, and have had

reference to the sentencing factors which federal law dictates that I should consider in imposing sentences in criminal cases.

Mr. Rawl, because the case against Exxon involves an agreed sentence, and will also involve the dismissal of certain charges if the plea agreement is accepted, you are advised that in the event that I should reject the plea agreement, Exxon Corporation will be entitled to withdraw any plea that you might offer at this time. Do you understand that?

A Yes, I do, Your Honor.

Q Mr. Rawl, even at this stage of the proceedings, there are certain rights available to Exxon Corporation, which will still apply unless they are waived or given up by you. I am going to be reciting certain of those rights for you, and at the end will inquire as to whether or not you are prepared to waive or give up those rights.

Exxon Corporation, in this case, has the right to a trial by jury; it has a right to be represented by counsel; it has the right to see, hear and have its attorneys cross examine the governments witnesses.

Exxon Corporation would have the right to present a defense against the charges to call witnesses on behalf of the corporation, and to require the presence of those witnesses, using the court's subpoena powers, even if those witnesses did not wish to voluntarily come forth.

All of these rights are available to Exxon at

this stage of the proceedings. However, it is your right, if you wish to go forward with the plea agreement, to waive or give up those rights.

Does Exxon Corporation wish to waive and give up the right to a jury trial and these other rights that I have explained to you.

A Yes, Your Honor, we do.

Q If this case were to go to trial, and if Exxon were to be convicted by a jury, Exxon would have a right to appeal that conviction to the Ninth Circuit Court of Appeals. If you offer, and if I accept a plea of guilty on behalf of Exxon Corporation, there is, as a practical matter, no right of appeal from the conviction that results from that offer and my acceptance of it. Do you understand that?

A Yes, I do, Your Honor.

Q Even though there are no guidelines applicable to this case, it is my assumption that if some party were of the view that my sentence were illegal, they probably could appeal that sentence due to the present state of the criminal law.

One final thing that I need to take up with you, Mr. Rawl. It is normally a case in a criminal matter that we require a presentence report. That report is often as beneficial to the defendant as it is to the prosecution. It is my inclination, based upon what I know about this case, not to order a presentence report. Do you have any objection to that?

A No, Your Honor, I do not.

Q At this time, Mr. Rawl, how does Exxon plead to the charge that it violated the Migratory Bird Treaty Act as charged in Count III of the Indictment. Is Exxon Corporation guilty or not guilty?

A Exxon pleads guilty, Your Honor.

THE COURT: Okay. Based upon what I have ascertained in response to my questions, and in this instance, based, also, upon the substantial knowledge that I have of this case from memoranda that have already been filed by counsel as I related at the outset, I am satisfied that there is an independent factual basis for the charges brought against Exxon Corporation. I'm satisfied that Mr. Rawl is lawfully and properly authorized to offer a plea of guilty on behalf of Exxon Corporation. I'm satisfied that that plea of guilty is being voluntarily offered to the court.

I will, therefore, accept the plea of guilty in connection with the charges brought against Exxon Corporation under the Migratory Bird Treaty Act. And Exxon is at this time adjudged guilty of that offense, subject to the right to withdraw its plea of guilty in the event that I reject the plea agreement.

We will turn now to Exxon Shipping, Mr. Elmer. If you would administer the oath to Mr. Elmer, please.

THE CLERK: Please raise your right hand.

(Oath administered)

MR. ELMER: Yes, I do.

EXAMINATION OF MR. ELMER

BY THE COURT:

Q Mr. Elmer, what is your age?

A Fifty-one years old, sir.

Q And what is your position with Exxon Shipping Company?

A Director and President of the company.

Q Mr. Elmer, do you understand that inasmuch as you have been placed under oath, you are obligated to answer my questions truthfully. If you should fail to do so, you could possibly be prosecuted for perjury?

A Yes, I do, Your Honor.

Q Is there a separate corporate authorization or resolution in connection with Exxon Shipping, or is the prior resolution still in effect?

A We believe the prior resolution is in effect, Your Honor. We do have a copy here if you wish to reference it.

Q No. It was filed with the court previously, and I was satisfied previously that Mr. Elmer was authorized to speak on behalf of Exxon Shipping Corporation. And inasmuch as he is today in the same position that he was with the company previously, I am satisfied with his authority to speak here for the company.

Mr. Elmer, have you received on behalf of Exxon Shipping, and have you reviewed a copy of the charges brought against that company by the federal grand jury?

A Yes, I have, Your Honor.

Q Do you have any question about those charges?

A No, Your Honor.

Q Have you reviewed the same with counsel?

A Yes, I have, Your Honor.

Q Are you fully satisfied with the representation which your company is receiving from counsel in these proceedings?

A Yes, I am.

Q Have you previously reviewed, and are you familiar with the terms and conditions of the plea agreement which we have under consideration. It's dated September 26, 1991?

A Yes, I am.

Q And you reviewed that with counsel?

A Yes, sir.

Q Mr. Elmer, has anyone made any other or different promises or assurances or any other agreements with respect to the disposition of the case, as to Exxon Shipping, other than what appears in that plea agreement?

A No, Your Honor.

Q Has anyone in any fashion attempted to threaten or coerce Exxon Shipping Company into entering the plea agreement?

A No, Your Honor.

Q It's entirely voluntary?

A Yes, Your Honor.

Q Mr. Elmer, was the case with your co-defendant -- there are certain factual matters represented to me in the plea agreement. Are those facts that are in the plea agreement true and accurate to your knowledge?

A Yes they are, Your Honor.

Q At the previous hearing I received from counsel for the government, some information about the maximum fines applicable to Exxon Shipping Corporation, if it were to go to trial. It's my understanding that under the Clean Water Act a maximum fine, without enhancement of $200,000.00 is possible, and that under the Refuse Act, a like fine of $200,000.00, without augmentation, is possible. And finally, that under the Migratory Bird Treaty Act, a maximum fine of $10,000.00 could be imposed.

Here, again, there is a provision in federal law for the augmentation of those fines, based upon loss to victims, which could very substantially increase the amount of the fines.

THE COURT: Mr. Neal, I understand that Exxon Shipping and the government have agreed as to your client also that we would side step any adjudication of the questions that we have as to whether the Alternative Fines Act does or does not apply.

MR. NEAL: That is correct, Your Honor.

THE COURT: Thank you.

Q (Mr. Elmer by The Court:) The net effect of this, Mr. Elmer, is that you understand that Exxon Shipping Company is exposed to a fine

of the magnitude expressed in the plea agreement. You understand that that is what you are exposed to?

A Yes, Your Honor.

Q Based upon your understanding of the plea agreement, Mr. Elmer, is it clear to you at this stage of proceedings that your company can be exposed to a very substantial restitution requirement as a result of these proceedings?

A Yes it is, Your Honor.

Q Do you also understand that your company is exposed to a $25.00 special assessment in connection with each of the three offenses?

A Yes, Your Honor.

Q Mr. Elmer, inasmuch as the plea agreement with respect to Exxon Shipping, also calls for a specific sentence, and calls for the dismissal of certain charges. You should understand that if you offer, and if I accept a plea of guilty to the charges in Counts I, II and III of the Indictment, and if I should subsequently reject the plea agreement, you would be entitled to withdraw from any plea that you enter at this time. Do you understand that?

A Yes, I do, Your Honor.

Q As I also explained to Mr. Rawl, your company has, even at this stage of the proceedings, the right to go to trial, and all of the other attendant rights that I explained to Mr. Rawl. Do you understand that you have those rights at this time?

A Yes, I do, Your Honor.

Q Do you understand that if you offer, and if I accept a plea on this case, that you will, in substance, have given up those rights?

A Yes, I do, Your Honor.

Q And is it your company's desire at this time to waive or give up those rights?

A Yes, it is, Your Honor.

Q You understand that if Exxon Shipping Company were convicted by a jury, it would have the right to appeal that conviction to the Ninth Circuit Court of Appeals. But that if you offer, and if I accept a guilty plea, as a practical matter, there is not effective appeal right. Do you understand that?

A Yes, I do, Your Honor.

Q I think I asked you this, but I want to make sure I covered it. Have you personally reviewed the factual statement that is contained in the plea agreement concerning this case?

A Yes, I have, Your Honor.

THE COURT: Mr. Neal?

MR. NEAL: Your Honor, there is a -- I don't believe the factual basis for Exxon Shipping is in the plea agreement.

THE COURT: Oh, it's in a separate . . .

MR. NEAL: Yes, sir.

THE COURT: It's in a separate filing, isn't it?

MR. NEAL: And I think Mr. DeMonaco has that. It has been reviewed with Mr. Elmer.

THE COURT: Mr. DeMonaco?

MR. DEMONACO: Your Honor, if it pleases the court, I have photocopies of what was submitted to the court in March. I have some copies.

THE COURT: All right. Thank you. Would you give one of them to Mr. Elmer, please, so we can make sure that he has seen this document.

Q (Mr. Elmer by The Court:) Mr. Elmer, we have handed you the March 21, 1991 government's statement of factual basis, which we had in the courtroom with us when you were here back in April. Do you recall having seen that statement of facts at that time?

A Yes, I do, Your Honor.

Q And you are still familiar with it?

A Yes, Your Honor, I am.

Q All right. And are the facts which are set out in that government's statement of factual basis true and correct to your knowledge?

A Yes, they are, Your Honor.

Q Thank you. Turning now to the matter of a presentence report, Mr. Elmer. That presentence report, as I have indicated, is often helpful for the court in sentencing, both for the defendant and for the government. Based upon my considerable prior exposure to

this case, I am inclined to dispense with any requirement that there be a presentence report in this case. Do you have any objection to my doing that?

A No, I do not, Your Honor.

Q Mr. Elmer, on behalf of Exxon Shipping Company, and with respect to Count I of the Indictment which charges a violation of the Clean Water Act, is Exxon Shipping guilty or not guilty?

A Exxon Shipping pleads guilty.

Q With respect to Count II, the charges of violation of the Refuse Act, is Exxon Shipping Company guilty or not guilty?

A Guilty, Your Honor.

Q With respect to Count III, which charges a violation of the Migratory Bird Treaty Act, is Exxon Shipping Company guilty or not guilty?

A Guilty, Your Honor.

THE COURT: I am satisfied from what I have heard with respect to Exxon Shipping Company this morning, that there is an independent factual basis for the charges brought against that company under the Clean Water Act, the Refuse Act and the Migratory Bird Treaty Act. I am satisfied that the change of plea that has been offered on behalf of the company is done with proper corporate authority. I am satisfied that the defendant is knowingly and voluntarily offering the plea of guilty to these three charges. I will therefore accept the pleas of

guilty to those three charges. And Exxon Shipping Company is, at this time, adjudged guilty of the charges brought in Counts I, II and III of the grand jury indictment.

(Pause)

With respect to the matter of presentence reports, I am satisfied that there are good reasons to dispense with the preparation of a presentence report in this case. The defendants are corporate organizations. While these reports are very helpful and informative with respect to individuals, it is my belief that they are not quite so useful when it comes to dealing with the corporate entities. I believe I have acquired the information that I need for sentencing in the course of working with this matter, and from the memoranda that Counsel have supplied.

(Pause)

Counsel, as I have indicated repeatedly already, I guess I have reviewed all of the memoranda that has been filed by counsel on behalf of their respective clients. However, it is my inclination at this time, subject to hearing from you briefly a little bit further to proceed at this time with the matter of the decision that I must make on whether or not to accept or reject this plea agreement. Obviously, I am in a considerably different position than I was four or five months ago when the matter was first before me. And subject to hearing from counsel, I am somewhat inclined at this point to proceed with giving you a decision on that matter.

Mr. DeMonaco, I turn to you first.

MR. DEMONACO: Thank you, Your Honor.

Your Honor, counsel, may it please the court. The United States, Alaska, Exxon, and Exxon Shipping Company have entered into substantial comprehensive settlements that resolve all criminal and civil litigation between the federal and state governments, and the defendants arising out of the Exxon Valdez oil spill.

The settlements, which have a combined value of more than 1 billion dollars are contained in the plea agreement and the consent decree lodged with this court. The government believes that the settlements are fair, just and in the best interest to the public, when viewed in light of the sentencing factors contained in Title 18 and the case authorities.

The plea agreement strives to settle the criminal litigation with pleas of guilty and a criminal sentence consisting of a fine in restitution. The amount of the sentence actually required to be paid within 30 days conviction, is 125 million dollars, with the bulk of the money earmarked for use in Alaska for restoration of the areas affected by the oil spill.

This oil spill was a catastrophe, and was also an environmental crime. The criminal remedy should likewise, in substantial part, be environmental in nature. That is, 100 million dollars to be paid in restitution, to be used exclusively in this State of Alaska for

restoration of Prince William Sound and the Gulf of Alaska. The restitutionary components of a sentence for an environmental crime cannot be understated. The environment, as a victim, must be aided quickly through efforts funded by restitutionary payments.

The remaining amount of the sentence actually required to be paid is 25 million dollars. Of this amount, 12 million dollars is for violation of the Migratory Bird Treaty Act. Consequently, by operation of law, this total amount will be deposited into the North American Wetlands Conservation Fund, pursuant to the North American Wetlands Conservation Act, to carry out wetlands conservation projects throughout North America, of this country, Canada and Mexico.

Consequently, of the 125 million dollar sentence that is actually to be paid, 112 million dollars will go directly toward aiding the environment for this environmental offense.

In addition to being tough, the plea agreement is also fair. It addresses more than punishment. It takes into consideration the substantial efforts made by Exxon to rectify the consequences of their conduct by paying for oil spill clean-up efforts and engaging in other post spill responsible action at a cost of about 2.5 billion dollars. These actions by Exxon were important to us, as the United States Government, in helping us exercise discretion to achieve a fair and just

recommended disposition of this criminal case.

When these actions are considered in light of the sentencing factor that calls for the sentence to promote respect for the loss, the acceptance of the plea agreement will heighten the business community's, and the public's awareness of the respect of the laws designed to protect the environment. The fine is assessed at an amount of 150 million dollars, which means that standing alone, the facts and circumstances that gave rise to this violation warrant a fine of that magnitude. It is only because of Exxon's voluntary efforts, their cooperation with the investigation and prosecution of this case, and other responsible actions set forth in the plea agreement in the sentencing memorandum submitted to this court by the government, that makes remission or forgiveness of a substantial portion of the fine reasonable.

Cooperation was substantial at all times and all phases of the investigation in the prosecution. This is important to a prosecutor. I have been a prosecutor both in state and federal courts for more than 15 years. Cooperation is routinely taken into consideration by the prosecution, and the courts, in imposing a just sentence. We did so in exercising our discretion in this matter as well.

As a sentencing factor that speaks to the need of the sentence to afford adequate deterrence to criminal conduct, clearly, a sentence of 125 million dollars of money

actually required to be paid. It must be paid within 30 days of the date of the conviction, satisfies this factor, and should deter future corporate carelessness. There is no question that Exxon has paid dearly for this oil spill. In addition to spending about 2.5 billion dollars in response to the spill, it is also committing to pay in excess of 1 billion dollars pursuant to these comprehensive settlements. As a result, the total amount of the penalties, compensatory payments, and other voluntary expenditures will exceed 3.5 billion dollars. It is hard to imagine more adequate deterrence for negligence, but unintentional conduct.

In considering whether to impose a fine, Congress suggests that the court consider three factors. The first is the size of the organization. In this case, there is no question that Exxon is one of the world's largest and most profitable corporations.

The second factor is, any measure taken by the organization to discipline any employees responsible for the offense. Here, Captain Hazelwood was fired. He was fired for using alcohol within four hours before assuming duty, and for leaving the bridge of the vessel during a hazardous maneuver. The third mate at the time of the grounding was disciplined by being reassigned to the status of an able-bodied seaman for his role in the grounding.

The last factor relates to any measure taken by the defendants to prevent a recurrence of the offense. Here Exxon revised

its substance abuse policy substantially. Persons who had or are found to have a substance abuse problem will not be permitted to work in a safety sensitive position.

In addition, Exxon has taken steps to eliminate fatigue of the crew, by creating the position of loading mate in the ports of Valdez and in San Francisco.

Exxon will spend 1.6 billion dollars in 1991 on capital projects to enhance environmental safety performance, apart from the expenditures relating to the spill. And in addition, they have spent more than 40 million dollars to improve vessel operating safety, personnel training, and oil spill capability.

Another factor for the court to consider is to avoid unwarranted sentence disparities among defendants guilty of similar conduct. The only other case that approaches this one is Ashland Doyle (ph)*. I was also the prosecutor in that case, and began that when I was an Assistant United States Attorney in Pittsburgh. As far as the facts of that case are concerned, there was approximately 4 million gallons of oil that spilled out of a container of oil at a tank farm near Pittsburgh, Pennsylvania. It was a catastrophic rupture of the container.

And about 700,000 gallons of oil made its way into the Monogahela River and went over locks and dams shortly after it entered the river, and emulsified with the water. And it travelled downstream, past the city of

Pittsburgh itself, and eventually through five states, causing tremendous human suffering and a tremendous human impact, where the water supplies were closed, schools were closed, churches were closed, and businesses were closed.

Ashland Oil sought to plead nolo contendere in that case, and we vigorously opposed that. The court accepted nolo contendere and we went to the sentencing hearing. The sentencing hearing was litigated. There was not an agreed upon sentencing. We, as the government, requested a fine -- multi-million dollar fine in nature. Ashland requested that the fine be somewhere between $200,000.00 to $400,000.00, without application to the Alternative Fines Act.

The judge in the case, Judge Diamond, ruled that the lower amount of the fine was insufficient, and said that the fine would be between 2 million to 4 million dollars. We asked for a multi-million dollar fine in that case and we received a multi-million dollar fine in that case, and we received a multi-million dollar fine in that case, for the conduct that was the nature of that indictment in that violation.

Both cases involved negligent conduct. Exxon, obviously several times larger than Ashland, and the spill here was many more times larger than the Ashland spill. Thus it's appropriate here that the fine be proportionately larger than that in Ashland. But we believe the fine, both in the assessed

amount and the actual amount, is justified in light of all the circumstances of this case, and it is not disproportional. We believe this fine is adequate, both in the way it's assessed and both in the way that there is the actual payment required to be paid, when in comparison to other cases of similar magnitude. And, of course, Ashland is really the only case that comes close of similar magnitude of a matter that we brought as a criminal prosecution in the Department of Justice.

And the last factor I wish to address is the need to provide restitution. And here the plea agreement provides for 100 million dollars in restitution, and up to 1 billion dollars in the civil settlement. In addition, the defendants have paid more that 300 million dollars to third parties in settlement claims. And we believe that the agreed upon disposition will satisfy the loss to the environment and will avoid the time consuming complex and uncertain task of assessing unrestituted losses to the governments.

The alternative to this comprehensive settlement is years of litigation with an uncertain result. And the best example of protracted litigation is the case of the Amoco Cadiz, which is an oil spill of about 62 million gallons off the northern coast of France. Thirteen years after the spill the case is still being litigated. If upheld on appeal, the damages paid will be about 115 million dollars. This oil spill was about six times the size of the Exxon Valdez.

The governments urge that there be restitution now for the areas affected by the oil spill, and it should not await years of legal battles over damages and liabilities. The plea agreement provides an immediate infusion of money needed to continue the work of restoring the Prince William Sound and the Gulf of Alaska. While the consent decree provides money over the long term to insure that the restoration work can continue over time to heal the damages caused by the Exxon Valdez oil spill.

When viewed in light of the sentencing factors, the facts in this case, and the conduct of the defendants following the spill justify, and in fact, cry out for an agreed upon disposition of the criminal case. We recognize as this court's role and independently reviewing a plea agreement in light of the factors suggested by Congress. We ask that you approve the plea agreement, recognizing that this part of the comprehensive settlement with the defendants that will put an end to the criminal and civil complex litigation and getting much needed money to the environment now, as opposed to years of litigation with uncertain results.

We look to this settlement, Your Honor, as a comprehensive settlement. It's a criminal component and a civil component, and it's hard to believe that we would do one without the other. Because what we are getting on the consent decree is a very important consideration for us as to what we are seeking in restitution on the criminal side. And

likewise, when we put the whole package together, we believe it's in the public's best interest to settle this case in this matter to get the much needed money into the Prince William Sound and Gulf of Alaska now, as opposed to years from now after litigation. And we would urge the court to approve the plea agreement, as well as to enter judgment on the consent decree.

With me, Your Honor, at counsel table is Barry Hartman, who is the Acting Assistant Attorney General of the Environment and Natural Resources Division. And he is here to present to the court how this plea agreement fits into our environmental enforcement program.

In addition, I would like to call on Mr. Cole after Mr. Hartman finishes. Mr. Cole is the Attorney General for the State of Alaska, to present the State's views of this proposed comprehensive settlement. We have worked closely with the State from the very beginning of this investigation, and their views are extremely important to the decisions that we have reached in reaching the settlements with Exxon and Exxon Shipping Company.

And then following Mr. Cole, I will conclude our presentations and answer any questions the court may have regarding our position. At this time I would like to call upon Mr. Hartman to make a presentation to the court.

THE COURT: Mr. Hartman?

MR. HARTMAN: Thank you, Your Honor;

may it please the court. The court is faced today with the difficult and important task of evaluating the acceptability of this plea agreement and the proposed consent decree, which are both unprecedented in nature, as Mr. DeMonaco has explained.

The Department of Justice is currently litigating approximately 20,000 cases around the country involving the environment. This is by far and away the biggest. And my purpose here, briefly, is to share with the court why the Department of Justice, as well as the client agencies we represent, and, indeed, the United States government believes acceptance of these proposals will substantially contribute to our efforts to address environmental offenses, both civilly and criminal, throughout the country, and particularly in Alaska. And indeed, why, in this case, the plea agreement would be appropriate to accept, and a civil consent decree to approve.

As we approach environmental enforcement cases, we found, from our experience, that they are different from other cases, particularly in the criminal context, for two reasons.

First and foremost is the need in many environmental cases to address the environmental consequences of what may be illegal conduct. Unlike other economic crimes of which this court is well aware, we can't simply pay interest 20 years down the road to make up for the losses. In environmental

cases it is crucially important that we address the consequences of the conduct immediately.

I have with me today for the court's interest, if it desires, letters I recently received from the Secretary of Transportation, the Secretary of interior, as well as high-ranking officials at the Environmental Protection Agency, the Department of Agriculture, and the Department of Commerce, all urging the court to take that particular issue into account as it considers the plea agreement today. We must address the environmental consequences sooner rather than later.

And secondly, unique to the area of environmental enforcement is the novelty of the issues which are involved. The court mentioned the Alternative Fines Act as being one issue. These issues will, no doubt, as they become litigated around the country, take years to resolve. And those years will be spent at the cost of dealing immediately with substantial environmental consequences. Today the court has the opportunity to deal with that environmental consequence immediately.

So where, then, does this case fit in our national environmental enforcement program. As the court knows, as part of our plea agreement we attached information relating to our criminal enforcement program, and in connection with our civil case, we attached information relating to our civil enforcement program. And indeed, we submit to the court,

that the consequences today, just like the consequences of the spill, are off the charts.

The court can see from the attachments that were provided, that the proposed plea agreement is greater than all the fines in the history of environmental enforcement. The proposed civil consent decree dwarfs -- dwarfs . . .

THE COURT: Time out. Turn the other way. I know what they look like, because I've got hand copies of them. Let the folks in the back see what you've got there.

MR. HARTMAN: The proposed civil consent decree, as Your Honor knows, dwarfs civil remedies previously imposed in environmental cases. For example, whereas last year, in 1990, we recovered 11 million dollars for natural resource damages in cases. This case is up to 1 billion dollars. It was serious consequences, and we believe the case justifies the result.

Finally, Your Honor, we ask the court to seriously consider the effects in the State of Alaska. As Mr. DeMonaco indicated, the State of -- we worked quite closely with the State of Alaska in this case. We do not, Your Honor, have the luxury of simply picking a number out of the air and saying this is the appropriate number. The Department of Justice is committed to dealing with the facts and applying the law as we see it. And we believe, when we do that in this case, one can see the results compared to other cases, which we think are appropriate.

But with respect to the State of Alaska, the importance of this case, I think, cannot be understated. We have worked quite closely with Attorney General Cole. Quite frankly, Your Honor, without his support, without his views and his insights and participation, we probably would not be here today.

Based on that, Your Honor, we request that the court consider and approve the plea agreement and civil decree. And at this point I would like to call on Attorney General Cole to present the State's view. Thank you very much.

MR. COLE: If the court please, and counsel. This morning I appear here on behalf of the State of Alaska, the victim of the offenses to which the defendants have today pleaded guilty. I appear here at the request of Governor Hickel and as Attorney General of the State of Alaska, vested with the statutory and common law authority possessed by that office.

In addition, I appear here, I believe, on behalf of the overwhelming populous of the State of Alaska, which supports this criminal plea agreement and the civil settlement.

Now, how do I say, you know, Charlie Cole, Attorney General speaks for the people of the State of Alaska here today. Well, I have my own way, Your Honor, of taking a little informal poll of how the people of this state feel about this settlement. You know, travel in the airplane, go to the coffee shop, meet people along the jogging trails, if I say so, in

bars, in restaurants, you know. But I talk to the people in traveling, in department stores. And I have a real good sense of what the people out there in the state feel about this criminal plea agreement, and about the civil settlement. They are the great middle class of this great state. They don't write letters, they don't comment to the press, but they're just the people who live in this state and contribute to its greatness. And I feel very strongly that the people out there support this criminal settlement and this civil settlement.

Now, I don't want to repeat here what Mr. Demonaco and Mr. Hartman have said about the criminal plea agreement. And their remarks, I think, have been full and on the mark. But I do want to say this with respect to the views of the State of Alaska, with respect to this criminal plea agreement.

Very important from the State's standpoint is that 100 million dollars of this plea agreement will be used for the restoration of the damage to the natural resources, and for, perhaps, other purposes in the State of Alaska.

Now, I know there are those who urge a greater fine; 200 million, 300 million, whatever. But the state as the victim, wants to see the damaged natural resources in this state restored. I assure the court that if this plea agreement is not accepted and approved by this court, that the State will lose its last opportunity to obtain funds from this criminal proceeding to be used to restore these

damaged resources. The State has a deep vested interest in that purpose, of course. I mean, 200 million dollar fine; 150 million dollar fine could be put into the federal treasury, and perhaps used to buy a landing gear for a B-2 bomber, but what does that do for the Alaskan environment. And that is the consideration that the victim, the State of Alaska, today, urges this court to bear in mind when it decides whether to accept this plea agreement.

Now, next, is 150 million dollar fine sufficient to give pause to those who skirt the line concerning the protection of the natural resources in the state. Governor Hickel and I, and I believe the people, firmly are of the view that it is. It's a base line number, and a number which the State can hold up to whether polluters -- that this is the fine which you face, 150 million dollars, and that certainly should be sufficient, the State believes, to give pause to those who do not show the proper regard for the Alaska environment.

Now, so much for the State's views about the criminal plea agreement. I want to say a word about the civil settlement.

You know, it sort of reminds me, Your Honor, of years ago, perhaps in elementary school, when we used to fight a lot. I don't mean the court. Speaking for myself. But here's the thing, Your Honor. You know, as I recall it was a number of years ago, but there were always those who stood on the sidelines

and said, "I'll hold your coat; I'll hold your glasses. I mean, why don't you two guys go fight."

You know, and, of course, you know, being young, and so forth, I perhaps took undue urging there, and, you know, would get in there and engage in fisticuffs, you know, as it were. You know, it would go on until, you know, either I or my adversary had vested in skinned knuckles, and recipient shiners, and a bloody nose, and eventually one learned a little bit. Then these people standing on the side lines would say, "Well, nice fight. You know, here are your glasses and here are your coat", and we would limp home, and, you know, be back to fight again another day.

But -- so it's not unlike that in this present setting. There are those who say: Why don't you two heavy weights go fight. United States, Exxon, the State of Alaska, and, you know, we'll sit on the side lines and sand bag you. Not enough money, they say. So do they offer to get into the fray and to put up the 25 million dollars a year which the State of Alaska is footing the bill for to proceed with this civil litigation? I hear none of them say: Here is a million or 5 million dollars to support the prosecution of these claims. They simply urge the State to foot this bill. Now the court knows that the State has expended over 85 million dollars out of the State treasury in connection with this oil spill. And we are continuing to spend a reasonable estimate of 25 million dollars a year.

Now, the court can do the math for its own view as to how long this case is going to take, but certainly it is going to go on for years, we know. And soon the State will have 150 million, 175 million, 200 million dollars into this proceeding. And there becomes a limit, Your Honor, to which responsible public officials can continue to spend public funds in the prosecution of this claim at that rate.

Now, so to with respect to those who say: This is not enough money. I mean, you should get billions more. And, you know, guys like Governor Hickel and Charlie Cole -- I mean, they are irresponsible, they're hiding out, unable to face the personal responsibility. Well, let me assure the court that that is utterly irresponsible -- utterly irresponsible.

The State has carefully examined its damages. The State has studied ad nauseam the admissibility of contingent valuation studies. I personally have read over 1,000 pages of, you might say, esoteric articles on contingent valuation, admissibility, and its reliability. And some favor it, some don't. But those detractors never, I notice, when they criticize the amount of this settlement, that accompany their comments with the citation of authorities supporting the admissibility before this court of contention valuation studies. Nor do they comment on the reliability of that testimony, and how it will stand up in the face of vigorous cross examination.

The State has considered those elements.

The State has made studies, Your Honor, about the cost evaluation and testimony of birds, and bald eagles, and whales, and the lawsuit, sport fishing in the area. There's been exhaustive studies done, which I personally have reviewed. So we have a very good feel for the amount of recoverable damages in the court of law.

And let me say this with respect to those detractors: I see not one of them, Your Honor, who are prepared to guarantee, my letter of credit, if you wish, that the governments will not receive less if they proceed to trial. Then they recover under this settlement.

You know, it's like we used to say, maybe it's time to put your money where your mouth is. No one says, we will absolutely guarantee that this money will be recovered. They do not.

So we urge the court to approve that civil settlement. I know the court asked us to be brief, so I'm going to conclude my remarks now. But I want to say this: Chief Justice Burger, Chief Justice Renquist, the Court of Appeals for the Ninth Circuit, this court, constantly harps on the fact that lawyers litigate too much; they're not problem solvers. All they want to do is make money and, you know, send a lot of discovery, and prolong litigation so they can make money. And they exhort counsel to settle cases and work towards settlement, problem solvers.

Now, that's what these lawyers have done. They've worked hard. I, among them,

professionally evaluating their cases, supported by teams of some of the finest lawyers in the country. And they've represented their clients well. We've done what the courts asked. We've reached a fair, and just, and reasonable, and responsible settlement. And I urge the court, on behalf of the State of Alaska, and Governor Hickel, to approve those agreements. Thank you.

THE COURT: Before you sit down, Mr. Cole.

MR. COLE: Yes, sir.

THE COURT: A couple questions. I read the newspapers, just like everybody else does. You've alluded to some of the mutterings that have been in the papers about these proposals already, but there are some others that you haven't mentioned. Have you . . .

MR. COLE: They make my blood boil, Your Honor, I must say.

THE COURT: Well . . .

MR. COLE: But I . . .

THE COURT: Simmer down for a minute. Are you, based on your own evaluation, or your staff's evaluation, sure to a reasonable legal certainty, that the State of Alaska and Exxon are legally bound to this civil settlement agreement?

MR. COLE: Yes. No equivocation there, Your Honor.

THE COURT: Second question. And this just gets to some of the muttering that I have

heard that has made me uneasy about where the restitution money is going to go. Are you satisfied to a reasonable legal certainty, that this restitution money, if I approve that agreement, will get where it is agreed to go, to restoration rehabilitation, and so forth, of Prince William Sound, as opposed to being drained off somewhere else and spent somewhere else.

MR. COLE: Is the court talking about the civil settlement agreement?

THE COURT: I'm talking about the civil settlement.

MR. COLE: Let me say this, Your Honor, because I am pleased to respond to that. By the grace of Governor Hickel, I am one of the three State trustees, along with John Sander and Carl Rosier. The court will notice, as it reads the civil settlement agreement, that the six trustees comprised of three state trustees and three federal trustees, must act unanimously.

Now, I want to say, when we went back and redid this memorandum of agreement between the United States and the State, there was a stout discussion between the State and the federal government as to whether those six trustees must act unanimously. The State said they must act unanimously, sort of the proverbial bottom line.

And I personally represent to this court, as long as I remain Attorney General of the State of Alaska -- as long as I remain one of these

trustees, I guarantee that that money will be used to the restoration of the Prince William Sound, and it isn't going to be drained off. That's one of the reasons I want to remain as a State trustee. Because, you know, it's time for the studies and the damage assessment to sort of come to a conclusion and to get on to physical efforts of restoring that sound. And I know Commissioner Sander and Commissioner Rosier agree totally with the commitments I have just made to this court.

Now, could I say one more thing, Your Honor. Thank you. There are these people who say: well, I mean, this is just a warmed over agreement that you had last March in the civil arena. There's no more money. It's essentially the same agreement. Sure. But what's happened since last March in September. I mean, the fish came back to Prince William Sound. I mean, how are we supposed to say to Exxon: Well, we want more money now that the fish have come back. They say: Well, it's just like we told you in the first place.

So, you know, there was heavy discussion as to whether that settlement amount would remain the same.

And the State said -- Governor Hickel said: Not one penny less. And that's why the agreement is as it is today, Your Honor.

Does the court have more questions? Thank you.

THE COURT: Yeah. You suggested it already. The money that comes from the

criminal settlement -- the plea agreement provides that there will be a gross payment of 100 million dollars for restitution, half of it being paid to the State and half of it being paid to the federal government. Does that State 50 million dollars go into the general fund?

MR. COLE: No.

THE COURT: Where does it?

MR. COLE: Well, in view of the Attorney General, it goes into a special fund, to be used solely for the restoration of Prince William Sound, et cetera, et cetera. But in addition to that, Your Honor, as the court will observe as it reads that provision carefully, there was provision made for the possibility, should the legislature and the governor, acting jointly, wish to use those moneys to fund in part an oil spill research center. But those monies do not go into the State x-checker, but must be used solely, by decree of this court, if you will, should the court prove this agreement. Only in that fashion.

THE COURT: Is it your opinion that that decree, if I sign it, will survive a challenge by legislators that they ought to be able to get into and spend that money the way they think it should go?

MR. COLE: Well, it's my firm opinion that they will not have that -- what I may call, "luxury". And it will be resisted firmly by the Attorney General, in any event, where effort is made to use the money in that fashion. I would imagine this court might summon the

Speaker of the House, the President of the Senate, and have a word with them if they don't have a clear recognition on the limitations of those funds. I would, you know, be pleased to have a quiet word with them in that regard.

I personally know the power of this court and the need to obey its orders. Thank you, Your Honor.

MR. DEMONACO: Your Honor, in conclusion, as one court has noted, a consent decree is a highly useful tool for government agencies, for it maximizes the effectiveness of limited law enforcement resource, by permitting the government to obtain compliance with the law without lengthy litigation. The same could be said for a plea agreement in a complex criminal case. For the reasons set forth in our memorandum in aid of sentencing, and the memorandum in support of the consent decree, the oral presentations of the Assistant Attorney General Hartman, and Attorney General Cole, and on behalf of the people of the State of Alaska and the United States of America, we strongly urge the court to approve the criminal plea agreement and enter judgment on the civil consent decree. Thank you.

THE COURT: Mr. Lynch?

MR. LYNCH: Your Honor, we have filed a joint memorandum, and if the court will permit, Mr. Neal will address the majority of those issues. And if there is some left ever item, we may ask to supplement his remarks.

MR. NEAL: May it please the court. I'm Jim Neal. I represent Exxon Shipping Company. I'm speaking on behalf of both for the moment, and will endeavor not to be repetitive, but I'm afraid I will. This may be the last chance that I get to talk about this. And I'm kinda like General Cole, I'm an old rat around the barn; tried a lot of cases, as General Cole has. And this case is not a lay-down hand for either side. There are a lot of issues. I think this court said one time that the legal issues in this case are unprecedented. And no one really knows how this case, either the civil or the criminal case, might come out.

Exxon is giving up, what I view to be, a great many arguments that it could make over a period of years, including the, I think, substantial argument that the Alternative Fine Act does not apply to non-economic crimes. And if it does not apply, then I will speak to a minute of what the fines could be in this case.

I want to talk very briefly about four or five subjects. And one I want to talk about is the Exxon family. I am not a silk stocking lawyer. I was born on a 100 acre farm in Tennessee. Over the years I, as a prosecutor -- as Bob Kennedy's special assistant, as a United States Attorney, as the Watergate prosecutor, as defense counsel for more decades than I want to remember. I've represented scores, if not hundreds, of persons -- entities charged with crime. I prosecuted scores, if not hundreds of people.

Our client is big, there's no doubt about that. But somehow in this country, bigness is equated, not with success, not with hard work. I have never been associated with people who work as hard as the Exxon employees do. I thought I got up early in the morning on the farm. I mean, they brought me back to those days by getting me up early. I want to talk a minute about, while, yes, Exxon is big, it is a good corporate citizen. And let me talk about, just for a moment, the point that Exxon's commitment to the environment, did not begin only after the spill from the Exxon Valdez.

I would like to point out something that may not be generally known or considered. Exxon Corporation -- and I'm talking about it, Your Honor, because there is a legal issue here. When I say "Exxon", I'm talking about Exxon, its subsidiary corporations, its family. Aside from the expenditures relating to the spill, Exxon has averaged more than 1 billion dollars a year in environmental expenditures during the 1980s. Research or environmental and safety problems of Exxon now account for annual expenditures of 160 million dollars. Fully, 25% of Exxon's total research expenditures. Another indication of a commitment to the environment.

Since 1987, before the spill, Exxon reduced its discharges reported on the EPA toxic release inventory by 25%, and has voluntarily committed to reduce by 50% by 1995, substances the EPA has identified as high priority. Now, I want to point out, we're not talking about illegal discharges now. We're

talking about something that can be done, but should, if you are a good corporate citizen, try to reduce these.

Exxon, early adopted, and has continuously updated its environmental toxic substance and safety policies. Exxon has pledged to abide by the environmental codes of conduct of the American Petroleum Institute and the Chemical Manufacturers Association. That's without regard to the grounding. May it please the court. Since the grounding -- and I think this is important. When I was a prosecutor, and I think that Mr. Demonaco will agree with me -- it was very -- we can't prosecute all the offenses in this country. And what we have to have is, if someone makes a mistake -- if someone makes a mistake, there has to be encouragement to that individual or that company to come forward and say, "I made a mistake and I will do my best to rectify it."

Indeed, Your Honor, the sentencing guidelines that I will get to in a minute, that will apply to organizations, at least in some areas, recognize that one great important thing in the area of crime and punishment, is if the entity committing the crime steps forward and accepts responsibility.

As Your Honor knows, in individual guidelines, that is one of the first things mentioned, acceptance of responsibility. And second is, doing something to repair the harm.

Right after the spill occurred -- and I don't know where people have been -- it didn't say

this. Somebody says: well, they're arrogant, or, this and that. Mr. Rawl stepped forward, publicly, with thousands of copies of letters distributed, going on television and said, we are sorry -- we are sorry, and we will remedy the wrong. And I have the material here if the court would like to see it.

Exxon, in 1990, after the spill, contributed 50 million dollars to fund, with contributions with others, the establishment of an industry response capability for dealing with large scale oil spills. As Mr. DeMonaco said, since the spill, Exxon has spent more than 40 million dollars to improve vehicle operating safety, personnel training and oil capability.

For 1991 alone, Your Honor, excluding expenditures connected with the Valdez matter, Exxon will spend 1.6 billion dollars on capital projects designed to enhance environmental and safety performance. Since the spill, Your Honor, defendants have expended more than 30 million in additional clean-up costs, since the filing -- and this has occurred since the filing in March of the previous plea agreement.

In sum, with the multitude of lawsuits still pending, the defendants have paid, and with the civil settlement, agreed to pay an amount totalling more than 3.5 billion dollars as a result of this spill, Part of this is in the settlement of claims of 12,600 separate claimants, that Exxon has gone, seen a validity to their claim; paid the claim without these individuals or entities having to go to

court. The 3.5 billion, may it please the court, is almost equal to the entire total worldwide income of Exxon Corporation, including affiliates, for the year 1989. It is approximately 70% of its total annual worldwide income for the year 1988, and for the year 1990. Nobody can fairly conclude that any corporation would accept this magnitude of expenditures simply as the cost of doing business.

And before I leave this port, let -- it's hard for me to talk about Exxon being a criminal in this matter. This spill occurred because of mistakes, no question about it. But this spill basically occurred because a master left the bridge at the wrong time in Prince William Sound.

That master who left that bridge was required to read and sign a bridge navigation and organizational manual that says, "You will stay on the bridge in Prince William Sound." Moreover, that master who left that bridge at the wrong time was being paid approximately $90,000.00 a year, for six months work. That master was paid extra -- as a matter of fact, $350.00 extra for a trip through Prince William Sound, because he held a Prince William Sound pilotage endorsement. Sure, we made a mistake. But it's hard to speak of conduct like that in the common terms of criminal.

Now, one thing this court said, and I'll move on. One thing this court said the last time, very appropriately, that unlike dealing

with individuals, I have no guidelines -- no sentencing guidelines prepared and promulgating by the Sentencing Commission who studies this, unlike the court and unlike the rest of us, full time. I have no guidelines to guide me.

Since the filing of that last plea agreement, the sentencing commission has come out with guidelines. And those guidelines will be effective, unless rejected by Congress -- they will be effective on November 1, 1991.

Now, it is true, at the present time, those guidelines do not cover environmental crimes. But what is important here, they cover a multitude of other crimes by organizations, and the spirit of those guidelines, it seems to me, can be instructive to the court. And I would like to talk about two or three things of those guidelines -- and I'm pretty sure the court is aware of this, because the court is going to have to deal with those guidelines very soon.

One of the things that those guidelines say, that pecuniary loss to a victim -- we talked about the Alternative Crimes Act, of how that could enhance the statutory punishment. Those guidelines say that pecuniary loss to a victim should not be used in calculation of the fine, unless the conduct is intentional, knowing, or reckless. And we are not pleading, and would not plead, to any conduct involving intent, knowing, or reckless.

Now, if you don't use that, then, Your Honor, you can apply these guidelines that

have now been submitted to Congress. And without using pecuniary loss to the victim, the entire fine in this case, for both corporations combined under those guidelines, would be 3 million dollars. Moreover, those guidelines suggest that the court should not impose both fine and restitution for misdemeanors.

Now, the reason I'm not giving citations, Your Honor, this is in the sentencing memorandum, and the court can check on the accuracy of my statements. The guidelines suggest the court should not impose, both fine and restitution for misdemeanors. These defendants are pleading to misdemeanors. Moreover, those guidelines say, that if the defendants have paid, or agree to pay remedial cost that greatly exceed gain -- and, my gosh, there is no gain here -- downward departure from that fine formula of 3 million dollars may be warranted. And I quote, in such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrences. Those don't bind this court, and these don't require this court to accept this plea agreement. But I think, unlike the last time, Your Honor, those are helpful to the court in seeing what is going on, and seeing what this Sentencing Commission thinks in principal, and that's all I'm suggesting, not that they bind the court. But those principals weren't there the last time.

Now, there is one thing I want to say that has concerned me a great deal, and I want to take this opportunity to state it. Mr. Rawl

had a press conference at the time of the last plea agreement. And what was picked up was, Mr. Rawl's statement that, well, the amounts that we are agreeing to pay will not affect, or will not substantially affect the projects we have going on, and the earnings for 1991, that sort of thing. What they want was not picked up -- what was not picked up -- and I have the transcript here if the court would like. What was not picked up was Mr. Rawl's further statement was, that the reason that I could say that, is because we have deducted, for the year 1989, 2.6 billion dollars and charged those against earnings.

Now, the current plea agreement just briefly provides for imposition of a fine and compensatory payments of 250 million dollars. The imposed fine is 50% larger than the previous one. The compensatory payment is 100% larger than the previous one, and we are, in fact, paying -- total amount being paid is 25% larger than the previous plea agreement. And it is being -- as the court would say, it is being directed to the victim to the harm.

The instant plea agreement then provides for 150 million to be paid, and these payments -- these payments -- 125 million to be paid, I'm sorry. These payments, together with the payments made and to be made, total approximately 3.5 billion dollars.

As this chart shows, Your Honor, the total fines -- fines, restitution and forfeitures of all criminal environmental cases for the eight

year period, 1983 through 1990, inclusive, total 56 million dollars. We are paying approximately two and a half times, in this one case, that involves simple negligence. We are paying two and a half times. The total amount of fines, forfeitures and restitution obtained by the United States government for an entire eight year period.

Two other cases I would like to mention, because, as Your Honor knows -- and I will stop. Two other cases I would like to mention, because this court has to be concerned with disparity in sentencing. Indeed -- indeed, this whole sentence guideline -- the Sentence Reform Act of 1984, and all these guidelines that most of us are depressed by, because you have to go back and be a mathematician again to understand it. But the whole guiding point of the guidelines was, we are concerned about disparity in sentencing, that may be going on in federal courts across the country, and so the guidelines were passed.

In talking about disparity of sentencing, of course, we put on the chart -- and I just mentioned that -- two other cases, let me point out to the court to consider.

Recently Phillips Petroleum agreed to settle wilful -- wilful violations. Now this court knows, in the Ninth Circuit, the term "wilful" means a voluntary intentional violation of a known legal duty. We are pleading to simple negligence. But Phillips Petroleum recently agreed to settle wilful violations of OSHA regulations which resulted

in the deaths of 23 workers for 4 million dollars.

In January of this year Arco Chemical Company paid less than 3.5 million dollars to settle charges of, quote, "serious", quote, OSHA violations which killed 17 workers.

Last month, on September 6, 1991, Sperry and Unisys corporation pleaded guilty to eight felony counts, including bribery of United States government officials, conspiracy to defraud the United States, filing false claims against the United States, and wire fraud, and they were fined 4 million dollars and agreed to pay up to 163 million in restitution.

May it please the court. I understand that the Sound is well on its way to recovery. On behalf of both Exxon Corporation and Exxon Shipping and the lawyers who have worked very hard, diligently, and in good faith on this, and believe that this is appropriate resolution of these matters, and far preferable to years and years of litigation in which only the lawyers would win. And therefore, we urge the court to accept the criminal plea agreement, and the civil settlement agreement. Thank you very much, Your Honor.

THE COURT: One minute.

MR. NEAL: Yes.

THE COURT: One of the statutory factors that 18 USC 3572 sets out for my application or consideration in imposing fines, has to do with the question of whether or not fines can

be passed on to consumers. This is something that, when we took comments before, I heard a fair amount about.

MR. NEAL: Yes, sir.

THE COURT: Can you address that for me?

MR. NEAL: I will address it. I meant to address it, and Mr. Lynch was prepared to address that. I could go ahead or have Mr. Lynch do that.

THE COURT: Whoever.

MR. NEAL: Why don't I have Mr. Lynch do it, Your Honor, because he has been a major part of this.

THE COURT: That's fine. That's fine.

MR. LYNCH: Your Honor, as to both of the defendants, but particularly as to Exxon Corporation, it is a participant in an extremely competitive industry. It does not control a large share of that industry, and it has no power to raise prices unilaterally. Accordingly, in the payment of sums so large and material as this, it has essentially no alternative, but to accept that as a cost against earnings. Basically a fine imposed on the shareholders and equity holders, because there is no capability to pass on the added cost, not only of the fines that Your Honor would impose under this agreement, but also the many other costs which all have been referred to in this case. Those fines, and those penalties, and those costs have all flowed back to the shareholders and the equity holders of

Exxon Corporation, because there is no ability to pass them on.

If you raise the price of your gasoline to an uncompetitive level, you simply make business for your competitors, and Exxon does not have, and has not attempted to pass such fines on to the public, Your Honor.

THE COURT: Mr. Lynch, Mr. Neal, do either of your clients wish to address the court? Each has the right of allocution in this court. And incidentally, I am taking this up in a point somewhat out of order from usual. But I am doing so because we are dealing with an agreed sentence here.

What your clients might say after I decide whether or not to accept the plea agreement is sort of a moot point with an agreed sentence. So I'm turning to you now to say, if there is anything the clients wish to say, now is the time?

MR. RAWL: Your Honor, I will just repeat what I've repeated many times before, and Messieurs Neal and Lynch said basically, that there is no question to anyone. I am sure that we regretted that spill very much. We feel like, that through the application of our technology and our people, and a heck of a lot of money, that we've done all we could possibly do at this point to get this cleaned up and to take care of the people that came forward with claims, and so forth.

We face a number of other issues, obviously, and I just wanted the court to know that we appreciated the opportunity to discuss

this matter today and to give our attorneys enough time to cover this in some detail.

But in terms of the case, we understand what the guilty pleas mean in this case, and I appreciate your making that clear to us. That's all I have to say, Your Honor. Thank you.

MR. NEAL: Mr. Elmer has advised me -- we'll advise the court that he has nothing further to add.

THE COURT: Is that the case, Mr. Elmer?

MR. ELMER: Yes, sir. Thank you.

THE COURT: We have been going at this almost two hours. Let's take about 10 minutes, and when we reassemble I'll make some decisions on this matter. We'll be in recess for 10 minutes.

THE CLERK: This court stands at recess for 10 minutes.

(Off record - no notes provided)

(On record - no notes provided)

THE CLERK: All rise. His Honor the court, the United States District Court, is again in session. Please be seated.

THE COURT: I suppose it's only fitting that as I got to the point in the corridor where I was directly behind where I'm sitting right now, I was handed a fax that has to do with this case. It's from a congressman by the name of Frank J. Garrini (ph), who purports to speak on behalf of one of the committees of Congress -- apparently the House Ways and

Means Committee, although the fax copy is pretty poor -- the quality is pretty poor.

The substance of the communication is that he would have the court defer, or his committee would have the court defer action on the matter that we have under consideration at this moment, in order that committees have sufficient time to analyze and comment on the proposed settlement before I rule on its adequacy.

Quite frankly, folks, it comes too late. We've all spent too much time and too much effort getting to this moment today to not go forward with the matter.

I have determined to accept and approve both the criminal plea agreement and the civil settlement which has been reached by the parties in the two environmental damage cases, A91-82 and 83.

Having reached that conclusion, during the course of this morning, I've only had a few minute to think of what to say about that decision. To those of you who worked so hard on it, probably no explanation is necessary or even very useful. To some who denounced the agreements, I suspect before they had any way of even knowing the full import of them, I suspect no explanation that I could give would be adequate.

However, I think we have a lot of people who fall in the middle here who are truly interested in this case and are truly interested in how and why the court reaches decisions that it reaches in matters such as this.

So for their benefit, and this will take a little bit of time -- but for their benefit, I am going to review and make some comments upon the sentencing factors that I am obligated to take consideration of in imposing a sentence.

I am to consider the nature and circumstances of the offense. I suspect everyone already knows my basic underlying view of that situation. It's been well described here this morning. The Exxon Valdez oil spill was a complete utter disaster, which I previously characterized as being off the chart.

In this same regard I am to consider the history and characteristics of the defendant. I didn't have sufficient information on that in April, frankly. I feel comfortable now with the information that I do have. Obviously Exxon Corporation is very large. It has been very profitable. But what is now very clear to me, is that Exxon has also been a good corporate citizen. It is sensitive to its environmental obligations. Indeed, although it wasn't mentioned publicly today, Exxon Shipping is reported to me, through the memoranda, to be an award winning enterprise, as regards the safety of its vessel operations. I've taken that into consideration.

Perhaps the most important characteristic though, in terms of what we have to do here today, is the fact that immediately after the spill, Exxon stepped forward with both its people and its pocketbook and did what had to

be done under difficult circumstances, because it's now quite apparent that the wherewithal to really do the job was something less than would have been desired. Nonetheless, they stepped forward and did the necessary to get the clean-up underway immediately. And perhaps most surprising of all, because it is really quite unique, Exxon stepped forward and started paying private claims to the tune of about 300 million dollars at this point.

And it's my information that at least some, maybe many of those settlements, were kind of open-ended, in that plaintiffs weren't, in all instances, required to sign off absolutely and forever that they weren't ever going to present another claim.

It's really quite extraordinary for any defendant to step forward and start paying parts of claims before they are in a position to wrap up all the claims.

Moving on. Sentencing needs to reflect the seriousness of the offense and promote respect for law. In some sense, it needs to punish, it needs to deter.

I have come to the conclusion that largely due to the nature of this accident -- and I so characterize it on purpose -- punishment and deterrence are of lesser importance in this case. We have a defendant that has both, before and after the incident, plainly acknowledged its duties, its responsibilities. And I'm confident if, perish the thought, there should be another problem, that this company would step forward again and do what it had

to do.

I think deterrence and punishment is important, but in this case I am satisfied that we have a defendant that understands that it made a mistake, and will do its utmost to prevent another one.

While some have characterized it as smoking mirrors, the structure of the plea agreement in this case is important. As some, maybe all of you know, the agreements provide for a gross fine of 150 million dollars, and then it provides for very substantial remittance of that fine. That's a little unusual. As a matter of fact, it's a lot unusual.

But in terms of deterrence -- I speak now of deterrence with respect to others, more so than with respect to Exxon. That structure of the fine is important. Because what it says to others in the industry, is that you can expect fines that are off the chart in response to oil spills that are off the chart.

But it also says to those others in the industry, if you accept and live up to your legal responsibilities, as far as clean-up is concerned; as far as all of the other damage control that has to follow an incident like this -- if you do those things, you will get credit for it.

I think the structure of this sentence contains an appropriate amount of punishment; it contains an appropriate element of encouragement for respect for the law, especially insofar as it makes provision

for a very heavy fine, the likes of which has almost never been seen in this country, and yet there is some relief for a defendant who has -- which has honored its legal responsibilities as far as cleanup.

I am to consider the avoidance of disparity in sentences. There is not a whole lot that can be said about this in this case, frankly. We have an environmental disaster, and insofar as Exxon's financial results for the year 1989, this case has imposed a financial disaster upon them. And in some very rough sense, that is as it ought to be. I see no problem with disparity where a most serious environmental accident is addressed with fines which are almost without comparison.

Perhaps the most important consideration in sentencing in this case -- well, not perhaps -- in fact, it is the most important consideration -- is the matter of restitution. Restitution is important here -- of vital importance, because of the rehabilitation that has to take place in Prince William Sound.

Now, some of you have probably noticed, with respect again, to the fine structure here, that when you cut through the details, the fine imposed by the plea agreement that I have under consideration right now, is actually 25 million dollars less than the fine that I had under consideration before, in terms of net amounts. Why would I go for that? Well, it's very simple. Mr. Cole alluded to it.

Dollars that I impose as fines go to the

United States Treasury. Dollars that are obligated to be paid as restitution, in simple terms, go to the victim. In this instance, go to the state and federal governments for rehabilitation of Prince William Sound.

It is in my view far better, as a practical matter, to lighten up on the fine by 25 million dollars, and in the process have not 25 million dollars more, but 50 million dollars more to go toward restitution.

To the extent that I had concerns about the dollar amounts involved in the criminal case alone, and I expressed those concerns before, a 25% increase in the net dollar cost is, to me, significant. Some have suggested that the fine, looking just at that, is really insignificant, and that the increase is insignificant.

Addressing that increase in particular, I consider a 25% increase in the amount to be paid, looking just at the criminal case, to be significant. If someone were to tell me that the federal income tax rate that I am obligated to pay was going to increase from a base level of -- what is it now, 33% or something like that -- to 58%, I would think that my taxes went up a whole lot. And, in fact, the dollars out would go up a whole lot. I don't understand the suggestion that a 25% increase in the amount of the fine in this case is insignificant.

But to be completely candid about it, I'm sure what is going on here is that there are those who are really of the opinion that the

total net fine, plus restitution, is not enough, and is, in their view, insignificant in the light of this case.

My response to that, frankly, in terms of what I am doing, is the chart that you saw. Criminal sentencing is to accomplish the purposes that I am discussing with you at this point. But amongst those is not revenge. And I suspect that some who want the fines piled on are more interested in revenge than they are in restitution and rehabilitation. The focus ought to be on the latter.

It is, in terms of my decision making, very, very important that the gross amount of the dollars to be paid by Exxon on account of these offenses is way, way more than everybody else who was prosecuted for similar offenses in the eight years preceding this incident.

Locking just at the criminal case, I think the punishment fits the crime. Also on the subject of restitution, I recognize, as do all of the parties, that the 100 million dollar restitution payment in connection with the criminal proceedings alone, is probably not sufficient; it won't get the job done. It was a considerable concern to me when this matter was in front of me last April, that the civil settlement seemed to be falling apart. And as we all know now, it did at that point stumble and fall.

I was concerned about being in somewhat of a box if I had approved the previous criminal plea agreement. And then the rest of the anticipated and needed restitution were to

fail for some reason. Now nobody has talked about it here today. I suppose nobody really wants to talk about it. But being very realistic about it, the 900 million dollar settlement of the civil case is more than just the agreement to pay "x" dollars for the wrong, the accident, the spill.

Nothing about this case is simple. The incident itself was not as simple as it has often been reported to have been. And as a consequence, and not surprisingly, there have been claims made against the State of Alaska, and there have been claims made against the federal government. And while nobody has talked about it, those claims are being settled. The 900 million dollars, plus the possibility of another 100 million dollars is a product of a number of things. The most important of which is the evaluation of the cost of rehabilitation of Prince William Sound. But the cold hard truth of the matter is that there is a lot more to that settlement than just rehabilitation. The lawyers recognize that. I recognize it, and I accept what has come out of the civil negotiations as a responsible and prudent job of balancing all of the risks of loss and of gain for all of the parties with, I am satisfied, the over-arching concern for rehabilitation of Prince William Sound.

With it reasonably sure at this point that the 900 million dollars, plus the possibility of another 100 million dollars for presently unknown risks; with that available, and with the restitution provided in the criminal plea agreement, I am satisfied that both are

adequate to provide restitution.

Now just to quickly get through the rest of the factors that I am required to consider, I must consider the income and resources of the defendant. I've already mentioned that situation. I am satisfied that the overall payout on account of this incident is commensurate with Exxon's resources. I am to look at burdens that fines and restitution place on the defendant. I've done that. I'm satisfied that they are appropriate. I am to look at losses incurred by others. That's what I talked the most about.

And finally, I am to consider the ability of a defendant to pass costs of fines on to consumers. As a side note on that subject, I really had no doubt what Mr. Lynch would tell me this morning. Quite coincidentally, I was in a position to attend a basic economics seminar last March, I guess it was, and not surprisingly, perhaps, the kind of economic considerations that we have been talking about here today and that are involved in the matter of whether these fines can be passed on, came up in the course of that seminar.

I am satisfied that the petroleum industry in this country is, in fact, sufficiently competitive. That it is unlikely that Exxon can pass a significant portion of the fines or restitutionary obligations in this case on to the consumers.

As I indicated at the outset, the plea agreement is approved. In the criminal case the agreement and consent decree will be

approved in the civil case. What I need to do next is really the concluding judicial function of this matter to impose sentence. I have a couple of questions about that.

Mr. DeMonaco, do you have something?

MR. DEMONACO: Yes, Your Honor. We have proposed a judgment form for the court for its review, as well as a judgment for entry of the civil consent decree.

THE COURT: Let's have a look. (Pause) With respect -- I'm looking at the civil order first. (Pause) I have signed both the judgment in case A91-82 and A91-83 approving the agreement and consent decree. I want to add a footnote to that. It may have seemed as though I was baiting Mr. Cole just a bit on this matter of where the money was going to go. And I was, and I did it on purpose. And I want you all to know that I'm not able to monitor this kind of thing, but I expect you all to do the monitoring. And quite frankly, I expect to see people back here if the money that flows from the disposition of these three cases is not going where I expect it to go, based upon the terns of these agreements.

(Pause)

Counsel, I'm not sure that the judgment that you propose for the criminal case goes quite far enough. My concern is this: I think probably we need to enter a judgment which doesn't incorporate things by reference. Let me suggest to you what I see as an appropriate formal disposition of the criminal case, and tell me if anyone has a problem with

it.

As to Exxon Corporation, that company has been found guilty of a violation of the Migratory Bird Treaty Act, 16 United States Code, Section 603 and 707(a), as charged in Count III of the Indictment. Tentatively, for your consideration, Exxon is fined 25 million dollars, of which some 20 million is remitted, such that the net fined Exxon is 5 million dollars, plus a $25.00 assessment. I'm laying aside the restitution obligation for just a second.

As to defendant Exxon Corporation, Counts I, II, IV and V of the indictment would be dismissed.

As to Exxon Shipping Company, that firm has been found guilty, and adjudged guilty of one each violation of the Clean Water Act, 33 USC 1311(a) and 1319(c)(1)(A). The Refuse Act, 33 USC 407 and 411. And the Migratory Bird Treaty Act, 16 USC 703 and 707(a).

As to those three counts of conviction, the court would impose a fine of 125 million dollars, and would remit 20 million dollars, for a net total fine as to all three counts of 20 million dollars.

And I feel constrained under the plea agreement to make some sub-allocation of that payment. This is where I feel perhaps I need some input. Going back to the Exxon judgment, it's my supposition that by operation of law, the 5 million dollar net fine would go into the special fund that is created by the Migratory Bird Treaty Act, and I don't

think I need to say anything about that. But it seems to me that I probably need in the judgment to provide a breakout as between Counts I and II, or, the one hand, and Count III on the other hand. And as I understand it, the agreement is, that of the 20 million dollars, 7 million dollars would be allocated to Count III, the violation of the Migratory Bird Treaty Act. Now, the question, then, is, do I need to make any further allocation in your view as between the fine on the other two counts. Is there any point in that?

MR. DEMONACO: No, Your Honor, not on behalf of the government. The disposition of the money for Counts I and II will go to the same place, with the U.S. Treasury, the Victim's Crimes Act, the VCA account. We leave it to the court's discretion as to the amount to be allocated for each offense, Counts I and II. Whether it all be on Clean Water and suspended on Count II, or just equally divided.

THE COURT: My inclination was to divide it up, 7, 6, and 7.

MR. DEMONACO: That's fine, Your Honor. That's fine with the government.

THE COURT: Does defense counsel have any problem with that?

MR. NEAL: I have no problem with that, Your Honor.

THE COURT: All right. Finally, then, it is my tentative view that as to the restitution

obligation, that it be the judgment of the court that the defendants are jointly and severally liable and shall pay restitution in the amount of 100 million dollars. Payable, one-half to the State of Alaska, and one-half to the United States of America within 30 days. Is that formulation of the restitution obligation satisfactory under the plea agreement?

MR. DEMONACO: Yes, Your Honor.

MR. COLE: Your Honor, may I address the court on that?

THE COURT: Yes.

MR. COLE: I would like to have the scope of that restitution set out in full in the agreement. And as I recall, it's set out in the plea agreement. So there is no misunderstanding on the part of anyone as to the scope of what those restitutionary funds may be used for. That was a carefully negotiated provision.

THE COURT: The plea agreement -- and I'm looking at page nine -- says: such monies are to be used by the State of Alaska and the United States, exclusively for restoration projects within the state of Alaska, relating to Exxon Valdez oil spill. And then there is some more.

MR. COLE: Yes, I would like that . . .

THE COURT: I would be very happy to include that expressed language in the judgment.

MR. COLE: I would be pleased if the court

would see fit to do that, Your Honor.

THE COURT: Defense counsel, any thoughts on this formulation of the judgment?

MR. NEAL: No, Your Honor.

THE COURT: Mr. Lynch?

MR. LYNCH: Your Honor, no problem with that formulation.

THE COURT: All right.

MR. COLE: May I say just a public word about that, Your Honor. I wanted to call the court's attention specifically to this sort of addendum to the standard definition of restoration. And point out that that includes, quote, "long term environmental monitoring and research programs directed to the prevention, containment, clean-up and amelioration of oil spills.

And I call the court's attention to the fact that that was a carefully negotiated provision, to give some flexibility to the use of the two 50 million dollar payments. Because, as you know, the governor has spoken in those terms of the desirability of studying oil spills, and could make a contribution to not only the environment of Alaska relating to oil spills, but also, you know, the entire United States.

THE COURT: Judgment will then be entered against Exxon Corporation in the terms that I tentatively announced. The same will happen as to Exxon Shipping Company. And as to Exxon Corporation, Counts I, II, IV and V are dismissed. As to Exxon Shipping

Company, Counts IV and V are dismissed.

That will be the judgment of the court, with the additional language concerning the restitution payment. Is there anything further that we need to do, Mr. DeMonaco?

MR. DEMONACO: Yes. Your Honor, pursuant to Rule 42 of the Federal Rules of Criminal Procedure, I have a formal motion for the court to dismiss Counts I, II, IV and V, Exxon; Counts IV and V, are Exxon Shipping.

THE COURT: Probably the form judgment will do that, but I'll sign it just to make sure you're covered on it.

All right. I have signed the dismissal order as to the criminal counts. I have not signed the proposed judgment with respect to the criminal case, because I will be entering a separate judgment of my own that reflects the exact terms and allocations of the fine that I have discussed with counsel.

MR. NEAL: That will be consistent with your remarks just a moment ago, you mean?

THE COURT: Yes, sir. And if it isn't, I'm sure you will call my attention to it.

MR. DEMONACO: Your Honor, and I've just been reminded to also request the court to sign a consent decree. We prepared a separate motion here on the civil side, but there is also a place for the court to sign the decree as well.

THE COURT: I will do that. I haven't a clue as to who has it or where it is right now,

but I do recollect that there was provision for a signature on it. If the clerk would find the original of the consent decree and get it to my chambers, I will sign the last page of that document, also.

Anything further, gentlemen?

MR. DEMONACO: No, sir.

THE COURT: Counsel, I want to thank you for your efforts on this case. I am absolutely certain that but for all of your efforts, we wouldn't have gotten here today. I am equally convinced that but for your efforts, all of your respective clients would have spent millions and millions of dollars -- sums of money that I just can't hardly comprehend, on the defense of this litigation.

I was told when I started working these cases that I would retire before they were finished. And at that point I had 12 years to go, I think. I have to tell you, I sort of changed my mind as I got into it and became concerned that I might retire before all of it was over. It may yet happen, but I am pleased and I compliment you on your efforts to get a very large segment of this litigation behind us -- behind you all, so that instead of making work for me, you can make work for someone else, in doing something really profitable in cleaning up Prince William Sound.

MR. NEAL: It seems to me that Prince William Sound won and the trial lawyers lost, Your Honor. I've got to figure out what I'm going to do for the next two or three months.

THE COURT: I'm sure you will find a way. We will be in recess for a few minutes, and then I have a trial starting.

THE CLERK: This court now stands at recess. (off record - no notes provided)

END

APPENDIX AB

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-0095-CV
	)	(HRH)
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	
This Order Relates to All Cases	)	
	)	

ORDER NO. 254

AMUSSEN PLAINTIFFS' MOTION TO REMAND
CASE NO. A94-0209 CV

The Amussen plaintiffs (Amussen) have filed a motion to remand case no. A94-0209 CV to the Alaska Superior Court, from which it was removed.[1] Exxon opposes the motion[2] and Amussen has replied.[3] Oral argument was not requested and is deemed unnecessary.

On December 22, 1993, Amussen filed a complaint in Alaska Superior Court against Exxon Corp., Exxon Shipping Co., Alyeska Pipeline Service Co. (Alyeska), Joseph Hazelwood, and Edward Murphy. At the time the complaint was filed, Amussen, Alyeska, and Murphy were Alaska citizens. Murphy was dismissed pursuant to a state

[1] Clerk's Docket No. 5216.

[2] Clerk's Docket No. 5363.

[3] Clerk's Docket No. 5363.

court stipulation on April 13, 1994, and Alyeska was dismissed on May 5, 1994. Exxon removed the action on May 13, 1994, pursuant to 23 U.S.C. § 1441(a)[4], reasoning that the parties in the state court action were of diverse citizenship, thus creating diversity jurisdiction in the federal district court under 28 U.S.C. § 1332.[5]

The issue on remand concerns the status of Murphy. It is undisputed that Murphy was dismissed in state court. Amussen argues, however, that although the stipulation dismissing Murphy purports to include Amussen, their attorney, Richard Jameson was not aware of and did not sign the stipulation.[6] Exxon argues that another of plaintiffs' attorneys, Matthew Jamin, had authority to enter into the stipulation on behalf of all plaintiffs, but Mr. Jamin's affidavit denies that he had authority to dismiss Murphy from the Amussen lawsuit. Mr.

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[4] 28 U.S.C. § 1441(a) provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant, or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

[5] 28 U.S.C. § 1332 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different states . . . .

[6] In fact, Mr. Jameson argues that he was not aware of the stipulation until Exxon filed its notice of removal.

Jamin further denies that his signature on the Murphy stipulation was intended to bind Mr. Jameson or Amussen. Notwithstanding the stipulation, Amussen argues that Murphy remains a part of the state court litigation, thus destroying this courts diversity jurisdiction.

The court need not decide whether Amussen dismissed Murphy in state court, because the evidence establishes that Murphy was fraudulently joined. "If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). Although issues of liability are not ordinarily determined on a motion to remand:

> [I]t is well settled that upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal.
>
> The court may "pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available."
>
> Of course, as in any removal action, doubt arising from merely inartful, ambiguous or technically defective pleadings should be resolved in favor of remand. Additionally, ordinarily a fraudulent joinder claim must be capable of summary determination.

Gasnik v. State Farm Ins. Co., 825 F.Supp. 245, 249 n.6 (E.D. Cal. 1992) (quoting Lewis v. Time, Inc., 83 F.R.D. 455, 460 (E.D. Cal. 1979) (aff'd, 710 F.2d 549 (9th Cir. 1983) (citations omitted)). See, 1 Richard A. Givens, Manual of Federal Practice, § 1.50 at 102 (1991) ("If there is no arguably reasonable basis for predicting that state law might impose liability on the resident defendants under the facts alleged, then the claim is deemed fraudulent and lack of diversity will not prevent removal.").

Exxon argues that the court has already determined that Murphy was entitled to judgment as a matter of law when it issued Order No. 186 granting Murphy's motion for summary judgment.[7] Because no plaintiffs, including Jameson's plaintiffs, opposed Murphy's motion, Exxon argues that Jameson has admitted that no claim against Murphy exists. However, none of the plaintiffs represented by Jameson named Murphy as a defendant in their federal complaints. They, therefore, had no reason to or basis for opposing Murphy's motion for summary judgment.

The court must now consider whether Amussen's state court complaint states a cause of action under the rules of Alaska. McCabe, 811 F.2d at 1339. Amussen alleges "that Murphy negligently turned over command of the Exxon Valdez to Captain Joseph Hazelwood, who was intoxicated." Amussen reply at 7-8.[8] Although faced with the issue of

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[7] Clerk's Docket No. 4663.

[8] Specifically, the Amussen state court complaint states in count IX:

> 70. Defendant MURPHY owed a duty of care to Plaintiffs to assure that the EXXON VALDEZ

fraudulent joinder, the only evidence Amussen offers to support a claim against Murphy is that "Murphy was aware the [sic] Hazelwood was impaired as he smelled alcohol on Hazelwood's breath." Amussen reply at 8.[9]

To prevail against Murphy, Amussen must prove that Murphy owed Amussen a duty to protect them from the actions of Hazelwood. Common law does not require a "defendant to prevent foreseeable harm when, to do so, he must control the conduct of another person . . . ." Div. of Corrections v. Neakok, 721 P.2d 1121, 1126 (Alaska 1986) (citation omitted). This rule absolves Murphy of blame. However, the

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> passed safely through the harbor, Valdez Narrows, the normal deep-water shipping lane channel, rocky reefs and Bligh Reef.
>
> . . . .
>
> 72. Defendant MURPHY breached his duty of care by entrusting the commanded of the EXXON VALDEZ to Captain HAZELWOOD when Captain HAZELWOOD was in a clearly intoxicated state, and in no condition to command the EXXON VALDEZ through the Narrows.
>
> 73. Defendant MURPHY knew or should have known that is [sic] was unreasonably dangerous to turn over the command of the EXXON VALDEZ to Captain HAZELWOOD and then disembark the EXXON VALDEZ leaving it in the command of Captain HAZELWOOD, who at the time was clearly and visibly intoxicated.

Amussen complaint at 15, attached to Exxon's notice of removal, Clerk's Docket No. 5049 (a).

[9] Amussen cites Murphy's deposition at 106, attached to the reply as Exhibit C.

court must also determine whether Murphy fits into the "special relationships" exception to the rule.

> When a defendant stands in a special relationship to either the dangerous person or the potential victim, the defendant is required to control the dangerous person or warn or otherwise protect the victim.

Id. (citing Restatement (Second) of Torts § 315 (1965)).

Although vessel pilots are held to an "'unusually high degree of care,'" Kingfisher Shipping Co. v. M/V Klarendon, 651 F.Supp. 204, 207 (S.D. Tex. 1986) (citation omitted), no case of which the court is aware has held that a pilot has a duty to control the captain of a ship. In fact, the opposite is true. "While the pilot has command of the navigation of a vessel, he is not her master. Even while on the bridge, he is subject to removal by the master . . . ." McGrath v. Nolan, 83 F.2d 746, 749 (9th Cir. 1936) (citations omitted). See Kingfisher, 651 F.Supp. at 207 ("It is the duty of the captain to interfere with a pilot's orders in cases of danger which the pilot does not foresee and in all cases of great necessity." (citation omitted)). Thus, Hazelwood had both the authority and duty to interfere with Murphy if necessary. Murphy, however, had neither the authority nor the duty to interfere with Hazelwood. Accordingly, Murphy did not stand in a "special relationship" with Hazelwood so that he might control Hazelwood.[10] Furthermore, by safely

[10] Amussen alleges that "Murphy negligently turned over command of the Exxon Valdez to Captain Joseph Hazelwood . . . ." Amussen reply at 7-8. This allegation fails because

navigating the Exxon Valdez to the normal disembarking point for pilots, and by leaving the vessel at the appropriate course and speed, Murphy fulfilled his duty to Amussen whether or not he stood in a special relationship to either Hazelwood or Amussen.[11]

Moreover, despite Amussen's allegation that "Murphy was aware the [sic] Hazelwood was impaired as he smelled alcohol on Hazelwood's breath," Amussen reply at 8 (emphasis added), the depositions of both Murphy and the Exxon Valdez crew show that Hazelwood never exhibited signs of impairment. Although Murphy smelled alcohol on Hazelwood's breath, neither Murphy nor the crew noticed Hazelwood slur his speech, stumble, stagger, sway, or misstep. (See, depositions of Murphy, Cousins, Kunkel, and Higgins attached to Murphy's motion for summary judgment and Murphy's trial transcripts). Hazelwood gave appropriate orders at appropriate times and appeared "normal." Id. Neither Murphy nor the crew detected any signs that Hazelwood was alcohol impaired. Id. Accordingly, Amussen cannot establish that Murphy knew that Hazelwood was intoxicated or impaired by alcohol.

Murphy was never in command of the Exxon Valdez. Captain Hazelwood was in command of the ship throughout its voyage.

[11] The court has reviewed the depositions of various individuals submitted in support of Murphy's motion for summary judgment and those portions of Murphy's deposition read at trial. The evidence shows that when Murphy left the Exxon Valdez at Rocky Point, the ship was in its normal course and the engines slow ahead. Murphy advised Hazelwood of the ship's course, speed, ice reports and vessel traffic before disembarking.

The actions of Murphy were those of a reasonable and prudent pilot. Murphy fulfilled any duty he may have had to protect Amussen and cannot be held liable to Amussen for the actions of Hazelwood. Amussen's failure to state a cause of action against Murphy under the settled rules of Alaska is obvious; therefore, the joinder of Murphy is fraudulent. McCabe v. Gen. Foods Corp., 811 F.2d 1336 (9th Cir. 1987).[12]

For the above stated reasons, Amussen's motion to remand is denied.

DATED at Anchorage, Alaska, this 13th day of September, 1994.

/s/
United States District Judge

[12] The court also notes that Murphy could not have foreseen, upon leaving the Exxon Valdez in a safe and normal condition, the series of mishaps which led to the ship's grounding.

APPENDIX AC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-0095-CV
	)	(HRH)
the EXXON VALDEZ	)	
	)	(Consolidated)
	)	
	)	
This Order Relates to All Cases	)	
	)	

ORDER NO. 254 SUPPLEMENT

JAMESON PLAINTIFFS' MOTION TO LIFT THE STAY TO FILE MOTION TO RECONSIDER OR FOR INTERLOCUTORY APPEAL OF ORDER NO. 254

The Jameson plaintiffs' have filed a motion to lift the stay to file a motion to reconsider or for interlocutory appeal of Order No. 254.[1] The motion is unopposed.

In Order No. 254, the court ruled that defendant Edward Murphy, pilot of the Exxon Valdez on the night of the grounding, was fraudulently joined in plaintiffs' Alaska state court action against Exxon Corporation, et al. That ruling created diversity jurisdiction in federal district court under 28 U.S.C.

[1] Clerk's Docket No. 5920. The motion to reconsider which the Jameson plaintiffs would file is attached to Clerk's Docket No. 5920.

§ 1332, and the court denied plaintiffs' motion to remand.

The purpose of a motion to reconsider is to present newly discovered evidence or to demonstrate manifest error of law. Plaintiffs' motion to reconsider would do neither; rather, the underlying motion is devoted to the request for certification of Order No. 254 for interlocutory appeal. The motion to lift stay is denied as to the motion to reconsider. However, the court will consider the request for leave to appeal on an ex parte basis.

The request for interlocutory appeal is based on 28 U.S.C. § 1292, which states in pertinent part:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order.

28 U.S.C. § 1292(b).

Plaintiffs' motion is founded on the misconception that Murphy was aware that Hazelwood was intoxicated before Murphy left the Exxon Valdez. The court specifically addressed this issue in Order No. 254, where the court found that:

> [T]he depositions of both Murphy and the Exxon Valdez crew show that Hazelwood never exhibited signs of

> impairment. Although Murphy smelled alcohol on Hazelwood's breath, neither Murphy nor the crew noticed Hazelwood slur his speech, stumble, stagger, sway, or misstep. (See, depositions of Murphy, Cousins, Kunkel, and Higgins attached to Murphy's motion for summary judgment and Murphy's trial transcripts). Hazelwood gave appropriate orders at appropriate times and appeared "normal". Id. Neither Murphy nor the crew detected any signs that Hazelwood was alcohol impaired. Id. Accordingly, [plaintiffs] cannot establish that Murphy knew that Hazelwood was intoxicated or impaired by alcohol.

Order No. 254 at 7-8, Clerk's Docket No. 5826.

In Order No. 254, the court found that Murphy left the Exxon Valdez in a safe and normal condition and that he could not have foreseen the series of mishaps which led to the ship's grounding. The court further found that:

> The actions of Murphy were those of a reasonable and prudent pilot. Murphy fulfilled any duty he may have had to protect [plaintiffs] and cannot be held liable to [plaintiffs] for the actions of Hazelwood.

Id. at 8.

The only authority plaintiffs offer in support of their motion actually supports the court's reasoning in Order No. 254. Plaintiffs cite The Law of Seamen for the proposition that:

> Under present conditions of vessel operation it is a fairly simple thing to notify the owner and the United States Coast Guard by radio of the conditions aboard the vessel and prudence would dictate that the mate seek permission to take over command.

Plaintiffs' underlying memorandum at 6 (quoting Martin J. Norris, The Law of Seamen § 260 (1970) (emphasis added) (this text is now found at § 10.19 (4th ed. 1985). Thus, even if there were evidence that Murphy knew Hazelwood was intoxicated, it was the mate's responsibility, not Murphy's, to take appropriate action.

A "substantial ground for difference of opinion" does not exist regarding Murphy's responsibilities toward plaintiffs or Murphy's knowledge of Hazelwood's condition the night of the grounding. 28 U.S.C. § 1292(b).[2] The court doubts that an interlocutory appeal as to Murphy would materially advance the ultimate termination of this case. Plaintiffs' request to certify Order No. 254 for interlocutory appeal is denied.

DATED at Anchorage, Alaska, this 17th day of October, 1994.

/s/
United States District Judge

[2] The court is aware that Jameson has filed an action against Exxon Corporation in New Jersey state court in which Murphy was not named as a defendant. In that suit, Jameson seems to have recognized the futility of pursuing Murphy.