The *Exxon Valdez* Oil Spill: The Final Chapter?

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Introduction

On June 25, 2008, about four months after opening arguments, the U.S. Supreme Court rendered a decision on the case of *Exxon Shipping Co. et al. v. Baker et al.* This represented the final appeal of ExxonMobil's suite of litigation cases beginning in 1989, just months after the *Exxon Valdez* supertanker ran aground on Bligh Reef in Alaska's Prince William Sound. Ironically, the vessel--- which had been in service for less than three years--- was named after the Alaska town which hosts North America's northernmost ice-free port; and it is also

the terminus of the Trans-Alaska Pipeline which had been in operation for almost twelve years at the time of the spill.

After reviewing the chain of events leading to the breach in the tanker's hull, this paper will analyze the recent, precedent-setting, Supreme Court decision. The ripple effects it will likely have in the U.S. maritime sector will also be outlined. While this was the 34th largest oil spill in history it was, arguably, the world's worst in terms of environmental impact; thus, litigation was to be expected. No one, though, at the time would have thought that the cases would take years, and even, decades to resolve.

Given that the 20th anniversary of the spill was on March 24, 2009, this paper will appraise the environmental and regulatory legacy of the multi-layered response to the event--- where Alaska truly lost its innocence.

Prudhoe Bay: A Brief History

A major oil field was discovered at Prudhoe Bay in 1967 and made public a year later. This was a joint venture by Standard Oil (renamed Exxon in 1973) and Atlantic Richfield Company (ARCO). The question was how the oil would be transported to the East Coast. While an attempt was made in 1968 to ship the oil via the Northwest Passage a pipeline was the final decision. After all, there would have to be a lot of vessel traffic required to move the 25 billion barrels deemed available at Prudhoe Bay. Indeed, Prudhoe Bay would become the

largest oil field in North America (and 18th largest in the world).

The participating field area is over 213 thousand acres in size with 1,114 wells in production (as of 2006). With today's technology about 13 (or 52%) of the 25 billion known barrels are retrievable. Production reached a plateau of 1.5 million barrels per day in 1979 and was maintained for 10 years. Since 1989, production has been declining at a rate of about 10% per year. As of 2006, about 11 billion barrels have been retrieved in total and daily production is about 475 thousand barrels. Ownership is shared among nine companies with the largest shares attributed to: ConocoPhillips (36%); ExxonMobil (36%) and British Petroleum (BP) (26%). BP acquired ARCO in 2000 and increased its share accordingly.

The 48-inch in diameter, 800 mile pipeline from Prudhoe Bay, on Alaska's North Slope, to the Port of Valdez crosses three mountain ranges, 34 major rivers and a further 800 minor rivers and streams (**Rutledge 1998; pt. vi, p. 2**). While ingress and egress are at sea level the pipeline reaches its highest peaks at Atigun Pass (4,739 feet) and Isabel Pass (3,420 feet). It would be built by a consortium of oil companies (at first ARCO, Humble Oil and BP) known as the Trans-Alaska Pipeline System (TAPS). The name would be changed to the Alyeska Pipeline Service Company. While pipe was being stored in Valdez and Fairbanks as early as 1971 construction would begin in 1974 after delays resulting from: (1) Alaska native land settlement claims; and (2) completion of environmental impact studies. But, more than anything

else, the OPEC oil price shocks of 1973 would turn the U.S. public's attitude firmly in favor of the project. The pipeline's capacity is 1.2 million barrels per day. Total cost would be $8 billion. Oil entered the pipeline on June 20, 1977 and reached Valdez on July 28.

Once the operation began in 1977 it would change the fiscal dynamic in Alaska in profound ways. With about 85% of state revenues derived from the petroleum sector it would bring about a "disconnect" between taxpayers and legislators. Basically, the bulk of government services enjoyed by Alaskans would not come directly out of their pockets. It would be easy for Alaskans to demand services since they had the luxury of not financing them; while legislators had a captive petroleum sector which was easy to tax.

With oil production generating state revenues, combined with a population boom in the late 1970s, Alaska's economy was dependent on the stability of world oil prices. When these started to fall in 1982 a recession in the state was impossible to avoid. Of course, as time pressed on and petroleum production peaked Alaska would enter the new century with fiscal deficits resulting from the "disconnect". Many Alaskans would accept a fiscal deficit so long as their annual "Permanent Fund Dividend" checks arrived. Solving the deficit through a state income tax or a sales tax would not be possible in the political atmosphere that persisted.

After the pipeline began operations at its southern terminus at the Port of Valdez, the northernmost ice-free port in the U.S., it would serve one or two supertankers per day. To give an idea of this impact, port tonnage rose

from 208 thousand in 1971 to about 85 million in 1980. While the pipeline made economic sense over the Northwest Passage, many Alaskans (indeed many Americans) would begin to question the idea of domestic oil transportation in pristine and fragile environments.

The Case

The 1989 *Exxon Valdez* oil spill would alter the course of Alaska's maritime history. The oil spill was the most extensive in North American history (and 34th in world history; though arguably the worst in terms of environmental impact). The oil spill created what only could only be described as a tsunami of criminal and civil litigation.

After 20 years of lawsuits the U.S. Supreme Court ruled in what was the final (legal) chapter in the stream of litigation over the *Exxon Valdez.* The court's decision is likely to ripple through U.S. maritime law for years to come.

On March 24, 1989 (at 12:04 a.m. to be exact) the 987 foot long, 166 foot wide *Exxon Valdez* supertanker, bound for Long Beach, California, went off its designated course and ran aground on a rock shelf known as Bligh Reef about 35 miles southwest of the Port of Valdez. The tanker had left the Alyeska Pipeline Terminal at Valdez about three hours earlier and was attempting to avoid the ice floes off of Columbia Glacier. The ship's single hull was ruptured and it spilled about 11 million out of its 53 million gallons of crude oil into Prince William Sound.[1] Though not fully loaded the tanker still drew up 56 feet of

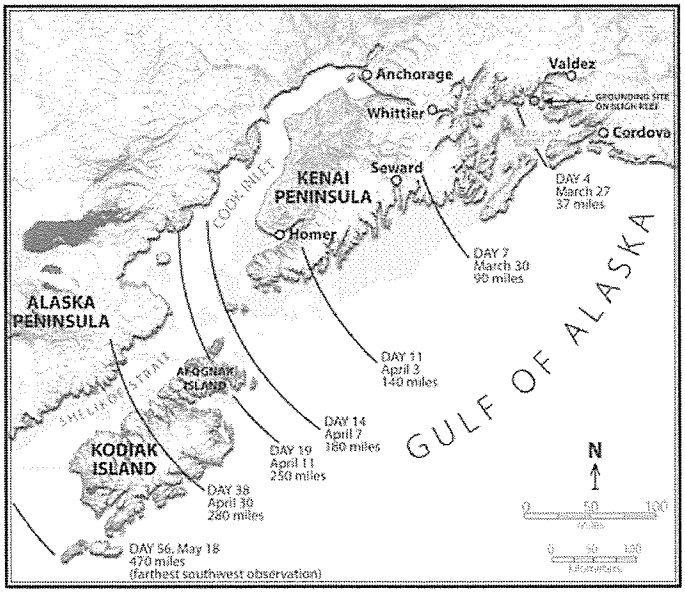
water. Eight of its eleven cargo tanks were ruptured creating the biggest oil spill in U.S. history. The U.S. Coast Guard estimated that had the tanker been double-hulled 60% less oil would have leaked into the water (**Alaska Oil Spill Commission 1990; p. 148**).

Though the 34th largest oil spill in the world it was arguably the worst in terms of environmental impact. Shorelines up to 1,200 miles to the southwest were blackened and thousands of fish, birds and mammals would die of suffocation from the sticky oil, including billions of salmon and herring eggs. The lucrative summer herring and salmon fisheries were closed in the region. In just over three months the oil covered 28,500 square kilometers of coastal waters from Bligh Reef to the coast of the Kenai Peninsula (curling northward as far as the town of Homer) and extending along the Alaska Peninsula past Kodiak Island (**Ott 2005, p. *xx***). To give some perspective, coastwise, this would be equivalent to a spill occurring along the U.S. East Coast from the southern tip of Massachusetts to the northern tip of North Carolina.

While there had been no disasters and only a few incidents along the oil transport route, a sense of complacency had built up of over the previous 12 years of pipeline operation with over 8,000 successful tanker trips through Prince William Sound. This mega-project, and the revenues it generated for the state and its citizens, was a source of great pride to many Alaskans. Indeed, nationwide, the last oil tanker spill at sea occurred in 1984 in the Gulf of Mexico with the *Alvenus* spilling about one-third the amount the *Exxon Valdez* would. In that case

most of the oil was simply carried out to open sea. Such optimism would bear a heavy cost in the aftermath in Prince William Sound.

Figure 1: Extent of the Exxon Valdez Oil Spill



Thousands of people would be involved in the clean-up effort which would cost Exxon about $3.4 billion to complete. After remaining aground for several weeks the vessel would be towed to dry dock in San Diego (where the vessel had been built in 1986). It would be repaired and re-commissioned by Exxon under the name *Sea River Mediterranean* and used to haul crude oil from the Persian Gulf to Europe and Asia.[2] Investigations by the National Transportation Safety Board determined

that the captain, while likely intoxicated, left the bridge in charge of his third mate who was not experienced to deal with these particular waters. In addition to prohibitions on being intoxicated while on duty, Exxon's policy was that the bridge be manned at all times by at least two officers.

The clean-up operation did not begin promptly. It took several days for booms to contain the leaking oil and for oil skimmers to arrive and be deployed. Alyeska Pipeline Service Company did not have an adequate supply of these on hand at Valdez, as was required by their plans, and had to be brought in from other state locales. The U.S. Coast Guard did not hear of the grounding until being informed by the captain himself via a radio distress call about 20 minutes after the grounding took place. In fact, they did not administer a sobriety test on the captain until ten hours after the grounding. A tugboat, carrying lightering equipment, did not reach the tanker until eleven and a half hours after the distress call. Alyeska's flat deck barge used for spill response had been damaged in use the previous January and had not been repaired as yet. Since it was still sea worthy the barge was fitted with response equipment gathered from around the terminal. It took over fourteen hours to complete the fitting and travel to the damaged tanker.

After two days had passed a spring storm struck the area making deployment of the clean up equipment impossible. Northwest intermodal operator, Lynden Inc., offered one of its barges for Exxon to use as a floating command post. It provided housing for 56 workers, a crane, and a helicopter-pad. Other barges would be used to haul generators, machinery, fuel and 400 cubic foot

containers used to collect oil-soaked material and waste. Under intense media coverage Exxon publicly took responsibility for the spill and declared its intention to clean it up.

The State of Alaska prosecuted the captain and he was convicted of illegally discharging oil; the jury acquitted him on the charge of intoxication. The sentence was a $50,000 fine plus 1,000 hours of community service. Both state and federal governments filed criminal charges against Exxon as well as civil claims related to the damage caused to public lands. The plaintiffs claimed $3 billion in damages in the civil suit. In October 1991 the U.S. District Court in Anchorage approved a settlement reached by all three parties in the civil suit. The payment would be $900 million spread over 10 years. Under the criminal case Exxon was fined $150 million with $125 million of this staid as a result of the company's own clean-up efforts. The remaining $25 million was split between the North American Wetlands Conservation Fund and the Victims of Crime Fund. Furthermore, a $100 million criminal restitution was ordered to be paid evenly to both state and federal governments. And to cover unknown or unanticipated effects at the time of the settlement Exxon agreed to pay the governments a further $100 million as necessary. This clause, "Reopener for Unknown Injury", could only be made active on September 1, 2002 through the same date in 2006.

Of course, that was not the end of Exxon's legal troubles. A class action lawsuit was filed in 1994 with the U.S. District Court in Anchorage awarding $286.8 million in compensatory damages to about 32,677 fishermen,

landowners, and Alaska natives plus a further $5 billion in punitive damages as recommended by the jury. The amount of compensatory damages sought by the plaintiffs was $895 million. In 2002, the 9th U.S. Circuit Court of Appeals in San Francisco upheld the punitive damages award but the amount was reduced to $4.5 billion.[3] On a second appeal in 2006 the amount was further reduced to $2.5 billion. Even at that amount, ExxonMobil (its new name after a 1999 merger) noted that this award was larger than the total of all punitive damage awards upheld by all federal appeals courts since the country's founding.

In 2007 an appeal of the class action suit against ExxonMobil was accepted by the U.S. Supreme Court; and arguments began in February 2008. Justice Alito recused himself due to his owning shares in ExxonMobil. As such, if the remaining eight Justices should tie the appeal would automatically fail and the damages award would stand. Several friends-of-the-court briefs from the shipping industry were filed in support of the appeal related to punitive damages. However, in early 2008, a brief against ExxonMobil was filed and signed by the State Legislature and former Alaska governors Hickel (Rep.; '66-'69 and '90-'94), Sheffield (Dem.; '82-'86), Cowper (Dem.; '86-'90 and in office at the time of the spill), and Knowles (Dem.; '94-'02). Alaska's senior U.S. Senator Stevens (Rep.; '68-'08) filed a similar brief. The issue was whether or not a shipping company, under maritime law, could be punished for the actions of its captains or crews especially when those actions contravened company policy.

During oral arguments the famous 1818 ruling in the *Amiable Nancy* case (***q.v.*, *supra*-note 3**) was looked upon as a potentially tenuous standard to apply to late 20th century ocean vessels. Rapid communications mean that the vessels are no longer a "floating world by itself" (in the words of Justice Souter). And the captain of the vessel may not be taken to be someone independent of Exxon's control once at sea. His acts are subject to much closer and synchronized control than in 1818 meaning there may be an expectation for Exxon's management to have exercised more oversight. The court also reviewed the size of the punitive damage award. Whether the decision focused narrowly on ExxonMobil or to punitive damages over a wider spectrum, the ruling would be important for the shipping industry. Some legal scholars wondered if, indeed, punitive damages were awarded, that there would also be a rule and/or cap of some sort attached to give guidance to vessel owners and the companies that insure them.

On June 26, 2008 the U.S. Supreme Court reached a split (4 to 4) decision on the relevance of the *Amiable Nancy* case; therefore, the appeal failed on those grounds. The lower court decision holding ExxonMobil culpable would, therefore, stand. The court also split (5 to 3) and remanded the case back to the 9th U.S. Circuit Court of Appeals with an order to grant punitive damages; but reduce them from $2.5 billion down to the level of compensatory damages (i.e., $507.5 million; the original award, though interest is to be added). The three dissenting Justices (Breyer, Stevens, and Ginsberg) would have upheld the punitive damages at $2.5 billion. A cap

on punitive damages now appears to have been set. The majority opinion, written by Justice Souter, expressed a concern that punitive damage awards relative to compensatory ones had become unpredictable. "[G]iven the need to protect against the possibility (and disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award [determined across all states], is a fair upper limit in such maritime cases." (**Souter 2008; p. 40**). In his minority opinion, Justice Breyer felt a "limited exception" to a 1:1 ratio was justified in this case given the "egregious nature of Exxon's conduct." (**Breyer 2008; pp. 1-2**). While ExxonMobil won its appeal in a narrow sense the level of the award was large; but the plaintiffs were disappointed by the reduction. Justice Stevens, also in the minority, wrote more directly for the $2.5 billion award. "In light of Exxon's decision to permit a lapsed alcoholic to command a supertanker carrying tens of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all the individuals who depended upon the sound for their livelihoods, the jury could reasonably have given expression to its 'moral condemnation' of Exxon's conduct in the form of this award." (**Stevens 2008; p. 8**).

In fact, the fishery in Alaska is so extensive the devastation it suffered in Prince William Sound in 1989 did not significantly affect the statewide catch of the various species. For example, over 1988-1989 the major fish species which suffered a state-wide decline in their commercial catches were: halibut (-8%), herring (-14%),

chum salmon (-50.1%), and silver (coho) salmon (-7.7%). Over 1989-1990, the declines affected only: halibut (-6%), herring (-7%) and pink (humpy) salmon (-14%).

The Legacy

As a result of the *Exxon Valdez* disaster the state government legislated some of the toughest environmental laws in the U.S. in 1990. Some of the rules of Alaska Statute 46.04.030 required oil companies to have clean-up equipment available within a given region in order to respond to any incident within 72 hours; and the equipment on hand must be able to clean up 60% of the largest potential spill out of a given tanker vessel and barge. To handle the other 40% they must demonstrate access to enough equipment outside of the region that can respond within those 72 hours.

The federal government passed the *Oil Pollution Act* (OPA) of 1990. Under the Act the Prince William Sound Oil Spill Recovery Institute was established in the town of Cordova, Alaska. The Institute would engage in research examining best practices in spill prevention and management. Tanker vessels in excess of 5,000 gross tons must be double-hulled. In the meantime, single-hulled tankers in Prince William Sound (and other specific places in the U.S.) had to be escorted by two tugboats (which would also act as first responders in case of a breach). As to tanker crews their employers must have a drug-abuse program in place.

The OPA (1990) gave the U.S. Coast Guard unprecedented authority over oil spills. Before the *Exxon*

Valdez spill the Coast Guard could not federalize a spill area unless the organization responsible was unwilling or unable to perform the necessary control and clean up. Also, should the Coast Guard take charge the response costs would have been covered by the federal government. Now the Coast Guard has the discretion to federalize spills and direct all levels of government and private parties in order to effectively coordinate the action (while the spiller pays the costs incurred by all).

The U.S. Supreme Court's decision on the 1989 *Exxon Valdez* oil spill broke from precedent and established that oil companies are, indeed, responsible for the actions of their vessel operators while at sea. Of course, double hull tankers are now the rule; in fact, 77% of today's world fleet is double-hulled compared to about 6% in 1989. Interestingly, by 1989, of the 94 tankers cleared by the state to travel Alaska's waters 25 of them (or 27%) were in fact double-hulled (**Alaska Oil Spill Commission 1990; p. 123**). The possibility of such a spill today is much smaller. Still, its legacy continues in Alaska. While the U.S. Senate passed a bill to approve drilling in the Alaska National Wildlife Refuge (ANWR; an area about the size of the state of New York) the spill put the bill in limbo which persists to this day. A further attempt built into the 1995 U.S. Federal Budget was vetoed by the President.

In 2009 plaintiffs began receiving their shares of the $507.5 million punitive damages award plus interest (but minus about $40 million in legal fees). This is expected to be about $1 billion. Commercial fishermen who were denied their 1989 fishing season are subject to

the largest shares (about 50% of the total) and could receive around $100,000-$200,000 a piece. Nonetheless, about 20% of the original plaintiffs in the 1994 class action suit have since deceased; and many of those who had hoped to retire on their award (which was 10-times larger before the appeals process) may have to continue in business and hope for the best. Native villages affected by the spill are slated to receive about 4% of the total award. Ironically, the recipient of the largest single share is ExxonMobil itself at 11% (**Kizzia 2008; p. A-9**). The reason for this is that the company struck a deal with seven Seattle-based fish processors in 1991 for $70 million. They were able to remain a party to the punitive damages lawsuit provided any award were remitted back to ExxonMobil.[4] Thus, ExxonMobil may receive over $110 million in remission.

One of Alaska's "Jones Act" carriers, Totem Ocean Trailer Express (TOTE), operates a twice weekly roll-on, roll-off (Ro-Ro) service between the ports of Tacoma and Anchorage. Their diesel-electric powered vessels, known as Orca-class, were ordered in 1999 and built specifically for Alaska trade lanes. In particular, given the lessons of the *Exxon Valdez*, they have double-hulls and other redundancies built into the navigation and propulsion systems. At 839 feet long and 118 feet wide they are 48 feet longer and 26 feet wider than the older, Ponce-class vessels. Capacity-wise the Orca-class can hold 1,200 TEUs (twenty-foot equivalent trailers) and 225 automobiles compared to 760 TEUs and 120 automobiles in the Ponce-class. Since the port of Anchorage is not ice-

free TOTE's route is more precarious than those in Prince William Sound.

The Alaska tanker fleet's transition to double-hulls, as required by the OPA, is almost complete. Loaded single-hull tankers are still escorted through Prince William Sound. Once the fleet has completed its transition there will be no mandate for tugboat escorts. No doubt there will be a drive by citizen groups to maintain escorts; and with the decline in the global economy, efforts to cut costs may see a reduction in margins of safety. Discussion of safety issues in Prince William Sound may be expected to rise in volume over the next few years.

Conclusions

The litigation over the *Exxon Valdez* oil spill may be over but the ripple effects continue. All ocean vessel companies in U.S. waters now must be aware of the increased oversight expected of them, by law, over their vessels and crews now that the 1818 *Amiable Nancy* precedent has been tossed aside. A 1:1 rule is now in place for compensatory and punitive damages which removes some uncertainty from litigation. The Alaska shipping fleet has steadily progressed to double-hulled vessels; and safety standards are much higher. Yet, though the margin of safety has been increased, no one can say by how much. Furthermore, if a spill were to occur no one can say to what extent coastlines would be affected. The greatest danger, no matter what plans and technology are in place, is complacency.

Notes

[1] The exact volume spilled was a matter of controversy. Caleb Brett, a petroleum industry consultancy retained by Exxon, estimated 10.84 million gallons (or about 258,000 barrels) spilled. It was simply a matter of noting the difference between the number of gallons originally on board (53.04 mil.) and the number transferred from the crippled vessel (42.2 million). The state was conducting its own studies into the matter but stopped the process when its lawsuit against Exxon was settled in 1991. Independent experts have suspected that the churning effect of waters around the holes in the vessel created an emulsification effect meaning that not all of the 42.2 million gallons was pure oil. If that is considered the amount leaked into Prince William Sound could rise to around 30 million gallons (**see Ott 2005; p. 5**).

[2] In 2008 the vessel was sold to Bloom Shipping of Hong Kong and will be converted into a dry bulk carrier. The vessel will be renamed *Dong Fang Ocean*.

[3] The appeals court's decision appeared at odds with the important and precedent-setting case of the neutral schooner, *Amiable Nancy* during the War of 1812. The U.S.-flagged *Scourge* detained the schooner, then robbed and assaulted its crew. By destroying the schooner's logs and other papers the captain could not explain his activities when captured by the British Navy a

few days later. As a result of having his vessel seized and nearly sold off, the captain of the *Amiable Nancy* sued the owner of the *Scourge* for damages both realized and punitive. However, an 1818 U.S. Supreme Court ruling stated that punitive damages could not be set against the *owner* for the actions of his crew. It is important to realize that punitive damages under this view of maritime law are to be focused on the payer and not the payee. When juries focus on the latter, and recommend large pay-outs, it can be interpreted on appeal as violating the due process provisions of the U.S. Constitution (i.e., the 5th and 14th Amendments).

[4] The "Seattle Seven" as they were known include: Aleutian Dragon Fisheries, Icicle Seafoods, North Coast Seafood Processors, North Pacific Processors, Ocean Beauty Seafoods, Trident Seafoods, and Wards Cove Packing Company.

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