

# The *Exxon Valdez*: A Lesson Learned?

by Adam Torem

## INTRODUCTION

The 1989 *Exxon Valdez* oil spill re-awakened America's environmental community. As ten million gallons of oil poured into Alaska's Prince William Sound, images of dead and dying wildlife poured into our living rooms. Network news coverage played the disaster like a Shakespearean tragedy.

After two seasons of cleanup efforts, Alaskan citizens have mixed feelings about the event. Nearly everyone in the vicinity of Prince William Sound profited from the spill; however, many fearfully ponder the long term effects. The sportfishing industry had one of its best years ever, but people are quick to point out that the commercial fisheries shut down for the season, fearful of putting an oil-tainted product on the market. Aerial surveys in September 1990 indicate little visible damage, but setting foot on one of the spongy "cleaned" beaches reveals the oil trapped beneath the rocks.

Opinions in the Continental United States are much more uniform than those in Alaska: the cleanup efforts were a sham. The world learned that no amount of money spent or number of personnel deployed can control a large oil spill.

In this article, I will explore the immediate consequences of the *Valdez* spill, examine other spills since March 1989, and review the responses of both the California Legislature and the Federal Government. Finally, the repercussions of the Persian Gulf Crisis will be analyzed along with American options for alternative fuels.

## I. THE VALDEZ: AFTERMATH OF A CATASTROPHE

On March 14, 1989, the *Exxon Valdez* ran aground on Bligh Reef spilling over ten million gallons of crude oil into Alaska's Prince William Sound. The spilled oil sullied over one thousand miles of coastline, killing countless birds and animals. To this date, two billion dollars have been spent on cleanup efforts; however, only three to four percent of the oil has been recovered. Exxon has given up its cleanup efforts, and

as a finale held an auction to sell off its cleaning supplies. The October 9, 1990, event saw everything from all-terrain vehicles to animal shampoos, and even an airplane, go to eager bargain hunters. (Davis Enterprise, Oct. 10, 1990, at A13, col. 1.)

Shortly after the spill, the Alaska Legislature created the Alaska Oil Spill Commission to analyze the causes of the wreck. This panel of seven experts in various environmental and governmental fields found that consistent violations of the original rules for tanker passage through Prince William Sound brought this catastrophe to Valdez. Further, the Commission determined that self-regulation in oil transportation contributed to the complacency and neglect that caused the disaster. (Alaska Oil Spill Commission Report at 2, 5.) The Oil Spill Commission's report made sixty formal recommendations to the State of Alaska and to the United States government to prevent future marine spills.

The National Transportation and Safety Board (NTSB), which also investigated the accident, found several contributing causes: drinking by the ship's captain, a fatigued and overworked crew, and inadequate traffic control by the Coast Guard. (Sacramento Bee, Aug. 1, 1990, at A8, col. 1.) The NTSB suggested several new guidelines to prevent future disasters, such as ensuring adequate rest for crews and creating stronger substance abuse programs to combat alcohol misuse among sailors.

Litigation resulting from the *Valdez* spill was quick in coming and is expected to continue for quite some time. (Frommer and Torem, at 11.) Captain Joseph Hazelwood was tried in a criminal action and acquitted of most charges by a jury in March 1990, one year after the wreck. A superior court judge sentenced Hazelwood to a fifty thousand dollar fine and one thousand hours of cleanup for a misdemeanor conviction: negligent discharge of oil. (*State of Alaska v. Hazelwood*, 3 AN S89-7218.) Captain Hazelwood is appealing his sentence.

In July, the Coast Guard suspended Captain Hazelwood's license for nine months after Administrative Law Judge Harry Gardner found him guilty of

consuming alcohol within four hours of sailing and of negligence in leaving the bridge of the ship just before the accident. Because Captain Hazelwood pleaded no contest to those charges, the Coast Guard dropped charges of drunkenness and misconduct. (Sacramento Bee, July 26, 1990, at A1, col. 1.) Captain Hazelwood's attorneys felt that the dropped inebriation charge indicated a botched or altered blood test.

Meanwhile, litigation against the Exxon Corporation and its subsidiaries continues. Exxon Corp. is seeking to sever its liability in the criminal indictment (*U.S. v. Exxon*, Criminal No. A90-015.) Two felony counts in *U.S. v. Exxon* assert that Exxon Corp. and Exxon Shipping Co. violated provisions of the Ports and Waterways Safety Act and the Dangerous Cargo Act. Three misdemeanor counts claim violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. Further, the Justice Department alleges that the spill killed more than 36,000 migratory birds, including a record-setting one hundred bald eagles. (Anderson at 28.)

The Justice Department also claims that Exxon knew about Captain Hazelwood's alcohol abuse problems nineteen months before the accident. Documents were introduced to show that Captain Hazelwood regularly hosted drinking parties aboard ships, threw empty bottles of "Jack Daniels" overboard, and left third mates in command on previous occasions so that he could retire to his cabin for a few drinks. The Justice Department feels that all of these factors demonstrate that Exxon should have reasonably foreseen the danger of allowing Captain Hazelwood to remain at the helm of their oil transport vessels. Exxon Corp. claims that there is no precedent for holding it liable for the actions of its subsidiary, Exxon Shipping, even though Exxon Corp. is the sole stockholder in Exxon Shipping.

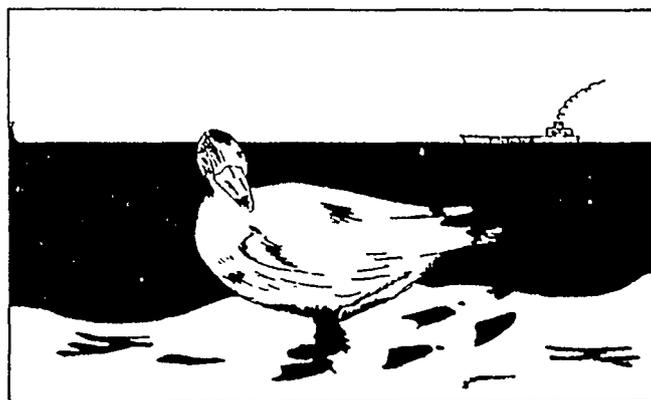
One of Captain Hazelwood's attorneys, Thomas M. Russo of New York's Chalos, English & Brown, asserts that his client's jury acquittal of intoxication charges removes all grounds for punitive damages in the federal government's case against Exxon Corporation. (Blum, Andrew, *Bombshell Stuns Exxon Litigators*, National Law Journal, Sept. 17, 1990.) Attorneys for environmental groups contend that Captain Hazelwood's role is not the only basis for punitive damages, because Exxon failed to maintain adequate means of fighting an oil spill. They further maintain that Exxon knowingly undermanned the ship and knew

of Captain Hazelwood's history of drinking problems. (*Id.*) Although compensatory damages and fines will be high, a large punitive damages award could make Exxon Corp. an example for the entire oil transportation industry.

In the civil actions against the corporation, Exxon filed a general denial to the plaintiffs' claims; however, Superior Court Judge Brian Shortell ruled that Exxon Corp. and its shipping subsidiary are strictly liable for all actual damages caused by the wreck. This ruling is derived from the law holding performers of ultra-hazardous activities strictly liable for any mishaps which occur as a result of their activities. The transportation of oil has been recognized as such an ultra-hazardous activity. While this is a victory for the State of Alaska, the fishing industry, native villagers, and environmentalists, actual damages still have to be proven at the upcoming trial. (San Francisco Chronicle, Sept. 28, 1990, at A23, col. 1.)

Among the difficult legal questions presented by Shortell's ruling is the measure of damages for low wildlife resources. In the past, the United States Supreme Court has had difficulty with a similar problem, finding that the 1973 Endangered Species Act gave the tiny snail darter's survival greater value than the Tellico Dam. (*TVA v. Hill*, 437 U.S. 153 (1978).) For the State of Alaska, the animals are already lost, so the questions revolve around replacement costs and habitat restoration.

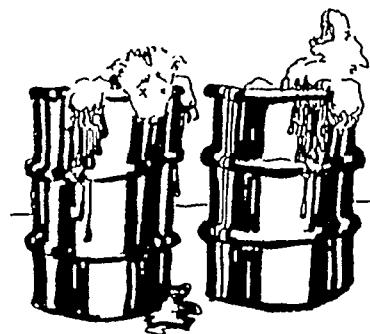
Valuation methods vary from determining the added value a person gets from observing wildlife to statutes setting dollar values for various animals. (*See Halter & Thomas, Stone, and Cross.*) There is no universally accepted method for natural resource valuation, but the *Exxon Valdez* case may offer a new precedent. Judge Shortell faces a true dilemma in this issue.



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Meanwhile, repair work on the *Exxon Valdez* began in August 1989 after the thirty thousand ton ship entered a graving dock in San Diego. The thirty million dollar repair job was completed in the summer of 1990 and the tanker was renamed the *Exxon Mediterranean*. On September 13, Greenpeace protesters delayed the maiden voyage of the newly rechristened supertanker; but despite the uproar and thick fog, she sailed for Singapore and a new route in the Middle East to deliver oil to Europe.



Laura Zerzan From "ECONEWS"

## II. CONTINUING DISASTER

The months following the *Valdez* disaster saw an unusually high number of spills in the United States. During his testimony to a Congressional Committee planning a federal oil spill policy, Brian Vincent, a lobbyist for the National Audubon Society, cited a recent report by the Wilderness Society listing ten thousand spills in the United States in the year following the *Exxon Valdez* disaster. Over one hundred of these were "significant."

The eastern seaboard experienced several large spills in early 1990, as did the states along the Gulf of Mexico. In June, the Norwegian tanker *Mega Borg* exploded off the Texas coast, spilling four million of the thirty-eight million gallons of crude oil she carried. In late July, two barges leaked over 500,000 gallons of "cat feed" oil into Galveston Bay, the most productive estuary on the Gulf.

Responses to these spills were slow, and Coast Guard officials charged with the cleanup efforts expressed a sense of frustration. Larry McKinney, director of the Texas Parks and Wildlife Department's Resource Protection Division, said the Galveston Bay spill had the potential to be the most damaging oil spill in the lower 48 states, and saw no preventive measures taken to avoid such a spill. (Sacramento Bee, August 1, 1990.)

In February 1990, Southern California experienced its own spill. The captain of the British Petroleum tanker *American Trader* miscalculated ocean swells and punctured the ship's hull with its own anchor. The spill came ashore while anxious residents wanting to volunteer in the mop up efforts were turned away by specially outfitted crews. For the most part, the Huntington Beach spill was well handled, but it brought the specter of a disastrous spill closer to home

for Californians. Litigation resulting from the Huntington Beach incident has not been as protracted as that in the *Valdez* incident because British Petroleum has appeared more cooperative than Exxon.

## III. CALIFORNIA'S ANSWER: LEGISLATION

Even before the Huntington Beach spill, the State of California recognized the possible dangers of a spill on its shoreline and began to act. Hundreds of Californians assisted in the *Valdez* cleanup efforts and thousands more avoided Exxon service stations for months following that spill. Because of intense popular outrage, the California Legislature was forced to take action.

In the summer of 1989, Lt. Governor Leo McCarthy and State Comptroller Gray Davis directed the State Lands Commission to report on the threat of an oil spill to California's coastline. The Commission indicated that a devastating oil spill was very likely to occur in California. Responding to this finding, Senator Barry Keene (D-Vallejo) introduced an oil spill prevention bill in late 1989, but the Senate Natural Resources Committee was looking for something different. Although Senator Keene's bill died in committee, it hinted at a receptive political atmosphere for new oil spill regulations.

In early 1990, three oil spill bills appeared. Assemblyman Ted Lempert (D-San Mateo) introduced AB 2603 on January 12, 1990. Senator Barry Keene followed with a competing bill, SB 2040, on February 16, and the late Assemblyman Eric Seastrand (R-San Luis Obispo) introduced the Deukmejian administration's measure, AB 3941, on March 2, 1990. Only

Keene's legislation survived the legislative process and arrived on the Governor's desk.

Seastrand's bill was the least powerful and the first to die in Committee. This bill proposed that the Department of Fish and Game establish an office to be responsible for directing oil spill response activities and would have required the governor to establish an oil spill response plan. The bill also proposed a Marine Oil Spill Prevention and Response Account of thirty million dollars. Opposed by both the Planning and Conservation League and the Sierra Club, this bill "never had a chance," according to Corey Brown, one of the chief lobbyists on the issue. The Senate Natural Resources Committee found the bill lacking in substance and, seeing concurrent bills which proposed much more protection, killed the bill.

The authors of the two remaining "Oil Spill Prevention, Abatement, and Removal Act" bills had different strategies for obtaining passage of their measures. Assemblyman Lempert wanted to push for as strong a bill as possible while Senator Keene wanted a signable bill that the industry could live with. (Brown interview, Oct. 10, 1990.) Both bills proposed to create an oil spill response fund made up of fees imposed on each barrel of oil shipped into California. This fund would be available to finance any oil spill cleanup efforts made by the State of California. The fund would not finance efforts made by oil companies themselves, but would serve as an "insurance" policy for the State. In the event of a spill, the major response teams would be regional "co-ops," voluntarily formed by the oil companies. The teams would work together to contain and cleanup any oil spill, regardless of its origin. The State would conduct the cleanup only if the spill was not receiving proper attention.

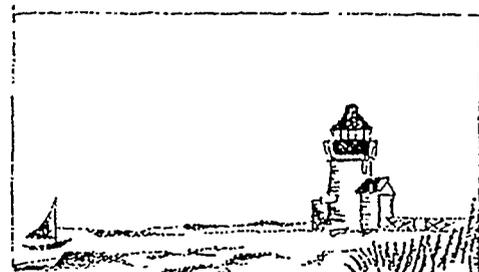
The bills also proposed a citizen's advisory committee, strict liability for discharge of oil into marine waters, creation of an Environmental Enhancement Fund, and required responsible parties to "fully mitigate adverse impacts" to wildlife, fisheries, and their habitats. Numerous other provisions were woven into the bills as they went through the Legislature, most of them aimed at adding even stronger preventive measures, many to be administered by the Department of Fish & Game. These measures included the establishment of rescue and rehabilitation stations for sea-birds and sea otters.

Two major stumbling blocks appeared as the bills advanced through the political process: the idea of a "qualified immunity" for persons responding to a spill, and the amount of money for an Oil Spill Prevention and Administration Fund. (Davis Enterprise, July 23, 1990, at A5, col. 1.)

Qualified immunity is traditionally defined as the limitation of liability one can incur when performing an act required by law. With regard to oil spill cleanup, qualified immunity would make any person responding to an oil spill immune from incurring greater liability if the cleanup efforts cause further damage to the environment. In this way, oil companies argue that they will be able to perform risky, but effective, attempts to clean up their spills. Chemical dispersants and burning spilled crude oil fall into the category of cleanup methods that sometimes do more harm than good, compounding an already bad situation.

The California Trial Lawyers Association opposed any reduction in liability. Keene and the oil companies, however, insisted that those involved in cleanup would minimize their efforts if not assured of a release of liability for routine errors. (Sacramento Bee, August 30, 1990.) Further, Keene pointed out that "orphan spills," those not caused (or claimed) by one of the major oil companies, might go ignored and be left for the State to clean up if the limited immunity was not guaranteed. (Brown interview, October 10, 1990.) In the end, some immunity was granted, but it was strictly enumerated. (See SB 2040, Art. 8.5, Sec. 8670.56.5(j) *et seq.*)

The other controversial issue was the amount of money to be contributed to the Oil Spill Response Fund. Keene wanted \$150 million while both Lempert and Governor Deukmejian wanted only \$50 million. The final compromise called for a \$100 million fund made up of \$50 million in cash and \$50 million in a secured credit line. This money would come from a 25-cents-per-barrel tax that would be abated as soon as the



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fund reached its \$50 million level. The monies in the fund would be used to finance any cleanup efforts that the State of California undertook if an oil spill was not receiving an adequate response. Of course, the tax would be reimposed if the fund was tapped to help clean up a spill.

The two bills, after going through numerous amendments and committee hearings, were finally combined on August 31. Subsequently, the Assembly passed the legislation by a 70-1 vote and the Senate by a 35-1 vote. (Sacramento Bee, September 1, 1990.) When signed by Governor Deukmejian on September 22, the law immediately created a new standard in California. This new standard "goes a lot further than Big Green [the failed 1990 California Ballot Proposition 128] does," stated Corey Brown, who considers the new law a strong victory for coastal protection.

Brown believes the most important measures of the Act are its requirement for full restoration of any damages the environment sustains, and the provisions giving citizen groups standing to sue if the Department of Fish and Game or the oil companies do not comply with the law. Further, Brown believes that the threat of criminal sanctions will act as an incentive for corporate leaders to consider environmental factors in their decisions. (Brown interview, October 10, 1990.)

Conservation groups have celebrated this new legislation but encourage Californians to decrease their oil dependence through greater conservation efforts. They warn that the law is only as good as its implementation. Corey Brown and the Planning and Conservation League have promised to remain vigilant to ensure that SB 2040 is carried out in full. However, the threat of oil spills is not just a state problem; a national response plan is also needed.

#### **IV. THE FEDERAL GOVERNMENT'S APPROACH**

A national response to the problems associated with oil transport cannot address all the specific issues that a regional or state solution can. Instead, the federal government has begun to experiment with tanker controls and contingency planning.

In what many attribute to election year politics, President George Bush, in the summer of 1990, pledged to delay all national offshore drilling lease sales for 10 years and to put California's Monterey Bay permanently off limits to drilling. Further, he pledged a 10

year postponement in drilling along most of the eastern seaboard and the coasts of Washington and Oregon.

Congress, in response to oil spills on the east coast and those in the Gulf of Mexico, formed a Congressional conference committee to debate liability issues and a proposal to retrofit tankers with double hulls. Congressman Gerry E. Studds (D-Mass.), a member of the committee, has been a strong proponent of federal legislation to address oil spills. (Blum, Andrew, *New Surge in Oil Spill Legislation*, National Law Journal, July 2, 1990 at 3.)

In late summer 1990, the House of Representatives passed a bill to strengthen coastal states' power over offshore oil drilling and in oil transport. The bill, H.R. 1465 by Rep. Walter Jones (D-N.C.), makes any federal activity affecting natural resources in a coastal zone, including offshore oil and gas leasing, subject to state review. The 391-32 vote passing the bill indicated a desire to overturn a Supreme Court decision (*Secretary of Interior v. California*, 464 US 312 [1984]) that allowed the federal government to sell offshore leases without checking to see if the drilling would comply with the state's coastal plan. Further, this bill requires double hulls on all tankers by the year 2015. This law, known as the Oil Pollution Act, does not preempt state laws or rights. It became law when President Bush signed it on August 18, 1990.

Although the federal government has not yet taken strong action to regulate the transport of oil by supertankers, Rep. Jones' legislation is a step toward greater coastal protection.

#### **V. THE PERSIAN GULF CRISIS-- NEW PRESSURES**

The crisis in the Middle East represents a new impediment to securing coastal protection from oil spills. Iraq's August 2, 1990 invasion of Kuwait brought a boom to the U.S. Oil industry and a corresponding threat to the United States coastal environment. As the Persian Gulf Crisis shocks Americans out of a 15 year-old complacency, the threat of a reduced oil supply from the Middle East and continuing demand at home creates a need to increase domestic supplies or to rethink consumptive habits.

One suggestion, fraught with negative implications, is to commence drilling in Alaska's Bristol Bay, despite President Bush's moratorium pledge. Alaska's outer continental shelf region has great potential for

energy exploitation; however, this exploration may come at the cost of an internationally important fisheries resource. First, increased vessel traffic would disrupt fishing methods utilizing nets. Second, an oil spill in Bristol Bay could substantially reduce fish populations. Unlike petroleum, fisheries are a renewable and sustainable resource, providing continuing revenue and employment for surrounding regions (Jones, at 601). While oil production would benefit the area in the short term, its long term effects could be devastating.

California Congressman Bill Lowery was attempting to write George Bush's pledge into law, but abandoned those efforts in early September. Because Bush renewed his pledge shortly after the Iraqi invasion of Kuwait, Lowery felt a push for enactment would "send the wrong signal" to the administration (Sacramento Bee, Sept. 11, 1990). Apparently, coastal protectionists are unwilling to press the matter and be characterized as unconcerned about national security.

Time is on the side of environmentalists. Exploring and drilling for oil would take 5 to 7 years to reach the stage where oil could be prepared for consumption. This time lag should allow world events to settle down and allow Congress to realize that continued dependence on domestic or imported oil puts the United States in a dangerous position.

## **VI. ALTERNATIVE FUELS & CONSERVATION : POSSIBLE SOLUTIONS?**

A poll of Californians taken by the Sacramento Bee two weeks after Iraq's invasion of Kuwait revealed a 10% drop in opposition to more offshore oil drilling and a similar decrease in those wanting stronger prohibitions against drilling oil and gas wells on government parklands. Most of those polled said it was "extremely important" for the United States to reduce its oil imports. Popular opinion indicates a recognition of the problems America faces, but the "easy" solution of offshore drilling is not the only answer.

Because new oil exploration and drilling could not produce available gasoline at our service stations for at least seven years, alternative fuels are once again being considered. New amendments to the federal Clean Air Act have set goals of reducing the number of gasoline powered cars on the roads of the nation's most

polluted cities and advocate production of multi-fuel vehicles that would mix gasoline and alcohol-based fuels.

These alternatives, however, are not without costs. Daniel Sperling, an associate professor of civil engineering and environmental studies at UC Davis, feels that multi-fuel vehicles may pollute even more than gasoline-only cars. Although their emissions would contain fewer hydrocarbons and nitrogen oxide compounds, multi-fuel vehicles may be more prone to technical breakdowns. Also, switching from fuel to fuel will not allow the engine to burn any single fuel in its most efficient manner.

Sperling sees compressed natural gas as a clearly superior fuel to gasoline but advocates turning to electricity or hydrogen as the ultimate fuel of the future. (U.C. Davis Magazine, January-February 1990, at 21-25.)

Dick Auld, a professor of agriculture at the University of Idaho, recommends turning to vegetable oils as a source of fuel, specifically that derived from rapeseed. Genetic enhancement of rapeseed could offer a yield of over 300 gallons of oil per acre of the crop, which would then be converted to diesel fuel. This conversion remains costly and Auld is encouraging Congress to fund research in this area. (*Insight, Science Briefing*, October 8, 1990 at 51.)

If the federal government commits adequate resources to the research and development of alternative fuels, oil consumption in the United States will begin to decline as the new technology becomes more widespread. Perhaps a technology-forcing scheme, such as that used by EPA when promulgating tailpipe emission standards could be utilized by the federal government to develop clean fuel vehicles. In fact, Los Angeles, California, is now required by the 1990 Amendments to the Clean Air Act to have a certain percentage of the vehicles sold and driven in its vicinity powered by "clean fuel" by the year 2010. A decline in the use of oil would certainly lead to a declining need for oil transportation and attendant risk of spills.

## **CONCLUSION**

The United States must make decisions and set priorities for both its economy and its natural resources. The most recent Iraqi aggression demonstrates the need for a National Energy Policy which would reduce our dependence on foreign oil. In addi-

tion, the *Exxon Valdez* disaster and similar spills illustrate the dangers of oil exploration and transportation. President Bush should maintain his pledge and not be pressured into jeopardizing our future environmental resources to satisfy today's thirst for oil. The search for alternative fuels must be intensified.

Oil spill prevention remains the only way to manage the transportation of this hazardous material, because no foolproof cleanup methods have been discovered. Legislative efforts like California's should be applauded; however, the American consumer must realize that the true solution lies in a change of lifestyle. The legacy of the *Exxon Valdez* will stay with us for generations to come, but we must look at it through student's eyes and find lessons for the future.

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# Legislative Update 1991

by Andrew Sabey

## INTRODUCTION

In an era seemingly dominated by propositions, environmental activity in California's legislature might easily be overlooked. However, in light of the fate met by environmental initiatives in the fall of 1990, it would be prudent for the environmentally concerned to

direct their resources to the Legislature. The single successful 1990 initiative related to environmental protection was the prohibition of gill net fishing within state waters.

While the Legislature is not likely to pass any laws as sweeping as "Big Green," or forestry restric-