

**[EXTERNAL] note to PAC**

Richard Steiner &lt;richard.g.steiner@gmail.com&gt;

Fri 9/10/2021 9:13 AM

To: Kilbourne, Linda L (EVOSTC) &lt;linda.kilbourne@alaska.gov&gt;; Johnson, Philip C &lt;philip\_johnson@ios.doi.gov&gt;

 1 attachments (147 KB)

env\_enforcement-2923302-v1-evos\_nrd\_pulestoration\_legal\_requirements\_91720.pdf;

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Dear Linda and Philip,

I would appreciate you forwarding this note along to all of the PAC members ASAP:

Dear EVOSTC/PAC,

As the upcoming Trustee Council meeting may be the last in many years (or ever), and the Council will decide on proposals that collectively request in excess of \$250 million on a remaining balance of \$162 million, the Council could commit all of its remaining funds at this meeting. This is a very significant development.

Thus, I ask your consideration of the two following requests:

- 1. Request that, at the Oct. 13 meeting, the Trustee Council set aside at least \$25 million from its Habitat account (now with \$66 million remaining) to negotiate and close a deal to retire the Bering River coalfield east of the Copper River Delta, subject to Fair Market Value appraisal. This deal has been "in the works" for over two decades, but due to the Council's inertia, is still not done.**
- 2. I urge you to request a legal review (by DOJ/ADOL) of all proposals, and a determination re: whether they are consistent with the consent decrees and court orders, as discussed in the 9/17/2020 DOJ/ADOL memo regarding the legal uses of the funds (attached). You should have this review in hand before making your decision on the proposals.**

Thanks!

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907-360-4503

TO: *Exxon Valdez* Oil Spill Trustee Council: Jim Balsiger, NOAA; David E. Schmid, USFS/USDA; Sara Taylor, U.S. DOI (substituting for Senior Advisor to the DOI Secretary for Alaska Affairs); Doug Vincent-Lang, ADF&G; Jason Brune, ADEC; Ed Sniffen, ADOL (Acting Attorney General)

FROM: William D. Brighton and Erika Wells, U.S. DOJ; Steven E. Mulder, ADOL; Craig R. O'Connor, NOAA Office of General Counsel; Elizabeth Gobeski, U.S. DOI Solicitors Office; Ronald McClain, USDA Office of the General Counsel

DATE: September 17, 2020

**RE: Legal requirements applicable to potential uses of EVOS Trustee Council restoration funds**

### **Context and Purpose**

More than 28 years ago, Exxon Corporation and its shipping company subsidiary (collectively “Exxon”) agreed in a Consent Decree to pay \$900 million to the United States and the State of Alaska to resolve the governments’ civil claims arising from the March 1989 *Exxon Valdez* Oil Spill (“EVOS” or the “Spill”). Over \$700 million of that amount was allocated to fund projects to restore, replace, rehabilitate, or acquire the equivalent of the natural resources injured as a result of the Spill, lost natural resource services, and damaged archaeological artifacts and sites (“restoration funds”). The restoration funds were invested and earned income over the years even as they were applied to restoration projects selected by consensus of the three federal and three state officials who comprise the Trustee Council. Today, more than \$140 million in restoration funds remain available for joint use by the Trustees.

Recently proposals have been submitted by a number of organizations and comments submitted by members of the public to make changes to the current EVOS Trustee Council (“EVOSTC”) restoration process. These include proposals to transfer some or all of the remaining EVOSTC restoration funds to an endowment or similar new trust fund independent of the current Trustee Council restoration process. At the request of the EVOS Trustees to their legal counsel, this Memorandum provides a summary for the public, including proponents of proposals, of the key federal and state laws, consent decrees provisions, and administrative decision documents that govern the Trustee Council and the Trustees’ decisions on how to invest and use EVOSTC restoration funds. The Trustee Council must evaluate all proposals in light of these laws and legal requirements.

### **Legal Authorities Applicable to the EVOS Trustee Council and Expenditure Decisions**

#### **A. The Governing Federal Statute: Clean Water Act, Section 311(f)(5)**

The restoration funds are subject to the primary federal statute under which the United States sought natural resource damages from Exxon, Section 311(f) of the [Clean Water Act](#)

(“CWA”).<sup>1</sup> Section 311(f)(5) states that “[t]he President, or the authorized representative of any State, shall act on behalf of the public as trustee for the natural resources to recover for the costs of replacing or restoring such resources.” It further provides that, “[s]ums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal government, or the State government.” 33 U.S.C. § 1321(f)(5).

This provision places a statutory duty on the designated federal and state trustees to ensure that natural resource damages (“NRD”) recoveries are used for the purposes specified in the statute.

## **B. Memorandum of Agreement and Consent Decree between the United States and the State of Alaska (“MOA”)**

The District Court entered the [MOA on August 28, 1991, in \*United States v. State of Alaska\*](#) (Civ. No. A91-081). The governments negotiated this document to establish an agreed structure for the Trustee Council and a decision-making process designed to hold up over the relatively long time expected to be necessary to restore the injured natural resources. The MOA requires:

- (a) Decisions concerning the use of restoration funds must be made by unanimous agreement of all federal and state Trustees. MOA at § V.A(1).
- (b) The federal Trustees must consult with the U.S. Environmental Protection Agency. MOA at § V.A(1) & V.C.
- (c) The Trustees must establish procedures for meaningful public participation in the restoration process, including a public advisory group to advise the Trustees. MOA at § V.A(4).
- (d) After cost reimbursements, the settlement funds may be used only for “restoring, replacing, enhancing, rehabilitating, or acquiring the equivalent of natural resources injured as a result of the Oil Spill and the reduced or lost services provided by such resources.” MOA at § VI.A.

The MOA also directs that restoration funds must be used exclusively within Alaska unless the Trustees determine that spending funds outside Alaska is necessary for restoration of injured resources in Alaska and services provided by such resources. MOA at § VI.C.

The MOA requires that restoration funds be held in a Court Registry account or as otherwise agreed by stipulation of the governments and order of the Court. MOA at § V.A(2). As discussed below, upon the request of the governments, the Court entered Orders in 2000

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<sup>1</sup> While the United States and the State sued Exxon under several federal and state authorities, the damages recovery was not allocated among different causes of action and therefore is subject to applicable requirements of any of the governing statutes.

authorizing the transfer of all remaining settlement funds from the Court Registry to an account in the State of Alaska Investment Fund.<sup>2</sup>

### **C. Consent Decree with Exxon (“Consent Decree”)**

On October 8, 1991, the District Court entered the [Consent Decree between Exxon](#), the United States, and the State resolving the civil claims of both governments against Exxon for natural resource damages and reimbursement of several categories of costs. *United States v. Exxon Corp. et al.* (Civ. No. A91-082); *State of Alaska v. Exxon Corp., et al.* (Civ. No. A91-083). Under Paragraph 10 of the Consent Decree, the settlement payments “shall be applied by the Governments” solely for listed purposes, which include four types of cost reimbursements and “(5) . . . to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources, natural resource services, or archaeological sites and artifacts injured, lost, or destroyed as a result of the Oil Spill, or the acquisition of equivalent resources or services.” The same Paragraph includes a representation by the governments that the settlement funds will be “allocated, received, held, and used” in accordance with the MOA. In accordance with the Court’s direction when it approved the Consent Decree, the governments regularly file notices with the Court of the Trustee Council’s approved expenditures of the settlement funds, so that the Court can verify that expenditures are being made by the governments in accordance with the terms of the Consent Decree and MOA.

### **D. 1994 Restoration Plan and 2010 Supplemental Environmental Impact Statement**

The [1994 Restoration Plan](#), adopted by the Trustee Council after a significant public outreach and comment process, provides long-term guidance for restoring injured resources and services and contains policies for the Trustee Council’s selection and implementation of restoration projects. These policies include, among other things, that:

- restoration will focus on resources and services injured by the Spill and must emphasize resources and services that have not recovered;
- restoration must occur primarily within the Spill area (except when specific conditions are met); and
- the restoration process must include meaningful public participation at all levels – planning, project design, implementation, and review.

See Restoration Plan, pp. 12-17, for complete list of the policies.

In 2010, the Trustee Council approved a supplement to the Restoration Plan narrowing its focus to five categories: herring; lingering oil; long-term monitoring of marine conditions and injured resources; harbor protection, marine restoration and lessons learned/outreach; and habitat

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<sup>2</sup> See June 7, 2000 [Third Amended Order](#) for Deposit and Transfer of Settlement Proceeds; September 29, 2000 Order Re: Transfer of Funds from the Exxon Valdez Liquidity Account and the Reserve Fund to an Investment Fund within the Alaska Department of Revenue, Division of Treasury.

acquisition and protection. See [August 2010 Final Supplemental Environmental Impact Statement for the EVOS Restoration Plan](#). As part of the process of evaluating the proposed focus of restoration on these categories, the Trustee Council engaged in a public outreach effort that included public meetings in six Spill-area communities, consultation with the Public Advisory Committee, experts and others, and consideration of other comments submitted to the Trustee Council.

#### **E. Trustee Council Resolutions Concerning the Management of Restoration Funds**

On March 1, 1999, the Trustee Council issued a decision to allocate the remaining EVOS restoration funds to two separate subaccounts: (1) \$55 million of the remaining funds on October 1, 2002 to be managed as a long-term funding source for small parcel habitat protection, including habitat acquisitions; and (2) the remaining balance of funds on October 1, 2002 to be managed to fund annual work plans that include a combination of research, monitoring, and general restoration. [EVOSTC Resolution 99-03-01](#). The Resolution recognized that, consistent with the Restoration Plan, restoration needs identified by the Trustee Council “require a long-term comprehensive and balanced approach that includes a complementary commitment to scientific research and monitoring; applied science to inform and improve the management of injured resources and services; continued general restoration activities where appropriate; support for community-based efforts to restore and enhance injured resources and services; and protection for additional key habitats.” EVOSTC Resolution 99-03-01 at p.2.

#### **F. Section 350 of Public Law No. 106-113 (Investment of EVOS Court Recovery in High Yield Investments and in Marine Research)**

In November 1999, Congress enacted [P.L. No. 106-113](#), which expanded the options legally available to the Trustees for the investment of the EVOS restoration funds. Under this new law, the Trustees are authorized to transfer restoration funds from the Court Registry account required under the 1991 Consent Decree into (a) the Department of the Interior Natural Resource Damage Assessment and Restoration (NRDAR) Fund, (b) accounts outside the United States Treasury that meet specified standards,<sup>3</sup> or (c) both. Section 350, Public Law No. 106-113, 113 STAT. 1501A-207-8, ¶ (1). Subsection (5) of P.L. No. 106-113 conditions the new investment authority on continued management and allocation of the funds in a manner consistent with the March 1, 1999 Trustee Council Resolution, including the dedication of \$55 million to habitat protection programs including small parcel habitat acquisition. *Id.* at ¶ (5). The law also endorses two key existing requirements for expenditures of restoration funds: First, it incorporates the MOA’s requirement that spending decisions be made unanimously by all federal and state trustees, stating that any funds invested under the law’s expanded authority “that have been approved unanimously by the Trustees for expenditure by or through a State or Federal agency shall be transferred promptly . . . to the State of Alaska or United States upon the joint request of the governments.” *Id.* at ¶ (2). Second, it specifies that the transfer of funds outside of

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<sup>3</sup> Such “outside accounts” must be “income-producing accounts or other obligations or securities” that have been determined unanimously by the Trustees to have a high degree of reliability and security. [P.L. No. 106-113](#), § 350, ¶ (1).

the Court Registry does not affect the supervisory jurisdiction of the District Court under the MOA or the Consent Decree over all expenditures of the funds. *Id.* at ¶ (3).

As noted above, upon the governments' request following the enactment of this law, the Court approved the transfer of the remaining restoration funds from the Court Registry to the State of Alaska Investment Fund in 2000. The Court Order approving the transfer provides that "funds in an Investment Fund shall remain on deposit in that Fund until such time as the EVOS Trustees unanimously resolve to expend all or part of the funds." June 7, 2000 [Third Amended Order](#), ¶ 27. The funds may then be expended, for purposes consistent with the MOA, upon the joint notification of the governments to the Investment Fund and the Court. Pursuant to the Order, the governments have continued to notify the Court of the proposed uses of the funds in the same manner and to the same extent as was the governments' practice when the funds were in the Court Registry account. *Id.* at ¶ 27.

### **G. State Laws**

In addition to the documents and federal laws described above, there are State of Alaska laws that affect the discretion of the State trustees concerning uses of the EVOS restoration funds. [AS 37.14.400](#) recognizes the EVOS trust and requires that the trust funds "be managed as provided in the Memorandum of Agreement and Consent Decree that established it."

Legislative appropriations are required to expend trust monies. [AS 37.14.405](#). State law also requires the State trustees to submit annual budgets and reports to the Governor and the legislature, provides that EVOS Trust records are public records under Alaska law, and generally applies the Open Meetings Act to Trust-related meetings. [AS 37.14.415](#), [.425](#), [.330](#).

Additionally, State law prohibits the State trustees from agreeing to "an expenditure of money from the trust to a person or entity other than an agency of the state or federal government unless the expenditure is for administrative expenses of the trust and is consistent with the competitive principles of AS 36.30 (State Procurement Code)." [AS 37.14.420](#).

The Dedicated Funds Clause of the Constitution of the State of Alaska prohibits the dedication of "proceeds of any state tax or license" to "any special purpose." AK Const. Art. 9 § 7. The Dedicated Funds Clause applies to settlements paid to the State.