



M E M O R A N D U M

TO: Gus Rassam, American Fisheries Society

FROM: Matt Jamin
Sarah Armstrong, 907-262-0038 or 260-5438; sadino@alaska.net

DATE: November 8, 2007

SUBJECT: **Supreme Court Review Of Exxon Valdez Oil Spill Punitive Damages Verdict/Request For Amicus Support**

On October 29, the Supreme Court agreed to hear Exxon's appeal in the Exxon Valdez case, Baker v. Exxon Mobile Corp., 490 F.3d 1066 (9th Cir. 2007). By seeking Supreme Court review, Exxon has further delayed facing and accepting its responsibility for the Valdez oil spill, which dumped approximately 11 million gallons of crude oil into Prince William Sound. This disaster killed half a million sea birds, thousands of otters, two dozen whales, and millions of salmon and herring eggs. Even today, the spill's lingering effects are felt by the region's wildlife.

In addition to this widespread environmental harm, the oil spill disrupted the lives of thousands of people in the Prince William Sound area. It required the State of Alaska to close fishing seasons in 1989, reduced harvests in later years, and caused fish prices to drop. It damaged approximately 1,300 miles of shoreline, much of it privately owned. It also destroyed the subsistence activities of Native Alaskans, for whom subsistence fishing is not merely a way to feed their families but an important part of their culture.

At Exxon's own urging, the federal district in Alaska certified a single, mandatory punitive damages class consisting of 32,677 commercial fisherman, related individuals and businesses, private landowners, and Native Alaskans. After a three-phase trial that lasted 83 days, in September 1994 the jury assessed \$5 billion in punitive damages against Exxon. At the time, this represented one year of Exxon's net profits. Today, it represents about six and one-half weeks of the company's net profits and less than five days of revenue.

Since the trial concluded, Exxon has fought relentlessly to avoid paying any punitive damages for its spill. In 2006, the company partly succeeded when the Ninth Circuit Court of Appeals cut the punitive damages award to \$2.5 billion. Now, after eighteen years of litigation, Exxon aims to eliminate the rest of this award.

While Exxon's post-verdict challenges have been pending, about 20% of the plaintiff class has died. Nor have the surviving plaintiffs seen any share of the punitive damages Exxon was ordered to pay. Exxon has more than recouped the entire value of the original \$5 billion verdict due to the differential between its own rate of return and the statutory judgment rate. Exxon should be held responsible for the enormous devastation it caused to the fishermen and communities of Alaska.

The principal issues which the Supreme Court agreed to hear are:

- 1) Whether federal admiralty law prohibits an award of punitive damages against Exxon, or requires any further reduction in the \$2.5 billion award.
- 2) Whether the statutory fines and penalties in the Clean Water Act shield polluters from punitive damages liability to injured victims.

On behalf of the plaintiffs, we are asking the American Fisheries Society to file an amicus brief on plaintiffs' behalf. We anticipate that AFS would be joined by a number of other national fisheries and environmental organizations as well as the State of Alaska.

The precise focus of an amicus brief is still open; however, the brief will likely urge the Court not to erode remedies against polluters in the name of the Clean Water Act. The brief might also emphasize the need for punishment and deterrence of Exxon in particular, due to the enormity of the oil spill and the persistence of its effects over time.

With regard to timing, Exxon's opening brief is due on December 15, 2007. Plaintiffs' brief is due on January 14, 2008, and plaintiff-side amici briefs are due on January 22, 2008.

If AFS is interested in joining this effort, we will be able to refer AFS to high-quality pro bono counsel. We would welcome the involvement of AFS's general counsel in the drafting of the brief, but recognize that you may not want to take the laboring oar. The only expense we anticipate AFS would be responsible for is a pro rata share of incidental out-of-pocket expenses, principally the costs of printing the brief.

Please contact Sarah Armstrong if you need further information. It would be extremely valuable to have AFS weigh in on these important issues.

-MDJ
-SA