

# **"A Closer Look at the Law of Water Pollution"**

**18th Annual  
Review of Research  
The Water Center  
University of Washington  
February 14, 2008  
Seattle, Washington**

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# **Fisheries and Law, New Scientist, Feb. 2, 2008, p. 4**

## **FISH FANTASIES TAKE A TOLL**

**Corruption is eating into the bones of the fishing industry, say fisheries experts, who are in Washington, D.C., this week to discuss the issue with the World Bank and the World Conservation Union (IUCN).**

**They say that fishing rules are increasingly being disregarded, as catches across the world shrink. The number of pirate boats flying flags of convenience from landlocked nations has boomed; fish are falsely labeled sustainable; inspectors are increasingly harassed or bribed; shrimp farms employ child labour; and a fifth of all catches worldwide are illegal.**

**This has led scientists to underestimate the pressure on stocks, so they recommend quotas that are too high. Even these may not be observed by authorities. "Fisheries managers should be held accountable when ignoring scientific advice," says Andrew Hurd of the IUCN.**

**Lynda F. Mapes, "Did development, logging set the stage for disaster? Many state officials and regional experts say they have been warning for years that the hunger for development in Lewis county was running counter to common sense," Seattle Times, Dec. 9, 2007, p. 1, col. 1:**

**"Clear-cuts and Mudslides"; "Tons of earth and vegetation washed away from clear-cut hillsides last week and slammed into Stillman Creek, a tributary of the south fork of the Chehalis River"; "in Chehalis, 70% of the city limits are within the floodplain"; "All the while Lewis County has debated its floodplain development, logging has been chewing through the forests in the Chehalis watershed since the last flood [in 1996]"; "In one large clear-cut alone, nearly a dozen slides emptied into a creek. In some areas, log jams may have acted like small dams, temporarily holding back water until they toppled over or breached. Some upriver communities got slammed with the mess. Then the floodwater moved on, all the way to the cities of Chehalis and Centralia and the development in the floodplain along I-5"**

**David Ammons, "Gregoire: Cleanup will take months," Seattle Post-Intelligencer, Dec. 11, 2007, p. B32, on the infallible strategy of blaming FEMA:**

"We pushed as hard as we could," Gregoire said, clearly frustrated.

Gregoire, who took daily flights over the area and met with families in many of the affected communities, said state agencies were "on the ground" from the very beginning. "We've been out there," she said.

She drew a contrast with FEMA and the federal bureaucracy. "I guess they're from Missouri. They had to be convinced, be shown, about the tragedy that has befallen so many of our citizens," she said.

The head of the state National Guard and the top state emergency management leader, Maj. Gen. Timothy Lowenberg, said a joint field office will open by Wednesday or Thursday, more than a week after the worst flooding, and pointedly said the timing is FEMA's call. Typically, a response center is operating within 72 to 96 hours of the emergency declaration.

FEMA officials did not respond to a call for reaction.

Gregoire's spokesman, Lloyd Brown, said the governor has been trying not to criticize FEMA publicly, but said her news conference made her point.

**"Shellfish beds to get better protection,"  
Seattle Post-Intelligencer, Dec. 11, 2007, p.  
B2, col. 3:**

**SEATTLE – Washington's shellfish beds will be better protected next year after the Port of Seattle, the state Department of Ecology and the North West CruiseShip Association update their agreement governing the 208 cruise sailings expected through state waters next year.**

**"The cruise ships will not be able to discharge within a half mile of shellfish beds," said Amy Jankowiak, a compliance specialist with the Ecology Department.**

## Tacoma News Tribune, September 27, 2007

# White River dam blocks thousands of pink salmon

## FIX PLANNED

### Biologists divided on need to hurry

*The News Tribune*

BUCKLEY, Pierce County — The fish were so thick in the rivers you could walk across on their backs. The old-timers' oft-repeated tale sounds like a phenomenon never to be witnessed again.

Yet a visit this week to the White River near Buckley brings the image to mind. Thousands of pink salmon have backed up behind Puget Sound Energy's old wooden diversion dam, eager to head upstream and reproduce.

The presence of a huge number of pinks has renewed a protracted dispute among the agencies and interests that control the river's flow and the fish that inhabit it.

"They've got a fixed amount of energy, and they're just wasting it beating themselves against the dam," said fish biologist Russ Ladley, the Puyallup Tribe's resource protection manager.

He and other tribal biologists predict a massive die-off if something isn't done to allow the pinks to migrate.

Gary Sprague, a state Department of Fish and Wildlife biologist, isn't so sure. The river is running relatively high for August, which

means the water is oxygenated and cool, good for fish. And pinks usually don't do much spawning until later in September, he said.

"They can hold in the river for a while," he said.

Meanwhile, the U.S. Army Corps of Engineers, which is obligated to move the fish past its flood-control facility farther upstream, is ready to authorize an intervention.

**Between 30,000 and 60,000 pinks are expected to head up the White River this season, said fish biologist Blake Smith.**

And a spokesman for Puget Sound Energy, which owns the dam, says the utility's willing to step in and attempt a fix if it gets the Corps' OK and it's safe to send workers into the river to do it.

Between 30,000 and 60,000 pinks are expected to head up the White River this season, said fish biologist Blake Smith, who also works for the Puyallups.

Pinks, also called humpbacks or humpies, are only 2 years old when they return to the rivers to spawn and die. They are the smallest and most numerous salmon spe-

cies, the kind granddad might have grown up eating out of a can.

Those who have studied the pinks say they commonly colonize new habitats.

And although pinks are relative newcomers to the White River, a run two years ago was similar in size, Smith said.

In the river near Buckley, the fins of the pinks appear dark against the gray of the river, which picks up its color from the runoff of glaciers on Mount Rainier. As the fish seek passage through the roiling current, they are confronted by the dam.

Erected starting in 1911, the dam is a vestige of the utility's White River hydropower generator, which shut down in 2004.

The Corps now has a cooperative agreement with the utility to maintain the structure. But flooding in November 2006 damaged it, so the dam no longer blocks the rushing river.

Even so, fish can't get past without human intervention. Ordinarily, enough water would flow past the dam to attract fish to an adjacent ladder, where Corps workers trap the fish and truck them upstream.

But August is typically the river's driest month, and most of the water left in the river hurdles over the broken dam rather than rushing through the fish ladder.

# Tacoma News Tribune, September 27, 2007

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### FIX PLANNED

### Biologists divided on need to hurry

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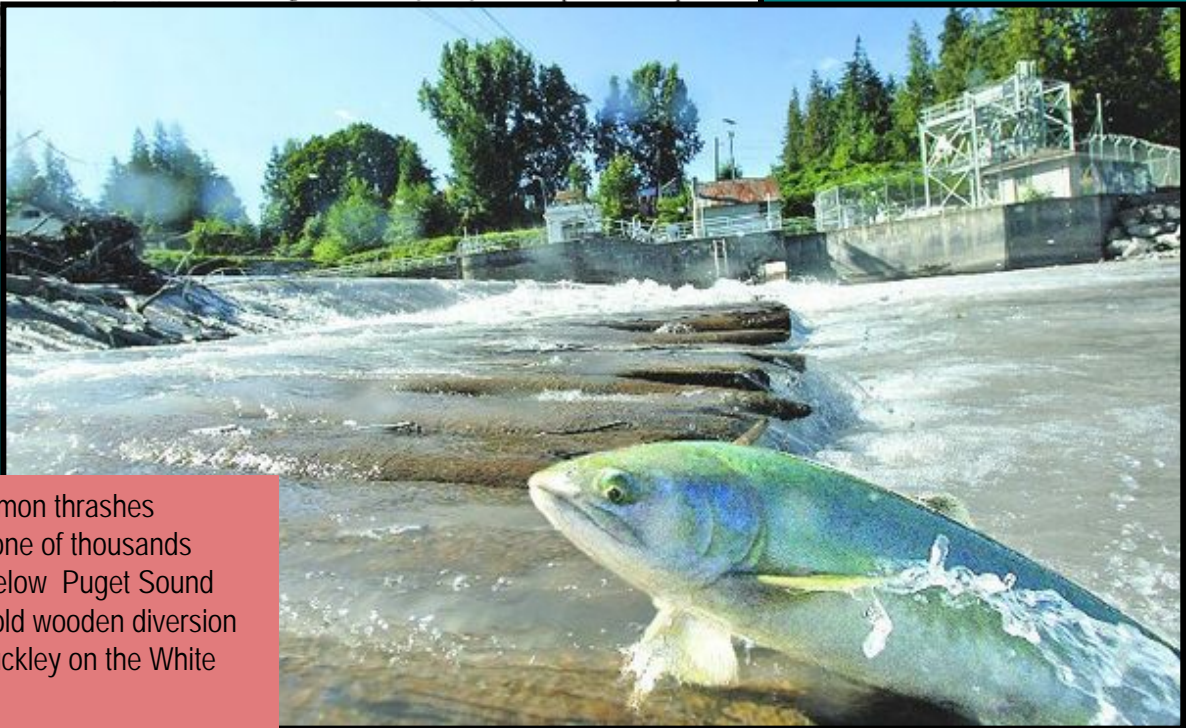
They can hold in the river for a few days, the kind granddad might have grown up eating out of a can.

Those who have studied the pinks say they commonly colonize new habitats.



He and other tribal biologists predicted if something low the pink salmon. Gary Spangler, a biologist, said the river is high for

...said fish biologist Blake Smith, ...der, where Corps workers trap



A pink salmon thrashes Monday, one of thousands trapped below Puget Sound Energy's old wooden diversion dam at Buckley on the White River.

# Seattle Post-Intelligencer, Oct. 12, 2007, p. B3, col. 2

## More pollutants pumped in Sound than allowed by law

### New study cites aluminum plants, sewage facilities

BY LISA STIFFLER  
*P-I reporter*

Many industrial and municipal facilities are dumping more pollution into Washington's rivers, lakes and Puget Sound than is allowed by permit, according to an analysis released Thursday by an environmental group.

More than 37 percent of these facilities are releasing more metals, oil and grease, nitrogen, fecal coliform, solid materials, low-oxygen water and other pollutants than allowed by the federal Clean Water Act.

The analysis by Environment Washington, part of the non-profit Washington Public Interest Research Group, looked at compliance for 75 major permit holders in 2005. The study was part of a national analysis that reviewed 6,428 permit holders.

"Definitely Washington is doing quite a bit better than other states," said Amy Peterson of Environment Washington. "But

still, just over half of our waterways are considered impaired based on the definition from the Clean Water Act."

Passed by Congress in 1972, the act set the goal of eliminating "the discharge of pollutants into navigable waters" by 1985.

The state Department of Ecology is responsible for issuing and enforcing water pollution permits here.

"Although we have not had time to thoroughly review this report, we agree that we continue to see pollution problems," said Kelly Susewind, Ecology's assistant water quality manager, in an e-mail.

"We challenge ourselves daily to better exercise our resources, authorities and people to improve compliance with discharge permits and to better protect and restore water quality in Washington."

Facilities that exceeded their monthly permits six or more times in 2005 were:

- ▶ Columbia Gorge Aluminum Co., Columbia River.
- ▶ Evergreen Aluminum, Columbia River.
- ▶ Shelton sewage treatment plant, Hood Canal.
- ▶ Prosser sewage treatment plant, Yakima River.

▶ Pullman wastewater treatment plant, Palouse River.

Other permit holders not in compliance included the U.S. Navy, pulp and paper companies, a coal plant and oil refineries.

Local leaders have expressed their concerns over pollution in Puget Sound and streams that feed it. Last December, Gov. Chris Gregoire presented a blueprint for saving the Sound, including the clean-up of contamination and reducing pollution.

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[datelineearth.com](http://datelineearth.com).

**Ski Swap**

**Huge Sale - 10,000 Sq. Feet!**  
Newport High School  
4333 Factoria Blvd SE, Bellevue  
Fri. Nov 9, 5-9  
Sat. Nov. 10, 8-3  
<http://skiswap.info> 206-467-3114

ANNIVERSARY  
**ROSARY-OUR LADY FATIMA**  
Oct. 13, 12-2 pm  
Magnuson Park & Kate Hill • N. Seattle  
Marymount Park & Park

# Killer Whales

**Margaret M. Krahn et al., "Persistent organic pollutants and stable isotopes in biopsy samples (2004/2006) from Southern Resident Killer Whales," 54 *Marine Pollution Bulletin* 1903, 1909 (2007):**

**"all Southern Resident killer whales sampled in this study had [PCBs] that exceeded thresholds for health effects established in captive studies of harbor seals. While caution should be used when making interspecies comparisons, the results suggest that these killer whales are highly contaminated with PCBs and at risk for adverse health effects."**

***Earth Island Institute v. Hogarth*, 484 F.3d 1123  
(9th Cir. 2007)**

(details history of Secretary's findings (and court reversals) that the tuna fishery is having no adverse effect on recovery of dolphin populations; historically, the "setting" technique has caused the death of more than six million dolphins; *id.* at 1127: "these species of dolphin are struggling to recover"; the 1992 Panama Declaration weakened the dolphin-safe labeling standard by allowing the label to be affixed "as long as no dolphins were observed to be killed or seriously injured during the set"; the finding of the Secretary (as of Jan. 15, 2003): "The chase and intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks" in the Eastern Tropical Pacific Ocean; the district court found a "compelling portrait of political meddling"; this court affirms the district court decision that the agency did not satisfy the statutory requirements

***Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007)**

“because the data from the mandated studies was not sufficient to support a definitive finding as Congress directed,” *id.* at 1130; inadequate sample sizes (less than 10% the requisite minimum); *id.* at 1131: “There is no basis for the Secretary’s position that Congress required a scientific study upon which an important environmental determination would turn, but did not demand reliable results from that study”; failed to complete statutorily-required CHESSE study; *id.* at 1123: “improperly influenced by political concerns”;

“Although there is uncertainty, most of the data we have point to the fishery as the cause [of the dolphins’ failure to recover], and [a] determination of ‘no significant adverse impact’ is not supported by the science.”

**NOAA Staff, Dec. 11, 2002**

***Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007)**

***Id.* at 1134-35:**

**“We think we can package either decision to demonstrate that we are conservation-minded, pro-active, and are dedicated to recovering dolphins as well as cooperating with our international partners”**

**NOAA Staff, Dec. 15, 2002**

***Id.* at 1134: “influenced to at least some degree by foreign policy considerations”).**

# Reefs

**Donald Kennedy, Editorial,  
"Year of the Reef," 318 *Science*  
1695 (Dec. 14, 2007):**

**"shallow water reefs are remarkable hot spots of biodiversity; those that surround oceanic islands often include a level of specialized endemic species that rivals that on the islands themselves."**

# Commenting on Declining Reefs –

**Thomas Lovejoy, President, H. John Heinz III Center for Science, Economics and The Environment:**

**"the single most profound environmental change I've learned about my entire career"**

...

**[Poachers and harvesters are still pursuing] species of Corallium, the beautiful living red or pink corals that are traded globally. Because the United States imports 60% of that commodity, mainly for use as aquarium decorations, we ought to be pushing to have them listed for sanctions"**

# Reefs

**O. Hoegh-Guldberg et al., "Coral Reefs Under Rapid Climate Change and Ocean Acidification," 318 *Science* 1737, 1742 (Dec. 14, 2007):**

**"It is sobering to think that we have used the lower range of IPCC scenarios in our analysis yet still envisage serious if not devastating ramifications for coral reefs. . . . Consequently, contemplating policies that result in [CO<sub>2</sub>] above 500 ppm appears extremely risky for coral reefs and the tens of millions of people who depend upon them directly, even under the most optimistic circumstances."**

# Salmon

**Martin Krkosek et al., "Declining Wild Salmon Populations in Relation to Parasites from Farm Salmon, 318 Science 1772 (Dec. 14, 2007) [study in British Columbia]:**

**"Rather than benefitting wild fish, industrial aquaculture may contribute to declines in ocean fisheries and ecosystems. Farm salmon are commonly infected with salmon lice. . . , which are native ectoparasitic copepods We show that recurrent louse infestations of wild juvenile pink salmon . . . , all associated with salmon farms, have depressed wild pink salmon populations and placed them on a trajectory toward rapid local extinction. The louse-induced mortality of pink salmon is commonly over 80% and exceeds previous fishing mortality. If outbreaks continue, then local extinction is certain, and a 99% collapse in pink salmon population abundance is expected in four salmon generations. These results suggest that salmon farms can cause parasitic outbreaks that erode the capacity of a coastal ecosystem to support wild salmon populations."**

# Walrus

**Dan Joling, "Global warming's latest victims: Pacific Walruses," Seattle Post-Intelligencer, Dec. 15, 2007, p. A6, col. 1**

("Global warming's latest victims: Pacific walruses;" "Melting sea ice forces herds to crowd beaches; thousands die in stampedes"; "The deaths took place during the late summer and fall on the Russian side of the Bering Strait, which separates Alaska from Russia"; "It was a pretty sobering year—tough on walruses," said Joel Garlach-Miller, a walrus expert for the U.S. Fish and Wildlife Service"; "Unlike seals, walruses cannot swim indefinitely. The giant, tusked mammals typically clamber onto land for just a few weeks at a time"; "Biologist Anatoly Kochnev of Russia's Pacific Institute of Fisheries and Oceanography estimated 3,000 to 4,000 walruses out of a population of perhaps 200,000 died, or two or three times the usual number on shoreline haulouts"; Walruses are vulnerable to stampedes when they gather in such large numbers. The appearance of a polar bear, a hunter, or a low-flying airplane can send them rushing into the water").

# ESA

## **Office of Inspector General, Report of Investigation: Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife, and Parks, undated (circa 2007):**

**"[The complainant alleged that MacDonald had bullied, insulted, and harassed the professional staff of the U.S. Fish and Wildlife Service (FWS) to change documents and alter biological reporting regarding the Endangered Species Program. As our investigation progressed, we also developed information that MacDonald had disclosed nonpublic information to private sector sources. Through interviewing various sources, including FWS employees and senior officials, and reviewing pertinent documents and e-mails, we confirmed that MacDonald has been heavily involved with editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field. MacDonald admitted that her degree is in civil engineering and that she has no formal educational background in natural sciences, such as biology.]"**

# ESA

**Office of Inspector General, Report of Investigation: Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife, and Parks, undated (circa 2007):**

**"While we discovered no illegal activity on her part, we did determine that MacDonald disclosed nonpublic information to private sector sources, including the California Farm Bureau Federation and the Pacific Legal Foundation. In fact, MacDonald admitted that she has released nonpublic information to public sources on several occasions during her tenure as Deputy Assistant Secretary for FWS.**

**[The investigation finds that MacDonald "violated" 5 C.F.R. § 2635.703 ("Use of Nonpublic Information") and 5 C.F.R. § 2635.101 ("Basic obligation of Public Service, Appearance of Preferential Treatment"). The case was referred to DOI for potential administrative action.]**

# ESA

**Office of Inspector General, Report of Investigation:  
Julie MacDonald, Deputy Assistant Secretary, Fish,  
Wildlife, and Parks, undated (circa 2007):**

*Id.* at 10:

**"According to DAS MacDonald,  
when she attended meetings at  
Western Regional Offices, it was  
not beyond the realm of  
possibility that she swore at field  
personnel when challenging them  
on their scientific / biological  
findings."**

# ESA

**Office of Inspector General, Report of Investigation: Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife, and Parks, undated (circa 2007):**

***Id.* at 11:**

**"The Portland Assistant Regional Solicitor stated that he has conducted approximately 15 [Endangered Species reviews and Critical Habitat Designations] legal reviews and that the administrative record for these reviews generally consists of factual support, scientific data, public comments and peer review. When asked why he does not generally surname on [these reviews], the Assistant Regional Solicitor commented he has not surnamed a document in six years due to the legal insufficiency of the documents. He states that he looks at the rule, the rationale within the rule, past judicial decisions, whether it is factually supported, and whether there are any hopes of public support.**

***Salmon Spawning & Recovery Alliance v. Basham*, 477 F.Supp.2d 1301 (U.S. Ct. Int'l Trade 2007)**

(challenge to failure to perform ESA-mandated duties in connection with the importation of threatened and endangered salmon from Canada into the U.S.; regulations say that importation of endangered fish are “to be refused Custom release,” 19 C.F.R. § 12.26(g)(1); plaintiffs documented the killing of endangered salmon (chinook from Puget Sound, the lower Columbia, and Snake River Fall Chinook) in Canadian waters and their subsequent import into the U.S.; *id.* at 1305: “In fact, in Canada an entire industry markets to U.S. sport fishermen the opportunity to hunt these protected salmon”); *id.* at 1306: “The discretionary nature of Custom’s exercise of its enforcement powers renders this Court incapable of redressing plaintiffs’ § 9 claim,” citing *Lujan*.

***National Wildlife Federation v. NMFS*, \_\_\_\_\_  
F.Supp.2d \_\_\_\_\_, 2007 WL 1541730 (D. Ore.  
May 23, 2007) (Redden, J.)**

**(“On April 10, 2007, the court received an anonymous phone message alleging that Bonneville Power Administration (BPA) intentionally violated biological fish restrictions during ‘the first part of April, end of March’ to satisfy its hydro-power commitments, and sought to declare a system emergency to conceal the variance”; the 2007 Operations Agreement is now incorporated into the court order; this Opinion and Order is made available to all BPA employees with authority and duties regarding FCRPs operations”).**

*National Wildlife Federation v. NMFS*, \_\_\_\_\_  
F.Supp.2d \_\_\_\_\_, 2007 WL 1541730 (D. Ore.  
May 23, 2007) (Redden, J.)

(The court requested that the parties investigate the event and submit written responses, the court found:

"BPA voluntarily violated fish protection measures to meet its sales obligations"

"This was not a system emergency. It was a marketing error, and ESA-listed salmon and steelhead paid the price. This, the law does not permit. Under the circumstances here, threatened and endangered species must come before power generation."

***Pacific Coast Federation of Fishermen's Associations v. NMFS*, 482 F.Supp.2d 1248 (W.D.Wash. 2007) (Martinez, J.)**

(FSEIS prepared in connection with amendments to the Aquatic Conservation Strategy (CASS) component of the Northwest Forest Plan fails to assess adequately significant aquatic habitat impacts and fails to disclose dissenting scientific views; *id.* at 1253: “These FFMAT scientists, who designed the ACS, expressed dissenting opinions and disagreement concerning potential negative cumulative effects of the ACS amendment”; these views were presented inadequately under 40 C.F.R. § 1502.9(b); *id.* at 1255: “dissenting views were not discussed at the appropriate point, nor with sufficient depth, to ‘inform decision-makers of the full range of responsible opinion on the environmental effects’”).

***Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, \_\_\_\_ F.Supp.2d \_\_\_\_, 2008 WL 110602 (D. Mont. Jan. 11,**

**2008).** (NEPA / ESA challenge to Forest Service use of fire retardants; Secretary Mark Rey is ordered to show cause why he should not be held in contempt and jailed; Chief District Judge Molloy sees from the FS—

- "a strategy of circumventing, rather than complying, with NEPA and the ESA"
- "In my view, the [FS] is in contempt of the law and the prior orders of this court"
- "[The FS] had no real intention to comply with the court's orders"
- the FS position is "duplicitous at best"
- "no intention to comply with the court's orders"
- "Consistent with its apparent strategy to feign compliance with the law while in reality disregarding it"

***National Wildlife Federation v. NMFS*, 481 F.3d 1224 (9th Cir. 2007)**

(affirming district court's determination that the 2004 BiOp for operation of the Federal Columbia River Power System (FCRPS) is structurally flawed; this time, the agency invented a "reference operation" approach and declared that "obligations under statutes besides the ESA—for such things as irrigation, flood control, and power generation—were as immutable as the existence of the dams," *id.* at 1232; "an analytical slight of hand, manipulating the variables," *id.* at 1239.

# NASA

**Mark Bowen, *Censoring Science: Inside the Political Attack on Dr. James Hansen and the Truth of Global Warming* 297 (2008, Dutton, N.Y., N.Y.), quoting Michael Griffin, head of NASA (may 2007) and leader of the organization that does more climate-related research than any other entity on earth:**

**"I have no doubt . . . that a trend of global warming exists. I am not sure that it is fair to say that it is a problem we must wrestle with. To assume that it is a problem is to assume that the state of Earth's climate today is the optimal climate, the best climate that we could have or ever have had, and that we need to make sure that it doesn't change. First of all, I don't think it's within the power of human beings to assure that the climate does not change, as millions of years of history have shown, and second of all, I guess I would ask which human beings—where and when—are to be accorded the privilege of deciding that what we have right here today, right now, is the best climate for all other human beings. I think that's a rather arrogant position for people to take."**

# Washington State

**Senate Bill 6580, State of Washington, 60th Legislature, 2008 Regular Session, Section 2, which would add to the goals of the Growth Management Act to guide the development and adoption of comprehensive plans and development regulations a new subsection:**

**(14) Climate change. Reduce climate change impacts by lessening emissions of greenhouse gases in accordance with emission reductions . . . , and adapt to the effects of climate change to protect people, property, the economy, and the environment.**

# Another Radical Proposal

**This sudden burst of scientific enlightenment encourages me to propose yet another subsection (called the David Montgomery Amendment) to the enlightened goals in our Growth Management Act"**

**(15) Gravity. Reduce the impacts of gravity by lessening sediment releases . . . , and adapt to the effects of gravity to protect people, property, the economy, and the environment.**

# Washington Hydraulics Law

**Fractured and shattered by exemptions over the years**

- **RCW 77.55.071 (expires June 30, 2009) (announcing the commanding necessity to destroy streams that interfere with the construction of facilities to house sexually violent predators)**
- **RCW 77.55.021(10) (exceptions for occasions where the normal permitting process "would result in significant hardship for the applicant or unacceptable damage to the environment")**

***Sierra Club v. Strock*, 495 F. Supp. 2d 1188  
(S.D. Fla. 2007) (Hoeveler, J.)  
(98 pp., 327 ft.)**

(Order Supplementing March 22, 2006 order for multiple violations of APA / ESA / CWA / NEPA in connection with the issuance of permits to nine private corporations “for the destruction of approximately 5,400 acres of wetlands in order to remove the underlying limestone for processing into cement, concrete blocks, and other products”; *id.* at 1191: “Shockingly, the Court learned for the first time during the evidentiary hearing, in June 2006, that benzene, a carcinogen, had been detected as early as January 2005 in the water being pumped from the Biscayne Aquifer” (footnote omitted), which serves the Miami-Dade Cnty. area; the likely source is Corps-permitted mining activities; *id.* at 1194: “The Corp’s lack of concern about the benzene contamination represents a failure to fulfill its legal obligations to conduct the agency’s permitting activities with transparency”;

***Sierra Club v. Strock*, 495 F. Supp. 2d 1188  
(S.D. Fla. 2007) (Hoeveler, J.)  
(98 pp., 327 ft.)**

*id.* at 1286:

“this case presents the first time in three decades of judicial service that this Court is left with the impression that a federal agency has exhibited a disregard for its duty”; the intervenors’ prediction of a “severe recession” and that action by the Court “will place restoration of the Everglades in jeopardy” have “masked the underlying facts of this case).

*id.* at 1199:

“The Corps was driven by a sense of pre-determination and an urgency” (footnotes omitted);

***United States v. Washington (Culverts Decision), August 22, 2007) (Martinez, J.)***

**— "Treaties do impose a duty upon the State to refrain from building or maintaining culverts" that block fish passage.**

**"It was thus the right to take fish, not just the right to fish, that was secured by the treaties."**

**"These assurances would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource."**

# Collaboration—Sometimes

**In 2006, the Puget Sound Partnership reminds us that "the History of Collaboration in Natural Resources in Washington is Nationally known"<sup>1</sup>**

<sup>1</sup> 2006 Puget Sound Partnership Recommendations at 18.

**Does this COLLABORATION swing into play when somebody is willing to take action to combat a serious and long-lasting detriment to Puget Sound? Consider the case of FISH-BLOCKING CULVERTS.**

# Culverts

**In 1998, the Washington State Legislature found**

- **that there are over 2,000 barriers to fish passage at road crossings throughout the state**
- **these barriers block fish access to as much as 3,000 miles of freshwater spawning and rearing habitat**

# Fish-Blocking Culverts

The Washington State Legislature has weighed in on this question (Laws of 1998, ch. 249, § 1):

**Findings—Purpose—1998 c 249:** "The legislature finds that fish habitat enhancement projects play a key role in the state's salmon and steelhead recovery efforts. The legislature finds that there are over two thousand barriers to fish passage at road crossings throughout the state, blocking fish access to as much as three thousand miles of freshwater spawning and rearing habitat. The legislature further finds that removal of these barriers and completion of other fish habitat enhancement projects should be done in a cost-effective manner, which includes providing technical assistance and training to people who will undertake projects such as removal of barriers to salmon passage and minimizing the expense and delays of various permitting processes. The purpose of this act is to take immediate action to facilitate the review and approval of fish habitat enhancement projects, to encourage efforts that will continue to improve the process in the future, to address known fish passage barriers immediately, and to develop over time a comprehensive system to inventory and prioritize barriers on a statewide basis."

But who has to lead the way? Who has to discover fortuitously useful fish-protection law in some 1855 treaties? The Indian tribes. And are they helped along the way by the **CONSENSUS-BUILDERS OF Washington State?**

**This case was argued before Hon. Ricardo S. Martinez in the U.S. District Court in Seattle on February 1, 2007**

- **Was the Governor there to file a supporting brief on behalf of the tribes? NO.**
- **Or the Puget Sound Partnership? NO.**
- **Or interested legislators? NO.**
- **An Amicus Brief was filed by the Washington Association of Counties—and this group opposed what the tribes were trying to accomplish**

**Washington Association of Counties,  
Memorandum in Support of the State's  
Motion for Summary Judgment, Sept.  
29, 2006, p. 6.**

**"The Tribes are seeking to force the State, and presumably later, the counties, to immediately repair all fish-blocking culverts. . . . [Absent specific language in the treaties], neither the State nor the counties can be found to have a duty to immediately return every culvert to a condition that allows for the same flow of fish as existed prior to the erection of the culvert. . . ."**

**Washington's Opposition to [Tribes'] Motion for Partial Summary Judgment [in the Culvert Case], Sept. 27, 2006, pp. 18, 19:**

**"The Tribes' claim, carried to its logical conclusion, would give them a right to demand restoration of 1855 conditions and to control all future land management decision in the *United States v. Washington* case area. . . . The potential scope of the right sought by the Tribes cannot be underestimated."**

# What could be done?

**What could be done in law to correct the thinking of this latest Attorney General of Washington who prefers to resist this modest "treaty" proposal to help the salmon?**

**He could be instructed by the legislature to settle the case forthwith and to take advantage of this wonderful opportunity to apply treaty-based habitat protection.**

*United States v. Washington (Culverts Decision), August 22, 2007) (Martinez, J.)*

## Reaction of Governor Gregoire?

"obviously disappointed,"

Seattle Post-Intelligencer, Aug. 23, 2007, responding to the ruling under the Indian treaties the State of Washington is duty-bound to repair highway culverts that block fish passage.

*United States v. Washington (Culverts Decision), August 22, 2007) (Martinez, J.)*

**Q. How optimistic can we be of enthusiastic and effective enforcement?**

*Global Management today involves "converting scientific findings into political action . . . trying to get a substantial portion of the world's people to change their behavior."*

**William Ruckelshaus, 1993 (The Ecologist, Whose Common Future? Reclaiming the Commons 129 (1993))**

*"I don't personally believe you can force the individual to change the way they interact with the environment through government."*

**William Ruckelshaus, 2007 (Warren Cornwall, "Huge task faces Puget Sound's anointed savior, Seattle Times, May 20, 2007).**

***United States v. Washington (Culverts Decision), August 22, 2007) (Martinez, J.)***

- Q. What happened to Phase II of U.S. v. Washington, which was the 1980 predecessor of the Culvert case?**
- A. Development interests in the state ganged up, formed the Northwest Water Resource Council, contributed \$10,000 apiece to fight Phase II of the Boldt decision**
- Q. How did the tribes escape from that one?**
- A. By a boycott that resulted in Indian tribes, citizens, and Alaska Native corporations pulling their money out of Seafirst Bank in Seattle.**

***See LAND OF THE QUINAULT 258-59 (1990, Pauline K. Capoeman, ed.) (published by Quinault Indian Nation).***

**Wash. Const., Art. 2, § 40:**

**"All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes."**

**Adopted by Amendment 18,  
approved Nov. 1944.**

**Levi Pulkinnen, "Deluge of sewage left in storm's wake," "Amount diverted into Green Lake is uncertain," Seattle Post-Intelligencer, Dec. 7, 2007, p.1, col. 2**

**("at a minimum, 350,000 to 600,000 gallons of untreated sewage flowed into Lake Washington during the storm. Discharges at Green Lake and other areas prompted health authorities to close some beaches").**

## **Elwha River Dams**

**Q. By the way, are the dams out yet on the Elwha?**

**In 1989 the Lower Elwha River Tribal Council described the situation thus:**

**"In the case of the Elwha River the United States has allowed private hydroelectric development to stop a treaty-guaranteed reservation fishery for 75 years. It has permitted exploitation of the river at the expense of the families who can least afford to underwrite it, increased the poverty of the Tribe by drastically reducing its principal economic resource, caused the depletion of reservation beaches, and forced the Tribe to live downstream from an unsafe Dam.**

# Elwha River Dams

For the uninitiated, we have an Elwha River Ecosystem and Fisheries Restoration Act (Pub. L. 102-495, 106 Stat. 3173 (Oct. 24, 1992)). This must be understood as a Public-Private Partnership, which can be defined as a "joint enterprise in which the public assumes all risks and costs while private entities enjoy all profits and benefits."

Understand the nature of the commitment made by the United States. It comes in four parts: The U.S. must pay full value to the private property owners ("\$29 million and no more") to acquire the projects. The U.S. assumes all costs and liabilities associated with dam removal and restoration. The U.S. must find the funds to do this within the normal budget appropriation process. Private owners get a full and complete release from the U.S. from the consequences of ninety years of destructive management: [acquisition of the projects] shall be conditioned on a release of liability providing that all obligations and liabilities of the owner and the local industrial consumer to the United States arising from the Projects, based upon ownership, license, permit, contract, or other authority, including, but not limited to, project removal and any ecosystem, fish and wildlife mitigation or restoration obligations, shall, from the moment of title transfer, be deemed to have been satisfied. . . (Section 3(b), 106 Stat. at \_\_\_\_).

## Elwha River Dams

The Elwha model of "U.S. liable" is completely oblivious of the Superfund model of "owner and operator" liable. "Polluter pays" is as good in one context as it is in another. Owners and operators of dams, like the monarchs of hazardous substance sites, make many incremental choices to charge the land and the waters with their unwanted costs. They ran the place down for profit and inspired many others to run it back up in the name of "restoration." Lest this model of "owner and operator pays" be forgotten completely, I sketch in what a "Damfund" law might look like.

## Elwha River Dams

Section 107 of the Damfund Law, 42 U.S.C.A. § 9607(a) (imaginary):

Notwithstanding any other provision or rule of law [and subject only to limited defenses]—

(1) the owner and operator of a fish-destructive dam;

(2) any person who at the time of fish destruction owned or operated the dam;

(3) any person who by contract, agreement, or otherwise acquired energy from a fish-destructive dam, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe;

(B) any other necessary costs of response incurred by any other person; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss.

***United States v. Robison*, 521 F. Supp. 2d 1247, (N.D. Ala. 2007) (Senior District Judge, Robert B. Probst, writes what is already a memorable essay on why he will direct the Clerk to reassign this case for retrial on remand post-*Rapanos*); Judge Probst writes—**

**id. n. 5: "I will not compare the [*Rapanos*] 'decision' to making sausage because it would excessively demean sausage makers"**

**Then he quotes the *Rapanos* Opinions' opinions of each other—**

**—"wrenched out of context"**

**—"perfectly opaque"**

**—"wholly implausible"**

**—"mere legerdemain"**

**—"the ultimate distinction without a difference"**

**—"two defects in a single sentence"**

**—"unprecedented reading of the Act"**

**—"creative"**

***United States v. Robison*, 521 F. Supp. 2d 1247, (N.D. Ala. 2007) (Senior District Judge, Robert B. Probst, writes what is already a memorable essay on why he will direct the Clerk to reassign this case for retrial on remand post-*Rapanos*); Judge Probst writes—**

**Then he quotes the *Rapanos* Opinions' opinions of each other—**

**—"revisionist"**

**—"Rather than defending its own antagonism to environmentalism, the plurality counters by claiming that my dissent is 'policy-laden'"**

**—Opinion cites the dictionary "for a proposition that it does contain"**

**—"mystifying" reasoning**

**—the "second statutory invention is as arbitrary as the first"**

**—"has devised his new statute all on his own"**

**—a "curious appeal to entrenched Executive error"**

**—uses the "gimmick" of "significant nexus"**

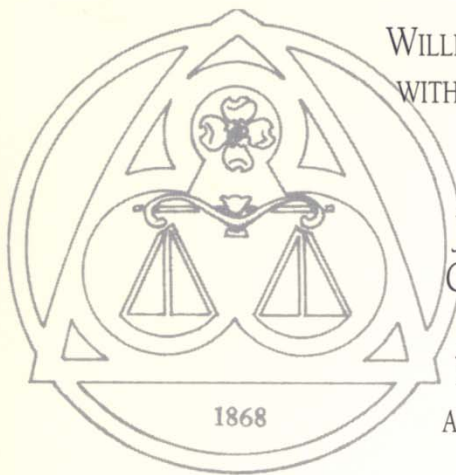
***United States v. Robison*, 521 F. Supp. 2d 1247, (N.D. Ala. 2007) (Senior District Judge, Robert B. Probst, writes what is already a memorable essay on why he will direct the Clerk to reassign this case for retrial on remand post-*Rapanos*); Judge Probst writes—**

**The court concludes (*id.* at 1264):**

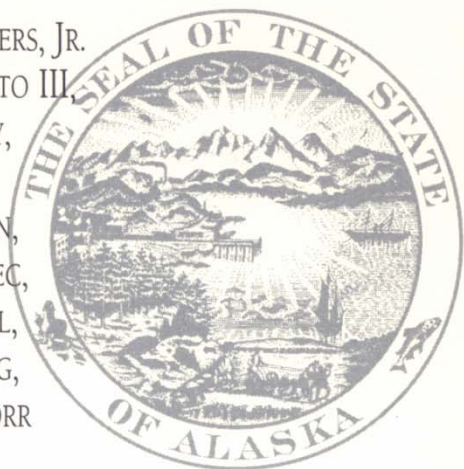
**It is not the reversal of the convictions in and of itself which concerns me. It is the methodology by which the result has been reached. I realize that I may be subject to criticism for telling the truth. . . . At age 76, this is not my swan song, but it may be preparatory to one. Throughout their lives, swans emit hissing and shrill sounds. It may be a myth that they ultimately emit a melodious sound. My emissions are likely no worse than those of the Justices.**

# ALASKA LAW REVIEW

The *Exxon Valdez* Reopener: Natural Resources  
Damage Settlements and Roads Not Taken



WILLIAM H. RODGERS, JR.  
WITH J.B. CROSETTO III  
C.A. HOLLEY,  
T.C. KADE,  
J.H. KAUFMAN,  
C.M. KOSTELEC,  
K.A. MICHAEL,  
R.J. SANDBERG,  
AND J.L. SCHORR



December 2005 ■ Volume XXII ■ Number II  
*Duke University School of Law*

# Reopener Key Dates

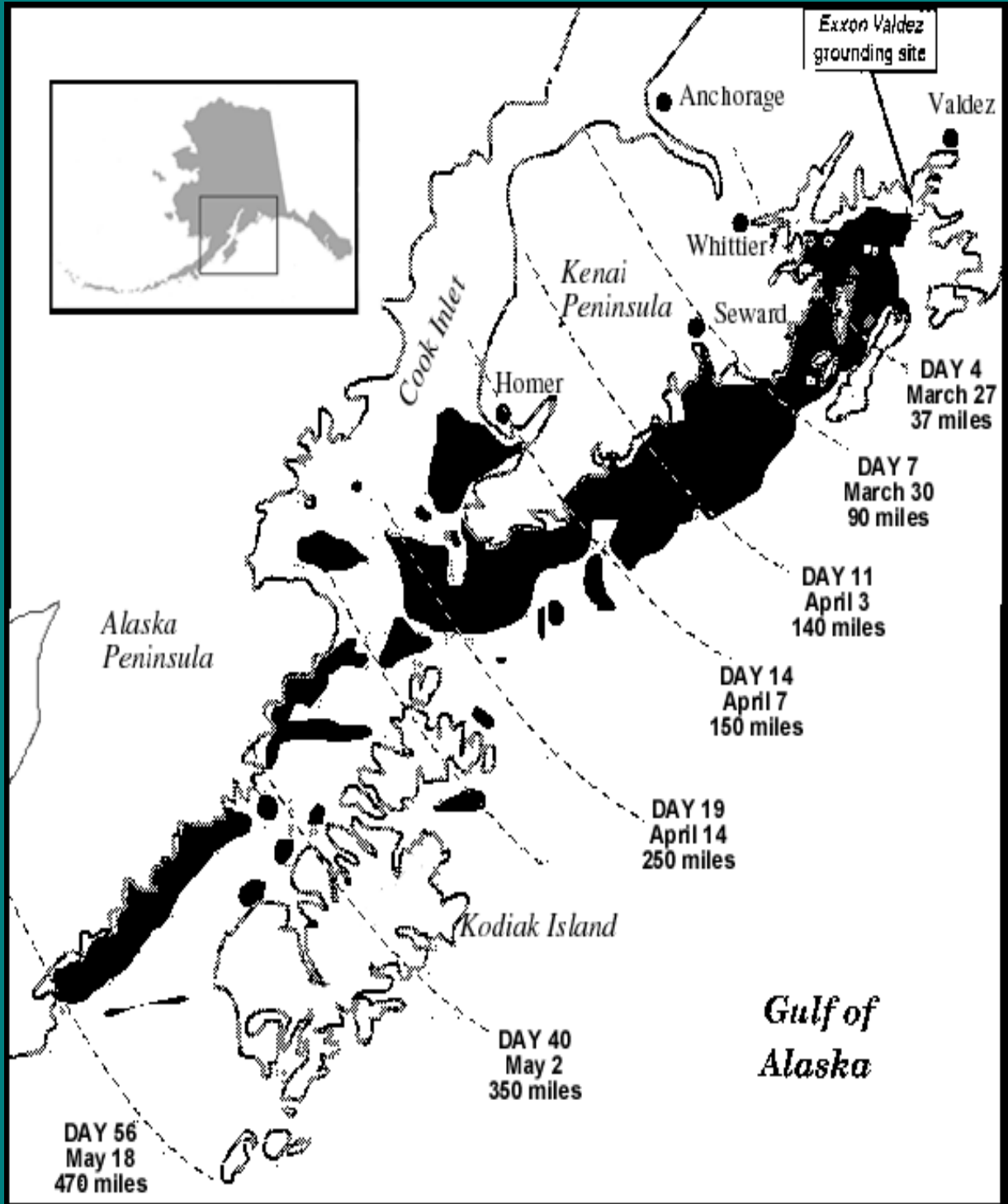
<b>1977</b>	<b>Clean Water Act amendments establish to-government model for NRDA (U.S. – state)</b>
<b>1980</b>	<b>ANILCA's "subsistence" provisions</b>
<b>1980</b>	<b>CERCLA (Superfund Law) establishes three-government model for NRDA (U.S. – state – tribal)</b>
<b>1987</b>	<b>Tribes can be treated as "states" under Clean Water Act (but not for purposes of NRDA)</b>
<b>March 24, 1989</b>	<b><i>Exxon Valdez</i> Oil Spill (EVOS)</b>
<b>1990</b>	<b>Oil Pollution Act of 1990 (three-government model of NRDA: U.S. – state – tribal)</b>
<b>Oct. 28, 1991</b>	<b>Settlement and Consent Decree (two-government model of NRDA: U.S. – state)</b>

## *Exxon Valdez* Grounded on Bligh Reef



- **March 24, 1989 *Exxon Valdez* runs aground on Bligh Reef with 53 million gallons of crude oil on board**
- **11 million gallons spilled (approximately 125 Olympic-sized swimming pools)**

# Oil Spill Progression (March 24 – May 18, 1989)



# 1991 Settlement to Address Damages to Natural Resources

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Attorney for Plaintiff State of Alaska

~~Lodged~~  
SEP 30 1991

**FILED**

OCT 09 1991

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,  
Plaintiff,

v.

EXXON CORPORATION, EXXON SHIPPING  
COMPANY, and EXXON PIPELINE COMPANY,  
in personam, and the T/V  
EXXON VALDEZ, in rem,  
Defendants.

Civil Action No.  
A91-082 CIV

STATE OF ALASKA,  
Plaintiff,

v.

EXXON CORPORATION, and EXXON  
SHIPPING COMPANY,  
Defendants.

Civil Action No.  
A91-083 CIV

AGREEMENT AND CONSENT  
DECREE

# Details of 1991 Civil Settlement

- **October 8, 1991: Judge Holland approved a settlement agreement between the State of Alaska, the United States and Exxon**
- **Exxon agreed to pay \$900 million over 10 years**
- **The settlement contained a “reopener clause”**

# The Reopener

## Reopener For Unknown Injury

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

18. The amount to be paid by Exxon for the restoration projects referred to in Paragraph 17 shall not exceed \$100,000,000.

# Conditions of the Reopener at face value, summarized

1. "one or more populations, habitats or species" must have suffered
2. a "substantial loss or substantial decline in the areas affected by the oil spill"
3. these losses must result from the oil spill
4. injury "could not reasonably have been known nor could it reasonably have been anticipated by any trustee"
5. costs of restoration "must not be grossly disproportionate to the magnitude of the benefits anticipated"
6. "detailed plans" for "restoration projects" are to be filed 90 days before demanding any payment

# The Punitive Damage Rollercoaster

- **1994: Certification of mandatory punitive damages class**
- **1994: Jury award of compensatory damages of \$287 million and punitive damages of \$5 billion**
- **1999: 9th Circuit vacated / remanded to reduce the amount**
- **On remand, Judge Holland reduced the amount of punitive damages to \$4 billion**
- **2003: the 9th Circuit vacated / remanded the judgment**
- **2004: Judge Holland reassessed the amount of actual harm and found that \$5 billion was justified, but reduced amount to \$4.5 billion to comply with 9th Circuit order**
- **Exxon appealed again and the award is once again before the 9th Circuit**

# How Does \$100 million or \$5 billion compare with the rest of the oil pollution world?

## Erratically

*Grapha v. Alpha Technical*, 901 So.2d 1117 (La. App. 2005) (\$1 billion punitive damage award is justified by Exxon's recklessness in contaminating property with low-level radiation from its oil business; but it is unconstitutional under *Gore* and is reduced to \$112.29 million – twice the compensatory award)

# Judgments and Law: The Value of Natural Resources

**1. How did the reopener get set at \$100 million?**

**No reason. William Reilly, EPA Administrator in 1991, "insisted" that it be \$300 million.**

**2. What were the original damages calculated to be from the spill of the *Exxon Valdez*?**

**\$3 – \$15 billion. These were the so-called contingent valuation studies, done by economists such as a Gardner Brown. But they would not be embraced by the administration in 1991.**

## AN OPEN LETTER TO THE PUBLIC

On March 24, in the early morning hours, a disastrous accident happened in the waters of Prince William Sound, Alaska. By now you all know that our tanker, the Exxon Valdez, hit a submerged reef and lost 240,000 barrels of oil into the waters of the Sound.

We believe that Exxon has moved swiftly and competently to minimize the effect this oil will have on the environment, fish and other wildlife. Further, I hope that you know we have already committed several hundred people to work on the cleanup. We also will meet our obligations to all those who have suffered damage from the spill.

Finally, and most importantly, I want to tell you how sorry I am that this accident took place. We at Exxon are especially sympathetic to the residents of Valdez and the people of the State of Alaska. We cannot, of course, undo what has been done. But I can assure you that since March 24, the accident has been receiving our full attention and will continue to do so.

  
L. G. Rawl  
Chairman



# Judgments and Law: The Value of Natural Resources

4. What was the value of the famous *Exxon Valdez* apology? What is the price of remorse? The value of regret?

\$125 million. This amount was "remitted" ("to forgive or pardon," "to refrain from exacting") because Exxon was a good corporate citizen.

5. Another \$100 million was declared "restitution" and went to the federal government and the State of Alaska for "restoration projects" in Alaska. What is "restitution"?

A "giving back to the rightful owner of something that has been lost or taken away." Stolen property. We don't call this "natural resource damages." This is the criminal side of the street.

# Judgments and Law: The Value of Natural Resources

6. So you subtract this \$125 million that was "remitted" (disappears like the mist in the morning) and another \$100 million that was "restitution" (the "side deal" for the state and federal government). What's left?

**That leaves the \$900 million that was the business of the EVOS Trustee Council.**

# Judgments and Law: The Value of Natural Resources

## 7. Where did the \$5 billion in punitive damages come from?

After-tax net profit. Take away the company's profits for a year. *See David Lebedoff, Cleaning Up: The Story Behind the Biggest Legal Bonanza of Our Time*, ch. 15 at 259-60 (1997, The Free Press, N.Y., N.Y.):

1988	--	\$5.26 billion
1989	--	\$3.52 billion
1990	--	\$5.01 billion
1991	--	
1992	--	
1993	--	\$5.28 billion

# Judgments and Law: The Value of Natural Resources

8. See David Kravets, "Exxon asks reduction of Valdez damage award," *Seattle Post-Intelligencer*, Jan. 28, 2006 (3rd quarter earnings of 10 billion; does this mean a \$40-billion punitive damage award)?

Of course not.

## *Exxon Valdez* Oil Spill

**Kellie Kvasnikoff, *EXXON VALDEZ*: 18 YEARS AND COUNTING 38, 39 (2007) (6,000 (of the 32,000 plaintiffs seeking punishment) are now dead)**

**Exxon's chief strategist have turned out to be true, and the case has stretched into the 21st Century.**

**After 18 years justice has turned out to be misspelled, it is JUST-US.**

**Those with the deep pockets that can manufacture legal arguments, use the law, buy science, keep Supreme Court Justices and Presidents in their hip pockets and play them like puppets when it is to their benefit."**