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The Exxon Valdez Oil Spill and the Confidentiality of Natural Resource Damage Assessment Data

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The Exxon Valdez Oil Spill and the Confidentiality of Natural Resource Damage Assessment Data*

Ann D. Cummings**

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INTRODUCTION

The grounding of the Exxon Valdez oil tanker on March 24, 1989, in Alaska's Prince William Sound, resulted in the largest oil spill in U.S. history. The spill polluted over 1200 miles of shoreline, "killed thousands of sea birds and marine mammals and closed areas to commercial fishing and traditional native food gathering." The first step in responding to the oil spill was to contain and clean up the oil. Next, the state and federal governments had to determine the extent of the injury to the natural resources along the Alaska coastline by monitoring the effects of the oil in the impacted area. Once the damage was assessed, a claim could be brought against Exxon Corporation for the cost of restoring the environment.

The method for determining the extent of damage, the natural resource damage assessment (the NRDA) process, is authorized under section 301(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and defined in regulations promulgated by the Department of Interior (the DOI) and the Environmental Protection Agency (EPA). As specified by these regulations, designated state and federal trustees design and execute NRDA studies, which, though expensive, provide a useful mechanism for determining the amount of damages a spiller must pay. Although obvious difficulties arise in placing monetary values on unexploited natural resources, de-

1. Bill McAllister, Huge Oil Spill Coats Alaskan Waters, PHILA. INQ., Mar. 25, 1989, at A1. An estimated 11 million gallons of crude oil were lost in the Exxon Valdez spill. Id.
5. 6. E.g., John Lancaster, Value of Intangible Losses from Exxon Valdez Spill Put at $3 Billion, WASH. POST, Mar. 20, 1991, at A4 (discussing social cost studies in which economists polled American households to try to assign a dollar value to the lost resources); Frank B. Cross, Natural Resource Damage Valuation, 42 VAND. L. REV. 269, 297-320 (1989) (describ-
veloping effective restoration methods,\textsuperscript{7} and assessing the extent of damage in accidents of this magnitude,\textsuperscript{8} one of the greatest impediments to an effective restoration process in the \textit{Exxon Valdez} case has been the state and federal governments’ decision to keep the bulk of the NRDA data confidential.

The trustees responsible for Alaska’s natural resources have withheld results of the NRDA studies in order to simultaneously preserve their case against Exxon and prevent third parties from using the data in litigation against the state and federal governments. This data may be withheld by the state and federal governments through a variety of mechanisms, including confidentiality agreements with researchers, litigation privileges created in the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence, and through exemptions to the disclosure requirements of the federal Freedom of Information Act (FOIA)\textsuperscript{9} and Alaska’s Public Records Statute.\textsuperscript{10} Yet this emphasis on confidentiality for litigation purposes detracts from the larger goal of evaluating environmental damage and restoring the injured resources.

In contrast to these restrictions on disclosure of damage assessment data, which the state and federal governments have imposed, the NRDA regulations emphasize coordination of research to avoid duplication and even encourage the sharing of information with potentially responsible parties (PRP’s). However, the DOI and EPA regulations each make a critical distinction between response studies, which are designed to create and evaluate cleanup methods, and NRDA studies, which provide the government with a monetary damage calculation. As a result, early data from the \textit{Exxon Valdez} NRDA studies, which may have improved the quality and success of the cleanup, was not made available to the response teams who were conducting separate investigations. Also, the confidentiality of the NRDA findings has compromised the accepted scientific method of peer review. Neither scientists nor the public can ade-

\textsuperscript{7} See, e.g., Keith Schneider, \textit{Harm to Nature From Valdez Spill is Now Seen as Far Worse by U.S.}, N.Y. TIMES, Apr. 10, 1991, at A1 (“[E]fforts to clean 400 . . . miles of the Sound’s shorelines with pressurized and heated sea water caused more damage to . . . organisms in the tidal zones than if the shorelines had been left alone.”).

\textsuperscript{8} Compare John Lancaster, \textit{Long-Term Damage Seen From Exxon Valdez Spill; Recovery of Some Wildlife May Take Decades}, WASH. POST, Feb. 21, 1991, at A1 (concluding that “the available body of scientific evidence . . . challenges the increasingly widespread assumption that the oil spill was a transitory event whose worst effects were cosmetic”) with Warren T. Brookes, \textit{Oil Spills Are Not as Bad as You Think}, S.F. CHRON., Nov. 27, 1990, at C3 (“Environmentalist overkill is causing the nation to waste massive resources for insignificant benefits.”).


\textsuperscript{10} ALASKA STAT. § 09.25.110 (public records) (1983 & Supp. 1991); \textit{id.} § 09.25.120 (exceptions); \textit{id.} § 09.25.122 (litigation disclosure) (Supp. 1991).
quately review restoration plans without the data upon which the plans are based.

A final drawback to the confidentiality of NRDA data is its effect on nongovernmental parties. Keeping NRDA data confidential serves the adversarial process by enhancing the negotiating power of state and federal governments and protecting these governments from inadvertently contributing to the strength of third party suits. However, confidentiality harms other parties who need the information to pursue their individual claims. For example, an accurate and detailed measurement of the environmental damage from the Exxon Valdez spill is vital to the cases of fishermen and Native Alaskans. Private parties are forced either to develop and finance their own studies, or to rely on the little data that has been released in order to substantiate their claims. Parties with significant resources, such as the State of Alaska and Exxon, have funded their own studies. But private parties not privy to the trustees' information, and lacking the resources necessary to collect it on their own, have limited means by which to make their claims.

Although confidentiality of NRDA data frustrates both the restoration process and private claimants, a variety of legal tools are available to compel disclosure. State public records and federal freedom of information statutes, rules of discovery and evidence, and settlement agreements may release enough information to build a case or critique restoration plans. However, FOIA and the discovery process are time-consuming and subject to exemptions largely within judicial and agency discretion. Information released after months or years of settlement negotiations is of little value to either the restoration process or private party claimants.

The problems created by the confidentiality of NRDA data should be addressed through modification of the Department of the Interior's regulations. This comment proposes removing the distinction between NRDA and response studies, incorporating past studies into the overall process, and adopting a mechanism for timely disclosure of important data to accommodate both scientific and public review of restoration plans.

Part I of this comment discusses NRDA studies and the regulations governing their implementation. Part II sets out other legal mechanisms for preserving the confidentiality of NRDA data, and the effects of confidentiality on the NRDA process in the Exxon Valdez case are explored in part III. Part IV discusses methods for obtaining NRDA data, and proposals for reform are suggested in part V.
I

NATURAL RESOURCE DAMAGE ASSESSMENT REGULATIONS

Two federal statutes govern recovery for the destruction of natural resources by oil spills: the Federal Water Pollution Control Act, commonly called the Clean Water Act (the CWA), and CERCLA. The CWA controls the discharge and subsequent removal of oil affecting United States natural resources. CERCLA addresses natural resource damage recovery in the aftermath of a hazardous substance release, and that recovery extends to "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." Government parties may bring an action under CERCLA to recover such costs, even before a state or federal agency spends any money. Oil spill cleanup is governed more specifically by the National Contingency Plan (the NCP) which provides for the development and revision of response plans. CERCLA requires the President to promulgate NRDA guidelines, a task the White House has assigned to the DOI, and the Act also pro-

13. 33 U.S.C. § 1321 (1988). Removal is defined as action which "may be necessary to minimize or mitigate damage to the public health or welfare, including but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." Id. § 1321(a)(8). United States natural resources include those resources "belonging to, appertaining to, or under the exclusive management authority of the United States." Id. § 1321(c)(2).
14. See 42 U.S.C. § 9607(a)(4)(C) (1988). CERCLA defines natural resources to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, any foreign government, or any Indian tribe." Id. § 9601(16).
15. Id. § 9607(a)(4)(C).
16. No private cause of action for natural resource damages exists under CERCLA. Kyle E. McSlarrow et al., A Decade of Superfund Litigation, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,367, 10,406 & n.534 (1991). In the past, federal courts have disagreed whether a municipality may bring a natural resource damage action, but the prevailing view today is that only the federal and state governments may do so. See id. n.534. No reported decisions address an Indian tribe's standing to bring a natural resource recovery action, despite language including tribal resources in CERCLA's definition of natural resources. See 42 U.S.C. § 9607(a)(4)(C) (1988). In contrast to the restrictions on standing for natural resource damage actions, a private party may recover costs incurred in undertaking a specific removal or remedial action. See McSlarrow et al., supra, at 10,395-96; 42 U.S.C. § 9607(a)(4)(B) (1988).
18. Contingency Plan, supra note 5. Both the CWA and CERCLA require the President to develop the NCP. Id. § 300.2. The EPA issued the current version of the NCP on March 8, 1990. See id. For more information on the NCP, see McSlarrow, et al., supra note 16, at 10,377-78.
vides that the DOI guidelines operate under the CWA. Thus, the two agencies coordinating oil spill studies in the case of the Exxon Valdez are the DOI and EPA. DOI's regulations specifically govern NRDA studies, while the EPA regulations cover immediate response studies for the spill. The difficulty which subsequently arises is that the NRDA process is designed for litigation and is therefore confidential, so an artificial wall is erected between these two types of studies. The results of the NRDA studies are withheld, and the response studies proceed without the benefit of NRDA research in the same area.

A. Natural Resource Trustees

Damages for injury to natural resources are assessed and collected by the federal or state trustee who owns, manages, or controls the resource, and are then applied to restoration efforts. These trustees are federal and state officials designated by the President and state Governors through the NCP. Because the jurisdictions of several agencies may overlap on a single natural resource, Congress was overly inclusive in naming all potential trustees under every natural resource recovery provision.

The actual role of the trustees is defined in the DOI and EPA regulations. The DOI regulations, which are applicable under both CERCLA and the CWA, recognize federal, state, and tribal governments as trustees for natural resources. The EPA regulations, applicable under the CWA, designate trustees for a broad range of resources.

Trustees have a strong incentive to assess damages according to the DOI regulations because they grant the benefit of a rebuttable presumption should the damage assessment be challenged in court.

22. NRDA's, supra note 4.
23. 42 U.S.C. § 9651(c)(1) (1988). Most provisions of CERCLA apply only to discharges of "hazardous substances," which the statute defines to exclude petroleum. Id. § 9601(14). Petroleum releases are subject to the natural resource damage assessment process by reference to the CWA. See id. § 9651(c)(1).
24. NRDA's, supra note 4, § 11.10.
26. Id. § 9607(f)(2). These designations also apply to natural resource damages under the Clean Water Act. Id. In the Exxon Valdez case the trustees are: the DOI, the U.S. Department of Agriculture, the U.S. Department of Commerce, the Alaska Department of Environmental Conservation, and EPA. CENTER FOR MARINE CONSERVATION, THE Exxon Valdez Oil Spill: A Management Analysis 43 (1989) [hereinafter TOWNSEND REPORT].
28. See supra notes 20-23 and accompanying text.
29. NRDA's, supra note 4, § 11.14(rr).
30. Contingency Plan, supra note 5, § 300.600 (designating federal trustees); id. § 300.605 (authorizing state trustees); id. § 300.610 (authorizing tribes to select trustees).
31. See id. § 300.5. The regulatory definition parallels the one enacted in CERCLA. See supra note 14.
Since both federal and state trustees assess natural resource damages, both sets of regulations intimate that there must be federal-state cooperation in this area. Because the regulations fail to identify which government leads in the recovery process, or which agency takes precedence where recovery efforts overlap, cooperation among federal and state trustees also is extremely important as a practical matter. However, CERCLA deters separate federal and state efforts by barring double recovery for natural resource damages, "including the costs of damage assessment or restoration..." Moreover, the DOI regulations outline the coordination of activities where individual trustees have overlapping responsibility.

The EPA regulations also urge federal and state agencies to develop procedures to coordinate their responses to oil discharges. The EPA regulations address the overlap issue by noting that "[w]here there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities." Therefore, because of the prohibition against double recovery and concerns with overlapping jurisdiction, it is in the best interests of the federal and state trustees relying on either set of regulations to coordinate their efforts to develop a single plan to measure damages which will allow for the equitable assessment and distribution of the damages among the various trustees.

under its guidelines “must be used by the Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 107(f)(2)(C) of CERCLA.” NRDA’s, supra note 4, § 11.10.


34. See NRDA’s, supra note 4, § 11.32(a)(1) (regarding the DOI regulations); Contingency Plan, supra note 5, § 300.135(d) (referring to the EPA regulations). See also infra notes 38-42, 50-51 and accompanying text.

35. See, e.g., Contingency Plan, supra note 5, § 300.615 (EPA regulation discussing responsibilities of trustees that refers to lead agencies, but fails to define such agency).

36. See, e.g., id. ("Where there are multiple trustees . . . they should coordinate and cooperate in carrying out [their responsibilities].").


38. NRDA’s, supra note 4, § 11.15(d).

39. NRDA’s, supra note 4, § 11.32(a)(I).

40. Contingency Plan, supra note 5, § 300.105(a)(3).

41. Id. § 300.615(a).

42. For example, the Exxon Valdez NRDA plans written between 1989 and 1991 have been jointly developed by the state and federal trustees. E.g., 1 UNITED STATES DEP’T OF AGRIC. ET AL., THE 1991 STATE/FEDERAL NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION PLAN FOR THE Exxon Valdez Oil Spill, at preface (1991) [hereinafter NRDA 1991].
B. The DOI Regulations and the NRDA Studies

Once the trustees have been alerted, NRDA studies are implemented immediately in order to catalogue and chronicle the damage to natural resources. These studies, as outlined in the DOI regulations, are designed to provide the information necessary “...to manage and restore injured resources appropriately and to provide necessary documentation to enable the governments to present a claim for damages to the responsible parties.” The NRDA process requires performance of two preassessment activities: (1) the trustees detect or are notified of a release; and (2) the trustees complete a preassessment screen to determine whether CERCLA or the CWA covers the incident and whether trustee resources are affected. Should further action be deemed appropriate, the trustees prepare an assessment plan. This plan includes the identification and involvement of PRP's and allows for public involvement in a thirty day review and comment period. The trustees must then decide whether to pursue a simplified assessment, known as the Type A procedure, or to conduct a site-specific inquiry, known as the Type B procedure. Finally, the trustees conduct postassessment activities, including making a report of the assessment, accounting for damage assessment awards, and issuing a restoration plan. The trustees use this process to determine the validity of a claim against a spiller for each separate injury.

43. Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill, 56 Fed. Reg. 14,687, 14,688 (1991). The goal of restoration is to restore injured resources to their pre-spill conditions. Restoration activities may include fish and wildlife habitat projects, work at archaeological sites, restoring or improving traditional subsistence resources, and restoring or improving scenic and recreation values. Restoration activities may also involve careful monitoring of natural recovery processes, replacement of injured resources, and the acquisition of equivalent resources (such as the purchase of similar habitat in another location).


44. See NRDA's, supra note 4, § 11.20.

45. See id. §§ 11.23-.25. A trustee may take immediate action to respond to a natural resource emergency. See id. § 11.21. The DOI regulations define a natural resource emergency to include "a discharge or release requiring immediate action to avoid an irreversible loss of resources ... or a situation in which there is a similar need for emergency action." Id. § 11.21(a)(2).

46. Id. § 11.32(a)(2)(i).

47. Id. § 11.32(e)(2)(ii).

48. Id. § 11.31(b); see also id. § 11.33 (guiding decision between Type A and Type B assessment); id. §§ 11.60-.84 (listing Type B assessment rules). The DOI Type B rules were partially invalidated in federal court. See Ohio v. United States Dep't of the Interior, 880 F.2d 432, 481 (D.C. Cir. 1989). The Type B regulations will now be reissued by the DOI in consultation with the National Oceanic and Atmospheric Association (NOAA). See Notice of Proposed Rulemaking, 56 Fed. Reg. 19,752, 19,754-55 (1991).

49. See NRDA's, supra note 4, §§ 11.90-.93.
In an effort to avoid duplication, the DOI regulations emphasize that the studies should be coordinated and shared. One provision states: "The Assessment Plan shall contain procedures and schedules for sharing data, split samples, and results of analyses, when requested, with any identified potentially responsible parties and other natural resource trustees." Unfortunately, the DOI regulations do not necessarily promote coordination in practice because of their emphasis on litigation-oriented data collection which encourages secrecy among the parties involved. Examples of the emphasis on litigation are found throughout the DOI regulations. For instance, the rule which governs the preassessment screen for natural resource damages states that the purpose of prescreening is to "ensure that there is a reasonable probability of making a successful claim before monies and efforts are expended in carrying out an assessment." The regulations also require cost efficiency, in that "[d]ata sufficient to pursue an assessment [must be] readily available or likely to be obtained at reasonable cost."

These legal requirements determine not only which studies will be pursued, but the overall scope of the research as well. The cost of assessment must be supported by records and documentation and "shall not reflect regular activities performed by the agency or tribe in management of the natural resource." This distinction between NRDA studies and regular research activities reappears throughout the regulations and interferes with the natural overlap of the two areas. The distinction runs counter to the scientific approach of utilizing all available background research and information to evaluate damage to an injured resource.

C. The EPA Regulations and the NRDA Studies

The newly revised EPA regulations which outline the National Contingency Plan provide the structure for an immediate spill response and cleanup, as opposed to the NRDA emphasis on which damages to claim from the spiller. However, because the EPA regulations provide for both response documentation and longer-term research, these regulations

50. See, e.g., id. § 11.23(f) (urging trustee coordination in preparation of preassessment screen).
51. Id. § 11.31(a)(4).
52. Id. § 11.23(b).
53. Id. § 11.23(c)(4).
54. Id. § 11.30(c)(2) (emphasis added). The DOI regulations fail to define clearly which procedures constitute "regular activities." For further discussion of this distinction, see infra notes 203-09 and accompanying text.
55. See, e.g., NRDA's, supra note 4, § 11.60(d)(2) (describing Type B assessments).
56. See infra part III.E.
57. Contingency Plan, supra note 5. The regulations were revised in 1990 in an attempt to improve the process post-Exxon Valdez, but little of substance was added. Compare National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (1990) with Contingency Plan, supra note 5, §§ 300.1-300.86.
potentially overlap with areas covered by the NRDA studies. In addition, current EPA regulations go further than the DOI regulations in promoting the disclosure of NRDA study information. EPA expressed its intention to maximize the availability of information at the time it published its revised regulations. The Agency explained:

To maintain a fair balance between the need for confidentiality and the public's right of review of the record, the lead agency must summarize or redact a document containing confidential information to make available to the greatest extent possible critical, factual information relevant to the selection of a response action in the nonconfidential portion of the record.

The new regulations are therefore quite detailed concerning the required contents of the administrative record file.

In addition, the revised EPA regulations promote coordination and cooperation among trustees more effectively than either of the earlier regulations or the DOI regulations by describing in more detail the information that must be made available to the trustees. However, the EPA regulations do not entirely resolve the problem of confidentiality. For example, the On-Scene Coordinator (the OSC) must ensure "that all appropriate public and private interests are kept informed and that their concerns are considered throughout a response, to the extent practicable . . . ." Although this is an attempt to improve the 1989 regulations, disclosure of substantive information is still not explicitly required. The phrase "to the extent practicable" gives the OSC discretion in what to disclose. For example, although guidance documents, decision records, and enforcement orders must be placed in the record, information may still be withheld if it is privileged or confidential. Information also

58. See Contingency Plan, supra note 5, § 300.315(a). The EPA regulations provide: Documentation shall be collected and maintained to support all actions taken under the Clean Water Act and to form the basis for cost recovery. Whenever practicable, documentation shall be sufficient to prove the source and circumstances of the incident, the responsible party or parties, and impact and potential impacts to public health and welfare and the environment. When appropriate, documentation shall also be collected for scientific understanding of the environment and for the research and development of improved response methods and technology.

60. See Contingency Plan, supra note 5, § 300.810.
61. Compare Contingency Plan, supra note 5, § 300.615(a) (a revised EPA regulation) with id. § 300.74 (1989) (a superseded EPA regulation) and NRDA's, supra note 4, § 11.23(f) (a DOI regulation). For example, the revised EPA rule states that the On-Scene Coordinator must make information and documentation available to the natural resource trustees to assist in determining any natural resource injuries from the oil discharge. Contingency Plan, supra note 5, § 300.135(d).
62. Contingency Plan, supra note 5, § 300.135(n). This provision requires that disclosures be made in compliance with a specified procedure. Id.; see also id. § 300.155 (describing the procedure required).
63. Id. § 300.810(a).
64. Id. § 300.810(c).
may be withheld if deemed irrelevant to the selection of an appropriate response action. 66

Together, the DOI and EPA regulations set the stage for a complex and confusing process of developing a spill response while simultaneously measuring natural resource damages for compensation. Unfortunately, EPA's attempt at reform may not significantly change or improve the NRDA process. Thus, the remaining overlap leaves the confidentiality of NRDA studies counterproductive to the spill response process.

II
MECHANISMS WHICH PRESERVE CONFIDENTIALITY

The confidentiality of NRDA data may be protected by four additional legal mechanisms: confidentiality agreements signed by researchers and consultants; litigation privileges created in the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence; exemptions from the federal Freedom of Information Act; 67 and exemptions from Alaska’s Public Records Statute. 68

A. Confidentiality Agreements

Confidentiality agreements are used primarily by industry to protect the results of research undertaken for litigation purposes. The hope is that agreements between researchers and employers will themselves maintain the confidentiality of research results. 69 However, if the confidentiality agreements fail to protect the data gathered, 70 private parties, as well as all other parties to the litigation, have recourse to the protection offered within the rules governing discovery.

B. Discovery Rules

The purpose of discovery rules is “to narrow and clarify the basic issues between the parties, and [to serve] as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative

65. Id. § 300.810(d).
66. See id.
68. ALASKA STAT. § 09.25.110 (public records) (1983 & Supp. 1991); id. § 09.25.120 (exceptions); id. § 09.25.122 (litigation disclosure) (Supp. 1991).
69. See infra text accompanying notes 319-28 (discussing confidentiality agreements).
70. See infra text accompanying notes 320-26 (describing reasons for failed confidentiality agreements); see, e.g., Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344-46 (holding that the trial court abused its discretion when it denied a contractor's motion to unseal motions and settlement papers regarding litigation between a bank and a developer). Noting that the bank and developer chose to file their settlement agreement rather than file a voluntary stipulation of dismissal, the court said that the parties were “no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements.” Id. at 345.
to those issues." These rules also protect information that could harm a party's position if revealed. Because of the fact-specific nature of discovery disputes, trial courts, exercising judicial discretion, decide these disputes on a case-by-case basis. Higher courts rarely overturn trial court decisions regarding discovery.

First, discovery rules limit disclosure to matters that are relevant to the subject area of the action. Second, the court may limit discovery that is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; [if] the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; [or if] the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, [or] limitations on the parties' resources.

Third, material prepared in anticipation of litigation may be discovered only if the moving party shows both a substantial need for the materials and an inability "without undue hardship . . . to obtain the substantial equivalent of the materials by other means." Even then, access will not be granted for material that discloses "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance," for the purpose of encouraging clients to make full disclosure to their attorneys. The Supreme Court of the United States in Upjohn Co. v. United States stated that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."

The party invoking the privilege carries the burden of

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74. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.").
75. Id.
76. Id. 26(b)(3).
77. Id.
79. Id.
81. Id. at 390.
establishing its applicability. However, the Court in *Upjohn* warned that "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ." Therefore, NRDA data reported to an attorney is likely to be discoverable.

The work product doctrine, codified in the Federal Rules of Civil Procedure, may provide a stronger shield for research information, since it "establishes a qualified immunity for ordinary work product—that which does not contain the mental impressions, conclusions or opinions of the attorney." Furthermore, the litigation for which it is actually prepared "need not necessarily be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." The doctrine can be used by the parties to protect NRDA data unless a plaintiff shows a substantial need for the information and undue hardship in gathering data itself. The courts usually extend the work product doctrine to documents prepared in anticipation of litigation even after that litigation has terminated. This final protection allows both the government and Exxon to avoid future use of NRDA data in later third party suits. Application of the work product doctrine to both prelitigation and postlitigation phases enlarges the area in which the governments and Exxon can maneuver with their respective NRDA data.

If disclosure of NRDA data is sought, the party seeking to preserve its confidentiality may request that the court view the materials in camera and issue a protective order which, once granted, would require

82. 8 WRIGHT & MILLER, supra note 73, ¶ 2016. It should be noted that state law provides the rules of privilege in diversity actions. FED. R. EVID. 501. In most states, however, the burden of proving the existence of a privilege also rests with the proponent of the privilege. See, e.g., Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981) (applying California law).
85. *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977). The purpose of the doctrine is to allow an attorney "to amass data and commit his opinions and thought processes to writing free of the concern that . . . an opposing party may be entitled to secure any relevant work product documents merely on request and use them against his client." Id. at 336. Opinion work product is subject to substantially greater protection than ordinary work product. Id. Federal courts disagree whether opinion work product deserves absolute immunity from discovery, or if it is discoverable, the degree of need required to compel discovery. See id. (surveying opinions on the question). The Eighth Circuit in *Murphy* concluded that opinion work product is discoverable "only in very rare and extraordinary circumstances." Id.
87. See FED. R. CIV. P. 26(b)(3). With regard to a plaintiff's ability to compel discovery of opinion work product, see supra note 85.
88. See *Murphy*, 560 F.2d at 334 & n.13 (discussing prior case law).
89. FED. R. CIV. P. 26(c).
some "extraordinary circumstance" or "compelling need" to lift.90 The moving party need not show that each item of evidence should be protected."91 Rather, the nonmoving party bears the burden of raising the issue of confidentiality for individual documents subject to the terms of an umbrella order.92

Finally, experts employed in anticipation of litigation, but who are not expected to testify at trial, are not compelled to disclose facts or opinions unless the party requesting disclosure shows "exceptional circumstances under which it is impracticable . . . to obtain facts or opinions on the same subject by other means."93

C. The Freedom of Information Act

The Freedom of Information Act (FOIA)94 provides for broad disclosure of government records, although the process can be cumbersome and time-consuming.95 However, FOIA explicitly exempts nine classes of information, including interagency or intraagency memoranda (exemption 5),96 and records or information compiled for law enforcement purposes (exemption 7).97 Exemption 5 is designed in part to protect the agency's decisionmaking process so that open discussion occurs within

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91. See id.
92. Id.
95. See, e.g., AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT ch. 7, ¶ 2 (Allan Adler ed., 14th ed. 1989) [hereinafter Adler] ("[I]t is becoming quite commonplace for a private party who has submitted information to the government, then sues in federal court to restrain disclosure of that information."); Edward A. Tomlinson, Use of Freedom of Information Act for Discovery Purposes, 43 MD. L. REV. 119, 152-53 (1984) ("[A] litigant . . . has no assurance that the agency will release the records in time for the party to use them in litigation."). A FOIA request must reasonably describe the records and be made in accordance with published rules and procedures. 5 U.S.C. § 552(a)(3) (1988).
97. Id. § 552(b)(7).
the agency. The purpose of exemption 7 is to protect investigative proceedings and techniques.

Facts such as NRDA data usually are unprotected unless they are "inextricably intertwined" with exempt portions of a "predecisional or advisory" government document. Under exemption 5, however, even purely factual material may be exempt from disclosure where such disclosure would expose the deliberative process of the agency. Facts also are protected if they fall within the work product or attorney-client privileges which are incorporated into exemption 5. Moreover, certain material may be exempt "without regard to the status of the litigation for which it was prepared" so long as it was prepared for litigation.

Records compiled for law enforcement purposes may be withheld only to avoid six types of harm that are listed in FOIA. Two of these harms are relevant to the disclosure of NRDA data. First, records compiled for law enforcement may be withheld to prevent interference with enforcement proceedings. This exemption would allow the government to maintain the confidentiality of NRDA data by showing that the

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98. Adler, supra note 95, ch. 7, ¶ 4. Adler discusses the Ninth Circuit's rejection of a fact/opinion test for disclosure of interagency communications. Id. ¶ 4.12.2. Rather, the court of appeals resolved to protect fact-based interagency communications "to the extent that they reveal the mental processes of the decisionmakers." Id. (quoting National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1121 (9th Cir. 1988)). The court upheld the withholding of certain information in the agency's draft Forest Plans because "[w]hile these opinions might be characterized as opinions on facts or the consequences of facts ... as long as these opinions reveal the issues that the Forest Service considers important and provide telling clues as to [its] proposed course of action in addressing conflicting demands on the Forest's resources, they are as much a part of the deliberative process as opinions on pure matters of law or policy." Id. (quoting National Wildlife Fed'n, 861 F.2d at 1121).

99. Adler, supra note 95, ch. 10, ¶ 2.

100. See United States Envtl. Protection Agency v. Mink, 410 U.S. 73, 85-89 (1973) (concluding that memoranda consisting solely of factual material are generally beyond the scope of exemption 5).


102. Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977); see also Russell v. United States Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) ("Where ... disclosure of even purely factual material would reveal an agency's decision-making process Exemption (b)(5) applies."); Lead Industries Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 85 (2d Cir. 1979) (finding that disclosure of factual materials which would reveal agency's deliberative process is subject to exemption 5 protection).


104. Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19, 26-27 (1983) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context.") For a discussion of other discovery privileges which are deemed incorporated into Exemption 5 of FOIA, see Adler, supra note 95, ch. 7, ¶¶ 5-11.

105. Grolier, 462 U.S. at 28.

106. Id. at 24-25; Sterling Drug, 488 F. Supp. at 1026.


material has been gathered for an upcoming law enforcement proceeding and that disclosure "could reasonably be expected to result in interference to a particular proceeding." Second, such records may be withheld to prevent disclosure of investigative techniques and procedures.

D. The Alaska Public Records Statute

NRDA data generated by the state of Alaska may be obtained more easily than federally generated data because of the liberal construction of the state’s Public Records Statute and recent amendments to state law. Alaskan courts have consistently interpreted the Public Records Statute broadly in favor of disclosure. Under the statute, "[u]nless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours." Exemptions similar to those found in the federal FOIA exist, including a provision protecting information compiled for law enforcement purposes. However, as a response to the confidentiality problems revealed by the Exxon Valdez spill, the Alaska Legislature amended the law to provide for disclosure of information "even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules."

III
THE CONFIDENTIALITY OF NATURAL RESOURCE DAMAGE ASSESSMENT STUDIES

The mechanisms described above will eventually be used to protect the NRDA studies themselves, which "identify the nature and extent of the injury to, loss of, or destruction of natural resources and will lead to a determination of damages as compensation for that injury, loss or de-

109. Adler, supra note 95, ch. 10, ¶ 4.1.4; see also Campbell v. United States Dep’t of Health and Human Servs., 682 F.2d 256, 259 (D.C. Cir. 1982) ("[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding.").
111. ALASKA STAT. § 09.25.110 (public records) (1983 & Supp. 1991); id. § 09.25.120 (exceptions); id. § 09.25.122 (litigation disclosure) (Supp. 1991).
112. See, e.g., City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316, 1319 (Alaska 1982) (observing that the history of the Alaska Public Record Statute demonstrates that the statute preserves the common law right of every individual to inspect public records); see also infra notes 287-95 and accompanying text.
114. Id. § 09.25.120.
115. Id. § 09.25.122. To qualify, these records must otherwise be subject to disclosure and copying under accompanying statutory provisions. Id.
The Valdez NRDA program was designed to study the effects of the oil spill on the physical environment, the biota, and the economy. The Trustee Council conducted sixty-three studies in 1989 alone, at a total cost of over $35 million. In April, 1989, Exxon paid $15 million for damage assessment studies, with the trustees reserving the right to seek additional sums if necessary. In fact, in January 1990, the trustees requested $20 million for additional studies. After this assessment, a restoration plan was designed and implemented. The damage assessment portion of this plan ultimately serves as the basis for claims made against the spiller for natural resource damages.

The DOI regulations distinguish between response studies, conducted specifically to develop and evaluate cleanup methods, and NRDA studies, which provide the government with a monetary damage calculation. The regulations also distinguish between NRDA research and ongoing agency research. Since current regulations bar the overlap of these two types of research, regular research conducted parallel to, or initiated in advance of, an NRDA study will not benefit from the NRDA research.

Furthermore, the results of the NRDA studies are confidential because they are undertaken primarily for litigation purposes. However, the DOI regulations require that assessment costs not reflect regular activities of researchers. Data from the NRDA studies in the Valdez case was not shared with response teams even though the teams could have incorporated the additional information into their efforts to improve the overall quality and success of the cleanup.

117. See Townsend Report, supra note 26, at 43. The Exxon Valdez NRDA program “was developed jointly by the State of Alaska, the Department of Agriculture, Department of the Interior, the National Oceanic and Atmospheric Association, and the Environmental Protection Agency.” Id. at 42-43.
120. Id.
121. NRDA’s, supra note 4, § 11.10.
122. See NRDA’s, supra note 4, § 11.30(c)(2); infra notes 203-09 and accompanying text (discussing DOI regulation requiring that assessment costs not reflect regular activities of researchers). Data from the NRDA studies in the Valdez case was not shared with response teams even though the teams could have incorporated the additional information into their efforts to improve the overall quality and success of the cleanup.
123. Townsend Report, supra note 26, at 232. The report observes, “Damage assessment research is undertaken to meet the requirements of the law, not really to learn about the effects of the spill. Decisions about what to study in a damage assessment are driven by legal requirements and the possibility of recovering damages.” Id. Many scientists were disturbed by the fact that data was collected solely for litigation purposes, because this approach fundamentally affected sampling methodology, as well as analysis of the results. According to one scientific consultant who has worked on both the public and private sides of the spill, selecting sample sites for measuring the oiling of a beach or the success of a treatment applied to the shoreline may involve subtle manipulation in order to achieve the desired results for litigation. Telephone Interview with Jonathan P. Houghton, Vice President, Pentec Environmental, Inc. (Apr. 3, 1991). For example, a sampling strategy can be devised to show damage to one specific rocky beach versus another, but that damage is not necessarily representative of all the rocky beaches in the area. Alternately, if a number of beaches are studied, the study can be
that confidentiality can undermine the effectiveness of cleanup efforts. While the DOI regulations emphasize coordination of the research among the trustees and encourage sharing data with potentially responsible parties, these goals were not achieved during the Exxon Valdez NRDA process. The potential legal claims between the parties inhibited the exchange of information, which in turn detrimentally affected restoration efforts.

One issue is whether NRDA studies can be separated from other research without unnecessarily impairing the restoration process, duplicating expensive research, or ignoring traditional principles of scientific experimentation. Also, confidentiality inhibits the coordination of studies and the sharing of data, and legal concerns promote the use of short-term NRDA studies rather than extended research, which is important for restoration purposes. NRDA studies are conducted on a year-by-year basis and are not fully incorporated into extended research programs.

The DOI regulations did not anticipate the difficulties with NRDA data that emerged during the Exxon Valdez crisis. Those difficulties included an overlap of state and federal scientific and economic studies, disagreements between Exxon and the natural resource trustees over response efforts and restoration work, and a lack of communication among agencies. Each party's adherence to confidentiality in the face of imminent litigation further aggravated these problems.

A. State and Federal Cooperation

The first difficulty encountered in the Exxon Valdez NRDA process was in the area of federal-state cooperation. The DOI regulations require that the state and federal trustees plan and coordinate NRDA assessments, investigations, and planning. The regulations note that early sampling and data collection should be coordinated in order to "minimize duplication of sampling and data collection efforts." The regulations also state that "[t]he Assessment Plan shall contain information sufficient to demonstrate that the damage assessment has been coordinated to the extent possible with any remedial investigation feasibility study or other investigation performed pursuant to the NCP." The regulations not only emphasize that data should be shared among the

designed to test only one soil level on all the beaches as opposed to a variety of levels. Id.

124. See supra notes 50-51 and accompanying text.
125. NRDA's, supra note 4, § 11.20.
126. Id. § 11.22(b).
127. Id. § 11.31(a)(3).
trustees,\textsuperscript{128} they even encourage sharing between the trustees and the potentially responsible parties.\textsuperscript{129}

From the beginning, the \textit{Exxon Valdez} oil spill revealed the practical difficulties of coordinating NRDA studies, sharing data, and avoiding duplication of research. The United States and Alaska initially conducted separate contingent valuation studies which, had a trial ensued, would have resulted in a battle over whose studies were more correct.\textsuperscript{130} It was difficult for the U.S. and Alaska to cooperate on other NRDA studies and to settle on a strategy for a criminal plea bargaining agreement with Exxon.\textsuperscript{131} Ultimately, the two governments might have sued each other had the Alaska Attorney General and the federal Justice Department failed to reach an agreement. Following that agreement, the two governments coordinated their efforts in building a case against Exxon through joint scientific and economic studies.\textsuperscript{132}

Individual trustees were criticized for lack of cooperation as well. One incident described by a rescue center worker involved a veterinarian at an animal rescue center who had radio tagged forty-five otters for monitoring after release. The USFWS took over the monitoring of the collars and eventually released information that a certain number of the otters had died, but would not disclose which ones had died. Therefore, the veterinarian could not correlate the mortality pattern to potential factors such as degree of oiling, sex, or weight, which would help in future rehabilitation of otters.\textsuperscript{133} In addition, the USFWS was criticized by the Center for Marine Conservation, a nonprofit group, for its inadequate supervision of pathological studies performed on otters by Exxon, EPA, and other groups.\textsuperscript{134} The National Marine and Fisheries Service

\textsuperscript{128} \textit{Id.} § 11.32(a)(1)(ii)-(iii).
\textsuperscript{129} \textit{Id.} § 11.31(a)(4); \textit{see also supra} note 51 and accompanying text (discussing this provision).
\textsuperscript{131} \textit{See William Horne, How the Oil Spill Settlement Exploded}, \textit{AM. LAW.}, June 1990, at 41, 45-47 (discussing risk that criminal plea bargain with Exxon could jeopardize state and private damage suits filed against Exxon).
\textsuperscript{133} Telephone Interview with L.J. Evans, Public Information Officer, Exxon Valdez Oil Spill Response Center, Alaska Department of Environmental Conservation (Apr. 11, 1991). Evans worked at the animal rescue center during the spill. \textit{Id.}
\textsuperscript{134} \textit{TOWNSEND REPORT}, \textit{supra} note 26, at 187. The authors concluded:

This report has been more critical of the [USFWS] than that of any other agency. We have also emphasized that Service staff generally took important initiatives, worked long hours, sacrificed their personal lives, and, in innumerable ways, demonstrated their commitment to the resources the agency is entrusted with ... We believe that fundamental defects in the statutory system for responding to major oil spills were responsible for many of those aspects of the [USFWS] response that fell short of what they should have been.

\textit{Id.} at 185-86; \textit{see also infra} notes 150-55 and accompanying text.
(NMFS), acting out of apparent fear of adverse publicity, barred the ADFG from conducting the research.135

B. The Effect of Confidentiality of NRDA Studies on Oil Spill Response Efforts

Not only was federal-state cooperation made more difficult due to concerns for confidentiality, but response efforts were adversely affected as well. Immediately after the oil spill, response studies were organized on a cooperative basis to determine how the cleanup would be handled. The initial response established the treatment that was adopted for the shoreline areas. An Interagency Shoreline Cleanup Committee was created which included representatives from state and federal agencies, Exxon, Alaska Natives, fishermen, and environmental groups.136 Exxon, the United States Coast Guard, the Alaska Department of Environmental Conservation (ADEC), and the National Oceanic and Atmospheric Administration (NOAA) commissioned corps of survey teams to study the affected shoreline.137 NOAA, acting in its role as scientific support coordinator for the federal On-Scene Coordinator, formulated a detailed shoreline monitoring program.138 Results from the various shoreline monitoring programs were exchanged under a data sharing agreement.139 Information gathered by Alaska authorities, such as oil tracking information, was also shared in order to facilitate decision making.140 Other cooperative efforts included research on subsistence food safety by the Oil Spill Health Task Force141 and bioremediation experiments performed by Exxon and the EPA.142

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135. See Townsend Report, supra note 26, at 188-89.
137. Erich Gundlach et al., Shoreline Surveys at the Exxon Valdez Oil Spill: The State of Alaska Response, 1991 Int’l Oil Spill Conf. 519, 522. Exxon sponsored the first combined survey group, known as the Fast Assessment Shoreline Survey Team (FASST), in early 1990. FASST included representatives of Exxon, the Coast Guard, and ADEC. In spring 1990, ADEC, NOAA, and Exxon participated in another survey commissioned by the Spring Shoreline Assessment Team (SSAT). Id.
139. Id. at 182.
141. Steiner & Byers, supra note 118, at 17. The Oil Spill Health Task Force is comprised of representatives from the Alaska government, Alaska Native organizations, NOAA, and Exxon. Id.
142. See Kelso & Kendziorek, supra note 140, at 21-22. The state used an independent panel of scientists to review bioremediation studies by EPA and Exxon. Id. at 22. Alaska officials took independent action because it questioned the controversial technique and believed that independent scientific review and an open public review process would lead to better
Difficulties arose when response studies overlapped with NRDA studies, because NRDA findings could not be revealed, even if they pertained to or could influence response efforts. The consequences of this restricted flow of information were that results from the NOAA response studies only achieved confidence levels of 60-80%, rather than the preferred level of 95%, which could only have been achieved if other scientists were brought in to analyze the data.

Joe Talbott, NOAA's Exxon Valdez Project Manager, did not have access to NRDA data and only received the information disclosed to the public. Talbott explained that if NOAA's $6 million, five-year NRDA program could be merged with the response studies, the greatly expanded data base could yield a higher confidence level, thereby providing a better basis for planning and management of both response and restoration activities. Instead, NOAA conducted separate, short-term studies with less money in order to find the quick answers necessary for response work.

One situation in which NRDA studies could have contributed to response efforts concerns a "rock washer" which NOAA was considering for cleaning oiled shorelines. Although the possibility of using such a machine had already been reviewed by the joint agency trustee committee, the committee refused to comment on certain aspects of the rock washer. NOAA, because it did not have access to the data of the NRDA studies, conducted its own study in order to make a quick decision concerning its use. After six weeks, NOAA concluded that the rock washer was not warranted. In addition, NOAA made definitive statements in its report concerning observations on recovery, new juveniles in the area, and other findings based on the science that NOAA had available to them. The NRDA committee disapproved of NOAA's definitive language, claiming that NOAA was overextrapolating from its data sets. The NRDA committee was trying to establish a different position with an eye towards litigation, and some of the statements in the NOAA report may have been contrary to their position.


143. Townsend Report, supra note 26, at 232.  


145. Id.  

146. Id.  

147. National Oil Spill Contingency Planning and Response Capabilities: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 101st Cong., 1st Sess. 23 (1989) [hereinafter Contingency Planning Hearings] (statement of Charles N. Ehler, Director, Office of Oceanography and Marine Assessment, NOAA). Ehler stated that damage assessment work was financed by the diversion of other NOAA program resources. Id.  

148. Telephone Interview with Joe Talbott, supra note 144.  

149. Id.
Exxon's prominent role in the response efforts also complicated natural resource damage assessment. For example, Exxon hired a private organization to conduct bird rescue activities. Exxon's facilities in Alaska also housed government laboratories set up to perform pathology studies on dead wildlife. The close proximity of the two parties—both anticipating expensive and protracted litigation—led to some uncomfortable results. One report observed:

[A] pattern emerged of conflicts with Exxon's contractors in charge of otter rehabilitation, and this reflects the basic problem of the division of responsibility between the trustees and the spiller. These problems continued into August when on one occasion neither the USFWS pathologist nor Exxon staff could get into the pathology lab because both the Service and Exxon had padlocked it in a dispute over the ownership and control of tissue samples and access to the lab. On earlier occasions, pathology samples disappeared when Exxon contractors took them on the assumption that they could control them. Samples were packed up and lost for two weeks on another occasion when Exxon acted on its decision to close down the Valdez lab.

The report found that oversight of Exxon's response was not effective and that attempts to combine efforts of the government and PRP's resulted in disputes. The report continues: “The Service pathologists had been keeping the lab locked for some months as part of their protocol for maintaining chain of custody for possible legal proceedings.”

EPA also experienced frustration in its dealings with Exxon. Although the two parties were able to work together successfully on bioremediation studies, the laboratory experience was altogether different. The EPA pathologist “was stymied by the insistence of Exxon's contractor that the dead animals were the property of Exxon and would not be released for examination.” These incidents illustrate some of the difficulties resulting from the conflicting interests of the parties who coordinated response efforts and the artificial separation of NRDA studies from response activity.

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151. Id. at 245.

152. *TOWNSEND REPORT*, supra note 26, at 188.

153. Id.

154. See id.

155. Id. at 188 n.461.

156. See id. at 190. Exxon contributed $3 million to the studies, and EPA scientists managed the project. See *Water Pollution: EPA to Test Use of Microorganisms to Break Down Oil in Prince William Sound*, 20 [Current Developments] Env't Rep. (BNA) 330 (June 9, 1989).


158. The experience in certain other oil spills has been similar to the *Exxon Valdez* case. Initially, after the 1988 Shell oil spill in Martinez, California, there was total cooperation in the preparation of the assessment plan. Then the California Attorney General prohibited direct contact between Shell and agency personnel. Ted Winfield, a scientist who worked on the
C. The Reaction of Scientists and Exxon

Many scientists working within the NRDA process have been dissatisfied with the wall of confidentiality it creates. Those interviewed linked their frustration with the arrival of lawyers in Valdez. Jonathan Houghton, a private consultant under contract to NOAA in Valdez, recalls the first days of the spill when weekly scientific meetings were held. Houghton observed that, in the beginning, information was exchanged freely during informal meetings between agencies and consultants. "Then the lawyers came along." Although people often talked informally over coffee, on the beaches they kept their distance and maintained the "party line." Houghton saw separate data gathering as a "waste of effort," believing that an openly coordinated pool of information and scientific peer review would have made better use of the money and resources available.

Another scientist, Glenn Juday of the University of Alaska at Fairbanks, conducted one of the few semiquantitative studies describing the biological effects of the spill. Juday found that accepted scientific procedures were seriously compromised at Valdez. For example, Juday noted that when results accumulated from damage assessment work failed to indicate natural resource damage, that line of work was abruptly dropped. He attributed this reaction to the influence of potential litigation. Juday remarked, "[T]he work is to establish a case in court, so whatever contributes, you do, and what doesn't, you stop and keep confi-

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spill, recounted that the two parties had worked together until the specter of litigation arose. Agency personnel were told to "stop talking," immediately making the tone more adversarial and splitting the scientists into two distinct parties. Telephone Interview with Ted Winfield, Senior Consultant, Entrix, Inc. (Apr. 23, 1991).

Information was shared much more freely, however, in the Arthur Kill, N.Y. spill by Exxon in 1990, in large part because Arthur Kill has been heavily polluted for a long time by other parties. The settlement agreement reached in this spill contained a clause for disclosure of data. Telephone Interview with Nina Sankovich, attorney, Natural Resources Defense Council (Apr. 19, 1991).

159. Telephone Interview with Jonathan P. Houghton, supra note 123.

160. Id.

161. Id.

162. Id. Houghton is working on three other NRDA cases. He observes, however, that in these other cases the parties have shown greater willingness to share information than the parties at Valdez. For example, a consent order has been entered in one case among the PRP's and the trustees to work together on sampling. Houghton wonders why no consent decrees were contemplated or negotiated at Valdez. Id.

163. Johnathan P. Houghton et al., Impacts of the Exxon Valdez Oil Spill and Subsequent Cleanup on Intertidal Biota—1 Year Later, 1991 INT'L OIL SPILL CONF. 467; see also Glenn P. Juday & Nora Foster, A Preliminary Look at Effects of the Exxon Valdez Oil Spill on Green Island Research Natural Area, 22 AGROBOREALIS 10 (1990).

164. Telephone Interview with Glenn Juday, Assistant Professor of Forest Ecology, University of Alaska at Fairbanks (Apr. 10, 1991). Juday is also the Alaska Ecological Reserves Coordinator. Id.
Juday found this situation very troubling and at odds with the view that science is an objective pursuit of truth.\textsuperscript{166} Joe Talbott, NOAA's project manager at Valdez, explained that while NOAA desires to disclose information, an effort arises "to keep a lot under wraps" until legal activity is completed, because "studies are a wild card."\textsuperscript{167} Thus, NRDA studies received little peer review. Talbott expressed his hope that scientists who review the studies will be impartial.\textsuperscript{168}

June Lindstedt-Siva, an Atlantic Richfield (ARCO) scientist attending the 1991 Oil Spill Conference, was very vocal about the ill effects of litigation sensitivity on science. She stated that "the immediate effect [of such sensitivity] at a spill scene is to polarize the scientists and other contractors working for each 'side' and [to] stop the free flow of information."\textsuperscript{169} In addition, [it] is vital that information gathered on, for example, presence and amount of oil in the water column and sediments at various locations, observed impacts, observed concentrations of sensitive organisms, the performance of equipment, be shared so that response efforts may be launched and coordinated, based on that information. Restricting information flow is the worst thing that can happen during an emergency. This occurred during the Exxon Valdez spill response and continued afterward, when response planners should have been sharing and applying the information to strengthen preparedness for the next spill. There has also been much difficulty among the scientific community in gaining access to data gathered during the spill. Scientific data should not be tied up for the long time it could take until legal issues are resolved.\textsuperscript{170}

Exxon's perspective is summarized in the testimony of Mel Harrison, executive vice president of Exxon, before the House Interior and Insular Affairs Subcommittee on Water, Power and Offshore Energy Resources.\textsuperscript{171} Harrison noted that Exxon had provided the government with $15 million for research in 1989 and was very interested in reaching an agreement about the studies to be conducted, and working with the agencies to determine restoration procedures.\textsuperscript{172} Yet state and federal agency attorneys advised their agencies not to work cooperatively with the

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Telephone Interview with Joe Talbott, supra note 144.
\textsuperscript{168} Id.
\textsuperscript{170} Id.
\textsuperscript{172} Id. at 81.
the company. Harrison said that Exxon had shared data in the beginning of the process, before the trustees refused to reciprocate, in violation of a memorandum of agreement with the company. He stressed that this excessive attention to litigation had been “detrimental to the overall efforts and premature,” concluding that “restoration interests and needs appear to have taken a back seat.” Ultimately, Exxon was allowed little access to the data, which made the firm reluctant to provide additional money for NRDA studies until more information was made available.

This view was repeated in a report by Alan Maki, a senior science advisor to Exxon. Maki noted that Exxon conducted an environmental assessment program to measure spill impacts and recovery rates which was initiated with the cooperation of state and federal agencies. “Although the agencies subsequently foreclosed cooperation in most of these studies because of litigation concerns,” Maki observed, “this comprehensive assessment program continues today.”

John Seddelmeyer, Chief Attorney of Exxon Company U.S.A., suggested that the government began acting secretly because the NRDA studies did not indicate that the spill would have a significant long term impact on the environment and, therefore, the original settlement proposal was sufficient. He claimed that the state of Alaska had insisted that Exxon not play a role in the NRDA process. Rather, Alaska wished the Department of Justice to take charge of damage assessment for litigation purposes on behalf of the trustees. Seddelmeyer also observed that Exxon chose to release its studies despite the firm’s authority to withhold them under the work product doctrine.

173. Id.
174. Id. at 72.
177. Id.
179. Id.
180. Id.
181. Id. Despite Exxon’s release of these studies, there is a likelihood they were geared towards their own case so their usefulness to the general public would be limited. In addition, Exxon’s presumed commitment to disclosure was subject to notable exceptions. For example, Exxon opposed an effort of the Alaska Department of Fish and Game (ADFG) to collect heavily oiled seals for necropsy and pathology workups. TOWNSEND REPORT, supra note 26, at 189. The Townsend Report sharply criticized the wisdom of the NMFS decision. See id. Exxon’s studies include JERRY M. NEFF, WATER QUALITY IN PRINCE WILLIAM SOUND (1990); JENNIFER M. BAKER ET AL., ENVIRONMENTAL RECOVERY IN PRINCE WILLIAM
D. The Confidentiality of the NRDA Studies and the Restoration Plans

Another area in which the impact of NRDA confidentiality is especially harmful is the yearly restoration plans drawn up by the trustees to evaluate damage to Prince William Sound. The Trustee Council's Damage Assessment and Restoration Plan is the only comprehensive source of public information that describes individual studies undertaken for development of the restoration plans.\textsuperscript{182} The plan is submitted annually for public comment on both the restoration program itself and the studies supporting it.\textsuperscript{183} However, the plan provides only a broad sketch of each study slated for the coming year.\textsuperscript{184} The Trustees refuse to disclose detailed additional information, including the raw data that is obtained from each study. As a result, requests for more complete disclosure are made each year on the grounds that access to the supporting research is necessary to make public commentary meaningful.\textsuperscript{185}

In 1989, the Trustee Council responded to these requests by claiming that they are not necessarily obligated to provide this information under the Administrative Procedure Act (the APA).\textsuperscript{186} The Trustees noted that they had made descriptions of the NRDA studies available to the public.\textsuperscript{187} The Trustees also stated that they had considered public commentary in making decisions concerning NRDA activities.\textsuperscript{188} In spite of their official stance on the availability of study data under the APA, the Trustees added that scientific data should be made available to the public, and they requested that a public data center be established for that purpose.\textsuperscript{189}

Comments on the 1990 NRDA plan reiterated the need for access to data. For example, Exxon commented that the lack of detail in the plan precluded adequate technical review of the studies.\textsuperscript{190} Exxon found the

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\textsuperscript{182} E.g., 1 NRDA 1991, supra note 42. A few newspapers have managed to acquire confidential results of particular studies. \textit{See}, e.g., Lancaster, supra note 8 (describing a federal study of impact of spill on murres, diving birds common to the North Pacific).

\textsuperscript{183} See 1 NRDA 1991, supra note 42, at preface.

\textsuperscript{184} See \textit{id.} at 10-14 (describing a study to assess injuries to killer whales in Prince William Sound). A typical sketch includes five parts: a brief introduction, a list of objectives, a summary of methods, a bibliography, and a budget. \textit{See id.}

\textsuperscript{185} 2 \textit{id.} at D-21 (describing public sentiment on release of study results and Trustee Council response to the complaints).


\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{Id.} The data center now exists.

Trustee Council's assurance that the Council had incorporated the company's 1989 comments unsatisfactory. "[N]o details are provided to substantiate this claim," observed Exxon, leaving the company "unable to determine the justification for the studies described in the 1990 Plan." Exxon also interpreted the Trustee Council's secrecy as a signal that Exxon was an unwelcome participant in the damage assessment process.

Public interest groups commenting on the 1990 plan argued that the lack of access to NRDA data has a particularly severe effect on their organizations. The groups complained that vague disclosure made their task of critiquing the Plan difficult or impossible, especially because the groups cannot afford to fund their own studies. The Natural Resources Defense Council criticized the lack of data for essentially the same reasons as Exxon. The lack of detail, they argued, prevented meaningful evaluation of the methods of sampling and the analysis, timing, and interpretation of the studies.

Similar comments on the 1991 NRDA Plan failed to persuade the Trustee Council that greater disclosure was necessary. For example, the Trustees stated: "Information about the status of the previous years' efforts is litigation sensitive. The Trustees cannot reveal information about that subject." Responding to the complaint that the lack of information prevents the public from effectively participating in the restoration process, the trustees asserted that "[t]he information in the 1990 plan was provided to give the public a general understanding of restoration activities to be conducted in 1990." The Council pointed to the establishment of the Oil Spill Public Information Center (OSPIC) in Anchorage, Alaska, as evidence of their commitment to making information available to the public. The Trustees also noted that state, federal, and Exxon representatives were nearing agreement on a proposal to release additional data in 1991.

Anticipating further questions about the confidentiality of NRDA data, and in an attempt to assuage the concerned parties, the trustees issued a notice that stated, "Data will be analyzed and verified to ensure accuracy before presenting them to the public for review." However, the notice revealed that disclosure would remain a secondary goal. "The trustees intend to provide scientific information to the public as data are compiled and scientifically reviewed," the notice provided, "subject to

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191. Id.
192. Id. pt. 5, at 12.
194. Id. app. D at 162. The Trustees promised to provide "additional information on the results" of the particular studies in a later notice. Id.
195. 1 id. at 275.
litigation considerations." The announcement also mentioned the availability of information at OSPIC in Anchorage.

An EPA notice from the same period also addressed the confidentiality issue. The notice announced the publication of the Trustee's Draft 1991 Restoration Work Plan, a report, separate from the NRDA plan, which discusses restoration planning and implementation activities. Although the plan encouraged public review and participation, EPA cautioned:

Carrying out this intent . . . is complicated by the need for confidentiality with respect to damage assessment information due to pending or possible future litigation with the parties responsible for the Exxon Valdez oil spill. Notwithstanding these considerations, the Trustees intend to provide an opportunity for meaningful public review and comment on all restoration implementation activities.

The notice also mentions that the trustees will place information at the OSPIC as it becomes available.

The absence of supporting material provided in the annual restoration plans raises questions as to the effectiveness of restoration plans which lack meaningful input from public interest groups, scientists, and other interested parties. Without disclosure of the supporting data, the restoration plans may fail to focus on those areas which deserve greater attention. Overzealous concern for confidentiality may lead to an inadequate measure of damages or conceal a biased evaluation of the study results.

E. Regular Research Versus NRDA Studies: The DOI Regulations

NRDA studies also have a profound effect where they overlap with "regular research." The separation of regular research from the NRDA process is an artificial demarcation resulting from the orientation of the NRDA process toward litigation and the attempt to separate costs for the two types of studies. The DOI regulations require that the costs of assessment be supported by documentation and "shall not reflect regular activities performed by the agency or tribe in management of the natural

197. Id.
198. See id. ("Scientific information already analyzed and verified that has been available to the public is housed in the [OSPIC].").
199. See Prince William Sound and Gulf of Alaska Restoration, 56 Fed. Reg. 8898, 8898 (1991). The draft plan is not required under either the CWA or Alaska law. Id.
200. Id. at 8899 ("The Trustees and EPA intend to encourage, provide for, and be responsive to public participation and review during the restoration planning process.").
201. Id. at 8899.
202. Id. at 8899. Funding for the 1991 Restoration Work Plan will be collected from the PRP's. However, since the amount due is yet unknown, state and federal governments may be asked to provide the funds. Id. at 8903. At the time of the EPA notice, no funds had been "committed or secured by either government." Id. at 8903.
This requirement appears throughout the regulations. As with the problems created by confidentiality, this separation results in an absurd distinction between what may and may not be studied. Scientists would normally approach the evaluation of a damaged area by utilizing all previously existing research and attempting to discern the impacts of a spill by applying methodologies and interpreting data consistent with the prior or ongoing research. Instead, regular agency research was disrupted by NRDA research, and funding, which may have been low to begin with, was diverted to NRDA efforts. Even so, NRDA studies tend to reflect regular agency activities due to the inherent difficulties in separating the two types of research and the agencies' sources of funding. The United States Court of Appeals for the D.C. Circuit also has differentiated NRDA studies and extended studies in a recent case:

[We reject] the petitioners' challenge to Interior's contention that the costs of general studies are noncompensable under § 107(a)(C)'s provision for the recovery of reasonable assessment costs. Interior states in its preamble to the final rules that "it is inappropriate that experimental research studies to advance general scientific understanding be included as a part of a specific natural resource damage claim." . . . Indeed, Congress considered and rejected a provision that would have provided funding for scientific research concerning, inter alia, "the effects of hazardous substances on living and nonliving resources."

One researcher frustrated by this distinction was Glenn Juday, Alaska Ecological Reserves Coordinator. Juday had documented the biodiversity of Green Island before the spill, and would have been in a unique position to evaluate the impact of the oil in that area. However, his research proposal was refused, most likely because it was seen as extended research, not tailored to the NRDA process. Thus, the opportunity to compare the biodiversity of the area before and after the spill was lost. The distinction between the two types of studies ignores

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203. NRDA's, supra note 4, § 11.30(c)(2).
204. See, e.g., id., § 11.60(d)(2) (defining categories of "reasonable and necessary costs" permitted in Type B NRDA assessments).
205. See supra part III.B.
206. See, e.g., Contingency Planning Hearings, supra note 147, at 23 (statement of Charles N. Ehler, Director, Office of Oceanography and Marine Assessment, NOAA) ("[NOAA] damage assessment work [was] financed by the diversion of other NOAA program resources . . . .").
208. Telephone Interview with Glenn Juday, supra note 164. Juday's research on Green Island was funded by a consortium of federal and state agencies. Id.
209. Id. The refusal contradicts the DOI regulations themselves, which state that historical data should be used to establish a baseline which reflects "conditions that would have been expected at the assessment area had the discharge of oil . . . not occurred. . . ." NRDA's, supra note 4, § 11.72(b)(1), (c).
the valuable insight that could be gained by using a broader, more comprehensive overview.

F. The Effect of Confidentiality on the Settlement Process

The final drawback to the confidentiality of NRDA studies became apparent during the settlement negotiations between the state and federal governments and Exxon. Because none of the findings had been released, outsiders to the negotiations could not effectively critique the terms of the settlement proposal. Although natural resource damages comprised the bulk of the settlement figure, the details were not made available to the public, and meaningful public review of the settlement was made impossible.

I. The March 1991 Settlement

In March 1991, a settlement was reached between Exxon, Alaska, and the United States requiring Exxon to pay $100 million in criminal fines and $900 million in restitution and civil payments over ten years.\(^{210}\) The March settlement further provided that Exxon could be liable for an additional $100 million for damages as yet undiscovered.\(^{211}\) The United States District Court for the District of Alaska, however, rejected the criminal portion of the settlement,\(^{212}\) which, in turn, led to the collapse of the civil portion of the agreement.\(^{213}\) The demise of the March settlement can be traced largely to the frustration that members of Congress, public interest groups, scientists, and others had expressed over the confidentiality surrounding natural resource damages. For example, one member of the House Subcommittee on Fisheries, Wildlife, and the Environment expressed his irritation with the secrecy of the NRDA process.

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211. Id. The settlement also required Exxon and its subsidiary to plead guilty to certain violations of federal law. See id. Exxon President L.G. Rawl appeared shortly thereafter before the United States District Court for the District of Alaska and personally entered the Company's guilty plea to a number of misdemeanor charges. See Exxon Pleads Guilty in Alaska Oil Spill, Judge Mulls Whether to Accept Plea Bargain, 21 [Current Developments] Env't Rep. (BNA) 2134, 2134 (Mar. 29, 1991).

212. Judge Rejects Exxon Valdez Criminal Plea, Calls $100 Million Fine Inadequate, Unacceptable, 21 [Current Developments] Env't Rep. (BNA) 2276, 2276 (Apr. 26, 1991). The judge agreed to Exxon's guilty pleas on four misdemeanor charges, but said the proposed fine "does not appear to adequately punish the defendants for the guilty pleas that were offered." Id.

213. See Alaska House's Rejection of Settlement Spells Death for $1 Billion Exxon Pact, 22 [Current Developments] Env't Rep. (BNA) 101, 101 (May 10, 1991) [hereinafter Alaska House Rejection]. Apparently the Governor of Alaska, Walter J. Hickel, had tendered the settlement offer to the Legislature for its approval as "a courtesy." Id. When the Alaska House of Representatives voted down the pact on May 2, 1991, the Governor withdrew the state's approval on May 3. Exxon followed suit, formally withdrawing its consent to the agreement on the same day. Id.
Rep. Gerry Studds (D-Mass.) exclaimed, “We don’t know—we can only guess—whether this settlement is fair . . . . We know only that the Administration, Alaska’s new governor, and Exxon went into a room and came out with an agreement they say is good for the environment.”

The public interest groups were dismayed that they were asked to comment on the settlement when only limited information was made available to them. Summaries provided by the trustees proved insufficient for evaluating the magnitude of the damage, or the anticipated long-term effects of the spill. The organizations pointed out that access to data could benefit future policy decisions on oil development and transportation and requested that all data be released publicly as a condition to any settlement.

Native Alaskan communities, denied a place in the settlement negotiations, filed suit in the United States District Court for the District of Columbia to enjoin federal and Alaska officials from finalizing the March, 1991 settlement. The Native communities argued that they should be given an opportunity to review and comment upon the pro-

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Soon after the terms of the settlement were publicly announced, a government economist leaked information to the press which placed the estimated social cost of the spill at $3 billion. Lancaster, supra note 6. Not all of the supporting research was made public. Id.

216. Comments, supra note 215, at 4. Some study results had been leaked a month earlier indicating substantial long-term impacts on murre populations, potentially large impacts on fish and shellfish; yet disclosure provided critics with only a limited amount of information with which to challenge the proposed settlement. See Lancaster, supra note 8. But see Brookes, supra note 8 (describing Congressional Research Service report which found relatively little long-term damage to the Prince William Sound ecosystem).

217. Comments, supra note 215, at 5-6.

218. See Judge to Order Exxon Officials’ Testimony on Whether Company Will Pay Alaskan Natives, 22 [Current Developments] Env’t Rep. (BNA) 6, 6 (May 3, 1991) [hereinafter Alaskan Natives] (quoting tribal attorney’s assertion that the March, 1991 settlement would have left Native Alaskans “out in the cold”).

219. See id.; Amended Complaint for Injunctive Relief at 2, Native Village of Chenega Bay v. Lujan, No. 91-0483 (D.D.C. Mar. 7, 1991) (“[N]amed defendants . . . are purporting to encumber, compromise and settle the claims . . . of the Native Villages named as plaintiffs arising from the oil spill, in direct contravention of federal law and applicable regulations.”).
posed agreement. The plaintiffs offered strong support for their data request. They pointed to an unfinished NRDA study on Native subsistence in the aftermath of the spill to show that the level of damage to Native subsistence rights had yet to be quantified. Thus, argued the Native villages, the proposed settlement fund could in no rational way be seen to encompass Native subsistence claims.

Responding in part to the Native villagers' action, the federal government argued that sensitive negotiations could not be conducted in the public arena without impeding the settlement and/or impairing litigation preparations. Judge Stanley Sporkin denied the villagers' request for a preliminary injunction but retained jurisdiction of the matter to assure that Native Alaskan rights were respected. However, in a subsequent hearing Judge Sporkin expressed concern that although the rights of Alaska Natives were not protected adequately in the settlement negotiations, the Justice Department would not venture an opinion as to whether their rights were affected. Judge Sporkin also expressed the worry that Exxon would use the settlement to block any future action by the Native villages. Therefore, he decided to permit the Alaska Natives to question Exxon officials about the effect of the settlement on the Natives' subsistence claims.

Because of the lack of information, the public's ability to review the first settlement was fatally impaired. A leak to the media of results from some of the NRDA studies in February, and the subsequent release of some of the 1991 NRDA study results in April, highlighted the core of

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220. Id. at 12.
222. Id. The plaintiffs also sought access to already completed NRDA studies, arguing that such information was necessary to permit plaintiffs to review the settlement from an informed position. Id. at 7-8.
223. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Orders at 31, Native Village of Chenega Bay v. Lujan, No. 91-0483 (D.D.C. Mar. 12, 1991) [hereinafter Defendants' Memorandum]. Justice Department attorneys made other arguments, including one that the D.C. court was without subject matter jurisdiction to hear the case. See Alaskan Natives, supra note 218, at 6; Defendant's Memorandum, supra, at 12-15.
225. See Alaskan Natives, supra note 218, at 6. Judge Sporkin rebuffed the Justice Department's argument that only the district court in Alaska could make determinations impacting the proposed settlement. See id.
226. See id.
227. Id. In September, 1991, the Native communities reached agreement with the federal and state defendants. The plaintiffs agreed to dismiss their claims in return for both access to scientific data and the commission of a study devoted to subsistence issues. Native Groups Drop Suits Against Alaska, U.S., Fueling Optimism for Exxon Valdez Settlement, 22 [Current Developments] Env't Rep. (BNA) 1367, 1367 (Sept. 27, 1991) [hereinafter Native Groups Drop Suits].
228. See Lancaster, supra note 8.
the controversy. Even the limited information disclosed showed that the effects of the spill were still apparent and quite possibly more harmful than previously thought, suggesting that the $1 billion proposed settlement was too low.\textsuperscript{229} The release of information could have been an effort by some within government agencies, recognizing the public's dilemma, to provide the public with some data so that a more informed review of the settlement could occur. According to Joe Talbott of NOAA, the limited disclosure was simply a response to pressure within the management to release information so that the agencies would not be accused of influencing the outcome of the settlement.\textsuperscript{230}

2. The October 1991 Settlement

Judge H. Russell Holland of the United States District Court of Alaska approved a renegotiated settlement on October 8, 1991,\textsuperscript{231} amid widespread criticism from Congress and environmental organizations.\textsuperscript{232}

\begin{verbatim}
229. Id.
230. Telephone Interview with Joe Talbott, supra note 144.
231. Federal Judge Accepts $1 Billion Settlement, Ends Two-Year Litigation in Exxon Oil Spill, 22 [Current Developments] Env't Rep. (BNA) 1533, 1533 (Oct. 11, 1991). Under the terms of the accepted settlement, Exxon will pay at least $900 million, and possibly as much as $1 billion, in civil damages. The settlement also imposes a $225 million criminal fine upon the company. A $100 million portion of the criminal sanction has been designated as payment for natural resource damage. Id. at 1533-34. A second $100 million portion will be given in restitution to the United States and Alaska. The remaining $25 million of the criminal fine will go into the U.S. Treasury, with $12 million earmarked for the North American Wetlands Conservation Fund. However, the Justice Department announced that it would credit to Exxon $125 million against the criminal fine for voluntary cleanup payments already expended by the Company. Joanne Wojcik, New Valdez Settlement Cuts Exxon's Net Cost, BUS. INS., Oct. 7, 1991, at 2.

Critics charge that Exxon will pay only about $463 million in real dollars under the October settlement, or slightly less than half of the total settlement figure. See Judi Perlman, Justice Department Defends Exxon Valdez Settlement, Reuter Bus. Rep. (Oct. 31, 1991), available in LEXIS, Nexis Library, BUSRPT file. Furthermore, Exxon will actually save $5.5 million in real terms under the new settlement, despite the fact that the October pact requires Exxon to pay $25 million more than under the previous settlement. Study Says Exxon Will Pay Less in New Spill Pact, N.Y. TIMES, Oct. 13, 1991, § 1, at 27.

232. See, e.g., Exxon Oil Spill Deal Criticized as too Similar to Earlier Agreement, Platt's Oilgram News (Oct. 2, 1991), available in LEXIS, Nexis Library, PONEWS file [hereinafter Deal Criticized] (describing criticisms directed at the pact). Representative George Miller (D-Cal.), chairman of the U.S. House Committee on Interior and Insular Affairs, stated that the new settlement was not "sufficient punishment for one of the worst environmental tragedies in this nation's history." Id. Attorney Debra Donahoe of the National Wildlife Federation asserted, "The judge could just look at our comments from last time. I don't see any difference to assuage any of our concerns." Charles P. Wohlforth, Valdez Spill Settlement Revisited, Little Difference from Plea Bargain, NEWSDAY, Oct. 1, 1991, § News, at 17.

Representative Frank Guarini (D-N.J.), chair of the House Budget Committee Task Force on Urgent Fiscal Issues, and Alaska legislator Max Gruenberg, the state's House Majority Leader, are critical of the tax deductions for which Exxon will qualify pertaining to the civil damage payments. See, e.g., Perlman, supra note 231 (containing statement of Rep. Guarini); Yereth Rosen, Lawmakers to Consider Ending Oil Spill Tax Deductions, Reuter Bus. Rep. (Oct. 27, 1991), available in LEXIS, Nexis Library, BUSRPT file (containing statement of
\end{verbatim}
Under the new agreement, with repayment terms substantially similar to those of the March proposal, Exxon is required to pay $1.125 billion over a ten-year period. The terms include disclosure of NRDA data to third party litigants but not to the public. Judge Holland cited Exxon's $2 billion outlays for cleanup efforts as one of the factors in his decision to accept the new pact.

One significant improvement in settlement terms was that, prior to reaching a final settlement with Exxon, the state and federal governments had negotiated two agreements with Native Alaskans and fishermen which acknowledged their claims against the governments. The first agreement provided that these groups dismiss their suits against the state in exchange for access to scientific information developed through the NRDA program. The second agreement provided that Native Alaskan groups would dismiss their lawsuit pending in the District of Columbia against the state and federal governments in exchange for NRDA data and a thorough study of the spill's impact on subsistence resources. These agreements preserve the litigants' causes of action against Exxon and give them the documentation they need to establish damages.

However, the public will not gain access to the same information because a number of lawsuits are still pending against Exxon. The plaintiffs in these suits call for the establishment of a "public trust to pay for restoration beyond that funded by the settlement." Although the trustees serve as the public's legal representatives, the confidentiality of


233. E.g., Wohlforth, supra note 232 ("The new deal . . . keeps the long payment schedule.").


235. Deal Criticized, supra note 232.


237. Linda Kanamine, Judge OK's Exxon Settlement, USA TODAY, at 5A. Exxon now estimates that it has spent $2.5 billion cleaning up the spill. Valdez Spill Toll Is Now Called Far Worse, N.Y. TIMES, Apr. 18, 1992, at A6.

238. See Native Groups Drop Suits, supra note 227, at 1367.

239. Id. at 1367. Native Alaskans also agreed that any future claims would involve only damage to their lifestyles, not to their natural resources. See Wojcik, supra note 231.

240. Native Groups Drop Suits, supra note 227, at 1367. The plaintiffs in this action number approximately 5000 Native Alaskans. Id.


242. See Wojcik, supra note 231.

243. See DOJ Statement, supra note 236, at 1740.

the settlement, like that of the NRDA information, precludes critical evaluation by the public and disinterested experts of the actual terms. This lack of outside evaluation could result in the "sweetheart" deals that CERCLA's settlement provisions are designed to prevent. Secrecy settlements also help industry to avoid setting damaging precedent. Therefore, if data is disclosed, the public can force the government and the PRP's to focus on the damage rather than each party's litigation agenda.

In order to reform the settlement process, some states are considering proposals which provide for fuller disclosure of information in settlements affecting public resources. The Attorney General of New York, Robert Abrams, champions rules drafted by the state judiciary which would recognize a presumption that all court records be open to public inspection. The rules would require a judge to articulate reasons to support a decision to keep records under seal. Abrams has also proposed limiting the ability of litigants to seal court records by agreement and allowing state agencies to review records when they are sealed. In Alaska, House Majority Leader Max Gruenberg is backing "settlement in the sunshine" legislation that would require both public commentary and legislative approval of state settlements over $10 million.


246. Cf. Gina Kolata, Secrecy Orders in Lawsuits Prompt States' Efforts to Restrict Their Use, N.Y. TIMES, Feb. 18, 1992, at A14 ("[W]ith the help of secrecy orders, every lawyer whose client wants to sue a company has to start from scratch in finding out what documents the company has . . . .")

247. Some NRDA settlements have provided for disclosure. See, e.g., supra note 158 (discussing Exxon spill in Arthur Kill, N.Y.). However, a settlement may stipulate that a certain number of years pass before data is released or, in the case of a government agency, it may be subject to agency rules. See, e.g., United States v. Pepper's Steel Alloys, Inc., 658 F. Supp. 1160, 1169 (S.D. Fla. 1987) (instructing that data and factual information contained in CERCLA consent decree be made available for public inspection, unless EPA identifies the material as confidential under Agency regulations).

248. Florida, New York, and Texas already have enacted laws which restrict the permissible uses of secrecy orders. Kolata, supra note 246. The California legislature is considering a similar bill. See id. The goal of these efforts is to "force judges to deny requests for protective orders when the data are in the public interest." Id.


250. Id.

251. Parrish, supra note 244. However, the statute would be unlikely to have retroactive
G. Conclusion on NRDA Studies

Access to information through a common data base or the sharing of information with a PRP and among agencies would improve the restoration process.\textsuperscript{252} When this data is not disclosed, a number of problems can result. First, the absence of shared data leads to disagreements regarding cleanup plans, spill effects, and future challenges.\textsuperscript{253} Second, the volume of data necessary for a true NRDA accounting is so huge, especially as technology improves and more subtle effects can be measured,\textsuperscript{254} that the government lacks the financial resources of a company such as Exxon.\textsuperscript{255} Third, the process will move at a glacial rate once litigation begins, because the government's receipt of reimbursement for the studies is postponed until a decision is reached on the merits.\textsuperscript{256} The government, in the interim, may be unable to afford the studies needed and may be hesitant to proceed for lack of a guarantee that funds will be forthcoming from the responsible party.\textsuperscript{257}

Fourth, potential plaintiffs, in this case the fishermen and Native Alaskans, need access to data because they may lack the resources to pursue their own claims. The information sought by those groups, as well as other potential parties, would relate to both the economic and scientific studies already conducted by the state and federal governments, such as the economic subsistence research on studies monitoring fish populations.\textsuperscript{258} Although disclosure of some studies may come about during discovery for those who are parties to the litigation,\textsuperscript{259} lack of

\textsuperscript{252} See TOWNSEND REPORT, supra note 26, at 232 ("[O]pen damage assessments will lead to better damage assessments and, likely, savings in litigation and other costs . . . ").
\textsuperscript{253} Oil Suit Spills and Science, ANCHORAGE DAILY NEWS, reprinted in L.A. DAILY J., Apr. 19, 1991, at 6 (editorial). Another confounding factor is that the NRDA studies are not intended to integrate short-term and long-term findings or to study a spill's effects on future planning. TOWNSEND REPORT, supra note 26, at 45.
\textsuperscript{254} See, e.g., Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Alaska: Oversight Hearings before the Subcomm. on Water, Power, and Offshore Energy Resources of the House Comm. on Interior and Insular Affairs, 101st Cong., 1st Sess., pt. 1, at 42 [hereinafter Rue Statement] (statement of Frank Rue, Director, Habitat Division, Alaska Department of Fish and Game) ("[E]ffects are subtle and very complex and require intensive study to detect.").
\textsuperscript{255} Cf. TOWNSEND REPORT, supra note 26, at 232 (recommending that Congress create an NRDA fund with assessment cost research to be recoverable from spiller).
\textsuperscript{256} See 42 U.S.C. § 9607(a)(4)(A) (1988). Moreover, the government may encounter difficulty in recovering its costs through litigation. A reasonableness standard is applied to the costs, one that is tougher than normal cost recovery showings under CERCLA. In addition, the government may be limited in its ability to recover indirect costs and attorneys' fees associated with natural resource damage claims. Marten & McFarland, supra note 245, at 672, 674.
\textsuperscript{257} See, e.g., TOWNSEND REPORT, supra note 26, at 45 (criticizing Exxon Valdez Trustee Council criterion which compared the cost of a particular study to the damage amount expected to be recovered from Exxon).
\textsuperscript{258} See id. at 150 (describing effect of spill on Native Alaskan harvest of fish); id. at 157 (noting existence of study to document losses to subsistence households).
\textsuperscript{259} See John H. Cushman, Legal Ripples of Spill Are Said to Distort Big Picture of Dam-
access to the data before that time may discourage many plaintiffs from pressing a claim because of their inability to determine what constitutes a fair settlement.\textsuperscript{260} Independent studies of the spill are practically non-existent, as is peer review of the data compiled by scientists working for Exxon, Alaska, and the United States.\textsuperscript{261}

Finally, the public, which is asked to comment on NRDA and restoration plans\textsuperscript{262} as well as some settlement proposals,\textsuperscript{263} needs information upon which to base an opinion. Thus, release of studies in a timely fashion, although potentially damaging to litigation, would make the public aware of the extent of the damage and enable it to fulfill its role of reviewing Trustee activity.\textsuperscript{264} The information gathered by public trustees should be used not only to restore public lands, but to benefit the local community as well. Ultimately, confidentiality circumvents the traditional scientific process\textsuperscript{265} and impedes the ultimate goal of moving ahead quickly with a plan to restore the environment.


\textsuperscript{261}Cushman, \textit{supra} note 259.

\textsuperscript{262}E.g., NRDA's, \textit{supra} note 4, § 11.32(c) (DOI regulation providing that NRDA assessment plan be made available for public review).

\textsuperscript{263}See, e.g., 42 U.S.C. § 9622(f) (1988) (providing opportunity for public review of settlements in usual cost recovery actions under CERCLA § 107 and in \textit{de minimis} settlement proceedings). EPA officials have indicated that a similar opportunity should exist with respect to natural resource damage claim settlements. See \textit{supra} note 245.

\textsuperscript{264}One of the newest federal environmental statutes requires NOAA to promulgate its own NRDA regulations. See Oil Pollution Act of 1990, Pub. L. No. 101-380, tit. 1, § 1006(e), 101 Stat. 484, 496 (codified at 33 U.S.C.A. § 2706(e) (West Supp. 1992)). Although the future NOAA may address the issue of confidentiality, the NOAA procedure thus far has been to conduct damage assessment in the same manner as the DOI regulations. See Notice of 60-day Comment Period, 56 Fed. Reg. 10,544 (1991). The NOAA has modified its approach to damage calculations, however, to conform with a D.C. Circuit ruling which invalidated a portion of the DOI regulations. Id.; see also Ohio v. United States Dep't of Interior, 880 F.2d 432, 442 (D.C. Cir. 1989) (holding DOI's measure of natural resource damages inadequate under applicable language of CERCLA).

\textsuperscript{265}One commentator summarizes the danger of confidentiality from a scientist's point of view:

Research is being financed one year at a time, and the financing is always uncertain because parties to the litigation cannot agree on what kind of work needs to be done. This leaves scientists uncertain, even from month to month, about whether their work will continue.

Because the litigants need data on damages quickly as the cases move to trial, short-term research is being emphasized over more complex long-term studies. Most studies emphasize looking at a single species rather than the entire biological system, and the work is concentrating on relatively few species, mostly those with direct commercial value. This undermines attempts to reach broad conclusions about the environmental consequences of the spill.

Scientists have also been unable to review each others' research plans in advance, to coordinate their work or to duplicate tests that produce particularly interesting results. Most distressing for scientists is the nearly total lack of communication among researchers. Without open disclosure and peer review, they say, the quality of research may suffer.
IV
POSSIBLE RELIEF FROM CONFIDENTIALITY

The failure of the environmental laws and regulations to solve the confidentiality problems which have arisen during the Exxon Valdez oil spill forces the public as well as private litigants to look elsewhere for access to NRDA data. This information potentially may be obtained through the federal freedom of information and state public records acts as well as rules of civil procedure and evidence governing discovery. Despite the existence of important exemptions to these rules, certain information may be available which would relieve some parties of the burden of collecting it independently.

A. The Freedom of Information Act

FOIA, as discussed in part II, provides for broad disclosure of government records to the public. The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." To further this policy, exemptions to disclosure allowed under the law must be narrowly construed.

Although a court reviewing a FOIA request must show deference to certain administrative decisions, the agency carries the burden of justifying nondisclosure. Unlike other forms of judicial review, where an agency action must be upheld if not arbitrary or capricious, FOIA broadly requires that a trial court conduct a de novo review of the decision to withhold documents. An appellate court would examine records in camera in order to rule directly on an agency decision. However, a trial court determination that an exemption to FOIA is applicable may be considered a question of fact, subject to reversal only for abuse of discretion.

Cushman, supra note 259.
266. See supra parts II.B.-D.
268. See supra part II.C.
271. See Tomlinson, supra note 95, at 132. For example, an agency has discretion to determine whether a record is properly classified, whether the release would hinder law enforcement, or whether the release would create an unwarranted invasion of another's privacy. Id.
272. Id.
275. See id.
In terms of the Exxon Valdez case, members of the public may make a request under FOIA for data related to natural resource damage assessment. OSPIC in Anchorage has been established in part to answer FOIA requests about the Exxon Valdez spill. OSPIC is also gathering documents for its own collection through FOIA requests. In addition, the U.S. Fish and Wildlife Service oil spill office was established in 1990 to process FOIA requests as well as manage response issues and damage assessment studies. FOIA requests have already yielded some preliminary data. In 1989, a San Francisco law firm, most likely representing the Alyeska Pipeline Service Company, filed a massive request for federal records relating to the spill. However, the likelihood of substantial disclosure of such information is uncertain because the data sought may fall within exemption 5 for agency memoranda or exemption 7 for information compiled for law enforcement purposes. A question may also exist whether the NRDA Trustee Council is an agency subject to FOIA. Since third-party litigation could last for years, even if certain claims are settled, the government may attempt to dodge disclosure of natural resource assessment data. However, if the government does not carry its burden of showing that the requested records are exempt from disclosure, a judge may decide that the presumption in favor of disclosure and the public’s need for access is greater than the government’s need for confidentiality and force disclosure of certain records.

276. 1 NRDA 1991, supra note 42, at 275; see also supra text accompanying note 195 (describing establishment of OSPIC).
277. Parker, supra note 150, at 243.
278. Houghton et al., supra note 163, at 468.
279. Agencies Swamped by FOIA Requests on Valdez Spill, 20 [Current Developments] Env’t Rep. (BNA) 866, 866 (Sept. 22, 1989). Alyeska has come under tough criticism for its failed efforts to contain and remove the spill soon after the accident. See Wojcik, supra note 231. Under the October 1991 settlement third party claims survive against the firm. Id.
280. See supra notes 98, 100-06 and accompanying text (describing exemption 5 to FOIA).
281. See supra notes 99, 107-10 and accompanying text (describing exemption 7 to FOIA).
282. FOIA defines “agency” to include “establishment[s] in the executive branch of the Government (including the Executive Office of the President).” 5 U.S.C. § 552(e) (1988). The Supreme Court has said, “Executive Office [of the President] does not include . . . units in the Executive Office whose sole function is to advise and assist the President” . . . .” Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (quoting H.R. REP. No. 1380, 93d Cong., 2d Sess. 14-15 (1974)); see also Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (introducing the sole-function test). The court of appeals in Soucie held that the Office of Science and Technology (OST) was an agency within the meaning of FOIA, reasoning that the OST performed independent regulatory functions. See Soucie, 448 F.2d at 1075. These functions included the investigation of federal scientific programs. Id. The NRDA Trustee Council performs similar functions. CERCLA requires NRDA trustees to assess natural resource damages, 42 U.S.C. § 9607(f)(2)(A)-(B), and the Council commissions studies to complete its task. See, e.g., 1 NRDA 1991, supra note 42, (listing studies planned for 1991). Thus, a court would likely conclude that the Trustee Council is an agency for the purposes of FOIA.
B. The Alaska Public Records Statute

The Alaska Public Records Statute\(^2\) also provides for broad disclosure and requires holding the public records of all public agencies open to public inspection "[u]nless specifically provided otherwise."\(^3\) Originally, this policy of disclosure, similar to FOIA, might not have brought much relief to those desiring access because of the exemptions to the Alaska Public Records Statute.\(^4\) However, a new addition to the Public Records Statute\(^5\) may provide a plaintiff with more information—except that the information is still subject to the FOIA exemptions. The primary relief, though, under Alaska laws for disclosure of information may be found in the case law.

The case law in Alaska concerning these statutes consistently favors disclosure. The Supreme Court of Alaska in City of Kenai v. Kenai Peninsula Newspapers, Inc.\(^6\) stated that "[t]here is a strong public interest in disclosure of the affairs of government generally."\(^7\) In City of Kenai, the records at issue consisted of employment applications for city positions, which the court ordered disclosed. The court said that its task required balancing "the public interest in disclosure on the one hand and the government's interest in confidentiality, on the other."\(^8\) In weighing those two factors, the court required the agency to explain why the records should not be disclosed.\(^9\) "Doubtful cases should be resolved by permitting public inspection."\(^10\) The Alaska Supreme Court has applied the City of Kenai standard in subsequent Public Records Act

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\(^1\) ALASKA STAT. § 09.25.110 (public records) (1983 & Supp. 1991); id. § 09.25.120 (exceptions); id. § 09.25.122 (litigation disclosure) (Supp. 1991).
\(^3\) Id. § 09.25.120; see also supra note 114 and accompanying text (describing Alaska Public Record Statute exemptions).
\(^4\) ALASKA STAT. § 09.25.122 (Supp. 1991); see also supra note 115 and accompanying text (describing the amendment and the circumstances of its enactment).
\(^5\) 642 P.2d 1316 (Alaska 1982).
\(^6\) Id. at 1323.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
cases.\textsuperscript{292} Furthermore, in its later cases the court has said explicitly that exemptions to Alaska's statute are to be interpreted narrowly.\textsuperscript{293}

Although the courts of Alaska have interpreted the public records statute broadly, in the Exxon Valdez case Alaska's Attorney General may be able to maintain confidentiality of NRDA data collected by state agencies. Exemption 6, which protects records or information compiled for law enforcement purposes,\textsuperscript{294} could limit Alaska's liability to third-party claimants by enabling the state to retain the data that such claimants would need to build a case.\textsuperscript{295}

\section*{C. Discovery Rules and Confidentiality Agreements}

Whatever is unobtainable through FOIA or Alaska Public Records Statute provisions may be requested during discovery.\textsuperscript{296} In the case of third-party claims arising from the Exxon Valdez spill, it is possible that the bulk of NRDA data sought will be requested during discovery proceedings rather than under a FOIA request. For example, prior to the settlement between Exxon, Alaska, and the United States, reports suggested that the litigants were ready to adopt a cooperative stance toward one another's information requests. According to one 1989 article, plaintiffs' lawyers had found Exxon ready to exchange thousands of documents despite the fact that discovery had yet to begin in any of the proceedings.\textsuperscript{297} If government claims had proceeded against Exxon, Ex-

\begin{itemize}
\item \textsuperscript{293} E.g., Anchorage Sch. Dist., 779 P.2d at 1193.
\item \textsuperscript{294} ALASKA STAT. § 09.25.120(6) (1983 & Supp. 1991).
\item \textsuperscript{295} But see id. (placing restrictions upon the applicability of exemption 6 similar to those in federal FOIA).
\item \textsuperscript{296} See Tomlinson, supra note 95, at 153 (contemplating that FOIA serves as prelitigation disclosure device which may be followed by discovery after lawsuit is filed). One difficult issue has arisen, however, involving the question of privilege under the discovery rules and FOIA. Most courts employ a distinct analysis for each query, leading to the result that a document may be privileged during discovery but available to the public under FOIA. Id. at 169. The minority view holds that the government is barred from raising a claim of privilege to defend against a discovery subpoena when FOIA would require the document's release. Id. at 168. In any event, an agency may not base a claim of privilege on a FOIA exemption. Id. at 138.
\item \textsuperscript{297} Barnaby J. Feder, Exxon Valdez's Sea of Litigation, N.Y. TIMES, Nov. 19, 1989, at A1, A6. A desire to avoid bad publicity may have been the motivating factor behind Exxon's generosity. Id.
\end{itemize}
xon probably would not have been able to receive data from the government, because it would be difficult for a company with Exxon's financial resources to demonstrate a substantial need for the information. That is why Exxon has compiled information on its own, even duplicating government procedures and data gathering.

Third-party plaintiffs, including fishermen and Native Alaskans, may fare better than Exxon under the discovery rules. For example, the plaintiffs would likely encounter less difficulty in establishing their need for the confidential data. Disclosure to third-party plaintiffs would be available if they lack the funds and expertise to conduct their own studies, and government data could be made available without great expense or burden.

Relying on the discovery process, however, has many drawbacks. For example, the delay in obtaining documents through discovery mechanisms may discourage bona fide claimants and inhibit pretrial preparation. Furthermore, a party whose motion for discovery is denied will have little chance of obtaining immediate appellate review of the trial court order. Also, discovery is by nature a process of limited duration that reaches only relevant documents. Finally, discovery is subject to many abuses. For instance, a party responding to a request for documents is under no obligation to index or otherwise aid a researcher in identifying relevant information contained therein.

One way to circumvent these drawbacks is to use FOIA as an alternative to formal discovery. However, the Supreme Court observes that FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants," and discourages the use of FOIA as a tool for discovery. Yet neither the terms of FOIA nor the

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298. Rule 45 governs discovery of documents from one who is not a party to the litigation. FED. R. CIV. P. 45. It provides the only means of discovering such documents. Tomlinson, supra note 95, at 143. Under Rule 45 a party obtains a subpoena to be served upon the person or entity in control of the particular documents. For a discussion of the rule's operation, see id. at 143-45. Third parties suing Exxon may well be able to demonstrate the substantial need required to get information from Exxon.

299. Exxon is less subject to budgetary restraints than is the Trustee Council. See Information Freeze, supra note 175 (statement of Erik Olsen, attorney, National Wildlife Federation).

300. Cf. Tomlinson, supra note 95, at 153 (describing FOIA as alternative to discovery for potential plaintiff wishing to determine the strength of a particular claim).

301. Cf. id. at 154 (describing advantage of using FOIA prior to discovery as a means of finding agency records relevant to a claim).

302. See 8 WRIGHT & MILLER, supra note 73, § 2006.

303. Id. at 121. For a discussion of how FOIA may be used to obtain documents that would be regarded as irrelevant under discovery rules, see id. at 173-78.

304. See id. at 141.


306. See, e.g., National Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214,
language of the Federal Discovery Rules bar the simultaneous use of discovery and FOIA requests.\footnote{207} Discovery privileges and FOIA exemptions are treated by most courts as separate issues requiring separate analysis.\footnote{208} In fact, FOIA requests are often used if discovery has been denied,\footnote{209} and the fact that information is sought for litigation purposes is irrelevant to the validity of the request.\footnote{210}

Using FOIA to supplement discovery may provide several advantages to a private party, although it can impose severe hardship on government agencies. Under FOIA, the party requesting information is not required to demonstrate the relevance of such information to her case.\footnote{211} Furthermore, FOIA may permit broader disclosure than discovery, especially where work-product immunity applies.\footnote{212} However, FOIA poses numerous disadvantages to the government. For example, FOIA gives an agency no right of access to information controlled by the requesting party,\footnote{213} no time limit exists to bar the presentation of additional FOIA requests,\footnote{214} FOIA requests may be massive\footnote{215} and duplicate discovery requests,\footnote{216} and a requesting party need only "reasonably" describe the desired records.\footnote{217} In addition, an agency may inadvertently disclose information that may be properly withheld under a FOIA exemption.\footnote{218}

Confidentiality agreements pose another hurdle for those trying to obtain information through FOIA and discovery. The problem is that, if the information covered by these agreements is not discoverable, no comparison or examination of the NRDA data will occur. The Exxon Valdez confidentiality agreements are extremely broad, and they severely limit access to almost any type of information.\footnote{219} Fortunately, in the

\footnote{207}{Toran, supra note 274, at 848.}
\footnote{208}{Tomlinson, supra note 95, at 168; see also supra note 296.}
\footnote{209}{Toran, supra note 274, at 855.}
\footnote{210}{Robbins, 437 U.S. at 242 n.23 (citing United States Envtl. Protection Agency v. Mink, 410 U.S. 73, 86 (1973)).}
\footnote{211}{Toran, supra note 274, at 861.}
\footnote{212}{Id. at 862.}
\footnote{213}{See Tomlinson, supra note 95, at 129-30.}
\footnote{214}{Id. at 128.}
\footnote{215}{Id. at 129.}
\footnote{216}{Id. at 128.}
\footnote{217}{Id. at 130.}
\footnote{218}{See id. at 167. Tomlinson notes that only rarely does an agency release information carelessly or inadvertently. Id. The usual cause for a "mistaken" release arises from different perceptions between an agency public information officer and a party's attorney of the scope of a particular FOIA exemption. Id.}
\footnote{219}{See, e.g., Michael Parrish, Secret Studies Put Spill Damage at $15 Billion, L.A. TIMES, Oct. 8, 1991 (describing effect of secrecy clauses in contracts for economic studies). Parrish observes: Almost all information about the economic studies has been kept secret by non-disclosure clauses in contracts that are described by one source as 'a mile wide and a mile deep.' At least one researcher bought a fax machine for his home to ensure that}
context of private industry, courts are reluctant to uphold broad confidentiality agreements. Their concern is that a broad agreement may create an unreasonable trade restraint which may restrict business competition. Further, an employee must be free to take her skills with her to a new job. If the agreement is an actual covenant not to compete, then its scope of protection is broader. Other courts have stated that even a restrictive covenant will not be enforced if it interferes with a person’s ability to seek employment.

In terms of government consultants and employees, courts have held that information covered by a government confidentiality agreement is discoverable if the veracity of the information was not contingent on an employee’s expectation of confidentiality. This policy dovetails neatly with the scope of exemption under FOIA.

A further policy issue arguing in favor of open discovery of the NRDA data is the difficulty in challenging the interpretation of secret data. One example of the absurd effect of confidentiality agreements is recounted by Jonathan Houghton, currently a scientific consultant for NOAA, who originally worked for Exxon in 1989 on the Exxon Valdez spill. Houghton signed agreements for the sampling program he performed for Exxon, and all documents pertaining to this work were stamped “Work product - oil spill litigation, prepared work for Exxon.” In 1990, Houghton went to work for NOAA on the same sampling program. As a result of the 1989 agreement he signed with Exxon, Houghton cannot disclose to anyone any data, trade secret, or “specialized data did not leak outside the research team.

Id.

320. E.g., AMP, Inc. v. Fleischhacker, 832 F.2d 1199, 1202 (7th Cir. 1987) (“The Illinois courts have held unenforceable... provisions in confidentiality agreements because (1) they provide no limitation on the duration of the nondisclosure provision... and (2) they contain no geographical limitation or other kind of limit on the parties to whom the employee is prohibited from disclosing information.”).

321. Id. at 1203 (“Confidentiality agreements without... limitations constitute... unreasonable restraints on trade which unduly restrict the free flow of information necessary for business competition.”).

322. Id. at 1202.

323. Id. at 1203.


325. See Sterling Drug, Inc. v. Harris, 488 F.Supp. 1019, 1029 (S.D.N.Y. 1980). The court observed that “[c]onfidentiality is not expected, nor does it appear to be essential to the forthright and thorough preparation of these reports. Indeed, disclosure may be more likely to enhance the quality and thoroughness of the investigations.” Id. But see Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972) (involving grant evaluations by outside experts conducted with expectation of confidentiality).

326. See supra notes 103-06 and accompanying text.

327. Telephone Interview with Jonathan P. Houghton, supra note 123. All of the information contained in this paragraph is attributable to the telephone interview with Houghton.

328. Houghton is not subject to any confidentiality agreements for his NOAA work. Id.
knowledge" encountered in or originating from the studies for Exxon because it is proprietary information. Houghton points out that the "specialized knowledge" category is tricky, because it is extremely broad. The bizarre result of this situation is that Exxon can use the 1989 data, interpreted according to Exxon's standards, to counter Houghton's 1990 findings in the same area even though Houghton could refute Exxon's findings with his own knowledge of the 1989 data which he helped collect. In other words, Houghton cannot use the 1989 data he helped gather, nor his own impressions of it, to refute Exxon's interpretation of the same data. Houghton discovered that Exxon had changed its approach after he left, perhaps in anticipation of litigation.

If left to discovery and FOIA, release of data in the Exxon Valdez case will be decided on a case-by-case basis. Although some data will be disclosed and some will not, the issues of public review, public trust, and the need of nonlitigants and scientists for information will arise each time an NRDA case is considered. The unfortunate result will be that the rules will be applied methodically, even though they are inadequate for massive environmental cases, and all efforts will be focused on the legal questions of whether data should or will be released, not on the more important issue of restoration of the environment.

D. Federal Rules of Evidence Concerning Expert Witnesses

One final method which may be employed to circumvent or take advantage of discovery and FOIA rules is the use of expert witnesses who may aid a plaintiff in gaining access to certain NRDA data. Experts play a huge role in cases involving situations similar to the Exxon Valdez spill,329 and offering expert testimony in a third-party suit against Exxon could result in the disclosure of some of the data underlying the natural resource damage claims. While the Federal Rules of Evidence discuss the circumstances under which an expert may testify at trial,330 one rule in particular may give a party access to actual data. Rule 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.331

Although the data upon which an opposing expert relies is often available in discovery,332 it occasionally is protected under work-product im-

329. See Cushman, supra note 259 ("Like a migratory species, marine scientists are flocking back to Prince William Sound for a second summer of research into the effects of the Exxon Valdez oil spill.").

330. See FED. R. EVID. 702 (Testimony by Experts); id. 703 (Bases of Opinion Testimony by Experts).

331. Id. 705 (Disclosure of Facts or Data Underlying Expert Opinion).

munity, as well as a federal procedure rule governing the discoverability of experts' work. However, if an expert testifies at trial and relies on data collected, the court may require disclosure of the data on cross-examination.

Nonwitness expert data may be accessible through subpoena. In Deitchman v. E.R. Squibb & Sons, the Second Circuit expressed the view that nonwitness expert data should be discoverable. Deitchman involved a products liability suit against Squibb for injuries related to in utero exposure to diethylstilbestrol (DES). Squibb requested, by form of subpoena, data underlying a prominent (nonwitness) doctor's study of DES. The court recognized Squibb's need for the nonwitness expert's data, despite its confidentiality, because Squibb was "entitled to cross-examine plaintiffs' experts on the data underlying their opinions regarding DES." Since plaintiffs' experts apparently had based their opinions regarding DES "exclusively" on the nonwitness expert's study, to deny Squibb's discovery request could "preclude Squibb from engaging in any meaningful cross-examination of plaintiffs' experts' opinions."

The court of appeals drew a distinction between Squibb's request for patient records and its requests for the nonwitness expert's independent and ongoing research. The court explained that "substantial need" might require disclosure of records in other circumstances, but declined to find such circumstances in this case. As for the expert's research, the court averred, "discovery of this information ought to be wholly factual." Discovery would not be allowed of the expert's ideas and unpublished conclusions. The court admitted that deletion of patient names would be an inadequate protection of the patients' confidentiality, but suggested that protective orders and disclosure to third parties might resolve confidentiality problems. The courts have applied a similar analysis in cases involving FOIA requests and expert opinions.

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333. See id. § 9.7.4 n.18 (discussing applicability of work product rule, Fed. R. Civ. P. 26(b)(3), and of experts' work rule, Fed R. Civ. P. 26(b)(4)).
335. 740 F.2d 556 (7th Cir. 1984).
336. Id. at 558.
337. Id. at 561-62 (citing Fed. R. Evid. 703, 705). This idea is echoed in a personal injury action in which another nonwitness expert was subpoenaed. See Wright v. Jeep Corp., 547 F. Supp. 871, 874 (E.D. Mich. 1982). The court in Wright said the material requested was relevant and the testimony would be compelled. "If the conclusions or end product of a research effort is to be fairly tested, the underlying data must be available to others equally skilled and perceptive." Id.
338. Deitchman, 740 F.2d at 562.
339. Id. at 564.
340. Id. at 565.
341. Id.
342. Id.
343. See id.
Another issue particularly relevant to the use of experts in NRDA studies is the possible usurpation of the most qualified experts by the parties to the litigation. Usually the party with the most resources is able to hire the best experts.\textsuperscript{345} It seems unlikely that any restrictions could be placed on this practice. However, one possible solution is for the government or industry to sign long-term or captive contracts with experts in order to preempt the hiring of those experts by potential opponents in future litigation.

\section*{V
PROPOSALS FOR REFORM}

Frustration with the confidentiality of NRDA data has reached high levels in both the public and private sectors.\textsuperscript{346} Those parties affected by the issue have made several proposals for improving the NRDA process.

June Lindstedt-Siva of ARCO has focused on the problems that arise when agencies conduct both response efforts and NRDA studies. Lindstedt-Siva notes that agencies performing both tasks experience conflicting loyalties in setting standards for cleanup and in assessing natural resource damages.\textsuperscript{347} In order to rectify the potential conflict of interest, she suggests beginning natural resource damage assessment after cleanup and remediation are complete so that only residual damage is evaluated.\textsuperscript{348} The NRDA process should concentrate on long-term impacts using response data that is made available to all. She also suggests that government agencies coordinating spill response efforts should not conduct NRDA studies.\textsuperscript{349} A major drawback to this idea is that drawing such distinctions among an agency’s research resources may not be possible due to lack of available staff and funding.

(“Questions asked of [and] responses by . . . expert consultants in communication for litigation are within the work product privilege,” but “low level, routine factual reports that are severable from the private remainders of the document must be produced.”).

345. Speaking to the cost of discovery generally, retired U.S. Supreme Court Justice Powell has said, “[A]ll too often discovery practices enable the party with greatest financial resource to prevail by exhausting the resources of a weaker opponent. . . . Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.” United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 655 n.8 (1979). In the Exxon Valdez case, “[t]he three teams doing separate economic studies—researchers hired by the state of Alaska, the federal government and Exxon—include most of the country’s top experts in the tiny world of environmental damage estimates. All three studies are described as state of the art and comprehensive.” Parrish, supra note 319.

346. See Rue Statement, supra note 254, at 44 (requesting on behalf of Alaska Department of Fish and Game that Congress establish provisions for sharing acquired impact data); Harrison Statement, supra note 171 (detailing Exxon’s objections to lack of cooperation in natural resource damage assessment process).

347. See Lindstedt-Siva, supra note 169, at 351.

348. Id.

349. Id.
Glenn Juday of the University of Alaska at Fairbanks recommends a two-track process: (1) make a sum of money available on an open, competitive basis for research grants leading to publication; (2) continue counting bodies of animals and determining the extent of damage to make the case, "but don't usurp the free and open pursuit of science" by making the research in the scientific community bow to the tort process.  

Ted Winfield, a consultant who worked on the Shell spill in Martinez, California, suggests that if everyone would design studies together, agree on the protocol to follow, then go out and do it, everyone would feel comfortable with the data. He believes it would be good to discuss with other scientists from all the agencies what should be done at the beginning of their efforts, have an initial review with both sides, work out a program, then work in concert in the field. Enough samples should be taken to assure that everyone has them, and the EPA protocol should be used. Everyone would have the same data base, but the interpretation would be different.

The Townsend Report recommends that Congress establish a fund for oil spill response and damage assessment research. It also encourages the trustees to conduct research openly and to subject data to peer review using the best scientists available. Open damage assessments, according to the report, would produce better results and would lower litigation and other costs.

Some attempts to circumvent the confidentiality problem have been implemented. At the state level, the Alaska Legislature has passed a number of statutes affecting confidentiality of state-generated information. The Alaska State Emergency Response Commission, established in 1990, may request data and reports from state agencies, subject to laws making the information confidential and nondisclosable. A new Citizen's Oversight Council on Oil and Other Hazardous Substances can conduct investigations overseeing state and federal agency activity. The Council may also subpoena witnesses and require the production of
books or papers relating to matters within its realm of responsibility.\textsuperscript{358} State agencies must cooperate fully with the Council, to the extent permitted by other federal or state law, by providing information that includes records relating to the agency's enforcement of laws and regulations for the prevention of and response to releases of oil.\textsuperscript{359}

The federal government, through the Department of Justice and the natural resource trustees, has established OSPIC, which serves as a repository for all the public and private information collected from the Exxon Valdez spill.\textsuperscript{360} OSPIC also collects information from other spills and answers FOIA requests from the public about the Exxon Valdez spill. Exxon and the government trustees were expected to contribute to the facility. Exxon has not yet contributed financially, or provided information, because of litigation concerns.\textsuperscript{361} The federal government has expressed on many occasions its intent to release information, but the state has not cooperated because of fears that the information may be used against it in private party litigation.\textsuperscript{362} Currently, only a scant number of NRDA studies and other research related to the spill are available through the Center.\textsuperscript{363}

In addition, because of the urgent need for effective treatment methods for future oil spills, NOAA, EPA, the U.S. Coast Guard, and oil industry officials all funded American Petroleum Institute studies to assess the cleanup methodologies used in Prince William Sound.\textsuperscript{364} Such a strategy forces industry and government to focus on the primary goal of evaluating the needs of the environment rather than on their individual litigation concerns.

CONCLUSION

Efforts to reform the NRDA process could include modifying the DOI regulations so that response and NRDA studies are not conducted separately, and allowing limited access to certain types or categories of NRDA data for the benefit of response efforts. Also, some attempt should be made to include the expertise of those groups who deal directly with NRDA data, yet are adversely affected by the rules. These groups include not only the DOI, EPA, and NOAA, but also industry, public interest groups, and members of the scientific community. A conference could be held in order for those interested parties to design actual

\textsuperscript{358} Id. § 24.20.610(b)(2).
\textsuperscript{359} Id. § 24.20.620.
\textsuperscript{360} Telephone Interview with Carrie Holba, Librarian, OSPIC (Apr. 8, 1991); see also supra note 195 and accompanying text (discussing the relation between the Trustee Council and OSPIC).
\textsuperscript{361} Telephone Interview with Carrie Holba, supra note 360.
\textsuperscript{362} Id.
\textsuperscript{363} Id.
\textsuperscript{364} Houghton et al., supra note 163, at 467.
NRDA studies for oil spill cases. In addition, a set of standards should be established, such as the EPA protocols, which could be implemented immediately following a spill, and which would allow for or require participation of potentially responsible parties. The appointment of an independent committee of federal and state agencies, citizens, and PRP's to oversee the gathering and sharing of the data would facilitate recovery and restoration efforts. Finally, admissibility of NRDA data in court could be based upon adherence to these established procedures.

The opportunity to study spills and plan for future catastrophes is the only "benefit" of an oil spill. Responding to the emergency requires enormous advance planning, and the goal is to improve upon prior research so that the effects of the next spill may not be as devastating. If the information is confidential, though, public or private parties are unable to draw on the huge database for planning a response to future spills. In addition, if only government studies are made available, the degree of confidence with which they may be used for decisionmaking purposes is limited because the studies may have suffered from lack of funding, emphasis on litigation needs, and lack of substantial peer review.

Confidentiality is not suitable for public trust and restoration purposes, and years of litigation concerning damage reimbursement, resulting in part from the confidentiality of NRDA data, will hinder the ultimate goal of restoration. Disclosure of scientific and economic data will allow for meaningful public review of the trustees' natural resource damage assessment and restoration plans. Substantive public commentary will enhance the decisionmaking process and help the trustees achieve the successful restoration of Prince William Sound.

365. It is the sense of emergency that an oil spill creates that makes cooperation difficult. The publicity surrounding a spill, the catastrophic impact within hours, and the tangible impact on the local community and environment make oil spills a different type of emergency from a hazardous waste site that has existed for many years and requires a great deal of effort, time, and cooperation to clean up.