

# **Exxon Valdez Oil Spill Trustee Council (EVOSTC) meeting Oct. 17, 2018**

## **Public Comment**

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- 1. Proposed revision of Chugach National Forest Plan would seriously compromise EVOS Restoration Plan goals in PWS. I request a letter be sent from EVOSTC to U.S. Secretary of Agriculture Sonny Perdue (as legally-designated Trustee) seeking consultation and revision of the proposed Forest Plan to make it consistent with the EVOS Restoration Plan; and to recommend final congressional designation of the entire 1.9 million acre Wilderness Study Area as wilderness.**

The Chugach National Forest (CNF) includes much of western Prince William Sounds (PWS), the region that suffered the most oil spill injuries and that has been a focus of Restoration efforts within the EVOS Restoration Plan. US Forest Service (USFS) management and planning for this region has direct bearing on the state/federal EVOS Restoration program. Since 2012, the CNF has been in process of revising its Forest Plan, and now is proposing its Final Recommended Alternative that, **if enacted as proposed by USFS, would significantly compromise EVOS Restoration objectives for the PWS region.**

The current USFS Preferred Alternative (Alternative C) Wilderness Recommendation proposes excluding important lands from a future PWS wilderness area, including lands specifically purchased for conservation and wilderness purposes by the EVOS Trustee Council as part of the Restoration program.

The original Nellie Juan-College Fjord Wilderness Study Area (WSA) established by ANILCA was approx.. 2.1 million acres; this was reduced through conveyances to approx. 1.9 million acres; the 1984 Forest Plan proposed approx. 1.8 million acres be designated as wilderness; the 2002 Plan proposed only approx. 1.4 million acres be designated; and the current USFS Preferred Alternative proposes approx. 1.8 million acres be designated. While the current Preferred Alternative recommends significantly more wilderness than the 2004 Plan (and we appreciate this), our concern is that the current Alternative still proposes 100,000 acres less than the full 1.9 million acre WSA to be recommended for final wilderness designation, and directly in the region of maximum oil spill impact. Clearly, this is a significant EVOS Restoration issue that demands Trustee Council consultation and intervention.

It is troubling that the USFS – as both the administrator of the CNF and an administrator of the EVOS Restoration process (as the Trustee Council representative for the Secretary of Agriculture) -- failed to recognize or reconcile the conflict between its proposed Forest Plan and the EVOS Restoration Plan.

The current Preferred Alternative would ultimately weaken current protections for Elrington Island, Glacier Island, Nellie Juan Lake, and even the EVOS-fee acquired Chenega lands (Jackpot Bay, Ewan Bay, Paddy Bay, Hogan Bay, and Junction Island), if/when wilderness is designated by Congress. The Preferred Alternative proposes to remove these lands from Management Area 1 “MA1-WSA management” designation, and to transfer the EVOS lands into the less protective “MA6 EVOS-acquired lands” (see below).

This proposed reduction in recommended wilderness (100,000 acres less than the full 1.9 million acre WSA), in the area that suffered maximum oil spill impacts, would seriously compromise the overall Restoration goal of replacing injured wilderness resources and resource services in the region. These areas include some of the richest ecological habitat and provide some of the most significant resource services in the entire oil spill region, and should remain in the highest protective management designation possible.

**A. EVOS-acquired Chenega lands to lose protections:**

The Chenega lands acquired by EVOSTC pursuant to the 1997 *Chenega Purchase Agreement*, are required to be managed “**in perpetuity for conservation and wilderness purposes.**” At a total cost of \$34 million (\$24 M from EVOSTC; \$10 M from federal restitution funds), the 1997 Purchase Agreement transferred 21,414 acres of surface estate in fee to USFS (Jackpot Bay, Ewan Bay, Paddy Bay, etc.), a conservation easement on another 22,297 acres (Chenega Island, etc.), and transferred 16,289 acres in fee to the State of Alaska (Eshamy, etc.) – for a total of 60,001 acres (see attached map). And, as stated on the EVOSTC website:

**Two parcels acquired in fee simple, the Eshamy Bay and Jackpot Bay parcels, are among the highest ranked parcels in the oil spill area for restoration benefit.**

But now the USFS CNF Plan proposes to reduce the management protections on the federally fee-acquired part of this EVOS habitat acquisition, one of the highest ranked parcels in the EVOS habitat portfolio. Clearly, this would seriously erode overall EVOS Restoration value, as well as create a legal quagmire for the USFS. As stated in the *Chenega Purchase Agreement*:

Sec. 6a, page 322: Chenega Corporation:

*“is only willing to undertake the sale of the Federal and State Conveyance Lands under this agreement because of their intended management for conservation and wilderness purposes respectively by the United States as National Forest System Lands,”*

and;

*“the Federal and State Conveyance Lands purchased pursuant to this Agreement shall be maintained in perpetuity in their natural, pristine state in accordance with the terms of the Restrictive Covenants contained in the applicable...Warranty Deeds.”*

Significantly, the *Chenega Purchase Agreement* contains a “Reverter Clause” which provides that, if management of these lands ceases to be in compliance with the agreement, non-compliance issues must either be corrected immediately or **land title would be conveyed to the State**. That would be a spectacular embarrassment for the U.S. government, and would constitute a significant loss of Restoration value, which was purchased with \$34 million in public funds.

The proposed MA6 standards and guidelines (under which the EVOS-acquired Chenega lands are proposed to be managed) are ambiguous, inconsistent, and include no meaningful provisions for meeting the legally-binding *Chenega Purchase Agreement* goal to manage the lands “in perpetuity for conservation and wilderness purposes.” Under MA6, stream channels, water courses, and even the topography of the land can be altered at the discretion of the land manager, and MA6 offers the manager no tools or guidelines for exercising discretion.

Transferring the EVOS-acquired Chenega lands into MA6 management, as proposed in the CNF Preferred Alternative, would clearly violate the *Chenega Purchase Agreement*, and would likely then trigger the Reverter Clause, by which title to the 21,414 acres of land would transfer to the State of Alaska. Again, this would betray the intent of the purchase, and would be a profound embarrassment to the U.S. government.

The MA1-WSA prescription does offer tools and guidelines in keeping with the wilderness prescription in the purchase agreement, and thus the only appropriate way for the Forest Service to meet the “conservation and wilderness purposes” mandate for the EVOS-acquired Chenega lands is to leave them in MA1 WSA designation.

In addition, the CNF Plan proposal is confusing regarding activities that are permitted on a “conditional” basis on EVOS-acquired lands in the region, including Day-use Facilities, Communication Sites, Energy-related Infrastructure/Utilities, Forest Service Recreational Cabins, and Assigned Sites for Outfitter/Guides. As per the purchase agreements, these activities are not permitted on EVOS-acquired fee

lands (but perhaps may be permitted pursuant to the various purchase agreements on *conservation easement* lands).

**B. Other aspects of the CNF Preferred Alternative in conflict with EVOS Restoration Plan:**

On the entire WSA, the proposed USFS plan changes the current Forest Plan requirement to "maintain presently *existing wilderness character*" to "maintain presently *existing character*" – **omitting the word "wilderness" altogether**. This would be a change from both the 1984 and 2002 forest plans, would constitute a significant loss in current habitat and wilderness protections in the oil spill region, and thus is in direct conflict with EVOS Restoration Plan objectives.

The proposed CNF Plan proposal also removes the question: "Is the wilderness character of the WSA being maintained" from the Forest Monitoring Program. This is in direct conflict with EVOS Restoration Plan objectives, as monitoring and maintaining existing protections is vital to the overall Restoration program.

There are several other issues in the proposed CNF plan that deserve EVOSTC review and intervention, e.g. maintaining the restrictions on motorized use in the WSA, restrictions on hardened camp-sites, etc...Clearly, the legally-binding purchase agreements for the EVOS-acquired lands need to be front-and-center in any management discussion for these lands, but are not accorded such attention in the proposed CNF Plan.

Finally, as I have recommended several times to EVOSTC, it is in the interest of the overall Restoration program that the Trustee Council recommend to Congress the final designation of the entire (1.9 million acre) WSA as wilderness. Final designation of the WSA as wilderness would go a long way toward replacing wilderness, intrinsic, recreation, and fish & wildlife values lost in the spill.

**Recommendation 1:**

I request the EVOS Trustee Council immediately send a letter to U.S. Secretary of Agriculture Sonny Perdue, requesting consultation, intervention, and remedy to these conflicts between the proposed CNF Plan revision and the EVOS Restoration Plan. The public comment deadline for the CNF Plan is Nov. 1, 2018. The EVOSTC letter should request that the Secretary put the CNF Plan process on hold until these conflicts are resolved. The letter should also request that the administration recommend to Congress the designation of the entire 1.9 million acre WSA as wilderness. In addition, a letter should be sent from the EVOSTC to appropriate members of Congress (including the Alaska delegation) urging final designation of the entire 1.9 million acre WSA as wilderness, in the interest of EVOS Restoration.

I note once again for the record, that this is precisely the sort of consultation and consistency determination process that I recommended in my Jan. 11, 2016 letter to

the EVOSTC (attached), that the Council has refused to acknowledge or answer. In that letter, I brought the CNF Plan process to your attention, but as far as I am aware, the Council has ignored this issue entirely. This is irresponsible, and must be remedied.

**2. Recommended transition of the government EVOS Trustee Council to a Court-appointed private non-profit *EVOS Restoration Foundation* or *EVOS Restoration Trust*.**

As proposed in my Sept. 22, 2018 email to all Trustee Council members, staff, and USDOJ/ADOL, I recommend immediate transition of the current Trustee Council process from government to a court-appointed private non-profit ***EVOS Restoration Foundation***, or ***EVOS Restoration Trust***. I appreciate the Council adding this proposal to its agenda today, and I ask that you take action today as recommended below.

I recognize that such a transition can be accomplished without Trustee Council consent, as this is a decision for the parties to the 1991 Consent Decrees, not the Trustee agencies *per se*. But clearly it would be useful for the Trustee Council, as the body empowered by the Consent Decrees to carry out the Restoration program to date, to endorse the proposed transition. And even if either the State of Alaska or U.S. do not agree with the transition, either party alone can, and should, so move the Court.

For the record, my 9/22/18 email to the Trustee Council is below:

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Dear EVOS Trustee Council,

After almost 30 years of involvement with the EVOS Restoration process, and close observation and interaction with the Trustee Council over that time, I respectfully recommend that you now transition the current EVOS Trustee Council from government into a Private Not-Profit (PNP) EVOS Restoration Foundation.

To remove conflict of interest (government agencies funding themselves), it is necessary to move the Restoration process from sole government discretion, and refocus the process exclusively on the primary interest of restoring the injured environment. Unfortunately, agency interests have not always aligned with the interest of ecosystem recovery. While the process has resulted in many notable successes (e.g. the habitat protection program), it has also failed on countless Restoration opportunities. Agencies have tended to look at the EVOS process in terms of what they consider may be in their immediate self-interest, rather than how the process can be applied to best assist environmental recovery. These are not always the same goal, and it is time to correct this dynamic.

As envisioned, the EVOS Restoration Foundation would consist of a Board of Directors -- **appointed from outside of government by the U.S. District Court** (which approved the consent decrees and retains authority and discretion over the compliance with the decrees) -- independent scientific advisors, and staff. The Trustee agencies currently conducting the process would still be able to propose and conduct projects, as they do presently, but would not remain in the role of deciding themselves which projects are funded. We need to de-politicize the process, remove agency bias and conflict of interest, stop the "horse-trading" between the agencies, and **refocus the process strictly on ecosystem recovery**. The only way to do so is to remove the process from the exclusive control of government agencies, which operate in a political context, and authorize an apolitical Foundation, appointed by the Court, to carry the Restoration program forward.

Many of us from the region have long felt that this would have been a better model from day-one, but here we are, 30-years on, and it is time to make this necessary transition. To do so, you would need to petition the federal court to amend the 1991 Consent Decrees that authorize the current EVOS Trustee process, but I suspect the court would deem such a favorable transition and approve the request. As well, there would be need for continued involvement, in an advisory capacity only, of the USDOJ and ADOL, and an audit function, to ensure that the remaining funds are used in strict compliance with their original intent. I trust you can all set aside agency egos, consider this suggestion, and then move forward with the transition.

I look forward to working with you to achieve this transition **prior to the upcoming 30th anniversary of the spill, March 24, 2019**

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Some additional thoughts on this proposal:

The most effective corporate and government managers recognize the need to continually reevaluate their management structures and processes, seeking greater efficiencies and effectiveness. As stewards of the public trust in the EVOS Restoration process, it is incumbent on you to do just that today.

There are several obvious benefits to this proposed transition. In addition to eliminating the conflict-of-interest issue raised above (agencies self-funding), all of you have full-time jobs administering your respective agencies, and thus the EVOS Restoration process cannot possibly receive the full-time attention it deserves. The proposed *EVOS Restoration Foundation* or *Trust* would afford such full-time attention.

The administrative overhead of a PNP Foundation or Trust would be considerably less than the administrative costs taken by the Trustee agencies to administer the program. As such, more funds would be available for actual Restoration rather than government bureaucracy.

A Foundation or Trust would reduce, if not eliminate, the tendency for the agencies to fund normal agency duties from Restoration funds, which has been a problem for decades.

If you are indeed confident that your agency proposals are robust, competitive, and fully supportive of the Restoration Plan, then your agency proposals will fare well in a genuinely competitive evaluation process within the proposed EVOS Restoration Foundation. You can demonstrate such confidence today by resolving to transition the process from your control into a more effective private Foundation or Trust.

It has long been a problem in the Restoration program that creative agency staff proposals (e.g. from those field staff on the front lines of Restoration) don't survive the political process of internal agency review, and thus are not forwarded by the agency for consideration by the full Trustee Council. As such, creative and effective Restoration opportunities are often ignored, which diminishes the effectiveness of the overall Restoration program. Thus as envisioned, the Foundation or Trust would open its annual solicitation for Restoration proposals to all, including directly to agency professional staff, encouraging these resource professionals and scientists to submit proposals directly, without needing to first filter proposals through the political process of agency supervisors. As creative decisions and opportunities for Restoration are devolved to professional front-line field staff, this will ensure that the best proposals are developed, considered and funded.

Finally, I strongly recommend that the Director/s of the EVOS Restoration Foundation or Trust be appointed directly by, and serve at the sole discretion of, the U.S. District Court, not the governor or president. This is the only way to de-politicize the Restoration process, something sorely needed.

I trust you will objectively consider this proposal, and take action today as recommended below.

### **Recommendation 2:**

The Trustee Council should immediately request ADOL and USDOJ, on behalf of government parties to the 1991 Consent Decrees, to petition the U.S. District Court to dissolve the current government Trustee Council established by the Consent Decrees, and transfer all remaining funds, responsibilities and authorities pursuant to the Consent Decrees into a court-appointed, private non-profit ***EVOS Restoration Foundation*** or ***EVOS Restoration Trust*** (as proposed above), to continue the Restoration program.

I am confident that ExxonMobil and the Court will concur with this proposed transition. And again, while Trustee Council endorsement is not essential for the government parties to petition the Court to amend the Consent Decrees as proposed, it would certainly help. And even if one government party – the State or the U.S. –

does not endorse the proposed transition, either government party alone can, and should, so move the Court.

Again, I propose that this transition be completed before the **30<sup>th</sup> anniversary of the spill, March 24, 2019.**

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Thank you for the opportunity to comment. I look forward to answering any questions you may have, and to your discussion of these recommendations.