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## Oil Tanker Regulation: A State or Federal Area

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# OIL TANKER REGULATION: A STATE OR FEDERAL AREA?

CONSTITUTIONAL LAW—WASHINGTON TANKER LAW: Washington may enforce part of its Tanker Law. The federal Ports and Waterways Safety Act pre-empts the state Tanker Law in some areas, but not in others. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

## INTRODUCTION

Puget Sound in the state of Washington is a magnificent product of nature's handiwork. It was wrought by the movements of the earth's crustal plates and then refined by the actions of glaciers some 14,000 years ago.<sup>1</sup> It contains approximately 700 square miles of water surrounded by 1,400 miles of rugged coastline. It is a scenic and wooded country which still boasts relatively pure water. Many of the activities of the area are dependent upon this purity of water. There are oyster beds and salmon fishing in the area, as well as a substantial amount of recreational sailing. However, the delicate balance of nature in Puget Sound (Sound), in addition to its natural beauty, is threatened by the large amounts of crude oil being delivered to refineries within the Sound.

As of January 1977, there were 335,000 barrels of crude oil coming into the Sound by tanker each day.<sup>2</sup> Much of this is from the rich oil fields of Alaska. There is a constant threat of a collision of an oil tanker with another vessel in one of the narrow channels of the Sound.<sup>3</sup> Oceanographers estimate that if a major spill were to occur within the Sound, crude oil would cover the entire Sound area within two 24 hour tidal periods. According to one expert, the question is not *if* a major oil spill will occur, but rather *when* one will occur.<sup>4</sup>

The possibility of an oil spill resulting from a collision of a tanker is easily understood when oil tanker's stopping ability and maneuverability are examined. According to a Senate Report,<sup>5</sup> it takes a

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1. 151 NATIONAL GEOGRAPHIC 7 (1977).

2. *Id.* at 79.

3. Some channels are less than one mile wide.

4. Bob Lynette, an aeronautical engineer, who applied all the available data on oil spills throughout the world to conditions of the Sound.

5. S. Rept. No. 92-724, 92d Cong., 2d Sess. (1972), at 18.

200,000 DWT<sup>6</sup> tanker two and one-half miles and twenty-one minutes to come to a complete emergency stop. Such a stop involves slaloming the ship, or fish-tailing it back and forth, and reversing the engines. In a relatively narrow channel, it would take much longer, in terms of both time and distance, to bring a ship to a complete stop because it would be impossible to slalom. The maneuverability of a 250,000 DWT tanker vessel with 30,000 horsepower units has been compared to a forty foot boat with a one-half horsepower motor.<sup>7</sup> Thus, it is apparent that a large tanker would have difficulty stopping or avoiding an unexpected obstacle, such as another ship. This is especially true in a confined irregularly shaped area of water such as the Sound where the amount of warning time before seeing an obstacle might be small. A collision could rupture the oil compartments of a tanker and result in a devastating oil spill.

Given the danger of oil spills damaging the untarnished beauty of Puget Sound, the Washington legislature enacted the Washington Tanker Law (Tanker Law) in 1975<sup>8</sup> to govern the design,<sup>9</sup> size,<sup>10</sup> and movements<sup>11</sup> of oil tankers within Puget Sound. These same areas of regulation are also covered nationally by the Federal Ports and Waterways Safety Act of 1972 (PWSA).<sup>12</sup> When the Tanker Law came into effect, the Atlantic Richfield Company (ARCO), which operates one of the six oil refineries in the Sound, brought suit in the United States District Court for the Western District of Washington to enjoin enforcement of the statute.<sup>13</sup> The primary allegations by

6. DWT or deadweight tons is the actual weight in metric tons of cargo to bring a vessel down to her load waterline.

7. *Supra*, note 5, at 18.

8. WASH. REV. CODE § 88.16.180 (1977).

9. *Id.* at § 88.16.190(2): An oil tanker, whether enrolled or registered, of 40,000 to 125,000 DWT may proceed beyond points enumerated in (1) if tanker possess all of the following standard safety features:

- a) Shaft horsepower in the ratio of one horsepower to each two and one half deadweight tons; and
- b) Twin Screws; and
- c) Double Bottoms, underneath all oil and liquid cargo compartments; and
- d) Two radars in working order and operating, one of which must be collision avoidance radar; and
- e) Such other navigational position location systems as may be prescribed from time to time . . .

10. *Id.* at § 88.16.190(1): Any oil tanker, whether enrolled or registered, of greater than 125,000 DWT shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light South to New Dungeness light.

11. *Id.* at § 88.16.180: Any oil tanker, whether enrolled or registered, of 50,000 DWT or greater shall be required to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters and shall be liable for and pay pilotage rates.

12. The Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221 *et seq.* and 46 U.S.C. § 391(a) (1976).

13. *Atlantic Richfield Co. v. Evans*, \_\_\_\_ F. Supp. \_\_\_\_ (W.D. Wash. 1976).

ARCO were that the Tanker Law was pre-empted by federal law,<sup>14</sup> that it placed an undue burden on interstate commerce and was therefore in violation of the Commerce Clause,<sup>15</sup> and that it interfered with the regulation of foreign affairs by the federal government.

A three judge district court<sup>16</sup> held that the Tanker Law was pre-empted in its entirety and enjoined Washington from enforcing it. This decision has been amply discussed in two recent law review articles.<sup>17</sup> Washington appealed and the United States Supreme Court granted cert.<sup>18</sup>

#### SUPREME COURT'S OPINION

The Supreme Court dealt with the Tanker Law in a thorough, systematic fashion. To begin with, it discussed several principles it had established in previous cases for examining pre-emption questions.

When a federal law is enacted, which is alleged to pre-empt a state law, the state law in question is assumed to be valid unless pre-emption is intended by the "clear and manifest purpose of Congress."<sup>19</sup> If there is any pre-emptive capability present, whether a state regulation is pre-empted or not depends primarily on the congressional intent as it is ascertained by the Court.<sup>20</sup>

Congressional purpose is not always easily determined, but it can be evidenced in several ways. A federal pattern of regulation may be so expansive as to give rise to an inference that Congress intended there to be no room left for states to act.<sup>21</sup> The federal interest may so dominate a field that enforcement of state law on the subject is precluded.<sup>22</sup> Or the end desired by the federal action and the kind of obligations imposed on the federal government may indicate a desire to pre-empt any similar state actions.<sup>23</sup>

There are other situations in which a state statute may fail even though Congress has not completely occupied the field. Where there is a valid exercise of congressional power and a state law or part of it

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14. Primarily the PWSA. *Supra*, note 12.

15. U.S. Const. art. 1, § 8, cl. 3.

16. This is required by 28 U.S.C. § 2284 (1976): A district court of three judges shall be convened when . . . an action is filed of any statewide legislative body.

17. Note, 10 VAND. J. TRANS. L. 315 (1977) and Note, 17 NAT. RES. J. 691 (1977).

18. *Ray v. Atlantic Richfield Co.*, 98 S.Ct. 988 (1978).

19. Court quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

20. Engdahl, *Pre-emptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973).

21. Court citing *Rice*, *supra* note 18.

22. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

23. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439 (1915).

actually conflicts with the federal law, the state law is void. Such a situation arises, for example, when compliance with both laws is a physical impossibility.<sup>24</sup> Another situation in which a state law will fail is where it frustrates the attainment of the "full purposes and objectives of Congress."<sup>25</sup> After laying down these principles, the Court proceeded to analyze the Tanker Law's three basic sections.

Part of the pilotage requirement provision of the Tanker Law, section 88.16.180, was in direct conflict with a federal law, namely, sections 215 and 364 of title 46. The Washington law required both enrolled and registered<sup>26</sup> oil tankers of over 50,000 DWT to take on a Washington licensed pilot when traveling the Sound. The two federal provisions had previously been held by the Court to give exclusive authority to the federal government to regulate pilots on enrolled vessels.<sup>27</sup> The Court sustained the district court's finding of invalidity as to the Tanker Law's requirement for enrolled tankers to have a Washington licensed pilot on board while within the Sound.

The Court, however, held that Washington is still free to require its own licensed pilots on those tankers engaged in foreign trade (registered). The federal law did not give the federal government the exclusive authority to regulate pilots on registered vessels. In fact, section 101(5) of the PWSA<sup>28</sup> and 46 U.S.C. § 215 provide for and recognize a state's right to require one of its licensed pilots on board a registered vessel within its jurisdiction.<sup>29</sup>

The next provision of the Tanker Law the Court examined was § 88.16.190(2), which deals with design and safety requirements for oil tankers. The federal government also legislated in this area by enacting Title II of the Ports and Waterways Safety Act. This law requires the Secretary of Transportation (Secretary)<sup>30</sup> to establish rules and regulations covering the "comprehensive minimum standards of design, construction, alteration, repair, maintenance and operation" of oil tankers as are necessary to protect life, property

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24. *Florida Lime and Avocado Growers Inc. v. Paul*, 373 U.S. 132 (1963).

25. *Hines v. Davidowitz*, *supra* note 22, at 67.

26. Enrolled vessels are those engaged only in domestic trade. Registered vessels are those involved in foreign trade.

27. Together these statutes make it clear that coastwise seagoing vessels (except under register) are to be under the control of the Coast Guard licensed pilots (§ 364) and that no state can impose its own licensing requirements in addition to the Coast Guards (§ 215). The case which the Court relied upon is *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912).

28. 33 U.S.C. § 1221(5) (1976).

29. Section 101(5) provides that the Secretary of Transportation is to require pilots on board when "a pilot is not otherwise required by state law to be on board . . ."

30. The Coast Guard is located in the Transportation Department and 49 C.F.R. § 1.46(n)(4) (1976) delegates authority to the commander of the Coast Guard to carry out the functions vested in the Secretary by the PWSA.

and the marine environment from harm.<sup>3 1</sup> The Secretary met this mandate by issuing regulations which govern design and equipment specifications of tank vessels.<sup>3 2</sup> To ensure compliance with the regulations, the Coast Guard inspects vessels and issues certificates to those which pass.<sup>3 3</sup>

The Court felt that the extent of the authority granted to the Secretary indicated "that Congress intended uniform national standards for the design and construction of tankers that would foreclose the imposition of different or more stringent state standards."<sup>3 4</sup> Prior cases<sup>3 5</sup> which held that "vessels must conform to 'reasonable, nondiscriminatory conservation and environmental protection measures . . . imposed by a state'" were distinguished.<sup>3 6</sup> In these cases, the federal law had a different scope, purpose, and/or intent than the state law. In the instant case, the federal and state statutes and regulations seek exactly the same ends: protection of the environment from possible oil spills. Since the state law attempts to exclude vessels which have been certified as safe by the Secretary, the Supremacy Clause requires the state statute to give way to the federal determination. Hence, this part of the Tanker Law was held invalid.

In discussing this issue, the Court also noted a legislative concern for arriving at uniform international design standards for tankers.<sup>3 7</sup> The congressional objective of achieving world-wide design specifications makes an even stronger case for overturning the Washington law. The Tanker Law, if enforced as originally passed, would hinder both a national and an international desire for uniformity in this area.<sup>3 8</sup>

The Washington law provided a means to avoid the design requirements of § 88.16.190(2). If a vessel employs a certain amount of tug escorts, then the design provisions do not apply.<sup>3 9</sup> This part of the Washington law was upheld by the Court.

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31. 46 U.S.C. § 391(a)(1), (3) (1976). A Senate amendment to the PWSA as proposed by the House which amended the Tank Vessel Act.

32. 46 C.F.R. 30-40 (1976).

33. 46 U.S.C. § 391(a)(6) (1976).

34. *Supra* note 17, at 163, 997.

35. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Kelley v. Washington*, 302 U.S. 1 (1937).

36. *Douglas v. Seacoast Product, Inc.*, *Id.* at 277.

37. *Supra* note 5. The Report expressed a desire for international solutions to the world-wide problem of marine pollution.

38. In fact, foreign nations expressed concern over the imposition of even national standards.

39. *Supra* note 8, at § 88.16.190(2)(e): . . . if the tanker is in ballast or is under the escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker . . . the design requirements are not applicable.

The Court viewed the tug escort provision as an operating rule which originates from the local conditions of the Sound. Such a measure is within the reach of the Secretary under Title I of the federal PWSA.<sup>40</sup> However, Title I which deals with tanker operating procedures, as opposed to Title II of the PWSA, does not require the issuance of regulations to carry out these procedures, but only authorizes the Secretary to do so. Since the Secretary is not required to issue regulations under Title I, his failure to do so should not be interpreted to mean that no regulation is desirable in the area. If he does not issue regulations or take some other action so as to indicate that the area is occupied by the federal government, the area should be open for state regulation. The Court stated that the Secretary had not taken any action in this area and, until he does, the Tanker Law tug escort provision is valid.<sup>41</sup>

Any oil tanker in excess of 125,000 DWT is prohibited from operating in Puget Sound by the Tanker Law.<sup>42</sup> The Court held this provision void after examining Title I of the federal PWSA.<sup>43</sup> In order to invalidate this section of the Tanker Law, the Court needed to find that the Secretary had acted in the area of size limitations for Puget Sound. The federal law, section 1221(3)(iii) of the PWSA, gives the Secretary the power to establish vessel size and speed limitations. The Secretary, through the local Coast Guard, enacted a navigation rule<sup>44</sup> affecting part of the Sound: the Rosario Strait. This rule imposes a size limitation on vessels passing through the Rosario Strait at any one time. The Court construed this navigation rule as an action by the Secretary in the area of size restrictions. Thus, the Washington law concerning limiting the size of oil tankers in the Sound was contrary to the federal law and had to give way.

The Court also thought the size limitation imposed by the Tanker Law could be viewed as a design requirement covered by Title II of the PWSA. Design requirements had been previously found by the Court to be completely covered by the federal law.<sup>45</sup> If the size limitation had been viewed in this fashion, it would have been held invalid.

Even if the Secretary had not acted in the area of size limitations

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40. 33 U.S.C. § 1221(3)(iii), (iv) (1976). The Secretary can establish vessel size and speed limitations and vessel operating conditions.

41. The Secretary is considering issuing regulations in this area.

42. § 88.16.190(1).

43. *Supra* note 18, at 1002.

44. The rule prohibits the passage of more than one 70,000 DWT vessel through Rosario Strait in any direction at any given time and the size restriction is reduced to 40,000 DWT in periods of bad weather.

45. *Supra* note 18, at 1000.

and the size requirement of the Tanker Law was thought to come under Title I of the PWSA, the Court stated it "would be reluctant to sustain the Tanker Law's absolute ban on tankers larger than 125,000 DWT."<sup>46</sup> The Court's interpreted the Secretary's failure to act in this area as being akin to "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute."<sup>47</sup> This interpretation views the federal statute as containing an implied savings clause. In other words, either the federal government should act in the area in question or there should be no regulation in the area.<sup>48</sup>

Justices Marshall, Brennan, and Rehnquist wanted to uphold the Tanker Law's size limitation. They did not feel that the Secretary, through the Coast Guard, considered the question of size restrictions on tankers within the Sound when they enacted the passage regulation concerning Rosario Strait. They viewed the Secretary's "navigation rule" as just that—a rule dealing with the particular hazards of Rosario Strait. The rule was not deemed to be a judgment as to size limitations for the entire Sound. Even if the rule was construed as dealing with size considerations for the entire Sound, the Washington Tanker Law ban on 125,000 DWT tankers was not shown to be inconsistent with the federal determination.

The minorities' view on the size restriction provision appears to be the preferable one. The majority's rationale seems to view the Rosario Strait passage rule too broadly. This rationale considers the Secretary's "navigation rule" as a judgment by the federal government that no size restrictions on tankers are appropriate for the entire Puget Sound. The Court should not construe federal laws or regulations more broadly than they are intended and, in effect, invalidate legitimate exercises of state power.

Justices Stevens and Powell agreed with the majority opinion except in regards to the tug escort requirement provision.<sup>49</sup> They felt that this provision was so entwined with the design requirement of the Tanker Law that it should be voided along with the latter provision. They viewed this provision as a special penalty on shippers and oil producers for non-compliance with the design and safety requirements of the Washington law. The invalidation of one, they reasoned, should result in the invalidation of the other.

The Ports and Waterways Safety Act was passed by the Congress with the express purpose of protecting the "environmental quality of

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46. *Supra* note 17, at 178, 1004.

47. Court quoting from *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).

48. For a good discussion of this concept, see Note, 12 STAN. L. REV. 208 (1959).

49. § 88.16.190(2)(e).



ports, waterfront areas, and the navigable waters of the U.S."<sup>50</sup> This law delegated broad powers to the Coast Guard. Title II of the federal statute declares:

[T]he carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States and the resources contained therein . . . [i]t is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable water of the United States comprehensive minimum standards of design, . . .<sup>51</sup>

Similarly Title I of the PWSA states:

In order to . . . protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or loss, the Secretary . . . may (1) establish, operate, and maintain vessel traffic services . . . (2) require vessels which operate in an area of a vessel traffic service or system to utilize or comply with that service or system, including the carrying or installation of electronic or other devices . . . (3) (iii) establish vessel size and speed limitations and vessel operating conditions . . .<sup>52</sup>

The Washington Tanker Law contains a similar intent and purpose as Title I and II of the federal law.

Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent water creates a great potential hazard to important natural resources of the state. . . . It is therefore the intent and purpose . . . of this 1975 act to decrease the likelihood of oil spills. . . .<sup>53</sup>

The Court's conclusions, save for the invalidation of the Tanker Law's size restriction, appear proper when viewed from strictly constitutional law principles. The federal and state laws express the same purpose: to protect the navigable waters and the resources within them. They both seek accomplishment of these goals by similar means. But the federal law was intended to and does cover a broad area of tanker regulation. It occupies the field as far as transportation of oil by tankers is concerned. Thus the state law, to the extent that it interferes with the federal law, is pre-empted.

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50. *Supra* note 5, at 7.

51. 46 U.S.C. § 391(a)(1) (1976).

52. 46 U.S.C. § 1221 (1976).

53. WASH. REV. CODE § 88.16.170 (1977).

## CONCLUSION

The Ports and Waterways Safety Act is aimed at protecting the water environment for all the states, territories and possessions of the United States, and Puerto Rico.<sup>54</sup> Diverse conditions exist in these various areas. The regulations concerning some of these conditions would be better left to local solutions, which more adequately accommodate the local diversity. The design requirements of vessels operating in the open, relatively calm waters of the Gulf of Mexico should be much different than those applied to vessels traveling through the potentially rough, ice-laden waters around Alaska or Puget Sound. If design requirements are to be uniform, then they should be sufficiently protective of the environment in all possible areas where tankers may operate. Some considerations, such as size of vessels, should not be nationally governed at all. The individual characteristics of the different ports around the world need to be considered. For instance, there is some dispute as to whether a large tanker of over 125,000 DWT could even make it through the Rosario Strait without hitting the bottom.<sup>55</sup>

In view of the considerable damage which a major oil spill would cause, even a slight amount of risk is unacceptable if that risk can be reduced.<sup>56</sup> If a major oil spill were to occur in an area such as Puget Sound, it would be many years before the area would be restored to its original condition.

The costs of better control are insignificant when compared to the potential harm. The entire process of finding oil, drilling, pumping, refining it and delivering it to the consumer is a long and involved process. The cost of sea transportation of oil is a very small percentage of the total cost of the final product to the consumer. Even if all of the design modifications advocated by the Tanker Law were installed on tankers, it is estimated that the increase in the cost of gasoline to the consumer would be several cents per gallon at the most.<sup>57</sup> This is a small price to pay for the added protection to the environment such modifications would provide.

The solution to the ocean oil spill problem necessarily needs to be

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54. 46 U.S.C. §1221 (1976).

55. The minimum water depth in the Rosario Strait is 60 feet and there is disagreement as to how much depth some large vessels need.

56. Many factors affect the biological impact of oil spills, such as dosage, oil type, oceanographic conditions, season, etc. See PETROLEUM IN THE MARINE ENVIRONMENT, NATIONAL ACADEMY OF SCIENCES (1973).

57. The cost of double-bottoms alone would add anywhere from four to ten percent to the cost of a new tanker. See Pedrick, *Tankship Design Regulation and Its Economic Effect on Oil Consumers*, 9 J. MAR. L. COMM. 377 (1978).

an international one. It serves little purpose to require American ships to be as safe as possible when ships from other countries are relatively unsafe. The majority of the tankers in the world are not American owned and licensed. The impact of strict regulation of American ships alone is not significant. The United Nations realizes this and in 1959 formed the Inter-Governmental Maritime Consultative Organization (IMCO) to deal with environmental matters on the oceans.<sup>5 8</sup>

IMCO's record, though, has been rather dismal to date, especially in the area of design and construction standards.<sup>5 9</sup> This organization has not been forthcoming with the needed stricter design standards for tankers. Congress considered IMCO's failure to act when it enacted the PWSA. There was much foreign opposition to unilaterally imposed design standards by the United States. The response to these objections was that the impact of the legislation would not be great since 85 percent of the world's oil tankers are foreign and the standards would only put American ships at an economic disadvantage if foreign ships were not governed by the proposed legislation also.<sup>6 0</sup> Congress did not feel it could wait until some international standards *might* be forthcoming, as effective action was thought to be necessary in 1972 when the PWSA was passed. Foreign interests were taken into account, however. The effective date of the regulations was deferred for foreign vessels to allow time for possible international solutions to the problems.

Necessary precautions are needed now. The longer acceptable solutions take to be actualized, the greater the chances are that a major spill will occur. As a writer in the 1920's said of Puget Sound: "Here is the beauty and stark grandeur of a North that has no harshness."<sup>6 1</sup> That beauty should not be destroyed by an oil spill.

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58. OIL ON THE PUGET SOUND, AN INTERDISCIPLINARY STUDY IN SYSTEMS ENGINEERING, U. WASH. PRESS (1972).

59. *Supra* note 5, at 23.

60. *Id.* at 22.

61. R. WALKINSHAW, ON PUGET SOUND 18 (1929).