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STATE OIL SPILL PREVENTION LAWS AND INTERTANKO: WHEN IS STATE LAW PREEMPTED?

Paul H. Avery*

I. INTRODUCTION

Seeking declaratory and injunctive relief, the International Association of Independent Tanker Owners (INTERTANKO), a trade association of tanker operators, brought suit in 1996 against Washington State and local enforcement officials who enforced Washington's Best Achievable Protection (BAP) Regulations. INTERTANKO challenged the constitutionality of the BAP Regulations by asserting that federal regulations and maritime law preempted its provisions: "Article VI of the Constitution provides that the laws of the United States shall be the supreme law of the land; ... State laws notwithstanding." INTERTANKO founded its preemption theory upon: (1) conflict preemption, whereby a State law is invalid if it stands as an obstacle to the accomplishment of the full objectives of Congress; (2) field preemption, whereby federal regulation of oil tankers dominates the entire subject; (3) express preemption, whereby the BAP Regulations are expressly forbidden by federal statutes some of which authorize the Coast Guard rather than States to act in this field; and (4) that the BAP Regulations violate the Commerce Clause.

In the spring of 2000, the Supreme Court handed down its ruling in United States v. Locke. Regarding a state's ability to regulate oil tanker traffic by utilizing provisions of the Oil Pollution Act of 1990 (OPA), the Court pronounced a number of holdings. Specifically, the Court examined Washington's BAP tanker regulations and found that some of the regulations are preempted; as to the balance of the regulations, the Court

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2. See id. at 1490; see U.S. CONST. art. VI.
remanded the case so that the validity of the BAP Regulations may be assessed in light of the considerable federal interest at stake. Each of the BAP Regulations will be discussed in this Comment.

Washington provides a prime example for other coastal states of the need for aggressive tanker regulation. It encompasses some of the country's most significant waterways and its rocky Pacific coast presents treacherous grounding points for any wayward tanker. Of premier importance to Washington's coastal environment is Puget Sound, a body of water spanning some 2,500 square miles which connects with the Pacific by way of the Strait of Juan de Fuca, a twelve-mile wide channel reaching sixty-five miles into the state's interior. The sound and strait are busily and continuously plied by water traffic that includes small fishing vessels, cargo ships, naval vessels, oil tankers, and barges destined for Washington or Canada. The size and quantity of oil transport vessels have increased dramatically in the last fifty years; oil tankers averaged 16,000 tons of carriage in the 1940s, while numerous tankers exceeded 175,000 tons of carriage in the 1970s. Of all the world's merchant vessels in 1998, tankers numbered 6,739. The profound increase in size and quantity of oil transport vessels has led Washington's environmentalists to seek comprehensive tanker regulation.

In addition to examining the Supreme Court's decision regarding Washington's BAP Regulations, this Comment will also review the earlier treatment of the BAP regulations and two other state plans to regulate oil tankers plying their waters, discuss admiralty law, and examine state utilization of OPA to regulate tanker vessels.

II. STATE TANKER VESSEL REGULATION PRIOR TO THE SUPREME COURT'S LATEST HOLDING

A. Washington State's BAP Standards

Following passage of OPA in 1990, Washington State legislators sought to prevent oil tanker spills by creating a new body of laws, namely the Best Achievable Protection (BAP) Regulations, concurrent with

6. See United States v. Locke, 120 S. Ct. at 1152.
7. See id. at 1141.
8. See id. at 1141; See also Askew v. American Waterways Operators, 411 U.S. 325, 335 (1972). The term "tons" refers to "deadweight tons" which is a way of measuring the cargo-carrying capacity of a ship.
9. See United States v. Locke, 120 S.Ct. at 1141.
creating a new agency to oversee their implementation. Washington’s BAP Regulations attempt to regulate oil tankers in state waters in a comprehensive and thorough way, extending specifically to: (1) event reporting; (2) operating procedures regarding crew watch practices, navigation, engineering safeguards, pre-arrival tests, inspections, and emergency procedures; (3) personnel policies that address crew training, alcohol and drug use detection, evaluations, work hours, English language proficiency, and record keeping; (4) vessel technology that includes minimum standards of employment of GPS and radar technology; and (5) advance notice of a vessel’s entry into state waters along with periodic safety reports while therein.

At trial, the District Court found BAP regulations were not preempted by federal law and dismissed INTERTANKO’s suit accordingly. On appeal in the Ninth Circuit, the United States intervened on INTERTANKO’s behalf to assert that the District Court had failed to consider federal law’s proper scope of authority in foreign affairs. The Court of Appeals found that: (1) OPA’s savings clause applies to the entire Act; (2) BAP Regulations are not implicitly or expressly preempted by OPA; (3) federal regulation of tankers preempts state regulation of design and construction only; (4) regulations imposing operational requirements are not subject to field preemption, but radar and emergency towing gear both are preempted; (5) Coast Guard regulations allegedly preempting BAP Regulations are beyond the Coast Guard’s congressional delegated authority; and (6) BAP Regulations do not unduly burden interstate commerce. The Ninth Circuit reasoned that Washington State could enforce its laws, except for the requirement that vessels install certain navigation and towing equipment. This preemption holding was virtually identical to that of Ray v. Atlantic Richfield Company (ARCO), where the Court preempted similar equipment requirements.

B. California’s Oil Spill Regulations

Analogous to Washington’s BAP Regulations, California passed laws requiring vessel liability for any environmental damage caused by oil

12. See id. at 1500.
14. See id. at 1060–69.
15. See id. at 1067.
spills. These new laws churned in the wake of two Pacific-coast environmental disasters involving tankers. The Harbors and Navigation Code, which provided strict liability for oil spills, was passed in California after the collision of two oil tankers near the Golden Gate Bridge dumped eight hundred thousand gallons of oil into San Francisco Bay. Likewise, following the Exxon Valdez fiasco in Alaska, California expanded the reach of these laws in the form of the Oil Spill Prevention and Response Act of 1990. Just as concern over increases in the size and number of oil tankers in Washington's Puget Sound gave rise to the BAP Regulations, the 14.6 billion gallons of crude oil annually shipped via tanker to California refineries has led to strict laws regulating oil transport. California requires that tankers use tugboat escorts, have oil spill contingency plans, and submit for inspection as to compliance with relevant federal laws. California followed the Court's decision in Ray v. ARCO by recognizing that matters involving vessel design and construction are under exclusive federal control, which includes the requirement that tanker vessels be double-hulled by the year 2010. Proclaiming that "it is in the best interest of the state to coordinate with agencies of the federal government, including the Coast Guard, to the greatest degree possible," California sought to expand the effectiveness of its legislation; through the wording of its statutes, California incorporated federal spill prevention regulations and thereby gained additional trained personnel to assist the Coast Guard in fulfilling its directives. Conversely, by instituting a minimum depth for anchorage in its waters, California has also enhanced existing federal regulations to render them more acceptable in terms of either preemption or maritime law. Other coastal states, including Maine, Massachusetts, and Florida, have followed the lead of California and Washington by enacting similar legislation, with Washington's BAP regulations being the most comprehensive example. Moreover, by being the most far-reaching standards, Washington's BAP Regulations have served as a lightning rod for drawing attention to the issue of state regulation of tanker vessels.

18. See id. at *2.
19. See id.
20. See id. at *2-3.
21. See id. at *3.
22. See id., citing CAL. GOV'T CODE §§ 8670.2(1), 8670.17, 8670.17.2, 8670.18, 8670.22, 8670.28-.31.
23. See United States v. Locke, 1998 U.S. Briefs LEXIS 1701, at *3-4. Local regulation of vessels within maritime law will be discussed later in this Comment.
C. Rhode Island's Oil Spill Pollution Prevention and Control Act (OSPPCA)

In 1996, Rhode Island instituted the Oil Spill Pollution Prevention and Control Act (OSPPCA), a statute that institutes a comprehensive approach to preventing oil spills from oil transport barges.\(^\text{24}\) The plan regulates the industry with regard to equipment, construction standards, and personnel, and establishes a safety committee to monitor the effectiveness of regulations.\(^\text{25}\) As OSPPCA's purpose is to protect the state's coastal environment from oil spills, the legislation requires barges either to be double-hulled in times of bad weather or have an extra tug serve as escort.\(^\text{26}\) Regardless of weather conditions, Rhode Island requires all barges to be double-hulled by 2001, years ahead of OPA's standard for oil tankers throughout the United States.\(^\text{27}\)

In addition to double-hull requirements, OSPPCA institutes personnel policies that require a crew to meet minimum standards of proficiency and proscribe the consumption of alcohol or illicit drugs while a crew member is on duty.\(^\text{28}\) Additionally, a barge laden with oil must be occupied by two crewmen at all times, whether underway or at anchor.\(^\text{29}\) Further in excess of OPA's requirements, OSPPCA requires tanker vessels to be equipped with radar, global positioning systems (GPS), a compass, two VHF radios, fire and flood detectors, and manually deployable anchoring mechanisms.\(^\text{30}\) California, Washington and Rhode Island have each passed legislation that regulates a wide variety of activities including tanker traffic on their navigable waters as well as tanker construction standards. The Supreme Court's \textit{INTERTANKO} holding clearly proclaims that state tanker regulations in conflict with federal requirements are unenforceable. Admiralty law and federal pollution statutes such as OPA do not preclude state action; on the contrary, they specifically reserve certain powers to the states. The nature of these reserved powers will be examined in the following section.


\(^{25}\) See id.

\(^{26}\) See id. at 365.

\(^{27}\) See id.

\(^{28}\) See id. at 366.

\(^{29}\) See id.

\(^{30}\) See id. at 367.
OPA, in part, nullifies a tanker vessel owner's ability to limit his liability. The historic development of a ship owner's limitation of liability, as granted by the Limitation of Liability Act of 1851 (Act of 1851), is key to understanding why OPA's authors felt necessary to eliminate a ship owner's statutory haven after an oil spill. Congress advocated the Act of 1851 as an attempt to increase investment in the American Merchant Marines by enabling vessel owners to limit their liability for harm caused by the vessel to the amount of their investment in the vessel or, if disaster strikes, to the post-catastrophic value of the vessel—a figure which is often zero. The implications of this are far-reaching and run counter to much traditional tort liability law. If, for instance, one vessel rams another and causes $700,000 damage, the liability of the owner of the ship at fault will not exceed the after-accident appraised value of his vessel. An amendment to the Act of 1851 requires the vessel owner to establish a fund to cover the costs of personal injuries arising from accidents. Congress currently requires vessel owners to contribute $420 per-vessel-dead-weight ton to a fund from which claimants can receive recompense for injuries.

The Act of 1851 is quite comprehensive; it is nearly always applicable in maritime disasters, provided the vessel owner was not privy to the cause of the accident. As nearly every vessel today is corporate owned and under the command of someone other than the owner, the Act of 1851 is broadly applicable. Their immense size and expense—and consequent potential for liability—has given rise to the situation that tanker vessels in particular are owned exclusively by major corporations who, in turn, shield themselves from liability. Congress has recently reexamined the continued relevance of the Act of 1851 in light of the fact that most vessels today, even if owned by American corporations, are not flagged in the United States and therefore are technically not part of an "American" Merchant Marine. The potential for even a single wayward tanker to cause immense and expensive damage has prompted Congress to deny the Act's applicability in certain accidents involving oil spillage. This Comment will later

33. See id. § 183.
34. See id. § 183(b).
35. See id. § 181.
examine the statutory removal of the Act of 1851 as Congress permitted in OPA.

**B. The Robins Drydock Rule**

The *Robins Dry Dock* rule has come to mean that no cause of action arises against a vessel for purely economic harm. In *Robins Dry Dock v. Flint*, the Court held that a plaintiff who had time-chartered a vessel (leased a vessel for a contracted period of time) had no cause of action for loss of use of his chartered vessel that arose from ship repairer negligence.\(^{36}\) *Robins Dry Dock* holds that a wayward vessel must cause actual physical damage for a third-party damage claim to proceed.\(^{37}\) Circuit courts have broadly applied *Robins Dry Dock* to maritime situations. In 1982, for example, when a vessel grounded and backed-up river traffic along the lower Mississippi, many vessels that were delayed from departing Louisiana sued the grounded vessel for monetary damages. The Fifth Circuit, following *Robins Dry Dock*, held that the stranded vessel was immune from charges because it caused no physical harm to the vessels that brought suit.\(^{38}\)

In a situation more akin to an oil spill, the Fifth Circuit again failed to find a negligent vessel owner liable. Following the common law rule in *Robins Dry Dock*, the Court dismissed a suit by Louisville & Nashville Railroad Company against a wayward vessel that had rammed a train bridge and caused train traffic rerouting for many days. The Fifth Circuit held the rerouting of trains was a purely economic loss for which the vessel could not be held liable.\(^{39}\) Marking the absence of a statute making vessel owners liable for economic damage, these cases demonstrate the power of the *Robins Dry Dock* rule to limit or deny the liability of vessel owners. Moreover, absent a limiting statute, the *Robins Dry Dock* rule would exonerate an oil tanker owner of any liability in suits brought, for example, by tourist industries such as beach hotel operators that suffer economic harm when an oil spill disrupts tourism.

\(^{37.}\) See id.
\(^{38.}\) See *Akron Corp v. M/T Cantigny*, 706 F.2d 151, 152–53 (5th Cir. 1983).
\(^{39.}\) See *Louisville & Nashville Railroad Co. v. M/V Bayou Lacombe*, 597 F.2d 469, 474 (5th Cir. 1979).
C. Seaworthiness

Maritime tradition holds that an owner must warrant that the vessel he sends to sea is fit for its intended service; that the vessel is seaworthy. However, the owner is not required to send an accident-proof vessel to sea. Among other things, the duty of seaworthiness requires a vessel owner to provide a competent crew. A crew would be found lacking in competence when, for example, a seaman uses the wrong gear when the proper gear is available. Many provisions of this traditional common law warranty, including minimum hull requirements for tankers and liability for certain negligent acts by crewmen, are now codified in OPA.

IV. Admiralty Jurisdiction and Maritime Torts: The Connection With Maritime Activity Test

When an airliner crashed on Lake Erie, the airline company sought a hearing in an admiralty court (where there is no jury) to eliminate a sympathetic jury assessing a large liability claim. However, lack of proper subject matter jurisdiction precluded the admiralty court from hearing the case. After appeal, the Supreme Court agreed, holding that the admiralty court had no jurisdiction in this matter because there was no connection between the plane crash and a traditional maritime activity. To alter the situation such that admiralty jurisdiction would apply, the Court stated that a downed airliner would have to be destined for an island or on a transoceanic flight in order for there to be a sufficient nexus with traditional maritime activity and admiralty cognizance.

In Jerome B. Grubart v. Great Lakes Dredge & Dock Co., the Supreme Court again determined the extent of admiralty jurisdiction in 1995. The full implications of the Act of 1851 utilized in tandem with the Extension of Admiralty Act became obvious when a vessel caused a major flood in downtown Chicago. In spite of there being water involved in this tort, Chicago argued that this was still a “dry-land” tort, which had nonetheless

41. See id.
42. See Jo D. Lucas, Admiralty: Cases and Materials 909 (Foundation Press 1996).
44. See id. at 251.
45. See id. at 270–273.
drifted into the admiralty realm. The *Grubart* case began in 1993 after a dredging company damaged an underwater tunnel that spanned many basements in Chicago's downtown business district. When the tunnel burst and flooded much of the below ground office and utility space in Chicago, the dredging company limited its liability to the value of the barge that it had used in the dredging. Needless to say, the suits against the dredging company were far in excess of the value of a barge, but, according to admiralty law, this was the extent of the company's liability for the damage. Without admiralty jurisdiction, the dredge company could not limit its liability. Chicago's argument notwithstanding, the Court found the necessary nexus between traditional maritime activity (dredging a harbor channel) and the tort for there to be admiralty cognizance in this dispute, and therefore, Chicago and the other claimants could not recover more than the value of the dredge company's barge. In light of the Court's holding in *Grubart*, the *Exxon Valdez* catastrophe provides a quintessential maritime-environmental disaster that exemplifies the need for statutory prohibition of a ship owner's ability to limit liability.

V. CONGRESSIONAL MANAGEMENT OF MARINE POLLUTION

A. *The Clean Water Act (CWA)*

Since 1972, Congress has relied upon the Clean Water Act (CWA) as its primary mechanism to set oil pollution control standards and to establish liability for oil spills. Furthermore, the CWA establishes regulations for oil spill removal and recompense to those who are harmed. Although OPA replaced much of the CWA's scheme for establishing responsibility for clean-up costs, the CWA, nonetheless, continues to provide the framework with which the federal government attempts to prevent oil spills.

Section 311(b)(1) of the CWA mandates that "it is the policy of the United States that there should be no discharges of oil or hazardous materials into or upon the navigable waters of the United States." The statute further orders a complete prohibition on the release of any

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47. See id. at 540.
48. See id. at 529–530.
49. See id. at 547.
51. See id. § 1321.
52. See DONNA CHRISTIE, COASTAL AND OCEAN MANAGEMENT LAW IN A NUTSHELL 250 (1994).
dangerous substance in quantities that may be harmful. The CWA’s prohibition against harmful discharges applies to: (1) the navigable waters of the United States; (2) the 200 mile Exclusive Economic Zone; and (3) the waters of the Outer Continental Shelf. Navigable waters are those that are affected by the ebb and flow of tides or waters involved in interstate commerce.

In both admiralty law and the CWA, the term “navigable” is legally broad and can include such seemingly “unnavigable” locales as a tidal marsh. The CWA defines oil as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.” The CWA further declares to be hazardous any substance that, when introduced to navigable water, poses a threat to public health and safety. Harmful quantities of such materials are established if (1) the spill violates applicable water quality standards; or (2) it causes a film or sheen upon the surface or causes sludge or emulsion to be deposited beneath the water’s surface.

Civil enforcement of the CWA through administrative orders and injunctive relief remains available to address an imminent threat to public health, including that posed by an oil spill. Despite these regulations, however, additional oil spills demonstrated to Congress the need for more aggressive preventative and punitive regulations.

B. The Ports and Waterways Safety Act (PWSA)

The Ports and Waterways Safety Act (PWSA) and the Port and Tanker Safety Act of 1978 collectively attempt to prevent oil spills by addressing issues untouched by the CWA. The Acts call for improved standards in ship design, construction, and operation procedure. Additionally, the PWSA grants authority to the Coast Guard to regulate and monitor tanker traffic. The PWSA grants the Coast Guard broad powers to control the movement of tankers operating upon the nation’s navigable

54. See id. § 1321(b)(3) & (4).
55. See id. § 1321(b)(1).
58. See id § 1321(b).
59. See 40 C.F.R. § 110.3(b) (2000).
60. See CHRISTIE, supra note 52, at 254.
64. See 33 C.F.R. § 161.
waters. These powers include a vessel traffic control system to effect a vessel routing plan, vessel size restrictions in narrow or shallow channels, as well as speed limits. The Coast Guard may also deny access into a United States port to any vessels with a history of accidents or spills, as well as any vessel that disregards Coast Guard safety standards, such as sailing with an inadequately trained crew. The PWSA advances tanker safety by requiring the Coast Guard to regulate vessel design, repair, and operation procedures. These regulations include standards for a ship's maneuvering ability, stopping distance, as well as recommendations that will lessen the likelihood of a grounding and collision.

C. The Oil Pollution Act (OPA) of 1990

In addition to the CWA and the PWSA, Congress has enacted other water pollution control measures. As early as 1924, the federal government promulgated its first oil pollution control act. Such efforts failed to keep up with the advance of ship technology—when Congress enacted these laws, tankers were but a fraction of the size of a modern supertanker. During the 1960s, accidents involving supertankers alarmed environmentalists who soon persuaded Congress to consider bolstering federal environmental protection efforts through modification of existing statutes and stricter regulation of tanker vessels. The disastrous Torrey Canyon accident off the coast of Britain in 1967 hastened such efforts, in great part because the Act of 1851 permitted the owners of the Torrey Canyon to limit their liability to the value of the vessel post-disaster, which in this case was nearly nothing. Moreover, the CWA and the PWSA both left many elements of tanker regulation unaddressed.

66. See id. § 1223(b).
67. See id. § 1228(a).
68. See id. § 1223; See also JOSEPH KALO et al., COASTAL AND OCEAN LAW, CASES AND MATERIALS 688 (3rd ed. 1999).
69. See KALO, supra note 68, at 688.
70. See id.
73. See id. at 331; See Limitation of Shipowner’s Liability Act, 46 U.S.C. App. § 183 (1994).
The grounding of the *Exxon Valdez* and the short-comings of existing statutes precipitated congressional discussion that led to the passage of OPA in 1990. In the preceding year, Captain Hazelwood of the *Exxon Valdez*, probably drunk and otherwise not following procedure, foundered his vessel upon Bligh Reef in Prince William Sound, Alaska. The 987-foot vessel dumped eleven million gallons of oil that killed innumerable marine animals.\(^{74}\) Damage to the Alaskan fisheries alone has grown to hundreds of millions of dollars.\(^{75}\) This single disaster generated a spill equal to twenty percent of all of the spills in United States waters between 1980 and 1986.\(^{76}\)

When totaled, a conservative estimate places tanker spills collectively at over eighty million gallons of oil in the United States alone between 1980 and 1989.\(^{77}\) Exacerbating the *Exxon Valdez* spill was a woeful lack of preparedness for such an event. Before adequate measures could be taken to control the advancing spill, an oil slick covered 1000 square miles.\(^{78}\) After a $2 billion campaign that enlisted 11,000 workers, many environmentalists assert that Exxon’s oil is still present in dangerous quantities along many of Alaska’s beaches.\(^{79}\) Within weeks of the *Exxon Valdez* catastrophe, three more large oil spills occurred in United States waters, adding further impetus for Congress to quickly enact OPA.\(^{80}\)

OPA establishes strict liability and creates a cause of action for oil removal costs and damages.\(^{81}\) Additionally, Title I of OPA grants states a savings clause that permits them to impose additional requirements with respect to the discharge of oil.\(^{82}\) Such additional requirements can include more harsh monetary penalties for spills that occur where a responsible party has no defense.\(^{83}\) Responsible parties can include an owner of a vessel, operators and demise charterers (those who lease a vessel for a specified period of time), terminal and pipeline owners, and licensees of deep water ports.\(^{84}\) OPA requires vessels to have evidence of financial responsibility adequate to cover liability that arises under the Act.\(^{85}\)

\(^{74}\) See Millard, *supra* note 72, at 340–41.
\(^{75}\) See *id.* at 346.
\(^{76}\) See *id.* at 334.
\(^{77}\) See *id.*
\(^{78}\) See *id.* at 345.
\(^{79}\) See *id.*
\(^{80}\) See Harrington, *supra* note 71, at 7.
\(^{82}\) See *id.* § 2718.
\(^{83}\) See *id.* § 2702–04.
\(^{84}\) See *id.* § 2701(32).
\(^{85}\) See *id.* § 2716(a)(2).
Limitation of liability is removed in many circumstances. For example, limitation will not apply if a vessel causes a spill through gross negligence, the violation of a federal safety or operating regulation by a responsible party acting pursuant to a contractual relationship, or for willful misconduct.\textsuperscript{86} Also, limitation will not apply if the responsible party fails to report the incident or does not cooperate in the cleanup process.\textsuperscript{87} Congress explicitly negated the Act of 1851 when it drafted these provisions into OPA.\textsuperscript{88} As we have seen, the Act of 1851 affords a vessel owner who is not privy to the harm his vessel has caused, the ability to limit his liability to the value of his vessel, and thereby shields him from claims in excess of this investment.\textsuperscript{89} Rescinding this protection is intended to increase tanker owner vigilance of both crew and ship.

A liable party’s defenses (and ability to limit liability) under OPA are few and include only: (1) an act of God; (2) an act of war; or (3) when an act or omission of a third party, other than an employee or agent of the responsible party, where the responsible party can establish that he (A) exercised due care with respect to the oil spill concerned and took into consideration the characteristics of the oil spill in light of all relevant facts and circumstances, and (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts.\textsuperscript{90} OPA permits indemnification agreements between parties, but these agreements are only effective between the parties involved, not the public.\textsuperscript{91}

OPA penalties are severe. Vessels greater than 3000 gross tons begin with a fine of $1200 per ton up to $10 million; vessels less than 3000 gross tons must pay $600 per ton with a limit of $2 million.\textsuperscript{92} Money collected from these fines goes into a government trust fund.\textsuperscript{93} Money available from the fund is limited to $1 billion per incident and $500 million for damage to natural resources.\textsuperscript{94} Furthermore, the total damages assessed from an offending vessel includes natural resource damages which consists of the cost of restoring, rehabilitating, and replacing the damaged resource as well as the reasonable cost of assessing those damages.\textsuperscript{95} OPA also seeks to

\textsuperscript{86} See id. § 2704(c)(1).
\textsuperscript{87} See id. § 2704(c)(2).
\textsuperscript{88} See id. § 2718(a).
\textsuperscript{90} See 33 U.S.C. § 2703.
\textsuperscript{91} See id. § 2710.
\textsuperscript{92} See id. § 2704.
\textsuperscript{93} See id. § 2712.
\textsuperscript{94} See Millard, supra note 72, at 363.
\textsuperscript{95} See 33 U.S.C. § 2706(d)(1).
prevent oil spills through measures that require new licensing procedures for tanker captains and that tankers be double-hulled by the year 2016. 96

VI. IMPLEMENTING OPA WITHIN MARITIME LAW: APPLYING STATE LAW WITHIN ADMIRALTY LAW

The heart of the controversy between INTERTANKO and Washington is whether OPA's savings clause should be applied to the whole of OPA or to the portion in which the savings clause is directly written. In Section 2718 (Title I), OPA preserves to state authorities the ability to impose additional requirements and penalties with respect to the discharge of oil within that state. 97 In this litigation, Washington relied upon OPA's Title I savings clause to assert that the BAP Regulations are not preempted from the field of oil spill prevention and removal by the provisions found in Title IV of OPA. 98 INTERTANKO countered this argument by contending that OPA does not permit states to possess regulatory authority beyond the elements listed in Title I (oil pollution liability and compensation). 99 INTERTANKO contended that because OPA's savings clause is not found in the legislation's preamble, it only applies to Title I where it is located, and therefore, the BAP Regulations overreach as they implicate pollution prevention rather than pollution compensation. 100 Although OPA does waive a vessel owner's right to limitation of liability, the Act later states that "except as otherwise provided . . . this chapter does not affect admiralty or maritime law." 101 The apparent conflict between broadly applying OPA's state savings clause and limiting OPA's impact upon general maritime law presents the dilemma on which INTERTANKO centers.

Implementation of OPA's state savings clause has proven to be controversial because the U.S. Constitution and the Judiciary Act of 1789 require that, in most instances, admiralty jurisdiction be reserved to federal district courts where maritime law application will remain uniform. An important line of Supreme Court cases following this principle of uniformity disallows the incorporation of state law into maritime law. In Southern Pacific v. Jensen, the Court forbade New York's attempt to thrust its

96. See Millard, supra note 72, at 366.
99. See id. at 1491–92
workman's compensation scheme into the maritime realm. In *Kossick v. United Fruit Company*, the Court held that New York's contract fraud statute did not negate admiralty law's acceptance of an oral agreement between a seaman and his captain. Likewise, in *Knickerbocker Ice Company v. Stewart*, the Court found that Congress could not require that state law be accepted into admiralty law. Uniformity of maritime law is at the heart of *Jensen* and its progeny.

VII. THE SUPREME COURT'S INTERTANKO ANALYSIS

A. Federal Preemption and Washington State's Best Achievable Protection (BAP)

To reach its conclusions in *Locke*, the Court relied upon the PWSA, OPA, maritime law, and common law, including *Askew v. American Waterways Operators*. In *Askew*, the Court permitted Florida to recover clean-up costs by imposing strict liability for all oil-spill damage done to the state and private citizens while ships are either inbound or leaving Florida oil facilities. The Court reasoned that Florida's legislation did not invade an area preempted by federal maritime law and that Florida's police powers afforded its Legislature the authority to hold an oil-spiller liable for harm he creates. Florida's action in *Askew*—although it predates OPA—mimics OPA's Title I more closely than it does OPA's Title IV vessel regulation. Therefore, Florida's oil spill liability statute provided the Court guidance in determining what provisions a state may include in a spill prevention statute.

On appeal to the Supreme Court, INTERTANKO argued that a narrow reading of OPA yields a far different result than that reached by the Ninth Circuit. The Court agreed with INTERTANKO on this point, finding that, while OPA does clearly empower states to act in the field of oil spill liability, Congress did not intend to establish comprehensive state...
regulation of tankers.\textsuperscript{107} The Court reasoned that the preemptive power of OPA did not reach into other comprehensive federal regulation of tankers, including the PWSA.\textsuperscript{108}

Justice Kennedy began the Court's analysis in \textit{INTERTANKO} by stating that "Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established."\textsuperscript{109} States have from time to time challenged the sole authority of Congress to regulate maritime issues, and while the Court has permitted some regulations promulgated by the states, the Constitution, nonetheless, requires that maritime laws be uniform.\textsuperscript{110} The Court has been reluctant, therefore, to approve individual port regulation, except where particular hazards necessitate a vessel to adhere to local regulation. Maritime law permits individual state action when vessel safety and public health are paramount.\textsuperscript{111}

Police powers enable a state to regulate maritime activity within its territorial waters. A situation exemplifying state police power is found in \textit{Kelly v. Washington} where, in 1937, Washington enacted legislation that required safety inspections of all tugboats used within its waters. The tug owners objected to these inspections because their vessels regularly undertook interstate voyages that placed them beyond Washington's jurisdiction.\textsuperscript{112} The Supreme Court examined whether Washington's inspection program conflicted with federal law and it found that "in the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with federal provisions."\textsuperscript{113} Washington, therefore, could require safety inspections for vessels plying its waters if such inspections did not interfere with federal safety inspections. The BAP Regulations, however, test the reach of authority the Court permitted to Washington under \textit{Kelly v. Washington}.

\textsuperscript{108} \textit{See} id.
\textsuperscript{109} \textit{Id.} at 1143.
\textsuperscript{110} \textit{See} U.S. Const., art. III., § 2, cl. 1.
\textsuperscript{111} \textit{See} Cooley v. Board of Wardens, 53 U.S. 299, 320 (1851).
\textsuperscript{113} \textit{Id.} at 13.
In 1978, Washington had tried to exercise police powers to influence the standards a vessel must meet in order to sail in Washington waters. In this instance, Washington required that tankers be double-hulled and twin-screwed. Here the Court found that, unlike tugboat safety inspections, vessel design and construction were beyond state regulation. The Court did, however, allow Washington to require tug escort for tankers within specified state locales. Washington’s escort provision survived Court scrutiny because it was consistent with Cooley v. Board of Wardens, a nineteenth century case where the Court determined that individual states could best manage locally inherent dangers by mandating when a vessel should employ a local harbor pilot. In Locke, Justice Kennedy addressed the issue of police power and local regulation, stating that “[t]he state laws now in question bear upon national and international maritime commerce, and in this area, there is no beginning assumption that concurrent regulation by the state is a valid exercise of its police powers.” The Court found Washington’s ascertainment of police powers unpersuasive, proclaiming that a state’s power to regulate tankers must be of very limited extraterritorial effect and that Washington could not require a tanker to modify its conduct beyond Puget Sound.

Justice Kennedy’s decision left little room for state direction of tanker activities beyond a state port. As written, therefore, the BAP Regulations contradict United States treaties, including the 1974 International Convention for the Safety of Life at Sea, the 1973 International Convention for Prevention of Pollution from Ships, and the 1978 International Convention of Standards of Training, Certification, and Watchkeeping for Seafarers. The Court did not reach the question of whether the BAP Regu-
tions are explicitly invalid because of international treaty contradiction, but rather, the Court relied upon federal preemption to strike down the examined elements of Washington’s legislation.\textsuperscript{123}

B. The Supreme Court’s Analysis of BAP Provisions

The BAP Regulations affect sixteen aspects of tanker operations.\textsuperscript{124} Of these, the Court of Appeals struck down only number fifteen, a provision that deals with technology requirements as being impermissible under \textit{Ray v. ARCO}.\textsuperscript{125} The Supreme Court agreed with the Court of Appeals regarding this provision, but overturned and remanded the rest of the lower court’s findings.\textsuperscript{126} Each of the BAP’s sixteen provisions will now be examined in light of the Court’s findings.

The BAP Regulations’ first provision, event reporting, requires that a tanker report collisions and near-miss incidents that have occurred any time in the vessel’s operation during the past five years, including incidents that occurred in Puget Sound.\textsuperscript{127} The Court struck down this provision by asserting that “Congress intended that the Coast Guard regulations be the sole source of a vessel’s reporting obligations with respect to the matters covered by the challenged state statute.”\textsuperscript{128} The Coast Guard, therefore “shall prescribe regulations on the marine casualties to be reported and the manner of reporting.”\textsuperscript{129} Washington’s dual reporting mechanism is invalid because the state’s requirement burdens a vessel in terms of cost and risk of innocent noncompliance.\textsuperscript{130} Additionally, the Court found that this BAP Regulation “affects a vessel operator’s out-of-state obligations and conduct, where a State’s jurisdiction and authority are most in doubt.”\textsuperscript{131} One could argue that event reporting presents no undue burden upon commerce; it

\textsuperscript{123} See United States v. Locke, 120 S.Ct. at 1145.
\textsuperscript{124} See Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); see INTERTANKO v. Locke, 148 F.3d 1053, 1057–58 (9th Cir. 1998).
\textsuperscript{125} See id. at 1066–67.
\textsuperscript{126} See United States v. Locke, 120 S.Ct. at 1135.
\textsuperscript{127} See WASH. ADMIN. CODE § 317-21-130 (1999).
\textsuperscript{128} United States v. Locke, 120 S.Ct. at 1151.
\textsuperscript{129} Id. at 1151-52 (citing 46 U.S.C. § 6101).
\textsuperscript{130} Id., 120 S.Ct. at 1152 (citing The Roanoke, 189 U.S. 185, 195 (1903)).
\textsuperscript{131} Id.
merely necessitates conveyance to port authorities specific information held in a ship's log. The Court, however, found otherwise.

The second BAP Regulation is more complicated and includes two elements.\textsuperscript{132} The first requires that tankers employ specific watch practices, namely that two licensed deck officers, a helmsman and a lookout be on duty while either navigating in state waters or while at anchor. The second portion requires that bridge management systems adhere to the "standard practice throughout the operator's fleet."\textsuperscript{133} The Court found that the general watch requirement was not tied to "the particularities of the Puget Sound; it applies throughout Washington's waters and at all times. It is a general operating requirement and is pre-empted as an attempt to regulate a tanker's 'operation' and 'manning' under 33 U.S.C. § 3703(a)."\textsuperscript{134} The Court left Washington the option to rewrite this statute so that it only encompasses vessels navigating Puget Sound.\textsuperscript{135} It is somewhat surprising that the Court struck down this provision because it merely reiterates what is found in federal regulations, namely that a foreign country have safety standards for vessels that are at least the equivalent to that of the United States.\textsuperscript{136} If Washington requires a ship to maintain standards that are already required by United States laws, then Washington has neither added to, nor disturbed current federal regulation.

The BAP Regulations' third section states that crews navigating a tanker in state waters should record the vessel's position every fifteen minutes, write a comprehensive voyage plan before entering Washington waters, and frequently take compass bearings.\textsuperscript{137} Although the Court remanded this issue to the lower court, it would seem likely that this BAP provision is preempted, as was provision one, because it infringes upon Coast Guard vessel management. BAP Regulations' third section does present the specter of preemption because under the Ports and Waterways Safety Act, Congress granted vessel routing authority solely to the Coast Guard.\textsuperscript{138} If the lower court determines that such position reporting is too

\textsuperscript{132} See WASH. ADMIN. CODE § 317-21-200 (1999).
\textsuperscript{133} Id.
\textsuperscript{134} United States v. Locke, 120 S.Ct. at 1179.
\textsuperscript{135} See id. at 1143.
\textsuperscript{137} See WASH. ADMIN. CODE § 317-21-205 (1999).
burdensome on a crew, this task could be effected by the local pilot assistant while stationed on board.

The Court remanded the fourth section of the BAP Regulations, one that requires a vessel to employ specified engineering practices. If these practices are consistent with Huron Portland Cement v. City of Detroit, then state police powers are properly employed to regulate vessel activity. Huron should not be too broadly applied, however. Detroit’s smoke abatement policy addressed only active polluting, it did not require a vessel to alter its engines or modify the crew’s engine maintenance procedure—both of which were already federally approved. Huron only forbade the operation of a non-compliant engine along Detroit’s water-front.

The Court also remanded the fifth section of BAP Regulations, which involves pre-arrival engine tests and inspections. This provision does not unduly burden the uniformity of maritime commerce, it merely dictates specific inspections of existing equipment. If these inspections are not being currently followed by a particular vessel, Huron’s police powers will likely apply when such inspections are necessary for public safety.

Remanded section six of the BAP Regulations covers emergency procedures and is probably preempted because requiring written crew assignments infringes directly upon federal regulation, including when emergency drills are required. Also, BAP’s requirement that crew members be tested for drug and alcohol abuse is a subject covered by existing federal law.

Washington’s statute dictates in section seven that a vessel is forbidden from altering its plotting records if such records detail a collision that occurred in state waters. This section was remanded and the lower court will likely find that it is covered by existing Coast Guard authority. Sections eight through thirteen all involve personnel requisites that expand

140. See Huron Portland Cement v. City of Detroit, 361 U.S. 806 (allowing Detroit’s smoke abatement policy to supersede federal certification of a steam engine).
141. See id.
143. See id.
144. See id. § 317-21-220 (1999).
147 See id. § 317-21-225 (1999).
extensive federal regulation of crews. The Court specifically found that sections eight and twelve are preempted and it is likely that the lower court will strike down the rest of these remanded provisions as being preempted.

Section fourteen's requirement that technological improvements be incorporated infringes upon federal vessel requirements and the Court's finding in Ray that vessel design is beyond state regulation. It is likely therefore that the lower court will deny Washington application of this provision. Section fifteen has already been discussed as being struck down by the Court of Appeals. Section fifteen provided that tankers be equipped with special navigation equipment in violation of the Court's holding in Ray that states can not regulate tanker design. The BAP's final section, number sixteen, requires that a vessel provide advance notice of its arrival. This provision seems to be within Cooley's reach, in that advance notice will grant local authorities time to allocate a pilot to the arriving vessel.

VIII. CONCLUSION

The Supreme Court's decision in INTERTANKO has left little room for individual state tanker regulation. By relying primarily upon the PWSA, the Court has denied the states power to influence tanker design and severely limited local vessel traffic control. States are also forbidden the ability to require tanker record keeping that could alert local authorities that a "problem" vessel has arrived. Instead, the Supreme Court has found that the PWSA grants the Coast Guard comprehensive management authority over vessel traffic that is exclusive of state involvement unless such involvement is in accord with either Cooley or Huron. Moreover, the

Court's narrow reading of OPA's savings clause precludes state regulation of tankers beyond establishing liability for oil spills.

OPA has greatly advanced a state's ability to seek claims against a vessel for damages resulting from a spill by removing the Act of 1851, but this is where the Court has drawn the line. Aggressive tanker regulation that is not in accord with federal requirements will not stand. It is therefore unlikely that Rhode Island's tanker barge regulations will remain effective, particularly those that affect barge design. OPA has enabled states to regulate liability for spills beyond federal standards, but the Court has held that this is the limit that OPA affords a state to reach. Beyond OPA's scope, state regulation, such as that in California, Rhode Island, Washington and elsewhere, is restricted by federal statute and maritime law.

The Court has made clear its determination to keep maritime law and the regulation of vessels under federal control as much as possible, save in situations that are particular to a port and require individual regulation. The Court seems to have left Washington the option of relying upon Cooley to regulate tanker activity that is particular to Puget Sound. It is equally clear that Washington can not pass blanket regulations that continually affect tankers throughout all state waterways. The Court's message is clear: state regulation of ships must be limited to obviating local dangers concealed within a specific port. State police powers can accomplish this end. INTERTANKO plainly asserts that the Court will not tolerate any disturbance of federal maritime law by over-reaching state regulations that affect different ports in an identical manner. Perhaps parts of the BAP Regulations will reappear as the Washington legislature redrafts it in accord with the Court's directions—we will have to wait to see.