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# STATE INCENTIVE BASED OIL TANKER REGULATION: AN ALTERNATIVE TO TRADITIONAL COMMAND- AND-CONTROL REGULATION

Mark T. Peterson\*

## INTRODUCTION

Major oil spills from tankers often result in severe localized damage. After the *Exxon Valdez* grounded on Bligh Reef in Prince William Sound, Alaska, spilling approximately eleven million gallons of oil,<sup>1</sup> the federal government passed the Oil Pollution Act of 1990 (OPA),<sup>2</sup> establishing a federal scheme of oil spill prevention, liability, contingency planning, and

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1. The *Exxon Valdez* spill is the largest oil spill in United States waters. S. REP. No. 101-94, at 2 (1990), reprinted in 1990 U.S.C.A.N. 722, 723. The *Exxon Valdez* spill is only the thirty-eighth largest globally. Charles Boisseau, *Tanker Owners Blast Lax Safety Standards / Report Urges New Management System*, HOUS. CHRON., Oct. 4, 1996, (Business), available in 1996 WL 11568203. The ten largest tanker oil spills, in descending order, (ship name, location, year, reason, millions of gallons spilled) are: *Atlantic Empress*, off Trinidad & Tobago, 1979, collision, 88; *Castillo de Belver*, Cape Town, 1983, fire, 74; *Amoco Cadiz*, Brittany, France, 1978, grounding, 66; *Torrey Canyon*, Land's End, England, 1967, grounding, 35; *Sea Star*, Gulf of Oman, 1972, collision, 34; *Urquiola*, La Coruna, Spain, 1976, grounding, 30; *Hawaiian Patriot*, Northern Pacific, 1977, fire, 29; *Braer*, Shetland Islands, 1993, grounding, 26; *Sea Empress*, Milford Haven, Wales, 1996, grounding, 20 (estimate); *Othello*, Tralhavet Bay, Sweden, 1970, collision, 18. Katherine Culbertson, *Though Not Directly Responsible, Oil Industry Saddled With Blame For Latest Big Spill. (Sea Empress off Milford Haven, Wales)*, 46(65) OIL DAILY, April 8, 1996, available in 1996 WL 8318351 (citing the WORLD ALMANAC). The largest man-created oil spill was not a result of tankers, but an oil well blow out. The *IXTOC I* offshore oil well blowout into the Bay of Campeche, Mexico released an estimated 150 million gallons (500,000 tons) of oil into the water. State of Maine 114th Legislature Second Session, APPENDICES TO THE REPORT OF THE COMMISSION TO STUDY MAINE'S OIL CLEANUP PREPAREDNESS, Appendix E: Oil Spills in Maine and Elsewhere, at 17, Nov. 1990.

2. S. REP. No. 101-94, *supra* note 1, at 2.

compensation.<sup>3</sup> Although comprehensive, OPA also specifically allows states to determine their own liability schemes,<sup>4</sup> and to enact other types of legislation.

Washington State was the first state to enact stricter oil pollution prevention regulations than those contained in OPA.<sup>5</sup> These regulations were challenged by the International Association of Independent Tanker Owners (Intertanko) in the fall of 1996. The Western District federal court for Washington held the regulations constitutional.<sup>6</sup> On appeal, the Ninth Circuit determined that a few of the challenged rules were unconstitutional because they were design and construction standards, not operational standards.<sup>7</sup> Rhode Island enacted similar regulations, which became effective June 1, 1997, after an oil spill fouled its coastline in 1996.<sup>8</sup>

This Comment discusses regulations relating to preventing catastrophic oil spills from tankers as a result of collisions, groundings, or similar accidents. The primary objective of this Comment is to propose a method for states to enact design, construction, and manning requirements to help prevent oil spills that would survive a federal preemption challenge. The proposed method is for states to enact the requirements as an alternative to unlimited liability. By voluntarily adopting the option, a tanker's potential liability in the event of a spill would be reduce and/or capped. The liability limit would be instituted once the vessel was found to be in compliance with the enacted requirements.

Part II of this Comment outlines tanker regulation in the United States since the grounding of the *Exxon Valdez*, highlighting oil spill prevention provisions and the state law savings clause under OPA. Part III discusses the actions that Washington has taken to help prevent tanker incidents since OPA was enacted. This includes a discussion of Washington's regulations and the *Intertanko* case. Finally, the Comment presents the proposed liability scheme and why it should survive a preemption challenge.

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3. 33 U.S.C. §§ 2701-2761 (1994).

4. *Id.* § 2718.

5. WASH. REV. CODE ANN. §§ 43.211.005 to 43.211.030 (West Supp. 1998); §§ 90.56.005 to 90.56.540; §§ 88.46.010 to 88.46.924 (West 1996); and WASH. ADMIN. CODE §§ 317-21-010 to 317-21-560 (1995).

6. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996).

7. *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053 (9<sup>th</sup> Cir. 1998), *reh'g en banc denied*, 159 F.3d 1220 (9<sup>th</sup> Cir. 1998).

8. R.I. GEN. LAWS §§ 46-12.5.1-1 to 46-12.6-14 (Michie Supp. 1997). These regulations pertain primarily to tank barges, not self-propelled tankers.

I. UNITED STATES OIL TANKER REGULATION POST *EXXON VALDEZ*

When the public saw the aftermath of an oil spill on U.S. shores up-close, something had to be done. The sight of oil drenched birds, seals, fish, and the shoreline elevated what was an abstract possibility to a shocking reality. The *Exxon Valdez* spill encouraged Congress to set aside the differences that had held up comprehensive oil spill regulation for fifteen years. The result was the Oil Pollution Act of 1990. The Act not only set forth standards that increased liability for responsible parties, but also actively encouraged prevention. OPA also included an ambiguous state law savings section.

A. *The Problem of Oil Spills from Tankers*

To understand the importance of oil spill prevention, a brief discussion of the effects of oil in the marine environment is necessary. The amount of oil spilled into U.S. waters by tanker accidents varies annually and a single catastrophic event such as the *Exxon Valdez* spill can greatly skew the figures. About 24.6 million gallons of oil were spilled into U.S. waters in 1989.<sup>9</sup> In 1990 16.9 million gallons were spilled.<sup>10</sup> That number further decreased in 1991 and 1992 to 12 million and 5.9 million gallons respectively.<sup>11</sup> Only about eight percent of the oil spilled is recovered after a typical spill.<sup>12</sup> That leaves about ninety-two percent of the oil to evaporate, burn, or be dispersed into the water column or sediments.<sup>13</sup>

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9. *Data Show Decrease in Amount of Oil Spilled In U.S. Since 1989*, 3(4) OIL SPILL US LAW REPORT, April 1, 1993, available in 1993 WL 2755615.

10. *Id.*

11. *Id.*

12. Chris Chivers, *Troubled Waters: Despite a Wake Up Call Named Exxon Valdez, Oil Tankers Continue to Foul the World's Waterways*, 7(3) E, May 15, 1996, available in 1996 WL 9824903.

13. The National Oceanic and Atmospheric Administration reported that by October 1992 "20% of the oil from the *Exxon Valdez* spill evaporated, 50% biodegraded on land or water, 14% was recovered or disposed of, less than 1% remains in the water column, 3% remains on intertidal shorelines in the form of 'highly weathered, biologically inert materials,' and 12% remains in subtidal sediments, mostly in the Gulf of Alaska and in the form of 'highly weathered residuals.'" *Scientists Reveal Impacts of Exxon Valdez Oil Spill*, 16(6) OIL SPILL INTELLIGENCE REP., Feb. 11, 1993, available in 1993 WL 2755338.

Approximately fifty percent of major oil spills are caused by tanker collisions and groundings.<sup>14</sup> These types of accidents occur primarily around loading and unloading ports.<sup>15</sup> Although most oil spills in U.S. waters are under 10,000 gallons, the infrequent large spills account for ninety-five percent of the volume of oil spilled.<sup>16</sup>

### B. Oil Pollution Act of 1990

The Oil Pollution Act of 1990 was pushed through Congress as a result of four oil spills that occurred close in time.<sup>17</sup> The Act is the most comprehensive domestic oil pollution legislation to date and it establishes a system of liability,<sup>18</sup> contingency planning,<sup>19</sup> and prevention.<sup>20</sup> The

14. *Finding A Smooth Passage*, LLOYD'S LIST INT'L, Oct. 28, 1996, available in 1996 WL 11841924.

15. *Id.* Unloading ports generally suffer a greater number of such accidents. *Id.*

16. Eric E. Anderson and Wayne K. Talley, *The Oil Spill Size of Tanker and Barge Accidents: Determinants and Policy Implications*, 71(2) LAND ECON. 216, 218 (1995). Small spills occur fifty times as frequently as large spills. *Id.* In 1986 there were a reported 366 spills of over seven tons, spilling 1,303,000 tonnes of oil. International Tanker Owners Pollution Federation Ltd. (ITOPF) (visited Nov. 6, 1996) <<http://www.itopf.com/>>. Ten incidents accounted for approximately seventy four percent of the total, 958,000 tons. *Id.*

17. Although the *Exxon Valdez* spill was the Act's prime mover, S. REP. NO. 101-94, *supra* note 1, at 723, three other spills in Rhode Island, Delaware, and the Houston Ship Channel eased its passage. S. REP. NO. 101-99, at 2 (1990), reprinted in 1990 U.S.C.C.A.N. 750. These spills occurred within 24 hours of each other. *Id.*

18. Title I of Public Law 101-380 imposed new liability standards for tankers. Unlike traditional maritime law, Congress imposed upon shippers removal costs and natural resource damages beyond the value of the vessel. However, Congress did provide for limits on liability. HOUSE CONF. REP. NO. 101-653, at 101-104 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780-82. See also William M. Duncan, *The Oil Pollution Act of 1990's Effect on the Shipowner's Limitation of Liability Act*, 5 U.S.F. MAR. L.J. 303 (1993); Stephen R. Eubank, *Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990*, 18 MD. J. INT'L L. & TRADE 149 (1994); Cynthia M. Wilkinson et al., *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 181 (1992); Frederick J. Carr, Comment, *Statutory Liability for Oil Pollution from Vessels in Marine Environments*, 3 U.S.F. MAR. L.J. 267 (1991); Daniel Kopec and Philip Peterson, Note, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597 (1992); Elizabeth R. Millard, Note, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331 (1993).

19. OPA requires that the President ensure the "effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge" in conformity with the National Contingency Plan. Oil Pollution Act of 1990 § 4210(a), 33 U.S.C. § 1321(c) (1994). Vessels must also maintain a contingency plan that outlines responses in

sections most relevant to this Comment are in Title IV: Prevention and Removal and the state liability law savings clause of section 1018 of Public Law 101-380.<sup>21</sup> The ambiguous statutory language of these sections, however, raises questions over concurrent state and federal regulation. This overlap was the primary issue in the *Intertanko* case.

### 1. Oil Spill Prevention

Oil spill prevention under OPA falls into four broad categories: vessel traffic systems, vessel manning requirements, illegal drug and alcohol testing, and vessel construction standards. A fifth prevention strategy, Prevention Through People, exists, though it is not a part of OPA regulation.

#### a. Vessel Traffic Systems

The vessel traffic system is a traffic system designed to increase safety by monitoring various aspects of moving vessels, such as speed, location, direction, and time to a nearby hazard, in busy ports.<sup>22</sup> The systems can specify times of vessel movement,<sup>23</sup> routing schemes,<sup>24</sup> set speed, draft limitations and operating conditions,<sup>25</sup> and restrict certain vessels from

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the event of an oil spill. See also Wilkinson, *supra* note 18; Millard, *supra* note 18.

20. Much has been written on the development of OPA elsewhere. See generally Michael P. Donaldson, *The Oil Pollution Act of 1990: Reaction and Response*, 3 VILL. ENVTL. L.J. 283 (1992); Antonio J. Rodriguerze & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. L.J. 1 (1990); Wilkinson, *supra* note 18; Gregg L. McCurdy, Comment, *An Overview of OPA 1990 and its Relationship to Other Laws*, 5 U.S.F. MAR. L.J. 243 (1993); and Cynthia Carney Johnson, Note, *The Oil Pollution Act of 1990: A Long Time Coming*, 2 FORDHAM ENVTL. L. REP. 59 (1990).

21. The Oil Pollution Act of 1990 was enacted through Public Law 101-380 in 1990. Title IV contains oil spill prevention requirements. Title IV was codified by amending various sections of existing legislation, contained primarily in Title 46 of the U.S. Code. Section 1018 is codified at 33 U.S.C. § 2718 (1994).

22. Damon L. Vickers, Comment, *Deterrence or Prevention – Two Means of Environmental Protection: An Analysis of the Oil Pollution Act of 1990 and Oregon Senate Bill 242*, 28 WILLAMETTE L. REV. 405, 415 (1992). Oil Pollution Act of 1990 § 4107, 33 U.S.C. § 1223(a).

23. 33 U.S.C. § 1223(a)(4)(A).

24. *Id.* § 1223(a)(4)(B).

25. *Id.* § 1223(a)(4)(C).

hazardous areas.<sup>26</sup> The Secretary of Transportation can also require vessels to have certain navigation and communication equipment.<sup>27</sup> Compliance is required for tankers.<sup>28</sup>

*b. Vessel Manning Requirements*

Since the 1950s, technology has enabled increasingly large tankers to operate with smaller crews.<sup>29</sup> OPA addresses this problem by establishing minimum crew requirements.<sup>30</sup> The standards set the maximum number of hours a person can work. Crew members (unlicensed employees) are limited to working fifteen hours per twenty-four hour day or thirty-six hours out of seventy-two.<sup>31</sup> The Secretary of Transportation was directed to do a study to determine the appropriate number of crew on tankers and appropriate qualifications.<sup>32</sup>

*c. Illegal Drug and Alcohol Testing*

Congress amended the National Driver Register to allow the federal licensing authority (Coast Guard) to access the information to investigate for drug and alcohol violations on driving records of licensees and those applying for licenses.<sup>33</sup> It mandates that the Secretary test people who apply for a license or license renewal under the provisions for illegal drug use.<sup>34</sup> People who hold a license are required to submit to “periodic, random, reasonable cause, and post accident testing,” for alcohol and illegal drug use.<sup>35</sup> Licensees are also subject to testing for illegal drug use before employment.<sup>36</sup> If a licensee is found to be in violation of this section, their

26. *Id.* § 1223(a)(4)(D).

27. *Id.* § 1223(a)(3).

28. *Id.* § 1223(a)(2).

29. Vickers, *supra* note 22, at 416.

30. Oil Pollution Act of 1990 § 4106 (foreign tankers), 46 U.S.C. § 9101(a) (1994); Oil Pollution Act of 1990 § 4114 (tank vessel manning), 46 U.S.C. §§ 3703 note, 7502, 8101(a), 9102, 9102(a).

31. 46 U.S.C. § 8104(n).

32. Oil Pollution Act of 1990 § 4111(a), (b)(1)-(3), 46 U.S.C. § 3703. This study has not yet been completed.

33. 46 U.S.C. § 7101(g).

34. Oil Pollution Act of 1990 § 4101, 46 U.S.C. §§ 7101, 7302. This applies only to U.S. officers.

35. *Id.* § 4103(a)(2), 46 U.S.C. § 7702(c)(2).

36. *Id.* Public Law 101-380 § 4103(a)(2), codified by amending 46 U.S.C. § 7102.

license can be suspended or revoked, or, if applying for a license, not issued.<sup>37</sup>

*d. Vessel Construction Standards*

The final category of OPA requirements concerns tanker construction standards. The most controversial provision requires double hulls on tankers.<sup>38</sup> This section sets a timetable for requiring double hulls, based on tanker size and age.<sup>39</sup> The Secretary was first required to conduct a study to determine the appropriate plating thickness for tankers,<sup>40</sup> then to promulgate minimum standards.<sup>41</sup>

*e. Prevention Through People*

Prevention Through People (PTP) is the latest idea by the Coast Guard to reduce accidents from all types of vessels.<sup>42</sup> The idea behind PTP is to create a new safety-minded culture between industry and the government through non-regulatory means.<sup>43</sup> The program was initiated to address the finding that about eighty percent of marine accidents, and eighty-four to eighty-eight percent of tanker accidents, are caused by human error.<sup>44</sup> Fatigue, inadequate pilot-crew coordination, and deficient technical knowledge, especially with radar, are the primary contributors.<sup>45</sup> Under PTP, corporate management must demonstrate its commitment to safety.<sup>46</sup>

37. 46 U.S.C. § 7703.

38. Vickers, *supra* note 22, at 417. Double hulls are required by 46 U.S.C. § 3703a.

39. 46 U.S.C. § 3703a.

40. Oil Pollution Act of 1990 § 4109, 46 U.S.C. § 3703 note. *See* 46 C.F.R. pts. 30-32 (1998).

41. Oil Pollution Act of 1990 § 4109, 46 U.S.C. § 3703 note.

42. This program is not required under OPA.

43. Andrew Guest, *Initiative Stresses Human Error Elements and Non-Regulatory Approach*, LLOYD'S LIST INT'L 16, Nov. 23, 1995, available in 1995 WL 9976927; John E. Veentjer, *Commanding Officer's Comments*, MSO/GROUP PHILADELPHIA NEWSLETTER, March 1996 (visited Nov. 8, 1996) <[http://www.dot.gov/dotinfo/uscg/d5/msophili/mar\\_news.txt](http://www.dot.gov/dotinfo/uscg/d5/msophili/mar_news.txt)>.

44. Veentjer, *supra* note 43; *A U.S. Report Searches for Reasons Behind the Mistakes That Cause So Many Marine Casualties*, LLOYD'S LIST INT'L at 5, Dec. 5, 1995, available in 1995 WL 9977589.

45. Guest, *supra* note 43. *See also* Ken Cottrill, *Safety Focuses on Seafarer*, TRAFFIC WORLD, Feb. 3, 1997, at 31, available in 1998 WL 8975507.

46. Veentjer, *supra* note 43.



It also requires the company to promote safety through "company procedures, processes, quality assurance, communications and feedback."<sup>47</sup> To encompass varying conditions, the created culture is supposed to address a number of the factors impairing human behavior, such as, weather, conditions on the vessel, port facilities, and waterway conditions.<sup>48</sup>

## 2. *State Law Saving Clause*

OPA explicitly preserves for states the right to determine liability limits for oil spills, above those proscribed by OPA.<sup>49</sup> It is this issue that divided the House and Senate and was responsible for delaying comprehensive oil spill legislation for fifteen years.<sup>50</sup> The clause states that OPA shall not preempt state law regarding liability or other requirements with respect to "the discharge of oil or other pollution by oil within such State."<sup>51</sup> This has been interpreted by the court as not preempting state oil pollution control measures generally.<sup>52</sup> However, the House Conference Report<sup>53</sup> to the Act states that OPA does not disturb the United States Supreme Court holding of *Ray v. Atlantic Richfield Co.*<sup>54</sup>

47. *Id.*

48. *Id.*

49. 33 U.S.C. § 2718 (1994). The meaning of this clause was litigated in *International Ass'n of Independent Tanker Owners v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996) *aff'd in part, rev'd in part*, *International Ass'n of Tanker Owners v. Locke*, 148 F.3d 1053 (9<sup>th</sup> Cir. 1998), *reh'g en banc denied*, 159 F.3d 1220 (9<sup>th</sup> Cir. 1998); *see infra* notes 162-199 and accompanying text for discussion of this case.

50. *Wilkinson*, *supra* note 18, at 221.

51. 33 U.S.C. § 2718(a)(1)(A).

52. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F.Supp. 1484. *See also* Laurie L. Crick, *The Washington BAP Standards: A Case Study in Aggressive Tanker Regulation*, J. MAR. L. & COM. 641 (1996) (arguing that most of the standards are constitutional); Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can they Go?* 8 U.S.F. MAR. L.J. 1 (1995) (giving a thorough analysis of preemption law concerning Washington's regulations and arguing that they should be constitutional); Michael P. Mullahy, Note, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?* 25 HOFSTRA L. REV. 607 (1996) (arguing that the emergency towing package might be the only Washington standard unconstitutional); *but see* Robert E. Falvey, Note and Comment, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 ROGER WILLIAMS UNIV. L. REV. 363 (1997) (arguing that Rhode Island's law is "constitutionally indefensible").

53. H. CONF. REP. No. 101-653, at 122 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 800.

54. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

*Ray v. Atlantic Richfield Co.* is the seminal case defining federal preemption of state oil spill prevention legislation. *Ray* concerned a challenge to a Washington State law setting certain requirements for tanker design, size, tug boat, and movement of tankers on Puget Sound.<sup>55</sup> The law suit was initiated by various oil industry concerns, collectively known as "ARCO," who claimed that the law was unconstitutional because it was preempted by federal law under the Supremacy Clause and the Commerce Clause of the United States Constitution, and that the law interfered with federal regulation of foreign affairs.<sup>56</sup> Of the three requirements challenged, the Court found two unconstitutional because they were preempted by federal legislation.<sup>57</sup> The third was held constitutional because it was offered as an alternative to a tug escort.

*In toto*, the safety features provision was found constitutional.<sup>58</sup> The Washington legislation established an option of either complying with minimum design requirements or being under the escort of a tug boat.<sup>59</sup>

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55. *Id.* at 155.

56. *Id.* at 156. The Supremacy Clause is embodied in Article VI, clause 2 of the U.S. Constitution; the Commerce Clause is in Article I, section 8, clause 3 of the U.S. Constitution.

57. The first requirement addressed by the Court was the requirement that enrolled and registered vessels over 50,000 dead weight tons (DWT) take on a pilot while navigating Puget Sound. *Ray v. Atlantic Richfield Co.*, 435 U.S. at 158. Vessels "engaged in domestic or coastwise trade or used for fishing" are enrolled. *Id.* (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977)). Vessels engaged in foreign trade are registered. *Id.* The Court determined that requiring enrolled tankers to take on a pilot was preempted because it conflicted with the language of two federal statutes. *Id.* at 159. Because the two statutes were limited in their applicability to coastwise vessels, the pilot requirement was valid for enrolled vessels. *Id.*

The second provision of Washington's tanker law found to be unconstitutional was the prohibition of any tanker over 125,000 DWT from entering Puget Sound. *Id.* at 173. This provision was found unconstitutional because the Court determined that this area of regulation was already occupied by federal activities. *Id.* at 174. It was determined that the Coast Guard had addressed this issue when it promulgated regulations concerning the size of vessels that could transit Rosario Strait. *Id.* at 174-75. The Coast Guard rule stipulated that one vessel over 70,000 DWT could transit the Strait in good weather, and in bad weather, vessels were limited to approximately 40,000 DWT. *Id.* at 175.

58. The provision applied to oil tankers between 40,000 and 125,000 DWT. *Id.*

59. *Id.* at 160. The specific design requirements were:

- (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

The Court, however, determined that standing alone, the design requirements were invalid.<sup>60</sup>

Despite this determination, the Court held that "enrolled and registered vessels *must . . . comply* with the provision of the Tanker Law that requires tug escorts for tankers over 40,000 DWT *that do no satisfy the design provisions.*"<sup>61</sup> Thus, the tug escort provision, standing alone, was held not to be preempted and was a valid exercise of state jurisdiction.<sup>62</sup>

Of particular importance is the interaction between the preempted design requirements and the non-preempted tug escort requirement. Because Washington gave tankers a choice, one of which was a valid exercise of state authority, both sets of criteria were, as a whole, a valid option. In finding this, the Court said "[g]iven the validity of a general rule prescribing tug escorts for all tankers, Washington is also privileged, in so far as the Supremacy Clause is concerned, to waive the rule for tankers having specific design characteristics."<sup>63</sup>

The provision was also determined to be valid under the Commerce Clause.<sup>64</sup> This was in spite of ARCO's argument that the regulation indirectly regulated the prohibited area of design.<sup>65</sup> In so holding, the Court said:

the provision may be viewed as simply a tug-escort requirement since it does not have the effect of forcing compliance with the design specifications set forth in the provision. . . . So viewed, it becomes apparent that the Commerce Clause does not prevent a

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- (e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners . . . .

*Id.*

60. *Id.* at 160-61. The Court made this finding for a couple of reasons. The Court determined that the Congressional intent of the federal legislation was to ensure uniform national design standards, and that enforcing Washington's law would frustrate this intention. *Id.* at 163, 165. The Court also found that the stated purposes of the federal legislation conflicted and overlapped with that of Washington. *Id.* at 165.

61. *Id.* at 169 (emphasis added).

62. *Id.* at 170. The tug escort requirement was not preempted, because the Secretary had not promulgated any such requirements. *Id.* at 170-71.

63. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 (1978).

64. *Id.* at 180. The provision also did not violate the federal government's authority to regulate foreign affairs. *Id.* The Court viewed the tug requirement as having "insignificant international consequences." *Id.* Instead of looking at the intention of the provision as coercing design requirements upon tankers, the Court saw the provision only as a tug escort requirement. *Id.*

65. *Id.* at 179.

State from enacting a regulation of this type. . . . Nor does it appear from the record that the requirement impedes the free and efficient flow of interstate and foreign commerce, for the cost of the tug escort for a 120,000 DWT tanker is less than one cent per barrel of oil and the amount of oil processed at Puget Sound refineries has not declined as a result of the provision's enforcement.<sup>66</sup>

States are also allowed to "impose additional . . . requirements, or to determine the amount of, any civil or criminal penalty for any violation of law" under the state law savings clause.<sup>67</sup> This allows for more than just increased liability. "Other requirements" can be interpreted as encompassing requirements that can either increase or decrease liability; or as in *Inertanko*, prevention regulations.

Taken together, these requirements can enable states to set the criteria under which a tanker spilling oil into the marine environment will be criminally and civilly liable. It also allows states to impose punitive damages for oil spills.

### C. *The Future of OPA*

In 1996 and early 1997 there was increased activity in both Houses of Congress concerning amendments to OPA. In the Senate, Senator Chafee of Rhode Island introduced S. 1730: the "Oil Spill Prevention and Response Act."<sup>68</sup> One of the principal reasons for Senator Chafee's involvement was the January 19, 1996 North Cape oil spill off the Rhode Island coast.<sup>69</sup> The bill would provide incentives to companies that switch from single-hull vessels to double-hull vessels before the 2015 deadline set by OPA.<sup>70</sup> The incentive would be a reduction in the exceptions to the liability cap authorized under OPA.<sup>71</sup> Until the Coast Guard implements rules for

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66. *Id.* at 179-80 (citations omitted).

67. H. CONF. REP. NO. 101-653, *supra* note 53, at 122; 33 U.S.C. § 2718(c) (1994).

68. 142 CONG. REC. S4805-02 (daily ed. May 7, 1996). The bill is reproduced at 1996 CONG. U.S. S.1730, 104th Cong., 2nd Session. The bill also addresses response requirements.

69. S. REP. NO. 104-292, at 2 (1996).

70. 142 CONG. REC. S4804-02. *See generally* Tammy M. Alcock, Comment, "Ecology Tankers" and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers, 19 *ECOLOGY L.Q.* 97 (1992).

71. 142 CONG. REC. S4804-02, 104th Cong. § 102 (1996). Liability is not limited

single-hull vessel operations, S.1730 would impose increased regulations on the vessels. Single-hull tanker vessels would have to maintain minimum under-keel clearances when entering and leaving port.<sup>72</sup> One of the primary aims of the bill is to encourage the Coast Guard to issue regulations that should have been issued nearly five years ago.<sup>73</sup> Although Congress did not approve this bill as introduced, it did approve a watered-down version through various parts of the Coast Guard Authorization Act of 1996.<sup>74</sup>

### III. WASHINGTON'S BAP STANDARDS AND THE INTERTANKO LAWSUIT

As more areas are opened up to drilling in Alaska, it is likely that the amount of oil being brought into Washington refineries will increase. With this in mind, Washington enacted strict prevention regulations to help reduce the likelihood of an *Exxon Valdez* magnitude oil spill in its waters.<sup>75</sup> These provisions were challenged by a tanker industry group, Intertanko, in 1996. The federal district court summarily decided that the regulations were constitutional. On appeal to the Ninth Circuit, the court determined

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under OPA:

[I]f the incident was proximately caused by-

- (A) gross negligence or willful misconduct of, or
- (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

33 U.S.C. § 2704(c) (1994).

72. S.1730, 104th Cong. § 101(b)(ii) (1996).

73. 142 CONG. REC. S4804-02 (daily ed. May 7, 1996). The House also discussed amending OPA. Representative Menendez introduced H.R. 238 on January 7, 1997. H.R. 238, 105th Cong. (1997). This bill was very similar to S.1730.

74. Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3901 (1996).

75. *Regulation and the Environment*, 75(86) PLATT'S OILGRAM NEWS 3 (May 5, 1997). Spills in Washington and Alaskan waters include: a tanker spill off Port Angeles, 1985, 239,000 gallons; a tanker spill along coast of Grays Harbor, 1988, 231,000 gallons; two refinery spills, total of 190,000 gallons, 1991. *Id.* Between June 1992 and June 1996, there were a reported 18 oil spills that ranged in magnitude from 25 to 10,000 gallons, and 86 spills in total. *Id.* Eighty percent of the spills were blamed on human error. *Id.* Between 1987 and 1991, from spills greater than 10,000 gallons, a total of 327,000 gallons were spilled in Washington. *Id.* Between January 1992 and June 1996, only 72,000 gallons were spilled. *Id.* The state's Office of Marine Safety was fully funded for the latter time period. *Id.* With this type of information, it is easy to see why Washington wanted to enact regulations specifically addressing human error.

that the regulations determined to be operational were constitutional,<sup>76</sup> while those that were determined to be design or construction standards were unconstitutional.<sup>77</sup>

### A. State Oil Spill Prevention Regulation

State regulation of oil spill prevention can generally be put into two categories: stringent and minimal.<sup>78</sup> The stringent category comprises states with comprehensive oil spill prevention regulations. The minimal category comprises those states with little or no oil spill prevention regulations.

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76. The court determined that accident reporting, watch practices, navigation procedures, engineering procedures, pre-arrival tests and inspections, emergency procedures, rules against altering or destroying records, training programs, illicit drugs and alcohol use, personnel evaluations, work hours, language requirements, training records for crew members, management, and advance notice of entry and safety reports were all operational requirements and not design and construction requirements. *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053 (9<sup>th</sup> Cir. 1998), *reh'g en banc denied*, 159 F.3d 1220 (9<sup>th</sup> Cir. 1998).

77. The requirements that tankers have global positioning system receivers, two radar systems, and emergency towing equipment were the only requirements determined to be design and construction standards. *Id.*

78. The discussion does not consider remediation, compensation, or liability regulations to be prevention oriented. To be considered prevention oriented, the regulations must contain affirmative actions which must be taken that could prevent oil from entering the marine environment initially. Examples of such regulations include: vessel traffic systems, construction standards, personnel requirements, and required technology. However, the author makes no judgment as to whether the various regulations would actually decrease the frequency or severity oil spills. Unlimited liability is not considered a prevention regulation because no affirmative actions must be undertaken by the vessel operator or owner. Also, although unlimited liability might scare some vessels into taking affirmative steps, vessels that accidentally discharge oil into the environment will be equally penalized regardless of whether they took additional steps to prevent an oil spill or whether they took none. Because of this, unlimited liability is not being considered a prevention regulation.

Numerous articles have outlined various state's oil spill legislation. *See generally* James E. Beaver, James N. Butler, III & Susan E. Myster, *Stormy Seas? Analysis of New Oil Pollution Laws in the West Coast States*, 34 SANTA CLARA L. REV. 791 (1994) (discussing the laws of: Alaska, California, Oregon, and Washington); Michael P. Donaldson, *The Texas Response to Oil Pollution: Which Law to Apply?* 25 ST. MARY'S L.J. 533 (1994); John D. Edgcomb, *Responding to an Oil Spill in California – The Impact of OPA 1990 and OSPRA*, 5 U.S.F. MAR. L.J. 389 (1993); Gary V. Perko, *Spillover from the Exxon Valdez: North Carolina's New Offshore Oil Spill Statute*, 68 N.C.L. REV. 1214 (1990); Stephen L. Sawyer, *Oil Spill Response: California's Perspective*, 7 U.S.F. MAR. L.J. 59 (1994); Vickers, *supra* note 22; and Falvey, *supra* note 52.

The stringent category consists of just three states. Of the three, Washington State is the leader, with California and Rhode Island in its wake.<sup>79</sup> Briefly stated, these plans provide steps to decrease oil spills by supplementing and enhancing OPA. Rhode Island's plan takes the additional step of imposing construction standards on barges. Rhode Island requires that either double hulls or a tug escort be used in state waters during times of limited visibility.<sup>80</sup> Reportedly, other coastal states are not currently thinking of implementing such regulations.<sup>81</sup>

Although many states have an oil spill act with the word "prevention" in it, most do not actually provide for active prevention measures. This omission is in spite of legislative findings that oil spills present "a real and substantial threat to the public health and welfare, to the environment, the wildlife and aquatic life, and to the economy of the state."<sup>82</sup> Most of these plans do provide for oil spill contingency plans and liability schemes.

### 1. *The Washington State Example*

Washington State has taken a proactive position regarding prevention of tanker oil spills.<sup>83</sup> Washington recognized that the best way to remedy an oil spill is to prevent it from occurring. The scheme Washington established is referred to as the "Best Achievable Protection Standards For Tankers" (BAP standards).<sup>84</sup> The standards incorporate operating pro-

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79. See Washington, WASH. ADMIN. CODE §§ 317-21-010 to 317-21-910 (1996); California, CAL. GOV'T CODE §§ 8670.1 to 8670.72 (West 1992 & Supp. 1997); and Rhode Island, R.I. GEN. LAWS §§ 46-12.5.1-1 to 46-12.5.1-15 (1996).

80. R.I. GEN. LAWS § 46-12.5-24(a). The limited visibility restriction applies only until January 1, 2001. After that all non-self-propelled tank vessels must have either a double hull or a tug escort. *Id.* § 46-12.5-24(b). At least one commentator believes such construction standards are beyond the ability of states to regulate. Falvey, *supra* note 52. The proposed plan could be adapted to provide a way to have otherwise preempted design and construction standards enacted into valid, non-preempted, law.

81. Alan Abrams, *Federal Tanker Laws Hold Sway*, J. COM., Jan. 9, 1997 at B2.

82. LA. REV. STAT. ANN. § 2453(A) (West 1997). This quote was used as an example. Similar findings are present in many states' legislation.

83. Washington was the first of the three to impose such stringent standards. Washington design regulations were also at issue in the late 1970s in *Ray*. Of the three today, Rhode Island's regulations go the farthest by imposing design and construction standards.

84. WASH. ADMIN. CODE §§ 317-21-010 to 317-21-910 (1996). Effective June 7, 1995; adopted pursuant to authority granted by WASH. REV. CODE ANN. §§ 43.211.030, 88.46.040 (West 1996 & Supp. 1998). Because the actual standards are located in Washington's Administrative Code, references will be to it instead of statutory language that only sets up

cedures, personnel policies, management oversight, and technology requirements.<sup>85</sup>

Washington's oil spill prevention regulations were adopted to reduce the risk of an oil spill from a tanker and to "[e]ncourage the development and use of procedures and technology that increase the safety of marine transportation and protection of the state's natural resources."<sup>86</sup> These requirements are not voluntary, they are required.<sup>87</sup> They apply to all tankers entering Washington waters.<sup>88</sup> The tanker must have an oil spill prevention plan in accord with the regulations.<sup>89</sup>

Washington's regulations are generally stricter versions of OPA requirements.<sup>90</sup> For example, Washington's drug and alcohol testing applies to all crew members and officers aboard domestic and foreign vessels, not just officers on domestic vessels as under OPA.<sup>91</sup> Washington also requires an extra officer on the bridge during periods of restricted visibility.<sup>92</sup> Washington's manning requirements, such as language and training, are also stricter than under OPA.<sup>93</sup>

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broad guidelines.

85. WASH. ADMIN. CODE §§ 317-21-010 to 317-21-910.

86. *Id.* § 317-21-010.

87. *Id.* § 317-21-020.

88. *Id.* § 317-21-020(1). The regulations do not apply to a tanker that is determined to be in distress by the U.S. Coast Guard. *Id.* § 317-21-020(2).

89. *Id.* § 317-21-020(3). The specific requirements for tankers are located in Part 3 of the chapter. The regulations also include standards for tank barges. *Id.* § 317-21-300 (Part 4).

90. This paragraph highlights only three of the many differences. *See infra* notes 91-93 and accompanying text.

91. Neil Modie, *Shippers Attack State Oil Spill Law Lawsuit Is Filed In Federal Court*, SEATTLE POST-INTELLIGENCER, July 20, 1995, at B1, available in 1995 WL 4318178; compare WASH. ADMIN. CODE § 317-21-235 with Oil Pollution Act of 1990, Pub. L. No. 101-380 §§ 4101-4103, 104 Stat. 484, 509-11 (1990) (codified as amended in scattered sections of 46 U.S.C.).

92. Compare WASH. ADMIN. CODE § 317-21-200(1)(a) with 33 C.F.R. § 164.13(c) (1998).

93. Sandi Doughton, *Critics Threaten Oil-Spill Prevention Efforts / Lawsuit, Lawmakers Target Safety Office as Memories of Disasters Dim*, NEWS TRIB. (Tacoma, Wash.), Dec. 17, 1995, at A1.



a. *Requirements While Transiting Washington Waters*

Any tanker transiting Washington waters must have at least two licensed deck officers, a lookout, and a helmsman.<sup>94</sup> During periods of restricted visibility an additional licensed deck officer is required.<sup>95</sup> Moreover, lookouts, with a reliable method of communicating with the officer in charge on the bridge must be posted in locations that allow sight and hearing of all navigational hazards and other vessels.<sup>96</sup> A log entry must be made when it is determined that visibility is restricted and when a crew member assumes watch duty.<sup>97</sup>

A written voyage plan must be developed before entering Washington waters and must address various local conditions, weather, and emergency procedures.<sup>98</sup> This plan must be adhered to, unless local conditions prompt the vessel master to deviate.<sup>99</sup> While transiting Washington waters, the tanker's position must be constantly monitored and recorded every fifteen minutes using "all appropriate navigational aids."<sup>100</sup> The vessel's steering gyrocompass and magnetic compass must be compared frequently while in state waters.<sup>101</sup>

Tankers that do not have gear to automatically switch between standard generators and stand-by generators must have stand-by generators operating that will be able to immediately assume the electrical load in the event of an emergency.<sup>102</sup> Unless the steering gear flat is "monitored by closed circuit television or other acceptable monitoring system," it must be inspected hourly.<sup>103</sup> If the tanker has scoop injection cooling systems,<sup>104</sup>

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94. WASH. ADMIN. CODE § 317-21-200(1). A state-licensed pilot can be substituted for a deck officer. *Id.*

95. *Id.* § 317-21-200(1)(a). "Restricted visibility" is defined as visibility limited "because of fog, mist, precipitation, sand storms or other conditions limiting visibility." *Id.* § 317-21-060(8).

96. *Id.* § 317-21-200(1)(b), (c).

97. *Id.* § 317-21-200(1)(a), (d).

98. *Id.* § 317-21-205(2)(a)-(j).

99. *Id.* § 317-21-205(2). A standardized plan can be used for consecutive voyages, if updated prior to entering state waters. *Id.*

100. WASH. ADMIN. CODE § 317-21-205(1) (1996).

101. *Id.* § 317-21-205(3).

102. *Id.* § 317-21-210(1).

103. *Id.* § 317-21-210(2).

104. Many of the terms mentioned in the text are undefined, but nevertheless used, by the Washington standards.

they must be secured "at least six hours before operating in state waters."<sup>105</sup> In addition, the "main engines must be operating to capacity on fuel used for maneuvering before operating in state waters."<sup>106</sup>

Before entering or getting underway in state waters, a tanker must complete numerous tests and inspections on various parts of the vessel, and log the results. The navigational equipment must be inspected.<sup>107</sup> The primary and standby generators,<sup>108</sup> steering systems,<sup>109</sup> engines,<sup>110</sup> lubrication oil pumps,<sup>111</sup> and, heavy oil pumps<sup>112</sup> must be tested and ready for use. The main engine lubricating and fuel oil systems must be cleaned, purged, and ready for use.<sup>113</sup> Sufficient fuel to transit must be transferred to the main engine settler or service tanks or both.<sup>114</sup> For motor-driven tankers, the main and stand-by engine cooling water systems,<sup>115</sup> intake air blowers,<sup>116</sup> starting and control air tanks,<sup>117</sup> and the air compressors<sup>118</sup> must be ready for use.

The vessel master must devise and post crew duties in the event of fire, orders to abandon ship, man overboard and oil spill response.<sup>119</sup> Procedures that should be followed in the event of a collision, grounding, hull breach, loss of steering, propulsion or electrical power, or a gyrocompass malfunction must also be established in writing by the vessel master.<sup>120</sup> Preparations for emergency towing, responding to loss of throttle control and severe weather that poses a risk to crew or vessel must also be written by the vessel's master.<sup>121</sup>

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105. WASH. ADMIN. CODE § 317-21-210(3).

106. *Id.* § 317-21-210(4).

107. *Id.* § 317-21-215(1). This includes compasses, speed monitoring gear, radars, and directional finders. *Id.* Additionally, "[c]ompass, range, and bearing errors must be logged in the deck log and posted on the bridge to be used by the bridge team." *Id.*

108. *Id.* § 317-21-215(2).

109. *Id.* § 317-21-215(3).

110. *Id.* § 317-21-215(4).

111. WASH. ADMIN. CODE § 317-21-215(5) (1996).

112. *Id.* § 317-21-215(6).

113. *Id.* § 317-21-215(7).

114. *Id.* § 317-21-215(9).

115. *Id.* § 317-21-215(9)(a).

116. *Id.* § 317-21-215(9)(b).

117. WASH. ADMIN. CODE § 317-21-215(9)(c) (1996).

118. *Id.* § 317-21-215(9)(d).

119. *Id.* § 317-21-220(1).

120. *Id.* § 317-21-220(2).

121. *Id.* § 317-21-220(3).

While in state waters, an owner or operator must ensure that no crew members consume or are under the influence of alcohol or illegal drugs while aboard the tanker.<sup>122</sup> This includes pre-screening of potential employees to prevent those likely from engaging in such activities from being employed.<sup>123</sup> After a collision, grounding, fire, or other incidence, "all crew members who may have been directly involved" must be tested for drug and alcohol use soon after the incidence.<sup>124</sup> All personnel must be randomly tested.<sup>125</sup>

To help protect against accidents due to errors caused by fatigue, the Washington BAP standards require that members of the crew not work for more than fifteen hours out of twenty-four, and that they only work thirty-six out of seventy-two hours, except in an emergency.<sup>126</sup> An officer cannot assume navigational watch duty unless (s)he has been off duty for at least six of the last twelve hours.<sup>127</sup>

Required technology includes navigation equipment and an emergency towing system.<sup>128</sup> The required navigation equipment includes a global positioning system (GPS) and two separate radar systems, one of which must be equipped with an automated radar piloting aid.<sup>129</sup> The emergency towing system must be present on the bow and stern of the tanker.<sup>130</sup> The system must be able to withstand sustained wave heights of at least eighteen feet,<sup>131</sup> and be deployable in under fifteen minutes by two crew members from a safe location.<sup>132</sup>

The above discussion highlights some of the requirements that a tanker must comply with while underway in Washington waters. The BAP standards are not so much *per se* operational requirements as they are minimum criteria that have to be addressed in a written pollution prevention plan. The requirements discussed below pertain to administrative

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122. *Id.* § 317-21-235(1).

123. WASH. ADMIN. CODE § 317-21-235(3)(a) (1996).

124. *Id.* § 317-21-235(3)(b).

125. *Id.* § 317-21-235(3)(d).

126. *Id.* § 317-21-245(1). These are the same requirements as under OPA. Oil Pollution Act of 1990 § 4114(b), 46 U.S.C. § 8104(n) (1994). The state perhaps enacted these requirements to give state enforcement officers jurisdiction.

127. WASH. ADMIN. CODE § 317-21-245(3).

128. *Id.* § 317-21-265.

129. *Id.* § 317-21-265(1).

130. *Id.* § 317-21-265(2).

131. *Id.* § 317-21-265(2)(a), (b).

132. *Id.* § 317-21-265(3).

requirements and requirements that would be addressed while not in Washington waters.

*b. Personnel Policies*

The personnel policies section of the BAP standards are divided into five main categories.<sup>133</sup> These categories are: illicit drug and alcohol use;<sup>134</sup> personnel evaluation;<sup>135</sup> work hours;<sup>136</sup> language requirements;<sup>137</sup> and, record keeping responsibility.<sup>138</sup> The first category, illicit drug and alcohol use, prohibits anyone who might have any responsibility on the tanker while in state waters from consuming either.<sup>139</sup> The tests are applicable during three stages of employment. First, the tests must be designed to prevent a person from being employed who is likely to use such substances while in state waters.<sup>140</sup> The testing program also must randomly test all personnel,<sup>141</sup> and especially test personnel for whom there is a reason to suspect such use.<sup>142</sup> Additionally, any crew member who might have been directly involved in a collision, grounding, or other accident must be tested for such uses as soon as practicable after the event.<sup>143</sup>

The second group of procedures involves personnel evaluations.<sup>144</sup> The tanker's officers must monitor the fitness for duty of the crew. If it is determined that a crew member is unfit for duty, (s)he must be promptly removed.<sup>145</sup> Any crew member under a contractual obligation with the vessel in excess of six months must undergo a performance review annually. The review should identify any training required so the person can safely perform his/her job.<sup>146</sup>

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133. Some of the requirements discussed in the text above are repeated in this section.

134. WASH. ADMIN. CODE § 317-21-235.

135. *Id.* § 317-21-240.

136. *Id.* § 317-21-245.

137. *Id.* § 317-21-250.

138. *Id.* § 317-21-255.

139. *Id.* § 317-21-235(1).

140. WASH. ADMIN. CODE § 317-21-235(3)(a) (1996).

141. *Id.* § 317-21-235(3)(c).

142. *Id.* § 317-21-235(3)(d).

143. *Id.* § 317-21-235(3)(b).

144. *Id.* § 317-21-240.

145. *Id.* § 317-21-240(1).

146. WASH. ADMIN. CODE § 317-21-240(2) (1996).

All officers must also be proficient in both English and the language spoken by both subordinate officers and unlicensed crew members.<sup>147</sup> All written policies must be in a language understood by officers and crew.<sup>148</sup> The owner or operator is required to maintain detailed training records.<sup>149</sup> The owner or operator must also maintain work hour records.<sup>150</sup>

The tanker must provide training for crew members in the use of “job-specific equipment, installed technology, lifesaving equipment and procedures, and oil spill response equipment and procedures.”<sup>151</sup> This must be accomplished within three years of the start of employment or effective date of Washington’s standards.<sup>152</sup> New crew members must be provided with additional training designed to familiarize them with the vessel and job-specific duties.<sup>153</sup> Fire drills must be conducted weekly,<sup>154</sup> and abandon ship drills must be conducted monthly.<sup>155</sup> On board drills for oil spill response, emergency steering and towing, loss of propulsion and electrical power, and man overboard, must be done quarterly.<sup>156</sup>

### c. *Management Oversight*

Owners and operators of tankers must monitor vessel operations, and establish a policy to do so that conforms to various international standards for management practices.<sup>157</sup> The policies and procedures must be

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147. *Id.* § 317-21-250(1).

148. *Id.* § 317-21-250(2).

149. *Id.* § 317-21-255(1).

150. *Id.* § 317-21-255(2).

151. *Id.* § 317-21-230.

152. WASH. ADMIN. CODE § 317-21-230(1) (1996).

153. *Id.* § 317-21-230(2). Training must be refreshed every five years. *Id.* § 317-21-230(4).

154. *Id.* § 317-21-230(5)(a).

155. *Id.* § 317-21-230(5)(b).

156. *Id.* § 317-21-230(5)(c).

157. *Id.* § 317-21-260. The international management standards and requirements that must be complied with include:

- (a) The International Ship Managers Association for complying with the Code of Ship-Management Standards;
- (b) Det Norske Veritas for complying with the Safety/Environmental Protection management system;
- (c) Lloyd’s Register for complying with the Quality Management System; or
- (d) The vessel’s nation of registry for complying with the International Maritime Organization’s Safety Management Code.

established, written, and actually performed.<sup>158</sup> They include lines of command, a preventative and planned maintenance program, and surveys of various parts of the tanker.<sup>159</sup>

*d. Analysis*

Washington's regulations seem to be common sense regulations. What is not known is whether the requirements would actually do much to prevent oil spills or reduce their severity. For example, do all of the pre-arrival tests and inspections really need to be conducted so often? Or, would monthly or semi-annual tests be sufficient? States and the federal government are seldom concerned about the economic realities of businesses or the cost effectiveness of regulations. Before states or the federal government require businesses to adopt costly procedures, they should be reasonably sure that the regulations are effective and needed. Although it is doubtful that many states or the federal government will embrace this attitude, establishing regulatory schemes such as the one proposed could provide an adequate alternative.<sup>160</sup> This is especially true if these regulations are used as an interim plan until proper studies are completed.

Washington's BAP standards impose many requirements not otherwise required under federal or international law upon tanker owners and operators. They also impose many administrative requirements on state agencies, such as recording information and pre-hiring screening. This has left the entire program open to attack by state legislators that functionally eliminates the effectiveness of the program. Washington legislators have attempted to disband the agency in charge and transfer the duties to another agency.<sup>161</sup> The legislature has also attempted to cut the agency's budget. Either or both of these would severely limit the effectiveness of the standards.

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*Id.* § 317-21-260(2).

158. WASH. ADMIN. CODE § 317-21-260 (1996).

159. *Id.* § 317-21-260.

160. Federal government agencies are required to submit cost-benefit analyses of major proposed regulations to the Office of Management and Budget. Eric T. Mikkelson, Comment, *Earning Green for Turning Green: Executive Order 12,291 and Market-Driven Environmental Regulation*, 42 U. KAN. L. REV. 243, 246-47 (1993).

161. Doughton, *supra* note 93.

Although environmental groups seem fairly happy with the standards, the oil industry is not. The oil industry is concerned about having to comply with regulations that vary by state. Many shippers might decide it is not worth shipping oil in United States waters, at least at reasonable rates.

Washington's regulations do not, on the whole, address construction standards. This is likely a result of *Ray*, a case with which Washington is all too familiar. A review of the literature on the subject does not reveal any commentator arguing that construction standards would be constitutional. Washington likely came to the same conclusion. It is to this problem, and the belief that some states desire to enact design and construction standards, that the proposal in this paper is addressed.

### *B. BAP Standards a Valid Exercise of State Power*

Washington's recent statutes and regulations were challenged by Intertanko.<sup>162</sup> Intertanko sought an order declaring certain Washington BAP standards unconstitutional. At issue was "the extent to which Washington State may protect its marine environment by regulating oil tankers in the areas of operations, personnel, management, technology and information reporting."<sup>163</sup>

Intertanko argued that the statutes and regulations were preempted by federal statutes, regulations, and treaty obligations.<sup>164</sup> Intertanko further argued that the regulations violated the Foreign Affairs and Commerce Clauses of the U.S. Constitution.<sup>165</sup> To support its claim, Intertanko argued

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162. International Ass'n of Indep. Tanker Owners v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996), *aff'd in part, rev'd in part*, International Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053 (9<sup>th</sup> Cir. 1998), *reh'g en banc denied*, 159 F.3d 1220 (9<sup>th</sup> Cir. 1998). Intertanko represents approximately 300 independent shipping companies, which comprise about eighty percent of the world's independently owned oil tankers. Doughton, *supra* note 93.

163. International Ass'n of Indep. Tanker Owners v. Lowry, 947 F. Supp. at 1490.

164. *Id.* The laws and treaties that Intertanko argued preempted the Washington regulations are: the Tank Vessel Act of 1936; Ports and Waterways Safety Act of 1972; Port and Tanker Safety Act of 1978; Oil Pollution Act of 1990; International Convention for the Safety of Life at Sea, 1974; International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol; International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978; and the International Regulation for Preventing Collisions at Sea, 1973. *Id.* at 1489-90.

165. *Id.* at 1490.

that the state law savings clause located in section 1018 of OPA<sup>166</sup> was limited to preserving liability and compensation regulations and excluded prevention regulations.<sup>167</sup>

Washington argued that OPA envisioned and approves of states enacting their own prevention policies.<sup>168</sup> The State believed that the savings clause prohibits preemption of state regulations.<sup>169</sup>

The court accepted Washington's interpretation of the clause for a number of reasons. The court looked at the entire Act to consider the meaning of the section.<sup>170</sup> The court stated that the language "this Act" in the clause was broad.<sup>171</sup> Because the section applies broadly to "this Act," the court interpreted that language to include prevention regulations.<sup>172</sup> The court did not accept Intertanko's assertion that interpreting the clause in this way would upset international standards. The court reasoned that because other parts of OPA contradict international standards, Congress could not have been overly concerned with international uniformity.<sup>173</sup>

The court found that the legislative history to OPA supported this view.<sup>174</sup> To get around the citation of *Ray v. Atlantic Richfield Co.* in the legislative history, the court reasoned that "[t]he citation to *Ray* may mean that there was an intention not to eradicate the Court's holding that federal law impliedly preempted state tanker design and construction regulations."<sup>175</sup> Because the court determined that Washington's regulations concern "tanker operations, personnel, management, technology and information reporting[.]" they fell within the umbrella of the savings clause.<sup>176</sup>

Intertanko also argued that the comprehensive federal scheme of tanker regulation impliedly preempted Washington's regulations by not leaving any room for state regulation.<sup>177</sup> This too was rejected by the court because it had determined that the regulations were not design or construction

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166. Oil Pollution Act of 1990 § 1018, 33 U.S.C. § 2718 (1994).

167. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. at 1491.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp at 1491.

174. *Id.*

175. *Id.* at 1492 n.5.

176. *Id.* at 1492-93.

177. *Id.* at 1492.



standards, and thus preempted under *Ray*, but were valid "tanker operations, personnel, management, technology and information reporting" standards to protect the environment.<sup>178</sup>

The court did not adopt the argument that some of Washington's regulations were expressly preempted by Coast Guard regulations because the savings clause prohibits the Coast Guard from preempting state regulations.<sup>179</sup> This also was based on the court's determination that design and construction standards were not involved.<sup>180</sup>

Intertanko argued that portions of the Washington regulations were preempted by Coast Guard regulations to take effect in the future. These regulations are the result of amendments to the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978.<sup>181</sup> Intertanko argued that the Washington regulations were preempted because they would require similar regulations to become mandatory in Washington before the federal regulations became effective.<sup>182</sup>

The court rejected this argument for two reasons. First, the Washington regulations only require earlier implementation of similar federal regulations. As such, compliance with the federal regulations will not only be possible, but will be facilitated because of Washington's earlier requirement.<sup>183</sup> Second, the savings clause, and how the court earlier interpreted it, allows states to implement prevention regulations.<sup>184</sup>

Intertanko's next argument was that the Washington regulations violated the Commerce Clause because they directly regulated international commerce.<sup>185</sup> Because the court determined that the regulations were not aimed at directly controlling international trade, but at protecting state waters from oil spills, this view was not adopted by the court.<sup>186</sup> The court found the regulations did not indirectly burden international commerce either. This was based on the relatively small costs associated with

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178. *Id.* at 1495.

179. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. at 1496.

180. *Id.*

181. *Id.* at 1497. The regulations included in this argument are: watch practices; navigation practices; training requirements for crew; personnel evaluations; limits on hours working; an English language requirement; and management practices. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. at 1498.

186. *Id.*

compliance versus the yearly operating costs of a tanker and the costs associated with an oil spill.<sup>187</sup>

The last major argument concerned a violation of the Foreign Affairs clause of the U.S. Constitution. Intertanko claimed that the Washington regulations interfered with international treaties and with the federal government's ability to enter into such agreements.<sup>188</sup> The court reasoned that this argument has only worked once in the past, and that Washington was merely exercising its allowable police powers and therefore did not violate the clause.<sup>189</sup>

The court granted the state's motion for summary judgment for the reason cited in the discussion above and the fact that the *Intertanko* case was largely a question of law, not fact.<sup>190</sup> The court concluded that Washington's regulations "legitimately protect Washington's delicate and valuable marine resources through the exercise of the state's police powers."<sup>191</sup>

### C. Discussion

The validity of Washington's regulations will likely be contested for some time to come. Intertanko appealed this decision to the Ninth Circuit Court of Appeals.<sup>192</sup> On appeal, the Ninth Circuit held some of the

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187 *Id.* at 1499. The court found that the required oil spill prevention plan would cost about \$12,000, and installing the emergency towing system would cost about \$80,000. These figures were compared to the yearly costs of operating a tanker of \$13.6 to \$19 million for a U.S. tanker, \$8.4 to \$12 million for a foreign tanker, and the average cost of an oil spill in Washington between 1984 and 1988 at \$6.3 million, with an additional \$2.2 to \$8.1 million in resource damage. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 1500.

191. International Ass'n of Indep. Tanker Owners v. Lowry, 947 F. Supp. at 1500.

192. International Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053 (9<sup>th</sup> Cir. 1998), *reh'g en banc denied*, 159 F.3d 1220 (9<sup>th</sup> Cir. 1998).

The U.S. Department of Justice intervened in the case, because of the interaction between Washington's regulations and international treaty obligations. *U.S. to Fight a State's Rules on Shipping*, PLATT'S OILGRAMNEWS, April 30, 1997, at 2, available in 1997 WL 8878609. The Department of Justice wanted the case remanded so that the court could determine whether certain provisions of Washington's regulations invade federal territory. *Id.* Opposition to these requirements was not limited to Intertanko or the Department of Justice. The Washington legislature also appeared to oppose them. Doughton, *supra* note 93. The state legislature has already tried to abolish the Office of Marine Safety, the agency responsible for enforcing Washington's regulations. The political opposition to the Office

challenged regulations to be operational in nature, and thus not preempted, and a few to be preempted because they are design and construction standards.

State regulations can be held unconstitutional because of federal preemption in two circumstances. The first instance is when Congress explicitly preempts state law.<sup>193</sup> In the *Intertanko* case, the court reasoned that section 1018 prohibited the Coast Guard from preempting concurrent state regulation.<sup>194</sup> In order to do this, the district court gave a very liberal interpretation to section 1018. On appeal, the court reaffirmed this holding.<sup>195</sup>

A second instance in which a state law can be preempted is when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>196</sup> The court summarily dismissed this claim.<sup>197</sup> By rejecting the federal interest in uniform regulation of oil tankers, the court left open the door to state regulations that could conflict with those of other states or nations. This policy is in direct contrast with general maritime law which, generally, seeks uniformity within the nation and internationally. Although the Coast Guard has been delinquent in promulgating required studies and regulations, it may eventually comply with the requirements of OPA. When it does, the federal scheme will be even more evasive. At that time, if not before, state regulations might well be held to be preempted. On appeal, the court looked to Congress' purpose in passing OPA to determine whether the regulations were preempted, and determined that most were not.<sup>198</sup>

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wants to merge it with the Department of Ecology, to eliminate a double bureaucracy. Proponents of the Office of Marine Safety say such a merger would weaken the programs that it offers. In 1995, political maneuvering merged the two agencies, but a judge ruled the procedure illegal. Although the Office was reestablished for 1996, its operating budget could not be removed from the Department of Ecology. *Id.*

193. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. at 1496 (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

194. *Id.*

195. *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d at 1068.

196. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This type of preemption is referred to as implied field preemption. *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

197. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. at 1495.

198. *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d at 1062.

Either theory of preemption presents a possible ground for appeal to the U.S. Supreme Court.<sup>199</sup> Indeed, the importance of the interests involved makes such an appeal more than likely. It is for this reason that an alternative approach is being presented.

#### IV. RECOMMENDATIONS

The recommendations presented here are an alternative to traditional command-and-control legislation. The proposed legislation would allow companies to utilize risk management analysis to determine whether the proposed benefits outweigh the costs. As Rhode Island's recently adopted regulations demonstrate, some states might not want to wait for the federal government to adopt stricter construction and design standards. The proposed plan could be a way to survive a preemption challenge and allow states to adopt such requirements.

The proposed methodology is analogous to the role of corporate compliance programs under the Federal Sentencing Guidelines (Guidelines).<sup>200</sup> To familiarize the reader with this role, a brief discussion of the topic will ensue. The minimum requirements to enact such oil spill prevention legislation will then be presented.

##### *A. Federal Sentencing Guidelines and Corporate Compliance Programs*

The Guidelines for corporations set up a convoluted system of adding, subtracting, and multiplying various figures together to reach an appropriate fine range.<sup>201</sup> Although a complete discussion of this process is unnecessary, the Guidelines provide that if an organization (corporation) has in place an "effective program to prevent and detect violations of law" before the violation occurs, the culpability score for the corporation will be reduced.<sup>202</sup>

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199. Although not discussed in this paper, the regulations could potentially be held unconstitutional because they violate the Commerce Clause or the Foreign Affairs Clause of the Constitution.

200. Compliance programs are appropriate for various federal laws. *See supra* notes 201-07 and accompanying text.

201. *See* U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 (1996); codified at 18 U.S.C.A § 8A1.2 (1996).

202. 18 U.S.C.A. § 8A1.2(b)(2)(D) applying 18 U.S.C.A § 8C2.5(f). For example, to

The scheme under the Guidelines for corporate compliance programs makes having a compliance program totally voluntary. It also makes enforcement for the federal government easy. Because the compliance program is voluntary and does not become functional under the law until sentencing, enforcement officials do not have to review the program to ensure its adequacy. That responsibility is left to the corporation.<sup>203</sup> The corporation also has the burden at sentencing to prove that it had an adequate program in place before the violation.

For a compliance program to be determined adequate, it must meet a number of minimum criteria.<sup>204</sup> The corporation must appoint a high-level employee to administer the program and assume overall responsibility for it.<sup>205</sup> The program must be proactive in detecting violations.<sup>206</sup> This can require monitoring employees and testing their knowledge of the subject in question. An adequate program does not ensure a corporation's fine will be reduced.

Under the application notes to section 8A1.2, a corporation can lose the beneficial effects of having an adequate program in place if a high-level employee "participated in, condoned, or was willfully ignorant of the offense."<sup>207</sup> In such instances, the compliance program is deemed non-functional. This places a duty or responsibility upon employees to enforce the program on their own if they later wish to be able to use the compliance program to reduce a fine.

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determine a fine for a corporation convicted of an antitrust violation, a base fine must first be determined. *Id.* § 8C2.4. This is usually about twenty percent of the volume of commerce done by the corporation. GARY R. SPRATLING, U.S. DEP'T OF JUSTICE, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION \*3, available in 1995 WL 623784 (D.O.J.). The corporation's culpability score is then determined. 18 U.S.C.A. § 8C2.5. One of the factors that can reduce a corporation's culpability score, and thereby its maximum and minimum multiplier figures, is an "effective program to prevent and detect violations of law." *Id.* § 8A1.2. The factors that make up such a program are located in 18 U.S.C.A. § 8A1.2 note (3)(k). The culpability score is then used to determine the minimum and maximum multiplier. *Id.* U.S.C.A. § 8C2.6. The base fine amount is then multiplied by the minimum and maximum multiplier numbers to determine the appropriate fine range. *Id.* U.S.C.A. § 8C2.7. A number of additional factors are weighed to determine the ultimate fine to be paid. *Id.* U.S.C.A. § 8A1.2.

203. Spratling, *supra* note 202.

204. 18 U.S.C.A. § 8C1.2 note (3)(k).

205. *Id.* § 8C1.2 note (3)(k)(2).

206. *Id.* § 8C1.2 note (3)(k)(3).

207. *Id.* § 8C2.5(f). This part of the discussion assumes that the compliance program is otherwise adequate.

*B. Incentive Based Regulation*

Incentive, or market, based regulation is not a new concept.<sup>208</sup> Since the 1980s it has been gaining popularity and has generated considerable literature. It has been discussed as a more effective and efficient way to regulate environmental concerns.<sup>209</sup> The most notable example of incentive based regulation in the United States is emission trading under the Clean Air Act.<sup>210</sup> The advantages of incentive based regulation are perhaps best highlighted by comparing them with traditional command-and-control regulation.

Command-and-control regulating through best available control technology has been criticized for a number of reasons. By mandating specific requirements, regulations cannot be tailored to meet specific conditions.<sup>211</sup> This also reduces innovation in technology development and alternative methods.<sup>212</sup> To avoid massive financial costs for existing operations, the standards are usually more lenient for existing operations than new ones. This approach disproportionately places the burden onto new operations. It also requires a large bureaucracy to administer and enforce.<sup>213</sup>

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208. See generally Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: New Era from an Old Idea?* 18 *ECOLOGY L.Q.* 1 (1991) (discussing what incentive based regulation is and its use in environmental control). See also David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* 19 *HARV. ENVTL. L. REV.* 303 (1995) (advocating the use of financial incentives in combination with a regulatory framework to help protect biodiversity on private land by inducing land owners to manage their own land); C. Foster Knight, Comment, *Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market*, 12 *ARIZ. J. INT'L & COMP. L.* 619 (1995); and Mikkelson, *supra* note 160.

209. Hahn & Stavins, *supra* note 208.

210. 42 U.S.C. §§ 7401-7642 (1994). The Clean Air Act authorizes the use of tradeable emissions allowances which allow one polluter to sell its right to pollute to another polluter.

211. Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based Approaches*, 19 *B.C. ENVTL. AFF. L. REV.* 547, 551 (1992). Stewart offers a complete argument in favor of market-based regulation for most environmental pollution. Cf. Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 *STAN. L. REV.* 1267 (1985) (arguing for command-and-control regulation).

212. Stewart, *supra* note 211, at 551.

213. *Id.* at 552.

There are five general categories of incentive based regulation. The first is the imposition of pollution charges. This method charges a tax per unit of pollution discharged.<sup>214</sup> The second is a tradable permit system, as in the Clean Air Act. Under this regime, an overall level of pollution is allowed for, and a percentage is allotted to concerned firms.<sup>215</sup> The third system is a deposit refund system; as with bottle returns.<sup>216</sup> Removal of market barriers, such as allowing voluntary exchange of water rights in the west, is the fourth idea.<sup>217</sup> The final method is the elimination of government subsidies. An example of this is the Forest Service's practice of selling timber rights below the cost of making the timber available.<sup>218</sup>

Market-based pollution control has generally been advocated for pollutants for which some deliberate release is acceptable. Oil spills from tankers present a different problem. Unlike sulfur releases into the air, an oil spill is caused by an accident, usually beyond the control of the vessel. Because of this, traditional incentive based regulation, such as tradable permits, are of limited applicability. There is also no legally tolerable level of oil that can be released into water due to oil spills, so permitting would not work.

Incentive based regulation would work if oil shippers are rewarded for taking additional steps to reduce and eliminate the number of oil spills. As the discussion on the proposed plan below will explain, establishing liability limits for vessels that take additional steps could provide a way for tankers to adopt various methods that would work, and yet be flexible enough to allow for changing technology without costly governmental studies and enforcement.

### *C. Oil Spill Prevention Plan*

The proposed plan is a cross between traditional command-and-control and incentive based regulation. It favors command-and-control regulation by setting certain minimum requirements, but favors incentive based regulation by giving industry an option on whether it wants to implement such a program, how the requirements will be implemented if it does, and

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214. Hahn & Stavins, *supra* note 208, at 7.

215. *Id.* at 9.

216. *Id.* at 10.

217. *Id.* at 10-11.

218. *Id.* at 11.

what the company's policy will be. In this sense it resembles the concept contained in S.1730 section 102. As discussed above, section 102 provides economic incentives to shippers that convert (or switch) single-hull vessels to double-hull vessels before the statutory requirement under OPA. The plan is also different than using unlimited liability to encourage vessels to take action because under the proposal a vessel that takes additional steps will be rewarded compared to a vessel that takes none.

The plan is not presented as a pure form of incentive based regulation. For, unlike the Clean Air Act, which allows some polluted emissions to enter the air, current law forbids any oil from entering the water.<sup>219</sup> This prevents the trading of permits to achieve a given level of emissions. Furthermore, the nature of the proposed program, the reduction in liability, does not lend itself to allowing companies to unilaterally decide what level of compliance and requirements should be adopted. If shippers could take whatever actions they wanted to and have them automatically deemed sufficient under the program, it is doubtful that much would be done. Minimum guidelines would have to be established to give shippers some idea of what is required.<sup>220</sup> If oil shippers were allowed to use varying technologies, such as different types of hull design that might be as effective in preventing oil spills as double hulls are, the shippers could tailor their operations to best fit both their needs and the needs of society. This is far cheaper and more flexible than traditional command-and-control methods.<sup>221</sup>

### 1. Discussion

It is generally agreed that the best way to protect the environment from an oil spill is to prevent one from occurring. The disagreement is over how to best accomplish this. Many people believe that the polluter should pay for clean-up costs, and therefore prevention costs. To do otherwise, they argue, would be to subsidize oil spills. Shipping interests want caps on liability. They feel that liability limitations would encourage responsibility

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219. A small number of exceptions, such as an act of God or war, are allowed. See 33 U.S.C. § 2703 (1994).

220. This is exactly what the application notes to the Guidelines do. As discussed above, the Federal Sentencing Guidelines do not establish exactly what must be done by a corporation. Instead, the Guidelines establish certain minimum requirements that must be accounted for.

221. Stewart, *supra* note 211, at 553.



among operators. Ship owners further believe that if all states, around the world, enact different legislation and impose different requirements, a regulatory nightmare would result. Doubtless, this possibility is real.

Washington state decided to force the potential polluter to pay for an elaborate prevention plan.<sup>222</sup> Its current plan costs the state an estimated \$5 million per year.<sup>223</sup> The proposed plan would greatly reduce the costs to the state and would allow the shipper to utilize cost-benefit analysis by determining the costs of alternatives.

## 2. *The Proposed Prevention Program*

The proposed plan would enact general standards and let shipping interests decide how best to meet those standards. For example, a standard could be that "in the event of an engine failure, the vessel must be able to control direction." Instead of mandating that a vessel have emergency engines, if given the choice, the tanker may decide it is easier and more cost effective to have a tug escort, or to have some other means of regaining control. This would promote innovation because regulations would not lock-in technology standards. Instead of enacting the provisions as an outright requirement, they would be enacted as a voluntary prevention plan program analogous to the role of compliance programs under the Guidelines. However, in order for the prevention program to be effective and work properly, minimum criteria must be established. These criteria could closely parallel those for compliance programs under the Guidelines.<sup>224</sup>

Three major differences between the proposed plan and the scheme under the Guidelines are apparent. First, state oil spill prevention requirements would provide the foundation and standards, not antitrust or other federal laws as under the Guidelines. Second, the elaborate system to determine fines under the Guidelines would not be required, as this plan proposes to reduce liability to a predetermined level, such as those put forth by OPA,<sup>225</sup> if the tanker meets the minimum requirements.<sup>226</sup> The third

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222. It is estimated that it would cost a tanker operator \$12,000 to develop a prevention plan that would comply with the BAP standards. *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9<sup>th</sup> Cir. 1998), *reh'g en banc denied*, 159 F.3d 1220 (9<sup>th</sup> Cir. 1998).

223. Doughton, *supra* note 93, at A1. This is the cost to the state, not including the costs to shipping interests.

224. 18 U.S.C.A § 8C2.5(f) (1996); 18 U.S.C.A § 8A1.2 note (3)(k).

225. See generally William M. Duncan, *The Oil Pollution Act of 1990's Effect on the*

difference involves substituting the tanker itself for the organization or corporation. The application guidelines established for corporate compliance programs under the Guidelines provide a reasonable place to start to determine guidelines for the oil spill prevention program.

The Guidelines require establishing a program that is reasonably capable of accomplishing its goal.<sup>227</sup> The larger the corporation, the more formal the program must be.<sup>228</sup> The oil spill prevention program would require a written plan that establishes policies for the tanker that would reasonably ensure that, if followed, the tanker would be in compliance with the prevention plan requirements and would be reasonably capable of preventing an oil spill. This would require the prevention plan to address all of the procedures and requirements determined to be important to preventing oil spills from tankers.

Corporations are required to appoint one or more high-level employee(s) to be responsible for overseeing compliance with the standards and procedures set forth in the compliance program.<sup>229</sup> This requirement could be modified for use on a tanker by requiring an officer on board to assume this responsibility. An employee of the vessel operator or owner might also have to be appointed to oversee compliance with maintenance and construction or other management standards if such standards are adopted. Regardless of where or who the employee is, (s)he would have the responsibility of enforcing and self-policing the standards set forth in the prevention plan.

The third compliance program requirement under the Guidelines requires corporations to ensure that "substantial discretionary authority"

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*Shipowner's Limitation of Liability Act*, 5 U.S.F. MAR. L.J. 303 (1993); Stephen R. Eubank, *Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990*, 18 MD. J. INT'L L. & TRADE 149 (1994); Marva Jo Wyatt, *Financing the Clean-Up: Cargo Owner Liability for Vessel Spills*, 7 U.S.F. MAR. L.J. 353 (1995); Frederick J. Carr, Comment, *Statutory Liability for Oil Pollution from Vessels in Marine Environments*, 3 U.S.F. MAR. L.J. 267 (1991); and, Daniel Kopec and Philip Peterson, Note, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597 (1992).

226. An elaborate system to determine the amount of liability could be used to either accommodate certain levels of compliance by the polluter or to more closely parallel the Guidelines and its objectives.

227. 18 U.S.C.A. § 8A1.2 note (3)(k)(1) (1994).

228. *Id.* § 8A1.2 note (3)(k)(7)(i).

229. *Id.* § 8A1.2 note (3)(k)(2).

not be given to individuals likely to engage in criminal activities.<sup>230</sup> This requirement could be modified for oil spill protection to define "substantial discretionary authority" to encompass individuals who could in any way cause an oil spill in state waters, for example, the helmsman or an engineer's mate. In the event that an oil spill is caused by someone with a history of violations, liability would not be limited if the operator or owner had not exercised due diligence to correct the situation. Hiring a person with a documented problem of drinking while on duty and then assigning that employee to be helmsman would be an example of not exercising due diligence. If that employee caused an accident and was drinking while on duty, liability would not be limited.

The organization must make efforts to effectively communicate the plan to employees.<sup>231</sup> This goes beyond reading the plan to personnel. The organization must ensure that employees actually understand the requirements, especially with regard to their individual responsibilities. Demonstrating and explaining the practical application of the prevention plan requirements using examples of everyday activities and responsibilities of employees would be favorable. The application note to the Guidelines suggests that training programs be used.<sup>232</sup> This is directly applicable to a tanker. The prevention program could suggest that safety drills be conducted. This would help the crew to understand what to do in the event of an emergency. This could not only prevent a spill but save lives. A language requirement would also have to be devised to ensure that crew and officers could effectively communicate.

Organizations must take reasonable steps to ensure compliance.<sup>233</sup> The prevention plan could operate in the same manner. Monitoring and auditing systems are suggested by the application note to ensure compliance. This leaves the paper plan behind and ventures into active detection of violations. Once a violation is detected it should be corrected. The prevention plan should then be updated to account for the problem. The prevention plan should also address this by establishing in the plan a system through which employees could report violations without fear of retribution.

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230. *Id.* § 8A1.2 note (3)(k)(3).

231. *Id.* § 8A1.2 note (3)(k)(4).

232. *Id.*

233. 18 U.S.C.A. § 8A1.2 note (3)(k)(5).

The standards must be consistently enforced and provide for disciplinary measures.<sup>234</sup> The appropriate disciplinary action would be situation specific. The plan should provide and identify what action is likely to be taken for certain conduct. This would require record keeping by the tanker or its operator to prove that the disciplinary measures have been consistently followed.

The last requirement for compliance programs is that after an offense is detected, all reasonable steps must be taken to prevent similar offenses in the future.<sup>235</sup> This could be modified for the prevention program to require prompt notification of officials in the event of a spill. An adequate contingency plan could also be required here. If the spill was caused by something that should have been contained in the tanker's prevention plan but was not, the plan should be modified to include the occurrence.

The Department of Justice looks favorably on compliance programs that take affirmative steps to detect violations.<sup>236</sup> By using a similar provision, tanker owners or operators that take steps beyond those otherwise required to improve safety and reduce the possibility of an oil spill could be rewarded. Washington provides for a reduction in inspections or other appropriate action for vessels that go beyond the BAP standards.<sup>237</sup> Although this would not directly translate to the proposed program, a similar provision could be developed.

It is doubtful that many, if any, tanker owners or operators would adopt such a voluntary plan without an incentive to do so. This incentive would be a limitation on liability. An alternative would be to penalize, through the use of civil or criminal fines, vessels determined to be deficient in an area. Perhaps the easiest method would be to substitute state-determined liability for the liability provisions under OPA for those tankers found to have an adequate prevention program. By providing a way for tanker owners to limit their potential liability, they may decide implementing a prevention plan and program is cost effective. This would be beneficial to both the state, in that the prevention regulations would be adopted, and the tanker, because liability would be limited.

There are a number of potential benefits of this proposal. The first is a reduction in the number and severity of spills. The second would be

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234. *Id.* § 8A1.2 note (3)(k)(6).

235. *Id.* § 8A1.2 note (3)(k)(7).

236. Spratling, *supra* note 202, at \*3, \*6.

237. WASH. ADMIN. CODE § 317-21-560 (1996).

industry support, or at least minimal industry opposition. A third is that the program would be easy to enforce. In fact, no enforcement by the state would be required.<sup>238</sup> Whereas various Washington provisions require filing various plans and documents with the Office of Marine Safety, the proposed plan could require the vessel to have such documentation onboard, ready for inspection, in the event of a spill. The only time a state would have to become involved in the process would be in the event of a spill. If a vessel never adopted a prevention plan and never had a spill, the state would not have to take any action or spend any money enforcing a program. This could save the state a lot of money and time.<sup>239</sup>

The state would also benefit because expensive technology studies would not have to be conducted. By mandating general, minimal guidelines, individual shipping companies could pick the technology best suited to their own and society's needs. General guidelines would also automatically account for changing federal and state law, and improving technology without additional legislative action.

Where appropriate, the prevention program should conform to national<sup>240</sup> and international law and conventions.<sup>241</sup> States should also try to work with other states to implement similar, non-conflicting requirements. Both of these would help reduce confusion and encourage vessel compliance.

OPA allows states to determine civil and criminal penalties or fines.<sup>242</sup> For example, Maine currently waives the imposition of fines if a discharge is reported within two hours, the oil is promptly removed, and if the party reimburses the state's oil spill fund within thirty days of demand by the state.<sup>243</sup> This regulation could be changed and augmented by the state

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238. This depends on exactly what type of program would be adopted. It also depends on individual requirements of the program. For example, the Washington program requires that three copies of the vessel's plan be filed with the Office. WASH. ADMIN. CODE § 317-21-070.

239. It is estimated that Washington's program costs the state at least \$5 million per year. Doughton, *supra* note 93, at A1.

240. See *e.g.*, Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 484 (1990).

241. See *e.g.*, The International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47; International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319, *amended by* 1978 Protocol, Feb. 16, 1978, 17 I.L.M. 546; Convention on the International Regulation for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459.

242. 33 U.S.C. § 2718(c)(2) (1994).

243. ME. REV. STAT. ANN. tit. 38 § 550 (West 1986 & Supp. 1996).

legislature. The provision could be changed to incorporate the prevention plan. The legislature could also establish substantial civil and criminal fines and penalties for vessels without a prevention plan that illegally discharge oil into the marine environment. This would provide an added incentive for vessels to voluntarily adopt the prevention plan.

### 3. *Federal Preemption Analysis of the Proposal*

The proposed prevention plan for tankers would be voluntary. It would not require tankers to take any action they are currently not required to, and it would not impose any fees or taxes upon the tanker. It would only come into action in the event of an oil spill. *Ray* held valid a Washington law, albeit under different legislation, because otherwise preempted design requirements were tied to a constitutional alternative, a tug escort.<sup>244</sup> There were, however, a couple of other factors that the Court believed were important.

The Court highlighted that the tug escort provision was not the type of regulation that should be uniform across the country.<sup>245</sup> Because OPA explicitly allows states to determine their own liability and penalty schemes, these issues do not need to be uniform across the country. If Congress changes its mind after states assert regulations using this authority, it can always amend OPA.

Another factor mentioned by the Court was the minimal cost of the tug escort requirement.<sup>246</sup> The Washington law in *Ray* imposed a new cost on tankers regardless of the option they choose. If they choose the tug escort, it would cost them under \$0.01 per barrel. If they choose the design requirements, they would be subject to additional costs. Under the proposed scheme, tankers would not incur any additional costs over those presently and legally imposed upon them as non-compliance with the prevention plan would cost the tankers nothing. Tankers would only incur additional costs if they voluntarily adopted the prevention plan.

The final factor mentioned by the Court was that a tug escort requirement would have little international significance.<sup>247</sup> The proposed scheme,

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244. See *supra* notes 54-66 and accompanying text.

245. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 179 (1978).

246. *Id.* at 180; see also *supra* note 66 and accompanying text.

247. *Id.* at 180; see also *supra* note 64. *Intertanko* also determined that international ramifications were of little concern because parts of OPA already contradict such

under the reasoning of *Ray*, would classify the proposed program as a liability provision and not preempted design or manning requirements. Although allowing states to determine liability might have international ramifications, Congress specifically allows states to determine liability limits under OPA. It was this issue that delayed federal oil pollution legislation for fifteen years.<sup>248</sup>

The discussion above highlights Supreme Court thinking under *Ray*. This is important because OPA provides that state regulations are to be consistent with *Ray*.<sup>249</sup> The proposed prevention plan would be nothing more than an elaborate liability scheme. Washington was allowed to waive its right to impose the tug escort requirement for vessels that met certain design criteria.<sup>250</sup> The same analysis should allow states to waive their statutorily granted right to impose unlimited liability and set civil and criminal penalties for vessels that are in compliance with its tanker oil spill prevention program.

## V. CONCLUSION

Preventing oil from being discharged into the marine environment is undoubtedly the best oil spill strategy. What is controversial is who should be responsible for setting the requirements and how should it be funded. OPA established certain minimum requirements specifically aimed at preventing oil spills. So did Washington State, and it involved them in a legal battle that even now has the potential to go to the Supreme Court. For this reason, a way around preemption challenges must be found. Also, if states want to enact design and construction standards, a way must be found. Aside from this, traditional command-and-control legislation has been criticized for failing to account for inefficiencies and stagnating innovation. The proposed methodology would avoid both of these problems.

Many interested parties, such as Intertanko, argue that OPA preempts stand alone state design and manning requirements. They would, however, also likely agree that OPA preserves the right of states to impose unlimited liability upon tankers that illegally discharge oil into the marine environ-

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regulations.

248. Donaldson, *supra* note 78, at 543.

249. See *supra* note 53 and accompanying text.

250. *Ray v. Atlantic Richfield Co.*, 435 U.S. at 173.

ment of the state. Under *Ray*, otherwise preempted requirements were held constitutional because a valid alternative existed. States can enact a valid unlimited liability scheme. That would be the valid alternative. The proposed prevention plan should be allowed, even if stand alone regulations are unconstitutional, when offered to tankers as an option. By offering a voluntary liability limitation scheme for tankers that meet or exceed certain requirements, state regulations should survive a preemption challenge.

A plan such as the one proposed would not ensure 100 percent compliance. However, by doing nothing, states are almost guaranteed that no action beyond the OPA requirements will be taken by tankers. The cost of establishing the proposed program to the state could be as little as that needed to enact the legislation or promulgate the required administrative rules. The potential, though unquantifiable, upside is fewer and/or less catastrophic oil spills.

The cost to tankers would be nothing if they chose not to adopt the program. For them, the potential benefits could be billions of dollars in savings in the event of a spill. Adopting the program would allow tanker owners and operators to run cost benefit analyses against predeterminable figures. Mobil Oil already believes the high cost of safer tankers is dwarfed by potential oil spill remediation and punitive damages.<sup>251</sup> If the reward for building safer tankers was even greater, it is likely they, and others, would build more of them. In a spill such as the *Exxon Valdez*, if Exxon had been given the choice (and complied with the program) between implementing a program such as the one proposed, which would result in limited liability (and may have prevented the spill or reduced its severity), and unlimited liability, for which choice do you think they would have opted?

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251. Daniel Southerland, *Mobilizing the Fleet; Oil Giant Hopes Emphasis on Tanker Safety Also Will Produce Profits*, WASH. POST, June 23, 1996, at H01.



