Nos. 98-1701, 98-1706

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Petitioner,

and

INTERNATIONAL ASSOCIATION OF INDEPENDENT
TANKER OWNERS (INTERTANKO),
Petitioner,

v.

GARY LOCKE, Governor of Washington, et al.,
Respondents,

BRIEF OF *AMICUS CURIAE* PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

Filed November 19, 1999

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BRIEF OF *AMICUS CURIAE* PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS[1]

The Prince William Sound Regional Citizens' Advisory Council respectfully submits this brief as *amicus curiae* in support of the Respondents.

INTEREST OF AMICUS CURIAE

The Prince William Sound Regional Citizens' Advisory Council (hereafter "RCAC") is a non-profit corporation organized under the laws of the State of Alaska and incorporated on December 26, 1989. RCAC was created in the months following the *Exxon Valdez* oil spill, after representatives of Prince William Sound commercial fishing interests approached Alyeska Pipeline Service Company[2] (hereafter "Alyeska") and persuaded Alyeska of the need for citizen oversight of the Valdez oil terminal and the tanker operations within Prince William Sound. RCAC was initially comprised of representatives from the municipalities that were affected by the *Exxon Valdez* oil spill, as well as representatives from environmental, Native, and commercial fishing organizations.

1. This Brief was authored solely by Avrum M. Gross and Susan A. Burke. No person or entity other than the Prince William Sound Regional Citizens' Advisory Council made a monetary contribution to the preparation or submission of the Brief.

2. Alyeska Pipeline Service Company is the operator of the Trans-Alaska Pipeline as well as the marine terminal located in Valdez, Alaska, from which North Slope crude oil is loaded onto tankers for transport to refineries outside of Alaska. It is a corporation all of whose shares are held by the major oil companies producing and shipping oil from Alaska's North Slope.

On February 8, 1990, RCAC and Alyeska entered into a contract, which will remain in effect as long as oil continues to flow through the Trans-Alaska Pipeline System. Under the contract Alyeska provides substantial annual funding enabling RCAC to carry out certain contractual responsibilities for the benefit of Alyeska and the public. Those obligations include monitoring oil tanker operations in Prince William Sound, providing local and regional input into the design of mitigation measures for oil spills, reviewing oil spill response and prevention plans and the capabilities of the terminal and tankers to comply with those plans, undertaking studies relating to spill prevention and mitigation of environmental impacts of terminal and tanker operations, and increasing public awareness of the actual and potential environmental impacts of terminal and tanker operations.

The existence of a Regional Citizens' Advisory Council for Prince William Sound was subsequently required by federal law. Immediately after the catastrophic spill in March 1989, Congress began work on legislation aimed at preventing such spills from occurring again. The result was the Oil Pollution Act of 1990.[3] Section 5002 of OPA 90 mandates the establishment of regional Citizens' monitoring groups for Prince William Sound and Cook Inlet. Section 5002 begins by outlining a number of Congressional findings, including that "many people believe that complacency on the part of the industry and government personnel was one of the contributing factors of the Exxon Valdez oil spill,"[4] that "the present system of regulation and oversight of crude oil terminals has degenerated into a process of continual

3. Public Law 101-380 (August 18, 1990) (hereafter "OPA 90").

4. OPA 90, § 5002(a)(2)(B).

mistrust and confrontation,"[5] that "a mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals,"[6] and that "only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus."[7] Section 5002(d) then establishes a Regional Citizens' Advisory Council for Prince William Sound. Section 5002(o) provides that in lieu of the Council established under Section 5002(d), an alternative voluntary advisory council may perform the functions of the Prince William Sound citizens' oversight program if Alyeska provides a minimum level of funding under a contract with a citizens' advisory committee for the duration of the operation of the Trans-Alaska Pipeline System and if the President annually certifies that the citizens' advisory committee "fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Prince William Sound." Each year since the enactment of OPA 90, RCAC has been certified as the alternative voluntary advisory group to fulfill the citizens' oversight and monitoring duties established in OPA 90.[8]

5. OPA 90, § 5002(a)(2)(G).

6. OPA 90, § 5002(a)(2)(D).

7. OPA 90, § 5002(a)(2)(H).

8. RCAC's current membership consists of two classes — voting members and ex-officio, non-voting members. Its voting members are representatives nominated by the following

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Since its formation in 1989 and during its nearly 10 years as the official OPA 90 citizens' monitoring group for Prince William Sound, RCAC has been a leader in the area of tanker monitoring and oil spill prevention. RCAC closely monitors the operations of the Alyeska oil terminal in Valdez as well as the operations of tankers while in transit through Prince William Sound and while berthed at the Alyeska terminal. RCAC has been actively involved in reviewing and commenting on the oil spill contingency plans prepared by both Alyeska, as operator of the Valdez terminal, and the tankers that transit Prince William Sound.[9] It has also conducted major studies relating to

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organizations and municipal governments: The Alaska State Chamber of Commerce, Cordova District Fishermen United, Chugach Alaska Corporation, City of Cordova, City of Homer, City of Kodiak, City of Seldovia, City of Seward, City of Valdez, City of Whittier, Kenai Peninsula Borough, Kodiak Village Mayors Association, Kodiak Island Borough, Prince William Sound Aquaculture Corporation, Community of Chenega, Community of Tatitlek, Alaska Wilderness Recreation and Tourism Association, and the Oil Spill Region Environmental Coalition. The following organizations have designated an individual to act as an ex-officio, non-voting member of RCAC: The United States Environmental Protection Agency, the United States Coast Guard, the United States National Oceanic and Atmospheric Administration, the United States Forest Service, the United States Department of the Interior, the Alaska Department of Environmental Conservation, the Alaska Department of Fish and Game, the Alaska Department of Natural Resources, and the Division of Emergency Services (Alaska Department of Military and Veterans Affairs), and the Prince William Sound Science Center (including the Oil Spill Recovery Institute established in Section 5001 of OPA 90).

9. Alaska Statutes ("AS") section 46.04.030 prohibits a person from operating an oil terminal facility, a pipeline, an exploration (Cont'd)

tanker operations in Prince William Sound. In 1993 and 1994, for instance, RCAC participated in a two part Prince William Sound Disabled Tanker Towing Study, along with representatives of the Prince William Sound Tanker Association, Alyeska, the Alaska Department of Environmental Conservation and the United States Coast Guard. This study evaluated existing equipment, personnel and procedures for emergency towing of oil tankers in Prince William Sound. The study included the use of computer simulations to assess the capability of existing escort vessels and to examine alternatives that could enhance escort and rescue towing capabilities in a "worst case failure scenario." More recently, RCAC participated in a 1996 study, along with representatives of the Prince William Sound oil shippers, the Alaska Department of Environmental Conservation, and the Coast Guard, to assess the risks associated with oil transportation in Prince William Sound. The Prince William Sound Risk Assessment Project, with a total price tag of over $2,000,000, identified and evaluated the risks under current and proposed risk reduction measures, and developed statistical models by which the efficacy of future risk reduction measures can be evaluated.[10]

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facility, a production facility or a tank vessel or barge within the State unless the person has an oil discharge prevention and contingency plan that has been approved by the Department of Environmental Conservation and the person is in compliance with the plan. The plans must set out in detail the actions that will be taken in the event of a spill, the equipment that will be used, and where that equipment will be located. Contingency plans are also required under federal law. *See* 33 U.S.C. § 1321(j) and 33 C.F.R. § 155.1010.

10. In addition to these major studies involving tanker operations, RCAC has also conducted a number of other scientific (Cont'd)

RCAC does not appear here simply to bear first person witness to the horrors of a catastrophic spill such as the *Exxon Valdez* spill of March 24, 1989. Those horrors have been adequately catalogued elsewhere.[11] RCAC is here because it

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studies, both on its own and in conjunction with other organizations, on a wide variety of topics relating to oil spill response and prevention. For example, RCAC has studied the environmental impacts of Alyeska's ballast water treatment facility as well as the impact of oil vapors released into the atmosphere during tanker loading; it has conducted studies of the incidence and trajectory of icebergs in the tanker lanes in and out of Prince William Sound; it annually samples the sediments of Prince William Sound for the presence of hydrocarbons; it has sponsored symposiums dealing with prevention of, and response to, fire hazards on tankers in transit through Prince William Sound and at the Valdez terminal loading berths; it is currently involved in research, in conjunction with the Smithsonian Environmental Research Center, to determine whether aquatic nuisance species (non-indigenous species) are arriving in Prince William Sound via tanker ballast water in order to avoid the type of problems that have occurred in the Great Lakes and San Francisco Bay; and it has prepared planning materials for local communities to deal with the social upheavals that a catastrophic oil spill inevitably brings.

11. The enormous environmental, economic and social impacts of the *Exxon Valdez* spill have been documented in a host of publications. *See*, for example, Stanley D. Rice, et al., editors, *Proceedings of the Exxon Valdez Oil Spill Symposium, held at Anchorage, Alaska, February 2-5, 1993* (American Fisheries Society, Bethesda, Maryland 1996); Richard Townsend and Burr Heneman, *The Exxon Valdez Oil Spill: A Management Analysis* (Center for Marine Conservation 1989); Ernest Piper, *The Exxon Valdez Oil Spill, Final Report, State of Alaska Response* (Alaska Department of Environmental Conservation 1993); *Economic, Social, and Psychological Impact Assessment of the Exxon Valdez Oil Spill, Prepared for Oiled Mayors Subcommittee, Alaska Conference of Mayors* (Impact Assessment, Inc., November 15, 1990).

(Cont'd)

believes the Court's decision in this case will have a major impact on the degree to which similar spills can be prevented in the future. The case calls into question the authority of State governments, including the State of Alaska, to adopt local rules governing certain aspects of oil tanker operations within their jurisdictions. Petitioner Intertanko argues that States may not adopt rules that affect tanker operations in any manner whatsoever if there is a federal statute or regulation that deals with the same subject matter. The sweeping concept of federal preemption that Intertanko urges this Court to adopt would invalidate nearly all types of State regulation of local tanker operations, regardless of whether the State rules are identical to the federal standards, whether the State rules deal with matters that are primarily of local concern, and whether State rules that impose additional requirements are compatible with the federal standards. The Respondents argue that there is no conflict here between State and federal authority and that applicable federal law must be read as authorizing the exercise of State police power to insure the safety of the coastal environment.

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Even after ten years, Prince William Sound has yet to recover fully from the *Exxon Valdez* oil spill. In a March 1999 publication, the *Exxon Valdez* Oil Spill Trustee Council reported that of the various injured resources, only bald eagles and river otters had fully recovered. Other species, including black oystercatchers, clams, Pacific herring, mussels, marbled murrelets, pink salmon, sockeye salmon, and sea otters were still "recovering." Listed as "not recovering" were killer whales, harbor seals, harlequin ducks, pigeon guillemots, and cormorants. Also listed as not fully recovered were recreation and tourism uses in Prince William Sound, Alaska Native subsistence resources, commercial fishing, and passive uses. *Exxon Valdez Oil Spill Restoration Plan, Update on Injured Resources and Services*, at 3 (Exxon Valdez Oil Spill Trustee Council, March 1999).

Because of its unique position as a citizens' monitoring organization, RCAC brings to this discussion the outlook of the residents of Alaska who have seen first hand the consequences of a major oil spill. RCAC believes that the United States Congress, in enacting OPA 90, shared RCAC's concern that it was not enough to have only the federal government regulating oil tanker operations. Congress intended that State governments, with specific local knowledge of coastal marine environments, were to play a significant and substantive role in the exercise of their police power in order to supplement federal regulation of tanker operations. So long as the State rules are not in actual conflict with federal requirements, there is no reason for States to be precluded from adopting and enforcing those rules.

SUMMARY OF ARGUMENT

Preemption of State authority to adopt regulations relating to the operation of tankers in State waters depends on Congressional intent. Section 1018 of OPA 90 specifically disclaims any intent to preempt the power of States to impose additional requirements "with respect to" or "relating to" the discharge of oil. This disclaimer should be construed broadly so as to allow State regulation of oil tanker operations for several reasons. First, a broad construction of the disclaimer is consistent with the impetus that gave rise to OPA 90 in the first place — the inadequacy of federal regulatory efforts in Prince William Sound that contributed in part to the *Exxon Valdez* oil spill. Additional participation by States and citizen groups like RCAC was encouraged, not prohibited by OPA 90. Second, the line that Petitioner Intertanko seeks to draw between valid State authority to regulate the efforts of oil tankers to clean up after a spill and invalid State authority to regulate tanker operations to

prevent spills is illusory. Since Section 1018 of OPA 90 clearly allows States to adopt regulations affecting the operations of tankers in the area of spill response, that Section by implication must also allow State regulation of integrally related oil tanker operations for the purpose of preventing spills, so long as the State regulations are not in actual conflict with analogous federal laws. Finally, Congressional intent should not be implied here to preempt State regulation, because total preemption will disrupt a successful partnership between the United States Coast Guard and State authorities that has developed since the *Exxon Valdez* oil spill and that has led to safer transportation of oil throughout the coastal waters of the United States.

ARGUMENT

I.

SECTION 1018 OF OPA 90 SPECIFICALLY ALLOWS STATES TO ADOPT OPERATING STANDARDS FOR TANKERS IN STATE WATERS THAT EXCEED FEDERAL STANDARDS.

A. Introduction

All parties in this case recognize that the federal government has the authority to preempt State regulation of particular matters by expressly forbidding State action. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Preemption may also occur when the Congress acts to so occupy a field with federal legislation "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Federal Savings & Loan Association v. De la Cuerta*, 458 U.S. 141, 153 (1982) (*quoting Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Finally, preemption can occur when "compliance with both state and federal law is impossible or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *California v. ARC American Corp.*, 490 U.S. 93, 100-01 (1989) (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

All of these preemption principles ultimately depend on the intent of Congress. The parties and *amici curiae* here have focused on Congressional intent and have attempted to demonstrate its existence or lack of it from a variety of sources. A basic element in all of those discussions is just how this Court should interpret OPA 90, and specifically, Section 1018 of that Act, which provides:

> (a) PRESERVATION OF STATE AUTHORITIES . . . Nothing in this Act or the Act of March 3, 1851 shall
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to
>
> (A) the discharge of oil or other pollution by oil within such State . . .
>
> . . . .
>
> (c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES. Nothing in this Act, or the Act of March 3, 1851 . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof

> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
> relating to the discharge or substantial threat of a discharge, of oil.

Intertanko argues that both the placement of this disclaimer in Title I of OPA 90 and certain legislative history surrounding the passage of OPA 90 suggest that Congress intended a narrow reading of this disclaimer — one that pertains only to State response to an actual spill, and to liability and damages for an actual or threatened spill. The Ninth Circuit Court of Appeals looked at the clear language of the provision and adopted a much broader interpretation, one that allows States to adopt oil spill prevention regulations pertaining to the operation of vessels in State waters that exceed federal requirements.[12]

The basic principles of federal preemption were discussed at length in the decision below and will be adequately presented by the parties to this case. RCAC can add little to that general discussion. RCAC, as the citizens' monitoring organization mandated by Section 5002 of OPA 90, can, however, provide some specific insights into that Act that have relevance to the interpretive issue before the Court. The first pertains to the atmosphere that surrounded the passage of OPA 90; the second relates to the internal consistency of the Act. Both bear on the interpretation of OPA 90 and specifically on the scope of the disclaimer in Section 1018 of the Act, which all parties recognize play a key role in determining Congressional intent in this case.

12. *The International Association of Independent Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053 (9th Cir. 1998).

B. Section 1018 Must Be Interpreted in Light of the Impetus for the Enactment of OPA 90 as a Whole.

OPA 90 had its genesis in the most catastrophic oil spill in the nation's history — one that devastated the pristine marine environment of Prince William Sound, a major fishing ground and tourism destination. The spill was caused not only by errors and omissions by the *Exxon Valdez* master and crew, but also from a nearly complete failure by federal authorities, principally the Coast Guard, to fulfill existing statutory responsibilities. For instance, the National Transportation Safety Board's inquiry into the *Exxon Valdez* spill concluded that:

> The Coast Guard was not maintaining an effective VTS [Vessel Traffic System] in Prince William Sound at the time of the EXXON VALDEZ grounding.

The board went on to note:

> . . . [T]he VTC [Vessel Traffic Control] watchstander had ample time to call the vessel to ascertain the intentions of the navigation watch. Any inquiry from the VTC regarding the vessel's intentions probably would have alerted the third mate to turn earlier or to use more rudder. A subsequent follow-up inquiry from the VTC would surely have alerted him to the fact that his vessel could be standing into danger and that a sharp right turn back toward the traffic lanes was needed. Any action by the third mate to turn earlier or to use more rudder could have been sufficient to steer the vessel clear of Bligh Reef.[13]

The Regional Citizens' Advisory Councils were established by Congress for the specific purpose of combatting what "many people" thought was "complacency" on the part of the government and industry in monitoring tanker activities.[14] The councils established in OPA 90 are charged with duties specifically related to crude oil tanker operations. For example, the councils' functions include recommending "site specific regulations intended to minimize the impact of . . . crude oil tankers' operations," suggesting "modifications of crude oil tanker operations and maintenance in Prince William Sound and Cook Inlet intended to minimize the risk and mitigate the impact of oil spills," and suggesting modifications to "oil spill prevention and contingency plans . . . for crude oil tankers in Prince William Sound and Cook Inlet intended to prevent and respond to an oil spill."[15] These duties were obviously not imposed on the citizens' councils established in OPA 90 as a reflection of Congress's satisfaction with the job that federal agencies had previously done in monitoring and controlling tanker operations in Prince William Sound. They were imposed because federal regulation, in and by itself, had failed in its most basic purpose — to prevent a spill. Congress sought not to protect federal authority in OPA 90

13. *Marine Accident Report, Grounding of the U.S. Tankship Exxon Valdez on Bligh Reef, Prince William Sound near Valdez, Alaska, March 24, 1989*, National Transportation Safety Board, PB90-916405, NTSB/Mar-90/09, at page 153.

14. OPA 90, § 5002(a)(2)(B).

15. OPA 90, § 5002(d)(6)(F).

so much as to insure that there were *other* bodies in addition to federal regulatory agencies that would play some role in this crucial area. It is consistent with that Congressional intent that States, which have particular local concerns, play a major role as well.[16]

It is an established principle of legislative interpretation that in ascertaining the intent of Congress, this Court will look to all the circumstances that surround the passage of an act.[17] Had OPA 90 been enacted to insure the exclusivity of federal regulation — to insulate it from other voices because the effectiveness of federal regulation had been or would be jeopardized by additional State's regulation — Intertanko's argument for a narrow construction of Section 1018 might

16. Additional evidence of Congressional intent to involve local authorities is found in Section 5002(e) of OPA 90, which establishes an Oil Terminal Facilities and Oil Tanker Operations Association, composed of one member designed by oil tanker operators, one by the terminal facility, one by the federal government, and one by the State of Alaska. The purpose of the Association is "to provide a forum" to "discuss and make recommendations governing all permits, plans, and site specific regulations governing the activities and actions of the terminal facilities . . . and of crude oil tankers calling at those facilities." An Association for Prince William Sound has never been formed, as it is not required when a voluntary alternative citizens' advisory council has been certified under Section 5002(o). But the structure of the Association is, again, clear evidence of Congressional intent to include the State of Alaska in oil tanker regulation.

17. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 2 Cranch (U.S.) 358, 386 (1804); and *see Watt v. Alaska*, 451 U.S. 259, 270 (1987), where this Court in interpreting ambiguous legislation discussed the political "impetus" for the proposal before the Congress.

make some sense. In fact, the disclaimer was adopted under circumstances that demonstrated that exclusive federal regulation had proven ineffective. The terms of the disclaimer should be interpreted in that light — to allow those other voices with more urgent and particularized local concerns to be heard, not stifled.

C. A Narrow Construction of Section 1018 Conflicts with States' Conceded Authority to Regulate Oil Spill Response Activities by Oil Tankers.

Section 1018 of OPA 90 specifically authorizes States to impose "additional . . . requirements . . . with respect to the discharge of oil." Intertanko concedes, as does the United States Coast Guard, that this section of law specifically authorizes the States to adopt measures dealing with the response to an oil spill.[18] In Intertanko's view, while States may not in any way impose restrictions on tankers that might *prevent* a spill in State waters, they may impose planning requirements on tankers that will insure that the tankers have the capacity to clean up any oil they spill. Intertanko apparently recognizes that this Court views that kind of authority as part of the traditional power of States to adopt

18. In its Brief on the Merits, Intertanko cites a Coast Guard legal opinion that is "consistent with the positions of Intertanko and the United States." The opinion, as described by Intertanko, "asserts that the States . . . may regulate . . . response." Intertanko Brief on the Merits at 36 n.26. The Petitioners' position on this point is also consistent with a prior decision of this Court that upheld States' authority to require tankers to maintain containment equipment "in the absence of any fatal conflict between the [State and federal] statutory schemes." *Askew v. American Waterway's Operators*, 411 U.S. 325, 337 (1973).

local pollution control measures.[19] Intertanko nonetheless argues that any effort by States to regulate the "primary conduct" of the vessel, as opposed to peripheral issues such as penalties and liabilities, is barred. As Intertanko sees it, Congress has never authorized "a joint or concurrent role for states and local governments in matters relating to standards and requirements affecting the on-board primary conduct of tank vessels or their crews."[20] The problem here is that what Intertanko sees as a clear line of demarcation between valid State requirements imposed on tankers to clean up a spill and invalid State requirements on tankers to prevent the spill in the first place simply does not exist. In both cases, the State requirements will affect tanker personnel and operations, yet Intertanko argues preemption in one area and concedes State authority in the other — a distinction that makes no sense. Since Congress clearly intended for States to have authority to require tanker operators to respond to a spill, it necessarily follows that Congress never intended to preempt State efforts to reach the operations and on-board conduct of tankers with regard to oil spill prevention.

19. *See, e.g., Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851) (local pilotage requirement upheld); *Kelly v. Washington*, 302 U.S. 1 (1937) (supplemental state safety regulations relating to motor driven tugboats upheld); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (municipal regulation of smoke pollution from vessels upheld). State regulatory regimes that are identical to federal ones have also been upheld against challenges that federal law has preempted State action. *California v. Zook*, 336 U.S. 725 (1949). And *see, Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (State law requiring tankers to carry certain oil spill response equipment not preempted).

20. Intertanko Brief on the Merits, at 11.

The complete interrelationship between prevention and response can be quickly seen by a brief review of the kinds of regulations concerning responses that have been adopted by the State of Alaska. Like the federal government, the State has adopted statutes and regulations requiring every owner and operator of an oil tanker within the State to have and to comply with an approved oil discharge contingency plan.[21] Some of the Alaska requirements relate to oil spill prevention, but some are confined to response, which the United States and Intertanko concede are not preempted by federal law. Many of the response requirements involve some kind of "on board" conduct on the part of the tanker crew. For example, the State of Alaska requires tankers to have access to sufficient lightering equipment and personnel to transfer all oil remaining in damaged cargo tanks and in undamaged tanks if there is a risk of discharge from those tanks.[22] This transfer will inevitably require the assistance of the tanker's crew to accomplish. The same would be true of a State regulation requiring that a vessel discharging oil in State waters must immediately contain the discharge by containment boom or other effective means.[23] The tanker's crew would be required to deploy the boom, and the State's containment requirement regulation would be meaningless

21. *See* AS 46.04.030(c) and Alaska Administrative Code sections 18 AAC 75.400 through 18 AAC 75.495. *See* 33 U.S.C. § 1321(j) and 33 C.F.R. § 155.1010 for federal contingency plan requirements for tankers.

22. *See* 18 AAC 75.445(d)(6).

23. 18 AAC 75.445(d)(4), for example, requires tanker owners and operators to demonstrate that "sufficient oil discharge response equipment, personnel, and other resources are maintained and available for the specific purposes of preventing discharged oil from entering an environmentally sensitive area . . ."

if the State could not also require the tanker to carry and maintain the containment gear. If Intertanko's theory is correct, it will mean that States will have the impossible task of sorting out which response regulations affect tanker operations and "on-board" crew conduct and which do not. The difficulty of differentiating between the two will lead either to extensive state and federal litigation, or worse, to paralysis on the part of the States to adopt and enforce entirely valid response requirements, for fear of trespassing on what Petitioners claim is the exclusive territory of federal regulation.

All of this conflict and confusion disappears if Section 1018 of OPA 90 receives a broad and literal interpretation, instead of the narrow one proposed by Intertanko. Traditional State activities in the oil spill recovery and response arena will continue, free of the risk of being nullified by a new and overly broad theory of federal preemption. States have always been free to protect their marine environments and OPA 90 confirms that authority — both for oil spill prevention measures and for spill response requirements. Equally important, the lack of any clear line between State regulation of tanker operations for spill response purposes, as opposed to prevention, strongly suggests that Congress intended the disclaimer provisions of Section 1018 of OPA 90 to apply to both spheres of State regulation.

II.

COMPLETE FEDERAL PREEMPTION OF TANKER REGULATIONS MAY JEOPARDIZE EXISTING COOPERATIVE RELATIONSHIPS BETWEEN STATES AND THE FEDERAL GOVERNMENT THAT HAVE BEEN SUCCESSFUL IN REDUCING THE RISK OF OIL TANKER SPILLS IN PRINCE WILLIAM SOUND.

The Coast Guard in recent years has recognized the State of Alaska as a valuable partner in cooperative efforts to prevent oil spills. Since the *Exxon Valdez* spill, the State of Alaska has been fortunate in achieving a high level of cooperation and consultation with local Coast Guard officials having jurisdiction and authority over tanker operations in Prince William Sound. This cooperation has resulted in tanker operation rules for Prince William Sound that have reflected local knowledge and concerns and that have significantly reduced the risks of tanker spills in the Sound. By way of example, Alyeska, as operator of the terminal, recently revised its Vessel Escort and Response Plan for Prince William Sound ("PWS VERP"). The plan, approved by the Coast Guard, was the result of a collaborative effort among the Coast Guard, RCAC, the Alaska Department of Environmental Conservation, tanker owners and operators, and Alyeska's Ship Escort Response Vessel System ("SERVS"). Included in this comprehensive port specific plan for tanker operations in Prince William Sound are detailed procedures for the use of escort vessels, speed restrictions for both ballasted and oil laden tankers at various locations in the Sound, closure rules for high winds and high seas, communications requirements, requirements for

pre-escort conferences, and navigation guidelines in the presence of ice.[24]

It is not unwarranted to assume that the Coast Guard's willingness to involve State officials in its regulatory efforts (such as the development and approval of the Prince William Sound VERP) is in large part a result of the Coast Guard's recognition that the State of Alaska exercises concurrent authority over a number of areas covered in the PWS VERP. A ruling from this Court that the State of Alaska is wholly without that authority might well undermine the Coast Guard's continued willingness to accept the active involvement of the State in its own regulatory efforts. History is replete with instances where those with power and responsibility have refused to share that authority unless compelled to do so. If cooperation breaks down, however, it bodes ill for the future, for on the horizon are other significant problems that clearly would benefit from the cooperative efforts that have existed since the enactment of OPA 90. One of the paramount future concerns in the area of tanker operations, for instance, relates to the imminent advent of double hulled tankers in the Prince William Sound tanker fleet.[25] Current federal law and regulation

24. The plan also requires, among other things, that "deck officers and crew must be familiar with the component parts of the towing package and the method of deployment." The plan goes on to require tankers to carry the "Prince William Sound Towing Package," which is identical to the towing package defined in Alaska regulations for use by vessels berthed at the Valdez terminal. *See* 18 AAC 990(96). The manual goes on to provide that "[e]quivalent towing gear may be substituted with the concurrence of the Alaska Department of Environmental Conservation and SERVS." PWS VERP (reprinted September 1998) at 7-3.

25. 46 U.S.C. § 3703a(c)(4), adopted in OPA 90 provides, "Except as provided in subsection (b) of this section . . . a vessel that has a single hull may not operate after January 1, 2010."

require a minimum of two escort vessels for single hulled tankers.[26] At present there is no federal law requiring escort vessels for double hulled tankers. While double hulled tankers will provide added protection from oil spills, these tankers are not totally invulnerable to having both hulls pierced, particularly in a powered grounding or collision. The Prince William Sound Risk Assessment Project, mentioned above, concluded that, "The single most effective risk reduction measure to date has been the current escort system which effectively reduces potential oil outflows due to groundings."[27] Based on past collaborative efforts, RCAC has every reason to believe that if the Coast Guard addresses the issue of escort vessels for double hulled tankers in Prince William Sound, it will listen to RCAC's and the State of Alaska's concerns and mutually acceptable and wholly consistent State and federal rules will be developed. The Coast Guard will do so, in part at least, because the State of Alaska has the authority to address the issue on its own, should the Coast Guard fail to act. Certainly, vessel escort requirements, based on particular local port hazards, would be no more an intrusion into federal regulation of vessel operations, and would be no more an obstacle to national uniformity, than are clearly valid State pilotage requirements, which have previously been upheld by this Court.[28] Intertanko's position would lead to States being barred entirely from this area of regulation and potentially to a breakdown of federal-state cooperation in this area.

26. OPA 90, § 4116; 33 C.F.R. §§ 168.01(a) and 168.40.

27. *Prince William Sound Risk Assessment*, Final Report, December 15, 1996, Executive Summary at 3.

28. *Cooley, supra* and *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

CONCLUSION

RCAC respectfully requests the Court to uphold the right of the State of Washington and other coastal states to adopt and enforce non-discriminatory regulations relating to both oil spill prevention and response capabilities of oil tankers, so long as the regulations are not in actual conflict with federal law.

Respectfully submitted,

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