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 ON THE MERITS FOR RESONDENT-INTERVENORS

Filed November 19, 1999

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SUMMARY OF ARGUMENT

The internal waters of Washington State are among the most productive and fragile natural resources in the world. These waters are continually threatened by the increasing number of foreign oil tankers in Puget Sound and the possibility of a catastrophic oil spill. Washington's Best Achievable Protection regulations (BAP regulations) are a direct result of that threat and the failure of the United States Coast Guard to enact and enforce regulations to protect against an oil spill as required by federal law.

The BAP regulations are a valid exercise of the state's police powers for the purpose of protecting its marine environment from the catastrophic effects of an oil spill. The right of Washington to enact oil spill regulations concurrent and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment.

Neither the Constitution nor prudent public policy requires that Washington State rely upon overextended and under budgeted federal officials for the protection of one of the most environmentally productive and sensitive ecological systems in the world. So long as Washington's BAP regulations are not in actual conflict with international treaties or Coast Guard regulations, the exercise of the state's police powers for the preservation of its environment may not be usurped.

Many jurisdictions have no regulations concerning protection against oil spills. As to those jurisdictions, federal regulations and/or international treaties continue to control. Just as the federal constitution exists as a floor beneath which the quality of individual rights may not fall, federal regulations and treaties exist as a floor beneath which environmental protection may not fall. Individual states, however, may provide for greater protection.

The Government asserts that Washington's BAP regulations impair or undermine the Government's ability to enter into international treaties. The Government, however, does not have

the right to bargain away by treaty the state's traditional police powers to preserve the health and safety of its citizens. This is exactly what the Government is attempting to do.

In an attempt to expand the Government's power and authority, Petitioners assert that the BAP regulations are maritime in nature. They are not. The Oil Pollution Act (OPA) and the Washington BAP regulations are environmental regulations, and not maritime. The BAP regulations are expressly authorized by the savings clause of OPA (Section 1018) which is modeled after the Clean Water Act and not by Title 46 of the U.S. Code or the Ports Waterways and Safety Act. Section 1018 of OPA is an explicit recognition that oil spill prevention is most reliably achieved by authorizing individual states to enact their own prevention regulations so long as they do not actually conflict with federal law.

The genius of federalism within the environmental context allows the states to be laboratories of experimentation in which various policies are debated, implemented and then refined. Innovative and better ways of protecting the public health, safety and environment will be the result of allowing states to enact their own oil spill prevention regulations.

There is no actual dispute alleged involving any tank vessel and any state regulation. There exists no evidence in this record that any vessel entering the internal waters of Washington was prevented from doing so, hindered in doing so, or subjected to enforcement because of a conflict between state and federal regulations. This court should not entertain hypothetical claims involving preemption.

No actual conflict exists between the BAP regulations and federal statutes or international treaties. The Washington BAP regulations are "reasonable, nondiscriminatory conservation and environmental protection measures." These are exactly the type of regulations acknowledged in *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978). The international uniformity so highly valued by the Petitioners is a myth. Moreover, the international treaties are not self-executing, and therefore have no preemptive effect.

ARGUMENT OF COUNSEL

A. The history of tanker regulations designed to protect the environment.

The history of the oil tanker is marked with a series of landmark events, the first of which was the expansion of the Russian oil market in the late 1880s. The first successful bulk tanker, the *Zoroaster*, set sail in 1878 on the Caspian Sea. Yergin, D., *The Prize: The Epic Quest for Oil, Money and Power*, Simon & Schuster, 59 (1992).

After World War II, there was a substantial increase in the number and size of oil tankers transiting the high seas. Ellis, E., *International Law and Oily Waters: A Critical Analysis*, 6 Colo. J. Int'l. Envt'l L. & Pol'y 31, 36 (1995). In response to the unprecedented growth of international trade, the United Nations established the 1958 Convention on the Intergovernmental Maritime Consultive Organization (IMO). 9 U.S.T. 621, T.I.A.S. No. 4044. The Convention introduced the first international body designed to address global shipping concerns.[1]

Prior to 1969, there were no international agreements which addressed the environmental consequences of an oil spill. Ellis, *supra* at 34-35.[2] Tankers were primarily governed

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1. Protection of the environment under the Convention was merely a contingent benefit to vessel safety. M'Gonigle, *supra*, at 41. The objective of IMO was, *inter alia*, "[t]o provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation." IMO Convention, Art. I. IMO served the interests of commerce and the shipping industry; the Convention was silent on pollution control. M'Gonigle, at 41.

2. Intentional discharges of oily ballast water was a common tanker practice throughout the first half of the 20th Century. It was

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by an assortment of non-uniform regulations, the majority of which were self imposed by the industry. M'Gonigle, R. and Zacher, M., *Pollution, Politics and International Law: Tankers at Sea*, University of California Press, 39 (1979).

1. The *Torrey Canyon* oil spill.

The emergence of the "supertanker" in the 1960s proved to be the defining factor spurring international action to address the threat of oil pollution. By the late 1960's, supertankers of 200,000 dwt were in operation and by the early 1970s tankers of over 400,000 dwt were in operation. De La Rue, C. and Anderson, C., *Shipping and the Environment: Law and Practice*, Lloyd's of London Press 10-11 (1998). On March 18, 1967, the supertanker *Torrey Canyon* struck rock off the coast of Cornwall, England carrying a cargo of 120,000 tons of crude oil. *Id.* Within days she broke into three separate pieces creating a scale of pollution without precedent; the spill fouled beaches over a hundred miles throughout the British and French regions of Cornwall, Normandy and Brittany. M'Gongile, at 144.[3] As a result of the *Torrey Canyon* oil spill, the United States rejected efforts by the maritime industry to await the development of international standards, and acted independently of international efforts. The rejection of international efforts was in large part based upon consideration of the rights of individual states to enact regulations for the protection of their local environment.[4]

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not until 1954 that these deliberate discharges became subject to international regulations. International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), 12 U.S.T. 2989, 327 U.N.T.S. 3. OILPOL was significantly limited in scope and intent; OILPOL did not prohibit intentional oil discharges but generally required that they be made outside of 50 miles from coastal zones. *Id.*, Art. III.

3. *See also Askew v American Waterways Operators, Inc.*, 411 U.S. 325, 333-335 fn 5 (1973) (describing the Torrey Canyon oil spill and the growth of oil tankers).

4. "Although efforts were made by the maritime industry to postpone [Congressional] hearings on new domestic legislation (Cont'd)

2. The Water Quality Improvement Act and Clean Water Act Amendments.

In the wake of the *Torrey Canyon*, Congress enacted the 1970 Water Quality Improvement Act (WQIA), 33 U.S.C. § 1161 *et seq.* WQIA generally created a national policy prohibiting the discharge of oil into U.S. waters and imposed strict liability for all clean-up costs incurred by the federal government. The Act also imposed limitation on the vessel owner's liability and required larger tankers to display evidence of financial responsibility up to statutory limits. Section 1161.

The WQIA introduced the early blueprint of OPA's savings clause: "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." WQIA § 1161(o)(2). This savings clause is virtually indistinguishable from OPA § 1018(a). Although incidentally applying to maritime matters, WQIA § 1161(o)(2) was held to be outside the scope of the federal presence in general maritime law. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973).

Unfortunately, it soon became clear that the WQIA was not accomplishing its objective of lowering the level of pollution in U.S. waters. De La Rue, at 23. Congress responded in 1972

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pending the adoption of an international convention, the US State Department refused to support any request for postponement. Secondly, given the strong economic position of the US, it was widely felt that the country could act independently of other nations in formulating its oil spill policy. A third factor, *destined to plague all future efforts to achieve an international solution to the problem of marine oil pollution, was the reluctance to accept an international regime that might prevent individual states from establishing their own liability and compensation laws for discharges of oil within their jurisdiction. This reluctance, emanating from the states' need to maintain autonomy within the federal system, was founded on a strong belief that individual states were in the best position to determine the most effective way to protect their citizens in environmental matters.*" De La Rue, at 22 (emphasis added).

by amending the Federal Water Pollution Control Act, or Clean Water Act (CWA). 33 U.S.C. § 1251 *et seq.* The CWA also contains a savings clause upon which OPA § 1018(a) was modeled: "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State." CWA § 311(o)(2).

3. The *Exxon Vadez* oil spill.

During the mid-1970s, Congress began to consider various bills to revamp the national system of oil spill liability regimes within the WQIA, the CWA, the Deep Water Port Act, 33 U.S.C. § 1501 *et seq.*, and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et. seq.*

On March 24, 1989, the *Exxon Valdez* ran aground in Price William Sound carrying more than 53 million gallons of Alaskan crude oil. The grounding resulted in the release of over eleven million gallons of oil, the worst oil spill disaster the United States has ever experienced. De La Rue, at 55. *Exxon Valdez* galvanized global public attention on an unprecedented scale. Approximately 190 lawsuits were filed in the District Court of Alaska, 212 were filed within Alaska state courts and the federal government brought federal criminal charges against Exxon. *Id.*

Following the spill in Alaska, oil spread over parts of 1,300 miles of coastline in Prince William Sound, the Kenai and Alaska Peninsulas, and the Kodiac Archipelago. Some 2,800 sea otters died; those that managed to survive could be seen swimming through the water covered in oil. An estimated 300 harbor seals were killed by the oil, and seal population levels fell by as much as 30 percent in areas tainted by the spill. Harlequin ducks did not reproduce in Prince William Sound for over three years following the spill. Salmon, herring, and shellfish were tainted by the oil, leading to oil contamination of animals which prey on them. Many marine animals were genetically damaged. Roughly a quarter of a million sea birds died. The bodies of

250 bald eagles, 395 loons and 838 cormorants were discovered. Numerous killer whales disappeared from Prince William Sound and many of those are presumed dead; one group or "pod" lost almost half of its members (14 of 36). These statistics represent only the losses that have been confirmed by scientists and clean-up crews. Exxon Valdez Trustee Council, *Exxon Valdez Oil Spill Restoration Plan: Update on Injured Resources and Services*, January 1999.[5]

It was not only a broad spectrum of wildlife that was damaged by the *Exxon Valdez* disaster. People were adversely affected, as well. Professional fishermen suffered distressing economic losses as fisheries were closed in 1989. While most fisheries opened again in 1990, the Prince William Sound herring fishery was forced to close again in 1993 due to an injured herring population, and remains closed today. The tourist industry in the spill area has suffered ongoing losses. The loss of wildlife has limited the recreational appeal of the spill area, and oil still covers parts of beaches once enjoyed by tourists. Restrictions on sport fishing and hunting to protect injured fish, animal and bird populations similarly harm tourism. *Id.*[6]

On February 10, 1999, the Alaska Wilderness League released a new report declaring Prince William Sound's wildlife

5. There are eight species that continue to be listed as not recovering 10 years after the spill: common loons, cormorants (pelagic, double-crested and red-faced), harbor seals, harlequin ducks, killer whales and pigeon guillemots.

6. "The Trustee Council determined that the 'human services' of commercial fishing, subsistence, recreation/tourism, and passive use will have recovered when the injured resources on which they depend are once again healthy and productive. Since that level of recovery has not been achieved, each of these services is considered to be recovering." *See also* Picou and Gill, The Exxon Valdez Oil Spill and Chronic Psychological Stress, *American Fisheries Society Symposium* 18:879-893 (1996) ("Chronic stress was documented for communities affected by the spill and for members of occupational groups most dependent on commercial fishing"). *See* Trustee Council 10 Year Report at http:// www.oilspill.state.ak.us/injury/notrecov.htm.

and ecosystem unrecovered. As the report points out, "the Office of Technology Assessment [has] estimated that cleanup has recovered 3 to 4 percent of the spill. Substantial contamination and depressed population . . . of wildlife persists." The Seattle Times reported on October 5, 1998: "Lingering oil from the 1989 grounding of the *Exxon Valdez* supertanker in Prince William Sound will kill or stunt Alaskan pink salmon for generations to come, government scientists say. Long lasting hydrocarbon components of the crude oil will cause chronic harm to successive generations." *Id.*

4. Passage of The Oil Pollution Act of 1990.

As a direct consequence of the *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990. Congress recognized that the preexisting legislation was inadequate to prevent catastrophic oil spills. The prevention of oil spills is now accomplished through a comprehensive integration of liability, compensation and vessel standards. OPA serves to remove the patchwork of oil spill prevention measures by placing them into a comprehensive, environmentally oriented statute.[7]

OPA is an environmental statute which explicitly recognizes that regulation by individual states is the best and historic source for innovative environmental protection. This explicit recognition is contained in the savings clause of Section 1018, which authorizes the states the right to enact oil spill regulations for the protection of their local environments.

5. The Coast Guard's failure to enact and enforce regulations required by OPA explains the necessity of state regulation.

Intertanko argues that the State and their supporters may disagree with the sufficiency of the regulatory scheme, but that

7. "[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, *preventing* oil spills is more important than containing and cleaning them up quickly." S. Rep. No. 94, 101st Cong., 2nd Sess. 2 (1989) *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (emphasis added).

disagreement is not of constitutional import. Intertanko Brief at 29 fn 18. Intertanko is correct on both issues. Although the insufficiency, lack of implementation and poor enforcement by the Coast Guard is not of constitutional import, the Coast Guard's failure to comply with the requirements of OPA for the enactment and implementation oil spill prevention regulations explains the perceived necessity by the states to enact oil spill prevention regulations of their own.[8]

OPA is intended to "address the many shortcomings of the existing patchwork of laws on oil spills." Sen. Rept. No. 101-94, 2, July 28, 1989. The act charged the United States Coast Guard with the rulemaking authority to implement most of the measures mandated by Congress within OPA. Exec. Ord. No. 12777, Section(d)(2). Over the last nine years, however, the Coast Guard has failed to adequately promulgate regulations for oil spill prevention and response as required by OPA.

A principal goal of OPA is to compel a process by which working oil tankers will function with double hulls. 46 U.S.C. § 3703(a). The process of using only double-hulled tankers cannot be implemented immediately, however, and Congress allowed for a phase-out period for single-hulled tankers of 25 years, until 2015. *See* OPA § 4115.[9]

8. On August 7, 1997, a number of environmental organizations (including the Natural Resources Defense Council, Ocean Advocates, American Littoral Society, Baykeeper, Clean Ocean Action, New Jersey Public Interest Research Group Citizen Lobby, Inc and Public Interest Research Group of New Jersey, Inc.) filed suit against the Coast Guard for its failure to promulgate interim structural measures for existing ships, as well as its refusal to require tank level pressure monitoring devises in contravention of OPA. The merits of the case were not reached, as it was dismissed on jurisdictional grounds. *Natural Resources Defense Council Inc. et al, v. United States Coast Guard, et al* No. 97-3910 (JCL) USDC New Jersey. *See also Natural Resources Defense Council Inc., et al. v. United States Coast Guard, et al.* No. CV-94 4892RJD (E.D. N.Y. 1994).

9. The double hull tankers mandated by Congress are inconsistent with MARPOL. Congress was willing to sacrifice

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Recognizing that until the phase-out period is complete there will be grave dangers posed by still-operating single-hulled oil tankers, Congress included in OPA a mandate for the Coast Guard to reduce that threat by promulgating a series of interim measures to prevent oil spills, and to create effective response measures in the event of a spill. Under section 4115(b) of OPA, the Coast Guard is required to promulgate structural and operational measures for single-hulled tank vessels carrying over 5,000 gross tons of oil that will provide as substantial protection to the environment as is economically and technologically feasible. Recognizing the immediacy of the threat, Congress required these measures to be promulgated by August, 1991. *Id.* "The goal of this provision [requiring structural and operational measures] is to ensure that the environment is protected as quickly as possible from oil spills." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. (Aug. 1, 1990).

In 1993, two years after the deadline for issuing structural and operational measures had passed, the Coast Guard drafted a Notice of Proposed Rule Making entitled "Structural and Operational Measures to Reduce Oil Spills from Existing Tank Vessels Without Double-Hulls." 56 FR 54870, October 22, 1993. In 1995, the Coast Guard then withdrew its 1993 proposal. 60 FR 67226, December 28, 1995. In 1996, approximately five years after the Congressional mandate, the Coast Guard finally issued rules for operational measures. 61 FR 39770 (1996). Unfortunately, the rules were minimal and only addressed issues such as lightering equipment, enhanced survey programs, and maneuvering performance capability tests. 61 FR 39788-91. These operational measures are minor, of limited importance, and largely mirror prevailing industry practice. They do not remotely comply with the Section 4115(b) requirement that the Coast Guard must provide the greatest feasible protection

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international uniformity in the name of greater protection from oil spills. The Ninth Circuit relied upon this Congressional intention. 148 F.3d at 1063.

against pollution from oil spills by tank vessels. No structural interim measures were enacted at all, thereby making the operational measures all the more important.

Perhaps the most significant failure within the context of this case is the Coast Guard's failure to provide for tug escort vessels for 70 miles in the Strait of Juan de Fuca west of Port Angeles. Section 4116 of OPA provides authority to require a minimum of two escort vessels for laden single hull oil tankers of 5,000 GT operating in Prince William Sound and Puget Sound. Despite the fact that Puget Sound is particularly identified in the statute as in need of tug escorts, the Coast Guard has failed to require tug escorts west of Port Angeles.

The Coast Guard has also failed to implement key spill response measures, including salvage and firefighting requirements; on-water response capacities; and on board containment and removal equipment. The Coast Guard Re-Authorization Act of 1993 specifically instructed the Coast Guard to test and evaluate technology that could be carried safely aboard tankers. Pub. L No. 105-383, 112 Stat. 3411 (1993). It also required that a report be sent back to Congress within a maximum of two years on the feasibility and environmental benefits relating to tanker oil spill response equipment. *Id.* Six years later that report has still not been provided.

Since the passage of OPA, almost a decade ago, oil tankers have continued to operate without the safeguards required by Congress. Many oil spills are reported every year. Although these incidents are not always widely publicized, they nonetheless harm the environment and quality of life of American citizens.[10]

10. *E.g.*, In March 1996, a barge in the Housting Ship Channel almost split in two, spilling 714,000 gallons of oil into Galveston Bay. Mick Drago, *Associated Press*, March 19, 1996. In January 1996, off the coast of Rhode Island, the North Cape barge had to be abandoned after the tug towing it caught fire; 820,000 gallons of #2 fuel were spilled into the water. Dennis Hevesi, *The New York Times*, February 12, 1995. In January 1994, a barge ran aground in Puerto
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B. Washington's Best Achievable Protection regulations are a legitimate exercise of its traditional police powers reserved to the states by the Tenth Amendment.

Washington's BAP regulations are a valid exercise of its police powers for the purpose of protecting its marine environment from the catastrophic effects of an oil spill. The right of Washington to enact oil spill regulations concurrent and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment.[11]

Neither the Constitution nor prudent public policy requires that Washington State rely upon overextended and under

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Rican waters after its towing cable broke; 750,000 gallons of oil spilled into the ocean off a popular beach area. Press Release by Guillermo Gill, U.S. Attorney, April 25, 1996; In August 1993, three ships collided in the main channel leading into the Port of Tampa Bay, spilling 328,000 gallons of oil into the water; an even larger amount of oil caught on fire, seriously polluting the air in this highly populated area. "Collisions and Oil Spill in Tampa Bay," (based on newspaper articles and the account in *Golob's Oil Pollution Bulletin*). In addition, many incidents that do not result in actual spill are not publicized.

11. The decentralization of power associated with the traditional sovereignty of states implicates the most basic concepts of a free and democratic society.

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. 452, 458-459 (1991). *See also United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy concurring) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power' ").

budgeted federal officials for the protection of one of the most environmentally sensitive ecological systems in the world. Fundamental concepts of federalism require that Washington State be able to protect and regulate the quality of its own environment. So long as Washington's BAP regulations are not in conflict with international treaties or Coast Guard regulations, the exercise of the State's police powers for the preservation of its environment can not be usurped.

Many jurisdictions have no regulations concerning protection against oil spills. As to those jurisdictions, federal regulations and/or international treaties continue to control; the BAP regulations do not usurp the authority of the Coast Guard in State waters, rather they reasonably complement the federal requirements. Much like the federal constitution itself, federal regulations and treaties exist as a floor beneath which environmental protection may not fall. As with state constitutional rights, however, individual states may provide for greater protection. *See* Utter, *Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 Pug. Sound. L. Rev. 491, 495 (1984); Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 501-502 (1977).

The Tenth Amendment confirms "that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). The Tenth Amendment encompasses "any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 fn. 4 (1992). Under modern analysis, the question is whether the State has exercised its police power in conformity with federal laws and the Constitution. *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 342-43 (1977); *Reid v. Covert*, 354 U.S. 1, 15-18 (1957) ("The prohibitions of the Constitution were designed to apply to all branches of the

National Government, and they cannot be nullified by the Executive or by the Executive and the Senate combined"). Federal maritime law has long accommodated the States' interest in regulating environmental protection, although the regulation may have an incidental effect on maritime affairs.[12]

Whether or not the enactment of state regulations may hypothetically result in some "Balkanization" is entirely besides the point.[13] What the Petitioners decry as the evil of

12. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215 fn.3 (1996) ("States have thus traditionally contributed to the provision of environmental and safety standards for maritime activities"); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) ("[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied"); *Huron Portland Cement Co. v Detroit*, 362 U.S. 440, 442 (1960) ("In the exercise of [police powers], the states . . . may act, in many areas of . . . maritime activities"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 97-1337 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, *this authority is shared with the Federal Government* when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making") (emphasis added); *International Paper Company v. Ouellette*, 479 U.S. 481, 502 (1987) (Brennan concurring and dissenting) ("This traditional interest of the affected State, involving the health and safety of its citizens, is protected by providing for application of the affected State's own tort laws in suits against the source State's polluters"); *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1, 10 (1937) ("The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' "); *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 435-36 (1976) (Stewart, dissenting) ("The Court has never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean 'territory.' ").

13. *See Hughs v. Oklahoma*, 441 U.S. 322, 342 (1979) (Rehnquist dissenting) ("Unless the regulation directly conflicts with a federal statute or treaty, . . . allocates access in a manner that (Cont'd)

Balkinization, the environmental community proclaims as the genius of federalism. The genius of federalism within the environmental context allows the states to be laboratories of experimentation in which various policies are debated, implemented and then refined. Innovative and better ways of protecting the public health, safety and environment will be the result of allowing states to enact their own oil spill prevention regulations.

> Within our federal system, states are intended to be laboratories of experimentation in which various policies are debated, implemented and refined. The modern environmental movement started in the states. The federal government has followed the lead of the states, evaluating different state programs and borrowing the best ideas in order to form a comprehensive federal law. It is incongruous that in adopting the ideas that states have already developed, federal law should prevent further innovation by prohibiting states from expanding their environmental programs, be they regulation of hazardous materials transportation or other initiatives. By preempting state authority in this case, we effectively eliminate the ability of states to develop new and

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violates the Fourteenth Amendment, . . . or represents a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation, . . . the State's special interest in preserving its wildlife should prevail. And this is true no matter how 'Balkanized' the resulting pattern of commercial activity") (Citations omitted); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 288 (1977) (Rehnquist dissenting) ("Barring constitutional infirmities, only a direct conflict with the operation of federal law — such as exists here — will bar the state regulatory action. . . . This is true no matter how 'peripatetic' the objects of the regulation or however 'Balkanized' the resulting pattern of commercial activity").

> better ways of protecting the public health, safety and environment. And, we prevent innovative state programs from percolating up to the federal level.

The Chlorine Institute, Inc. v. California Highway Patrol, 29 F.3d 495, 499 (9th Cir. 1994). *See also FERC v. Mississippi*, 516 U.S. 742, 789 (1982) (O'Connor concurring and dissenting) ("Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes").[14]

14. The BAP regulations apply to both the "primary" (on board/ substantive), and "secondary" (off the ship/procedural) conduct of tanker operations in state waters. Contrary to Petitioners' assertions, state authority over vessels is not limited to secondary conduct. Intertanko Brief at 37-39.

> The characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

American Dredging Co. v. Miller, 510 U.S. 443, 457-58 (1994) (Souter, concurring). In the environmental context, states have historically been authorized to reasonably regulate in the realm of primary conduct. In *Huron Portland Cement Co., supra* the Court upheld state regulations designed to protect the environment while simultaneously affecting primary conduct. *Huron* authorized state regulations of vessel boiler operations in order to prevent air pollution. *See Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d. 623, 629 (1st Cir. 1994) ("State regulation of [ships or sailors] is not automatically forbidden"); *Chevron v. Hammond*, 726 F.2d 483, 629 (9th Cir. 1984) *cert. denied* 471 U.S. 1140 (1985) (upheld an Alaska prohibition of tanker deballasting in state waters — an operational procedure designed to ensure proper submergence and vessel (Cont'd)

C. Federal case law supports the right of states to enact regulations for the protection of the marine environment so long as those regulations do not conflict with federal law.

In *Askew v American Waterways Operators, Inc.*, 411 U.S. 325 (1973) the Court considered an action to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act. *Id.* at 327. Shipping interests sought to have the Florida Act preempted by federal maritime interests and the Water Quality Improvement Act of 1970. The act subjected shipowners and terminal facilities to liability without fault up to $14,000,000 and $8,000,000, for cleanup costs incurred by the Federal Government as a result of oil spills. It also authorizes the President to promulgate regulations requiring ships and terminal facilities to maintain equipment for the prevention of oil spills. *Id.* The language of the Water Quality Improvement Act (WQIA) is similar to OPA. Section 1161(o) of the Water Quality Improvement Act provides that:

> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or

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stability); Wyatt, M., *Navigating the limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Maritime L.J. 1 (1995). OPA § 1018 affirms the Congressional intent that individual states may reasonably act in the regulation of foreign oil transport to protect unique, local environmental interests, even where the regulations incidentally address on-board activities.

Petitioners argue that the *Huron* Court spared the state regulation through a finding that it had a distinct purpose from the federal statute in question: "vessel . . . safety for the federal statute and air quality and cleanliness concerns for the municipality." Intertanko Brief at 41. This distinction is of no avail in the case at bar. As noted with specificity *infra*, OPA consolidates safety and environmental protection standards.

> privately owned property resulting from a discharge of any oil or from the removal of any such oil.
>
> (2) *Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.*
>
> (3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.

(emphasis added). The Court in *Askew* recognized that the federal statute "contains a pervasive system of federal control over discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." *Id.* at 330. Although the Solicitor General argued that portions of the Florida Act were contrary to the federal statute, the Court ruled that those portions of the State act concerning the application of liability to vessels had not yet been interpreted by the Florida Courts, and were susceptible to an interpretation which would harmonize the state and federal statutes. *Id.* at 331. As with OPA, the WQIA contemplated cooperative action between the states and the federal government; "that federal agencies 'shall' act 'in coordination with State and local agencies.' " *Id.* at 332. As with OPA, the reason for the WQIA savings clause was "that the scheme of the Act is one which allows — though it does not require — cooperation of the federal regime with a state regime." *Id.*

In *Askew* the Court declined to rule that Florida regulations requiring "containment gear" would be per se invalid merely because the subject to be regulated may require uniform federal regulation. The Court ruled that resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations, should await a concrete dispute under applicable Florida regulations. *Id.* at 337.

Notably, in the case at bar there is no actual dispute alleged involving any tank vessel and any state regulation. There exists no evidence on this record that any vessel entering the internal waters of Washington was prevented from doing so or was subject to enforcement because of the impossibility of complying with state and federal regulations. This court should not entertain hypothetical claims involving preemption. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978) ("This sort of hypothetical conflict is not sufficient to warrant preemption").

The Court in *Askew* also considered "whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government." *Id.* This question was answered affirmatively. "Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." *Id.* at 341.

In *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) the Court considered a challenge to the Washington Tanker Law, which regulated the "design, size, and movement of oil tankers in Puget Sound. . . ." *Id.* at 155. Allegedly, the Washington law was preempted by the PWSA/PTSA.

The Court in *Ray* began its analysis with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 157. As articulated above, Congress has not expressed a clear and manifest purpose to supersede Washington's historic police powers to enact environmental regulations to prevent an oil spill. Section 1018 of OPA is an expression explicitly to the contrary.

A plurality of the Court in *Ray* ruled that Congress intended to foreclose state regulation of tanker design and construction. *Id.* at 164. This ruling, however, was limited to design and construction.

> This statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.

Id. at 163. The Court, however, recognized the State's right to enact "reasonable, nondiscriminatory conservation and environmental protection measures. . . ." *Id.* at 164. "Of course, that a tanker is certified under federal law as a safe vessel insofar as its *design and construction* characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute *design or construction* specifications." *Id.* at 168-69 (emphasis added).

Washington's BAP regulations are not concerned with design and construction, and are simply "reasonable, nondiscriminatory conservation and environmental protection measures." It is undisputed that compliance with both federal and state regulations is not a physical impossibility. In addition, the BAP regulations do not stand as an obstacle to the full purposes and objectives of Congress; to the contrary they promote the objectives of Congress.

In *Chevron v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985), the Court addressed whether Alaska's environmental regulations prohibiting the operational discharge of oil in Alaska's water were preempted by Coast Guard regulations. The Court further considered an interpretation of the CWA, an environmental statute and a predecessor to OPA. The Court in *Chevron* ruled on many of the issues now presented.

Specifically, the Court reviewed a broad spectrum of federal statutes, including the PWSA/PTSA. Because the Ninth Circuit specifically found that *Ray* was limited to design and construction, it ruled that *Ray* was not dispositive to the outcome. *Id.* at 487-488. In considering the issue of implied field preemption, the Court acknowledged that although the PWSA/PTSA is silent on the subject of preemption, "numerous other federal statutes provide convincing evidence of Congress' intent that, within three miles of shore, the protection of the marine environment should be a collaborative federal/state effort rather than an exclusively federal one." *Id.* at 489. In particular, the Court considered that the Clean Water Act, which was designed to regulate the discharge of any pollutant into the nation's navigable waters, provided for a federal-state partnership for the control of water pollution. *Id.* at 489.

The Court further recognized "a well-settled congressional policy to promote a state's more stringent regulation of the local marine environment." *Id.* at 491. After reviewing the comprehensive legislative scheme, the Court concluded "that Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollutant discharges — and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums." *Id.* The argument that the comprehensiveness of the legislative scheme evinces an intent to preempt was rejected. "The complexity and comprehensiveness of federal marine environmental regulation are particularly appropriate without regard to the question of preemption because these regulations must 'be sufficiently comprehensive to authorize and govern programs in States which had no . . . requirements of their own as well as cooperatively in States with such requirements.' " *Id.* at 492.

The reasoning of the Ninth Circuit in *Chevron* is directly applicable here. OPA, which is modeled after the CWA, is the most recent statement of Congressional intent enacted

immediately after the worst oil spill in American history. OPA authorizes comprehensive federal regulation in recognition of the fact that many jurisdictions will not enact relevant regulation. Like the CWA, however, it recognizes that local regulation with involvement by local officials is the best way to protect the local environment. Federal enactments create only minimum requirements.

The Court in *Chevron* also considered the effect of the local statute on international affairs, and distinguished those valid concerns with tanker design from those relevant to environmental issues.

> Although national uniformity and international consensus are critical concerns in the establishment of tanker design standards, those concerns are not essential in the regulation of pollutant discharges into coastal waters. Once a ship is constructed, it cannot meet new or different design requirements in various ports. A ship's discharge of pollutants can, however, be varied according to environmental standards and conditions in different jurisdictions. Hypothetically, state regulation regarding the discharge of pollutants could possibly interfere with the establishment of nationally uniform design requirements. But, for the most part local environmental regulations can co-exist — as they do here — with federal regulations without impinging on the exclusively federal concerns of vessel design and traffic safety.

Id. at 493. The overall nature of the environmental regulatory scheme has not changed. Federal and state environmental regulations can co-exist, as they do here. Tank vessels entering the internal waters of Washington State can comply with the state BAP regulations, Coast Guard regulations and the provisions of international treaties. Prevention of oil spills and deference to traditional state police powers continues to

dominate considerations of illusory uniformity.[15] "Thus, we conclude Congress intended that stricter state standards for oil pollution within three miles of shore be enforced in addition to Coast Guard regulations issued under the PWSA/PTSA." *Id.* at 495.

In *Berman Enterprises v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992) the Plaintiffs claimed that the New York Environmental Conservation Law was preempted by operation of the PSWA as amended and subject to Coast Guard regulation. *Id.* at 414. The Plaintiffs in *Berman* also relied upon *Ray* to support their contention of conflict and field preemption. *Id.* The *Berman* Court rejected Plaintiffs' claim of preemption and their reliance on *Ray*. "Contrary to plaintiffs' view, *Ray* indicates how far the Supreme Court is willing to go to allow local regulation of oil tanker activity." *Id.* at 415 (Citing L. Tribe, *American Constitutional Law*, § 6-28, at 487 (2d ed. 1988). In response to Plaintiffs' claim of conflict preemption, the Court in *Berman* again relied upon *Ray* and ruled that only an *actual conflict* between state and federal law could result in preemption.

> *Ray*, however, only invalidated state provisions where there was an actual conflict between state and federal law. Where there was no such conflict, the Court steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states' police powers.

Id. at 415-416. In the case at bar, there is no actual conflict.

The Court in *Berman* explicitly recognized that states are authorized to exercise their historic police powers not only after

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15. The Court in *Chevron* recognized that the PWSA/PTSA does not mandate strict international uniformity and that the statute gives the Coast Guard specific authority to establish stricter standards than those set by international agreements, 46 U.S.C. § 391a(6). "This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction." *Chevron* at 493-494.

the oil hits the water, but to *prevent* oil spills in the first instance. "*Ray* specifically allowed for statutes that are designed to protect the environment against imminent (or even non-imminent) harms." *Id.* at 417. A more eloquent statement of the necessity for local regulation is hard to imagine.

> Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coast that would otherwise surely result from the high volume of oil barge traffic on the state's waterways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

Id. at 416-417.

The Court in *Berman* explicitly considered the effect of the non preemption provisions of both the CWA and OPA and acknowledges that if there were otherwise any doubt about preemption, these acts "settle the issue." *Id.* at 416. After quoting both acts, the Court concluded that "[f]ar from being preempted, [New York] accepts the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id.*[16] *See also Ballard Shipping Co., v. Beach Shellfish*, 32 F.2d 623 (1st Cir. 1994) (upholding state law despite the existence of a direct conflict between state law and maritime law).[17]

16. Addressing the issue of interstate commerce, the Court in *Berman* ruled that there was no evidence that the state's regulation created an unreasonable burden or that the burden exceeded the cost of policing and protecting against adverse consequences of oil transportation on New York's waterways. "The *Ray* Court indicated that commerce clause challenges to environmental protection statutes should not be entertained lightly." *Id.* at 417.

17. In *Ballard Shipping*, the Court addressed the state interests as follows:

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In the case at bar, there is no actual conflict between the federal regulatory scheme and Washington's BAP regulations; the State's regulations do not render compliance with federal law burdensome or impossible and do not inhibit conduct that federal law specifically encourages. There is no evidence in the record that compliance with the BAP regulations is anything more than *de minimus* in relation to the overall costs of oil tanker operation. *See* Affidavit of Arthur McKenzie, JA-330. Moreover, the protection afforded by the BAP regulations is unmistakable. *See* Affidavit of Stanley Norman, JA-253.

1. The BAP regulations do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

After the *Exxon Valdez* disaster, Congress recognized that only a broader joint partnership between the federal government and the states could prevent future oil tragedies. In the true spirit of federalism, Congress enacted OPA with the intent of consolidating and enhancing prior Congressional measures expected to prevent oil spills.

OPA's fundamental purpose and objective is oil spill prevention. This is accomplished through a comprehensive integration of liability, compensation and vessel standards.

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA 90. As the most recent federal statute in the field,

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> No one can doubt that the state's interest in *avoiding pollution* in its navigable waters and on its shores, and in redressing injury to its citizens from such pollution, is a weighty one. In *Huron Portland Cement*, the Supreme Court described state air pollution laws as a classic example of police power, and continued: "In the exercise of that power, the states . . . may act, in many areas of interstate commerce and **maritime activities**, concurrently with the federal government." 342 U.S. at 442.

Id. (italicized emphasis added, bold emphasis original).

> OPA 90 reflects "the *full* purposes and objectives of Congress," better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

148 F.3d at 1043 (internal citation omitted; emphasis in original). OPA serves to remove the patchwork of oil spill prevention measures by placing them into a comprehensive, environmentally oriented statute.[18] Prior to OPA, oil spill liability provisions were codified separately from vessel safety standards. OPA exhibits a marked change in the law through the compilation of particular vessel standards into an environmental context. OPA's evolution exhibits Congress' continuing efforts to strengthen laws designed to prevent oil spills, and is a direct recognition that the pre-*Exxon Valdez* status quo of liability and safety provisions were unacceptable. Section 1018 now presents a single comprehensive savings clause which includes authorization of "additional [state] . . . requirements . . . *relating to* the discharge, or *substantial threat of a discharge, of oil*." Such a threat is certainly presented by an oil tanker which is poorly operated in state waters.

2. The BAP regulations do not conflict with federal statutes, treaties or international law.

It is virtually undisputed that compliance with the State, federal and international standards is not a physical impossibility. *See* JA-87. In addition, the federal regulations do not afford protection for unique local conditions.

Petitioners allege that the lower court did not apply a comparative analysis of the BAP regulations with their federal

18. "What the Nation needs is a package of complementary international, national, and State laws that will adequately compensate victims of oil spills. . . . Instead, there is [currently] a fragmented collection of Federal and State laws providing inadequate cleanup and damage remedies . . ." OPA 90, Sen. Rept. No. 101-94, 2, July 28, 1989.

international counterparts. U.S. Brief at 16. Petitioners are mistaken. Both Petitioners and Respondents exhaustively briefed comparisons of the State rules with international standards. *See e.g.*, Intervenor Dist. Ct. Sum. J. Res., 26-40; U.S. 9th Cir. Rep. Br. 8-16; Intervenor 9th Cir. Res. Br. 45-52. The District Court entailed a specific analysis of federal, international and State provisions. 947 F. Supp. at 1496-97. Ultimately, as discussed, *infra*, Petitioners' assertions of international law conflicts were denied because the international treaty provisions at bar are non-self-executing and set only minimum standards. *Id.*, at 1490, n.3; 148 F.3d at 1063.

D. The Strait of Juan de Fuca is the internal waters of the State of Washington — the State has greater sovereign interest and authority over internal waters.[19]

To delimitate internal waters, the Court has adopted the rules of the 1958 Convention on the Territorial Sea and the Contiguous Zone. *See United States v. California*, 381 U.S. 139, 165 (1965); Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606; *United States v. Alaska*, __ U.S. __, __, 117 S. Ct. 1888, 1893 (1997). Three requirements must be met to satisfy the "historic-waters" classification; "the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska*, S. Ct. at 1895. All three requirements are met within the Strait of Juan de Fuca.[20]

19. In the appellate court, the Government argued for the first time that the BAP regulations interfere with the right of innocent passage. The Government is wrong. But this issue was never raised in the District Court. It should not be considered for the first time on appeal. The Ninth Circuit was correct is its decision not to consider this issue. 148 F.3d 1063-64. The government was explicitly invited by Intertanko to intervene in the District Court, but declined the invitation. Supp. Excerpts at 718.

20. The Strait of Juan de Fuca is a geographic cul-de-sac. Both U.S. and Canadian waters where tanker ports are located are

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The BAP regulations only extend to tankers which physically enter the internal, or "historic," waters of Washington State, including the Strait of Juan de Fuca. In 1993, the Coast Guard explicitly acknowledged that "U.S. waters in the Strait of Juan de Fuca are *internal waters* of the United States." 58 FR 27629 (1993) (emphasis added). The Coast Guard finding is consistent with a 1984 Canadian Supreme Court decision that all waters on the Canadian side of the Strait are comprised of the internal waters of both the Canadian government and British Columbia. *See Re: Ownership of the Bed of the Strait of Georgia*, 1 S.C.R. 388, 389 (1984). As internal waters, Washington State owns all the submerged lands under the Strait. *United States v Louisiana*, 470 U.S. 89, 94 (1985). Washington State's jurisdiction over, and proprietary rights in, the Strait of Juan de Fuca, to the Canadian boundary, underscores its interest in preventing oil spills within these waters.[21]

1. The presumption against preemption is stronger within internal waters.

Within internal waters, a state retains a right of sovereignty to regulate surface traffic concurrently with the United States. *Alaska*, *supra* at 1892 ("Ownership of submerged lands — which carries with it the power to control navigation, fishing,

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unquestionably within sovereign internal waters. The Court has commented that under U.S. policy, this geographical reality may itself be determinative on the classification of Strait waters as internal. *United States v. Alaska*, 521 U.S. 1, 18 (1997) ("the character of the strait depends on the character of the waters to which it leads").

21. The status of the Strait as internal waters has great relevance to the extent of Washington's police powers. One of the foundations of the Government's argument is that international concerns are greater with respect to the right of foreign tankers entering the Strait of Juan de Fuca. Correspondingly, the State's right to exercise it police powers must be at the highest within internal waters, waters which belong to the State as a matter of constitutional principle independent of any Congressional grant. *See Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

and other public uses of water — is an essential attribute of sovereignty"). While the State concedes that it does not have the authority to prohibit entry of tankers into the Strait (State Br. in Opp. 3, fn.4), it retains an even stronger right to exercise its police powers within its internal waters as compared to territorial waters. As the BAP regulations relate to internal waters, overcoming the presumption against preemption is more difficult.

E. There exits a strong presumption against preemption. The historic police powers are not to be superseded absent a clear expression of Congressional purpose.

All parties recognize that there exists a strong presumption against preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). In evaluating a federal law's preemptive effect, courts proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act *"unless that [is] the clear and manifest purpose of Congress."* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).[22] Quite simply, Congress has not clearly manifested its purpose to preempt efforts by the states to prevent oil spills. Just to the contrary, OPA Section 1018 specifically authorizes the states to regulate to prevent oil spills.

22. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred, and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. . . . Furthermore, we should be slow to strike down legislation which the state concededly had power to enact because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

F. The Oil Pollution Act of 1990 authorizes the states to enact complementary regulations to prevent oil spills or the substantial threat of an oil spill.

1. The clear language of Section 1018.

Contrary to expressing its "clear and manifest" purpose to supersede the state's historic police powers, the clear language of OPA provides for a savings clause or express non-preemption. The relevant statutory language appears as follows:

> (a) 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; or (B) any removal activities in connection with such discharge; . . .
>
> (c) *Nothing in this Act*, the Act of March 3, 1851, or section 9509 of the Internal Revenue Code of 1986 *. . . 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 discharge, of oil.*

OPA § 1018 (emphasis added). This clear statutory language obviates the necessity of consideration of the congressional history. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter for the court . . . must give effect to the unambiguously expressed intent of Congress").

Until now, Petitioners have conceded that Section 1018(a) of OPA granted to the states additional authority to enact regulations relevant to the issue of liability for an oil spill. 148 F.3d at 1059 ("Intertanko asserts, § 1018 is limited in its application to state laws concerning liability and penalties . . . ."). They have offered no explanation at all concerning the meaning or purpose of Section 1018(c). Petitioners have now apparently abandoned their earlier interpretations. Intertanko and the Government are not the only ones who have dramatically changed their proffered interpretation of Section 1018. Even the Coast Guard has previously conceded that Section 1018 authorized the states to legislate in this area without fear of preemption.[23]

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23. In a memorandum dated August 18, 1992 the Coast Guard Commandant, J.W. Kime, states:

> The Oil Pollution Act of 1990 (OPA 90) has been with us for over two years now. The act materially altered the nature of the relationship between the Coast Guard and the states in the marine environmental protection (MEP) arena. *States now have the opportunity for a more active role in pollution prevention, response, access to the Oil Spill liability Trust Fund (the fund), and freedom to regulate in areas historically reserved to federal agencies.*

JA-301 (emphasis added). In a memorandum dated May 19, 1993 from A. E. Henn, Chief, Office of Marine Safety, Security and Environmental Protection, the Coast Guard acknowledged:

> The Oil Pollution Act of 1990 (OPA 90) specifically affirmed the rights of states to protect their marine environment.
>
> . . .
>
> Several states have been extremely pro-active in developing programs that may differ somewhat from our Coast Guard policies and may exceed our mandates and regulations. *OPA 90 did not preempt states rights*, and, in our efforts we must be committed to work together to complement rather than duplicate. Should Federal preemption of a state mandate become necessary, it will become a complex legal issue.

JA-292-293.

Petitioners' previous arguments made little sense.[24] Petitioners now argue that Section 1018 only preserves the status quo; that this section preserves for the states whatever rights they may have had to enact oil spill regulations before the passage of OPA, but that those rights are not expanded by OPA. U.S. Brief, at 44.[25] This interpretation is inconsistent with the plain language of the statute and this Court's interpretations of a virtually identical savings clause in the Water Quality Improvement Act. *See Askew* v. *American Waterways Operators, Inc., supra.*

By the use of the words "additional requirements," Congress can only have meant additional to those requirements already established by OPA. The State of Washington has accepted Congress' invitation to impose additional requirements.[26]

24. If § 1018(a) grants to the states ample authority to impose their own standards of liability which differ from federal or international standards, then no additional statutory language is necessary to achieve this result. Subsection (c) expanded the permissible scope of state action from that already provided in subsection (a), otherwise it would be merely superfluous. The only real difference between subsection (a) and subsection (c) is that the latter allows the states to impose both "additional liability *or additional requirements"* for a *"substantial threat of a discharge, of oil"*, and not just for oil discharges or removal activities. It is clear that the terms "additional liability" and "additional requirements" have a different meaning, otherwise it would be a mere redundancy.

25. Petitioners' arguments that OPA § 1018 is limited to Title I of the Act (Intertanko Brief at 46-47) are in discord with the language of the provision. § 1018(a)(B) preserves the authority of the states to impose "additional . . . requirements with respect to . . . any *removal* activities . . ." *Id.* (emphasis added). Federal removal activities are placed within Title IV of the Act, along with prevention standards. This fact did not escape the District Court's attention; "Thus, the savings clause cannot be limited to Title I, but must also include Title IV." 947 F. Supp. at 1492.

26. Petitioners contend that a "substantial threat of a discharge" is limited to "incident[s] involving a vessel that may create a (Cont'd)

Petitioners dismiss the unique language and purpose of OPA § 1018(c). The provision is not found in any prior oil pollution liability statute. Prior to the passage of OPA, environmental statutes designed to prevent oil pollution [WQIA § 11(o)(2), CWA § 311(o)(2)] contained savings clauses which were virtually indistinguishable from OPA § 1018(a). However, in the construction of the OPA savings clause, Congress conspicuously changed the structure of the prior provisions and added subsection (c). Had Congress merely intended OPA § 1018 to be limited to liability and compensation, subpart (c) would not have been necessary. While OPA does not expand state police powers per se, the broader savings clause of OPA allows the states to utilize their police powers to impose a broader range of environmental restrictions than previously enacted statutes. *See* Congressional letter JA-327.

2. OPA is an environmental statute.

Petitioners attempt to dress the BAP regulations in admiralty clothing to expand the reach of federal authority, yet Petitioners cannot escape the fundamental underpinning of OPA: environmental protection. OPA is not a federal maritime statute in the character of PWSA/PTSA, but is instead an integration of prior liability and safety regimes, in particular CWA § 311: "[t]he body of law already established under section 311 of the Clean Water Act is the *foundation* of [OPA]." Senate Report

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significant risk of discharge of cargo oil. Such incidents include, *but are not limited to* groundings, stranding, collisions, hull damage, fire explosion, loss of propulsion, flooding, on-deck spills, or other similar occurrences." Intertanko at 44, n.30, *quoting* 33 C.F.R. § 155.1020 (emphasis added). Even assuming the applicability of this Coast Guard definition, the language of OPA § 1018(c) authorizes regulations "relating to" these risks; prevention of these incidents in State waters are precisely the purpose of the BAP regulations. Undermining Petitioners' contention that states only have the power to regulate for liability and compensation (i.e., after oil hits the water) is the inclusion of "significant risk." in the Coast Guard definition. Where a significant risk exists, oil is obviously still confined to the tanker.

No, 101-94, 4, July 28, 1989 (emphasis added).[27] OPA presents a comprehensive regime for oil spill prevention and stands alone in providing an authoritative federal-state partnership designed to prevent oil spills by embracing *both* liability and safety.[28]

27. Petitioners' assertion that environmental protection of the marine environment has historically been within the exclusive domain of the federal government is factually wrong. *E.g. The Chlorine Institute, Inc. v. California Highway Patrol,* 29 F.3d 495, 499 (9th Cir. 1994) ("The modern environmental movement started with the states"). The emergence of domestic tanker safety standards enacted specifically to prevent oil pollution did not occur until codification of the 1972 Ports and Waterways Safety Act (PWSA), 33 U.S.C. § 1221 *et seq.* Environmental oil spill liability regimes did not appear until passage of the 1970 WQIA.

> Prior to 1972, existing [U.S.] legislation dealt primarily with regulations governing the physical security of vessels, ports and waterfront facilities. For example, the Tank Vessel Act of 1936 was enacted to prevent damage to life and property from the carriage of flammable or combustible liquid cargos in bulk, but did not specifically address the protection of the environmental quality of US ports and navigable waters. In 1950 Congress passed the Magnuson Act which authorized the promulgation of rules governing the protection of vessels, harbours, ports and waterfront facilities in the United States in cases where national security was endangered. Neither of these laws, however, was considered sufficiently broad to encompass protection of the marine environment.

De La Rue, *supra* at 773.

28. The primary object and purpose of the PWSA/PTSA and Title 46 is to ensure safe construction design and navigational standards, fundamentally maritime issues. Nowhere within these acts is there any provision for liability in the event of an oil spill. This conspicuous absence confirms that these acts are maritime statutes, not environmental statutes. Under Title 46, "prohibited acts" *only* cover noncompliance with construction and design characteristics. 46 U.S.C. § 3713. Similarly, no treaties before the Court provide for spill liability. MARPOL 73/78 does provide for enforcement of

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Congress provides that the national policy to prevent water pollution rests primarily with the states; "[i]t is the policy of Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." CWA 101(b) (emphasis added). *See also* Clean Air Act, 42 U.S.C. § 7407(a)(3) ("the prevention and control of air pollution at its source is the *primary responsibility of states* and local governments") (emphasis added). Thus, there is not a uniquely federal interest in protecting the quality of the nation's water. Rather, the primary responsibility for preventing oil pollution rests on the states. Although there is arguably a federal interest in preventing oil pollution in state waters, this interest does not apply to the exclusion of state law.

Petitioners consistently refuse to acknowledge the difference between maritime regulation and environmental regulation. This difference, however, did not escape the Court in *Ray,* 435 U.S. at 164. ("We do not question in the slightest the prior cases holding that enrolled [those engaged in domestic or coastwise trade] and registered [those engaged in foreign trade] vessels must conform to 'reasonable, nondiscriminatory conservation and environmental protection measures' . . . imposed by a State."). The BAP regulations conform precisely to the above description: the BAP regulations are "reasonable, nondiscriminatory conservation and environmental protection measures."

3. Notwithstanding the clear language of Section 1018, Congressional history supports Intervenors' interpretation of the savings clause.

As the language of the Congressional record makes clear, Section 1018 of OPA was modeled after the savings clauses of the Water Quality Improvement Act and the Clean Water Act.

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intentional discharge violations, but does not specify a remedy. MARPOL 73/78, Art. 6. Actual prohibition of oil pollution is prescribed under distinguishable federal environmental statutes in coordination with state law, particularly OPA and the CWA.

Congress intended states to have the ability to protect their environment *before* oil hits the water.

> To date, Federal legislation has affirmed the rights of States to protect their own air, water, and land resources by permitting them to establish State standards which are more restrictive than federal standards.
>
> . . .
>
> [T]he Federal statute is designed to provide *basic protection* for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its resources and citizens is entitled to do so.

S. Report No. 101-94, at 6 (emphasis added).

> The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of the States to determine for themselves the best way to protect their citizens, is clearly affirmed in S. 686 [i.e., § 1018].
>
> . . .
>
> This subsection [(1018(c))] reinforces the position stated clearly elsewhere that *no aspect* of State oil spill programs is preempted, *including* the authority to impose additional requirements or penalties.

Id., 17-18 (emphasis added).

Petitioners simply pay undue reliance upon the House Conference Report statement that OPA "does not disturb the Supreme Court's decision in *Ray v.* [*ARCO*]." H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. At 122 (1990), reprinted in 1990 U.S.C.C.A.N. 800. Legislative history confirms that the purpose of this qualification was to ensure that the states would not act in the areas of design and construction.[29]

29. A Commerce, Science and Transportation Committee Report addressing the proposed legislation placed the pre-OPA (Cont'd)

G. The express preemption asserted by the U.S. Coast Guard has exceeded the scope of its administrative authority.

The U.S. Coast Guard has no greater authority to preempt state regulation than granted under the terms of the statute itself.

> [A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.
>
> . . . .
>
> *An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.* This we are both unwilling and unable to do.

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savings clause, then known as Section 112, within Title I, which also included tanker vessel standards. *See* Senate Report 101-99, Aug. 1, 1989. The Committee specifically commented on the objective of Section 112: "This section declares that nothing in this legislation shall be construed or interpreted to affect in any way the authority of a State or political subdivision to *regulate oil tankers or to provide for liability or response planning* and activities in State waters." *Id.* at 21 (emphasis added). The later acknowledgment of *Ray* in the House Conference Report did not invalidate this assertion, but merely qualified that it did not apply to the design and construction of tankers.

Louisiana Pub. Serv. Conn'n v. FCC, 476 U.S. 355, 374 (1986) (emphasis added).[30] Although deference to administrative agencies in some cases is appropriate, federal courts should not allow deference to "slip into a judicial inertia" and "rubber stamp" administrative determinations. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983). This deference is especially inappropriate where agency action "is premised on its understanding of a specific Congressional intent . . . [which is] the quintessential judicial function of deciding what a statute means." *Id.* 464 U.S. at 97-98 n.8. *See also Trustees of California State University v. Riley*, 74 F.3d 960, 963 (9th Cir. 1996) ("In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement").

In the case at bar, Congress has spoken to the precise issue in question. The statute and the legislative history make clear that Congress intended to allow the states to implement protective regulations to prevent oil spills within their jurisdiction. The Coast Guard's determination to the contrary "is premised on its understanding of a specific Congressional intent," and therefore is entitled to little deference. The Coast Guard "may not confer power upon itself." *Louisiana Pub. Serv. Conn'n v. FCC, supra.* The Coast Guard's determination of the preemptive effect of its regulations is simply beyond its authority and has no effect. This was precisely the ruling

30. *See also Jenkins v. I.N.S.*, 108 F.3d 195, 200 (9th Cir. 1997) ("[A]n agency interpretation is not entitled to deference if it is contrary to clearly expressed congressional intent. . . . Statements in a Committee Report are not law, and it subverts our constitutional structure to treat them as such when the statutory language is facially unambiguous."); *State of Alaska v. Babbitt*, 54 F.3d 549, 552 (9th Cir. 1995) (we consider "whether Congress 'has directly spoken to the precise question at issue' *either in the statute itself or in the legislative history.*") (Emphasis added).

of the District Court, 947 F. Supp. 1496, and the Ninth Circuit. 148 F.3d at 1068.[31]

H. The treaties cited by Petitioners are not preemptive because they are not self-executing.

Petitioners contend that as the "supreme Law of the Land," international treaties independently preempt the BAP regulations under the Constitution, Art. VI, Cl. 2. Intertanko Brief at 29, U.S. Brief at 28. A more sweeping generalization on treaty interpretation is hard to imagine. Respondents agree that by virtue of a treaty's ratification, it is the "supreme Law of the Land." This elementary conclusion, however, is of no import on the question of state law preemption by treaty provisions. Such provisions are subject to the same substantive limitations as any other legislation. *Reid v. Covert*, 354 U.S. 1, 16-19 (1965).[32]

31. Where a federal agency asserts differing policies on the issue of preemption, any deference to which they might otherwise be entitled evaporates. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 fn.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency held view."); *Seldovia Native Ass'n, Inc., v. Jujan*, 904 F.2d 1335, 1345 (9th Cir. 1990) ("When an agency reverses a prior policy or statutory interpretation, its most recent expression is accorded less deference than is ordinarily extended to agency determinations."); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) ("Given this fluctuation [of the agency's position] over the course of two years, we decline to rely on the Forest Service's " 'expertise.' "). The Coast Guard's pronouncement that its regulations are to have preemptive effect are inconsistent with its previous memoranda, and entitled to no deference. *See* n.20, *supra.*

32. When federal courts are presented with questions of international law preempting a state regulation, they are not bound by one set mode of interpretation. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-715 (9th Cir. 1992); *Restatement (Third) of Foreign Relations Law of the United States (Restatement)*, § 325, comment (d) ("[d]ifferent approaches to interpretation have

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In order for a vessel standard contained in an international treaty to constitutionally preempt the BAP regulations, it must be of a self-executing character. A self-executing standard is one which has specific requirements which can be directly applied by the courts. *U.S. v. Verdugo-Urquidez*, 939 F.2d 1341, 1359, n.17 (9th Cir. 1991) ("A self-executing treaty is one which, of its own force, confers rights on individuals, without the need for any implementing legislation"). There are at least four relevant factors to be considered when determining whether a treaty is self-executing:

> (1) The purposes of the treaty and the objectives of its creators, (2) the existence of domestic procedures and institutions appropriate for direct implementation, (3) the availability and feasibility of alternative enforcement mechanisms, and (4) the immediate and long-range social consequences of self- or non-self-execution.

People of Saipan v United States Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003

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developed for particular categories of agreements"). When state legislation is alleged to violate an international agreement, the federal judiciary will examine the treaty in light of the expectations the United States had when ratifying the agreement and subsequent changes in U.S. policy and the international order. *Reid v Covert*, 354 U.S. 1, 18 (1957) ("when a [federal] statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null"). OPA necessarily alters contemporary interpretation of international regimes.

Application of international law within the federal judiciary is limited to constraints imposed by the Constitution. *Guaranty Trust Co. v United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty, wherever reasonably possible, will be construed so as not to override state laws or to impair rights arising under them"). International law cannot supersede the Tenth Amendment in and of itself, particularly with respect to state police powers designed to prevent marine pollution. *See, e.g., Askew v American Waterways, supra*; *Huron Portland Cement, supra*.

(1975). When treaty provisions before a Court are phrased in broad generalities, they cannot be self-executing. *Frolova v Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). *See also* 947 F. Supp. at 1490 n.3. A non-self-executing treaty does not provide definitive rules which a court may apply to reflect preemption.

> (3) Courts in the United States are bound to give effect to international law and international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary legislation.
>
> (4) An international agreement is "non-self-executing" (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.

Restatement (Third) of Foreign Relations Law of the United States (*Restatement*), § 111 (1987).

None of the treaty provisions under consideration are self-executing. The treaties under consideration impose international vessel standards that require unilateral implementation on the domestic level by each signatory nation. All treaty provisions relied upon by Petitioners therefore necessarily require implementation by the Coast Guard.[33] It is

33. STCW provides that "Parties undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the Convention full and complete effect." STCW, Art. I(1). STCW standards set forth the least common denominator in vessel safety: "Although conceived as a minimum requirement below which no flag state should fall, *the lack of clear definition of training standards* means that STCW is often in effect the maximum level above which many states fail to rise." *Safer Ships, Cleaner Seas; Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* (*Donaldson Report*)

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not, therefore, the treaties which are relevant to the issue of preemption, but the Coast Guard regulations.

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(emphasis added) (JA-323). STCW is implemented by the Coast Guard pursuant to 46 U.S.C. § 2101 *et seq.*

Petitioners claim that many of the BAP regulations are prohibited by 1995 STCW amendments. These amendments have no force of law in the United States. The 1995 amendments came into international force February 1, 1997. However, the Coast Guard has merely issued a notice of intent to issue an interim rule in conformity with the amendments. 62 FR 5197 (1997). After the interim rule is issued, the amendments will not be enforced by the Coast Guard for previously certified vessels until January 31, 2002. *Id.* at 5198-99.

SOLAS also sets forth the least common denominator in vessel safety. Each State is required to unilaterally implement regulations for their vessels which are *"at least as effective* as that required by the [Convention]" SOLAS Ch.1, Pt. A, Reg. 5 (emphasis added). SOLAS is implemented by the Coast Guard pursuant to 3 C.F.R. § 277.

MARPOL 73/78 indicates that "[p]arties . . . shall issue, or cause to be issued, regulations or instructions on the procedures to be followed in reporting incidents." MARPOL 73/78, Protocol I, Art. V(2). The Convention further provides that "[e]ach party to the Convention shall . . . make *all arrangements necessary* for an appropriate officer or agency to receive and process all reports on incidents." MARPOL 73/78, Art. 8(2)(a) (emphasis added). MARPOL 73/78 is implemented by the Coast Guard pursuant to 33 U.S.C. §§ 1901-1915.

COLREG sets forth minimum, non-self-executing standards for navigational safety and nations are free to implement their own regulations: "[n]othing in these Rules shall interfere with the operation of special rules made by an appropriate authority for roadsteads, harbors, rivers, lakes, or waterways connected with the high seas and navigable by seagoing vessels. Such special rules shall conform as closely as possible to these Rules" COLREG R. 1(b). The Coast Guard "is authorized to promulgate such reasonable rules and regulations as are necessary to implement the provisions of [COLREG]." 33 U.S.C. § 1607.

I. International laws designed to prevent oil spills are not uniform.

Uniform international vessel standards are non-existent, a fiction. Reciprocity and uniformity are amorphous international goals and do not exist in any recognizable order, and certainly not in practice. International vessel standards are all subjectively interpreted by each signatory nation. *Restatement*, § 325, Reporters' Note (4).

None of the international agreements raised by Petitioners set forth specific rules which are, or are required to be, uniformly complied with by the international shipping community. *See* Dec. Sally Lentz, JA-211. IMO admits that treaty standards are non-self-executing and the least common denominator for a flag-state to follow when implementing domestic standards. *Flag State Implementation*, IMO Maritime Safety Committee, MSC 66/12/1 (January 29, 1996). *See* Supp. Excerpts at 514-516 par. 8-10. Uniformity in international standards is all but nonexistent.

> Flag States have duties as well as rights. They have a duty to ensure that their ships comply with the standards accepted by the Flag States under international law and Conventions. Regrettably *Flag States are not uniform in their determination or ability to discharge this duty.*

Safer Ships, Cleaner Seas; Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping (*Donaldson Report*) (emphasis added). Supp. Excerpts, at 819 par. 2.13.

Nations that ratify international agreements to prevent oil pollution have conflicting economic incentives for implementing or enforcing domestic legislation. *See Implementation of IMO Instruments* (JA-223); *see also Non-Observance of International Rules and Standards: Competitive Advantages*, (JA-229). Many "vessels fly the flags of whatever nation seems the most likely to tolerate the lowest and cheaper standards." *Donaldson Report*, Supp. Excerpts, at 821 par. 2.25. "[S]hipping is still a largely free market which allows considerable scope for shipowners,

. . . to . . . avoid compliance with internationally agreed rules and regulations as regards safety and the protection of the marine environment." *Flag State Implementation*, JA-230 par. 2.

Many owners avoid international standards by registering their vessels in "flag of convenience" nations. These nations consist of flag states which do not exercise effective supervision or regulation of their vessels "for reasons of economy or a perverted desire to be competitive." *Donaldson Report*, JA-315 par 6.24. Many flag of convenience nations, as well as other nations, refrain from implementing any internationally conforming standards and instead delegate this authority to Classification Societies. Classification societies are incapable of implementing effective standards to prevent marine pollution; classification societies "vary greatly in their quality, capacity and dedication." *Donaldson Report*, Supp. Excerpts, at 823 par. 2.33.

1. The United States Coast Guard does not practice domestic or international uniformity or reciprocity.

Under Title 46 of the U.S. Code and the PWSA/PTSA, Coast Guard regulations to protect the marine environment require unilateral consideration of unique local conditions. 46 U.S.C. § 3703(c)(2)-(5). The Coast Guard must necessarily employ non-uniform regulations from one geographic area to another. 33 U.S.C. §§ 1223-1224. Title 46 provides that "[t]he Secretary . . . may prescribe regulations that *exceed standards set internationally.* [These r]egulations . . . are *in addition to regulations prescribed under other laws* that may apply to [tank] vessels." 46 U.S.C. § 3703(a) (emphasis added).[34]

34. The U.S. will not practice reciprocity when it is in the Nation's interest. Passage of PWSA was due in considerable respect to Congress' rejection of international construction and design standards.

> The domestic pressures behind the international efforts of the United States . . . found expression in Congress' 1972 passage of [PWSA]. It required the Coast Guard to adopt

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Arguments for international uniformity are also undercut by the Coast Guard's implementation process. The Coast Guard reserves and practices the right to enact regulations at variance with treaties to which the U.S. is a party. The Coast Guard has explicitly declared in reference to the new amendments to STCW that "[i]n some cases, *clear differences with the international scheme are retained* to preserve continuity in the U.S. licensing system." 62 FR 13285 (March 26, 1996) (emphasis added).[35]

J. The BAP regulations are not prohibited by the Foreign Affairs Clause or the foreign affairs policy of the United States.

Petitioners argue that the BAP regulations jeopardize the ability of the United States to speak with one voice on the international level and impairs U.S. credibility.[36] They fail, however, to offer legal analysis in support of the their position.

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> strict unilateral equipment standards by 1976 unless other countries agreed to rules similar to those the United States was proposing [before IMO]. The Coast Guard was also to deny entry to any ships violating such rules.

Mitchell, R., *supra* at 94.

35. The U.S. argues, in part, that Title 46 U.S.C. Chapter 37 requires the Secretary to accept foreign vessel certificates of compliance, thereby acting with reciprocity. U.S. Brief at 5. Petitioner ignores the discretionary nature of the provision. Chapter 37 "requires" that "the Secretary *may* issue [a] certificate only after the vessel has been examined and found to be in compliance with this chapter . . . " 46 U.S.C. § 3711 (emphasis added). "This means that the Secretary *does not have to accept* foreign certificates of compliance." *Id.* at Historical and Revision Notes (emphasis added). Because of its discretionary nature, § 3711 is simply not reciprocal.

36. Graver concerns were expressed throughout the international community over OPA's promotion of non-uniform liability regimes, and the very real prospect of oil tankers facing state regimes which impose unlimited liability. De La Rue, *supra*, 66-68; Coney, M., *The Stormy Seas of Oil Pollution Liability: Will Protection and Indemnity Clubs Survive?*, 16 Houston J. of Int'l

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A state statute with international implications is valid if it provides no discretion for state administrative officials "to comment on, [or] key their decisions to, the nature of foreign relations." *Zschernig v. Miller*, 389 U.S. 429, 434 (1968). State regulations which have only an "incidental or indirect effect in foreign countries" do not intrude on the foreign relations of the United States. *Clark v Allen*, 331 U.S. 503, 517 (1947). When police powers are exercised to prevent pollution, any impact on international law and relations is incidental, remote, and constitutional. *Silz v Hesterberg*, 211 U.S. 31, 40-41 (1908). In order for a state regulation to frustrate U.S. foreign policy, its application must have more than an "incidental or indirect" effect on the foreign affairs of this country. *Zschernig,* at 434. *See also Clark,* at 516-17; *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990), *citing Zschernig* ("[o]n only one occasion has the Supreme Court struck down a statute as violative of the foreign relations power"). *In Re Alien Children Ed. Litigation*, 501 F. Supp. 544, 595 (S.D. Texas 1980) ("The constitutional delegation of the authority to conduct foreign affairs . . . has not evolved to prohibit states from enacting laws which may affect an area of international concern").

The BAP regulations are applied non-discriminatorily and not based upon any particular foreign national policy. As the Ninth Circuit aptly noted, "Intertanko fail[ed] to point to any

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L. 343, 347 (1993) ("transportation of oil to the United States could be severely disrupted . . ."); Eubank, S., *Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990*, 18 MD. J. Int'l L. & Trade 149, 150 (1994) ("[t]he fear of unlimited liability at the state level has generated . . . threats of trade-based retaliation against the United States"); Wilkinson, C., *et al.*, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. Energy, Nat. Resources & Envt'l L. 181, 235 (1992) ("[representatives of the oil transportation industry threaten to stop moving oil through United States ports unless they receive some relief from exposure to unlimited liability").

evidence in the record to establish that any 'incidental burden[ ] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits.' " 148 F.3d at 1069. In addition, Petitioners can not provide any evidence that even if the BAP regulations have an extraterritorial impact, that impact is anything more than "incidental or indirect." *Id.*[37]

K. International law authorizes the State of Washington to enact police power regulations extraterritorially.

The BAP regulations necessarily govern a vessel before it enters Washington internal waters. This extraterritorial policy is authorized by international law: a vessel must be in compliance with regulations to protect the marine environment the moment it begins to navigate directly toward internal waters. "In case of ships *proceeding to* internal waters, the coastal State [i.e., nation] shall . . . have the right to take the necessary steps to prevent any breach of the conditions *to which admission of those ships to those waters is subject.*" UNCLOS, Art. 25(2) (emphasis added). When a tanker navigates toward Washington's territorial and internal waters, the BAP regulations necessarily become implicated.

37. Petitioners rely upon *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 439 (1979) and *United States v. Pink*, 315 U.S. 203 (1942). These cases are distinguishable from the case at bar. In *Japan Line*, the Court invalidated a local property tax on foreign-owned shipping containers. Because of the potential for double taxation, the Court found a manipulation of international trade for the state's economic benefit, a finding of economic protectionism. There has been no offer of evidence or authority to allege that any BAP regulation will provide any discriminatory economic trade protection.

In *Pink*, the Court held that a state court's jurisdictional ruling directly hampered U.S. recognition of a foreign government; "The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system." *Id.* at 233.

1. Constitutional law authorizes the BAP regulations seaward of three nautical miles.

Oil spills are migratory. Before oil tankers which are seaward of Washington's territorial domain actually enter the Strait of Juan de Fuca or the Columbia River, the economy and environment of the State remain subject to damage from an offshore oil spill. A state may exercise its police powers outside of its offshore territorial jurisdiction where there is an integral nexus between the state's interest and the activity sought to be regulated *See Skiriotes v Florida*, 313 U.S. 69 (1941). The BAP regulations are not aimed at effecting the legality of international vessel standards, but rather at protecting state coastal waters and resources.

Under traditional police power analysis, the states are free to determine where, along their coastal zones, activities will affect their territorial waters. *Skiriotes*, at 76. Regulations governing extraterritorial activities which are designed to prevent impacts within the state are "not an extraterritorial assertion of jurisdiction." *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984). The migratory nature of oil spills provides the integral nexus reflecting Congressional purposes and state interests in preventing spills in the first instance.[38]

38. In *Skiriotes*, the Court ruled that a state could regulate sponge diving by a Florida resident upon the high seas. The Court noted that the state clearly had an interest in conservation and management of the fishery and that, absent a conflict with federal legislation, such regulation was within a state's police power. *Id.* at 75. In *Bayside Fish Flour Co. v Gentry*, 297 U.S. 422 (1936), the Court addressed the use of offshore police powers where interstate commerce was at issue. The *Bayside* Court held that both citizens and non-citizen fishermen could be subject to state police powers where an activity occurred more than three nm. offshore. *Id.* at 426. The Court held that although the state regulations indirectly and incidentally affected interstate commerce, the "provisions had a reasonable relation to the object of their enactment." *Id.* As the District Court noted, "[a]lthough these cases deal with fisheries rather than the prevention of oil pollution, the principle remains the same." 947 F. Supp. at 1500.

Petitioners failed to provide the Ninth Circuit with any evidence that even if the BAP regulations have an extraterritorial impact, that the impact is anything more than "incidental or indirect." 148 F.3d at 1069.

CONCLUSION

The Washington BAP regulations should be sustained.

Respectfully submitted.

JEFFREY L. NEEDLE
Counsel of Record
JOHN M. MACDONALD
LAW OFFICES OF JEFFREY L. NEEDLE
Attorneys for Respondent-Intervenors
119 First Avenue South
Suite 200
Seattle, WA 98104
(206) 447-1560