

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2057 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

Samson Tug & Barge Company, Inc.

Phone (907) 747-8559 • Fax(907) 747-5370 • P.O. Box 559 • Sitka, Alaska 99835

Senator Sam Cotten
Alaska State Legislature
P.O. Box V
State Capitol
Juneau, AK. 99811

March 14, 1991

Dear Senator Cotten:

We were aware of a compact being worked on by the Pacific Coast states and the Province of British Columbia, however information was somewhat scarce. We are very appreciative of having been brought up to speed on the status of the compact and of Senate Bill No. 102. We have reviewed SB 102 and find both agreements and disagreements with the bill.

This bill, as with HB 567 of 1990, fails to recognize the largest potential for a major oil spill in Alaska or members of the compact. Certainly the Exxon Valdez made an impression, but historically how many tankships have had major spills in the last 12 years? How many large freight vessels and foreign flag passenger vessels have had major spills? A review of U.S. Coast Guard records will show a very real list. In Southeast Alaska and the nearby Canadian waters in recent years - the Lee Wang Zin, the Sundancer, the North Star, just to name a few who have grounded and spilled oil into the water. No, they are not carrying crude oil, but they all carry and use heavy bunker oil (persistent). Some of the old and the majority of the new foreign flag passenger vessels carry in the neighborhood of 1,000,000 gallons of this heavy oil. During the summer they transit throughout Southeast Alaska, Prince William Sound, Seward, and into Anchorage. They do not have onboard any major oil response equipment.

Scenario: At 0200 on a summer morning the foreign flag passenger vessel Rotterdam grounds on a charted pinnacle in the vicinity of the entrance to Glacier Bay, Alaska. Two fuel tank compartments have been holed and heavy bunker oil is leaking. Weather is Southeasterly winds 30 kts with gust to 40; tide is flooding. There are 1200 passengers onboard and the vessel has a 15 degree list.

With this scenario, we have search and rescue - 1800 persons (passengers and crew) in jeopardy, a grounded vessel that may or may not be salvageable, oil in the water and the potential for a lot more oil. They have no C-Plans, no response equipment, no trained personnel to respond, and minimum liability insurance for clean-up. This oil will be around for a long time and the impact will be tremendous and so will the public outrage. Why aren't these vessels required to comply will be the question?

Other oceangoing freight vessels, including fish processors, visit ports year round from Ketchikan to Dutch Harbor and the Pribilofs. These vessels meet the minimum federal pollution prevention regulations but carry very little oil response equipment onboard. If one of these vessels grounded, there would be little to no containment of heavy oil by the spiller.

The above noted vessels need to be added to the definitions under Article II and they need to be regulated, as they are the biggest threat to the waters of Alaska and the members of the compact.

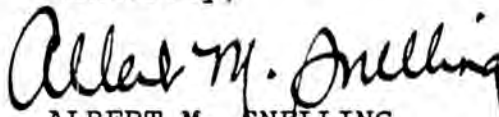
ADEC appears unwilling to acknowledge these vessels as potential threats, but the compact should, because they are threats.

As noted in your cover letter, we agree an exemption should be made for tank barges transporting non-crude petroleum products to communities. We recommend that instead of deadweight tonnage that vessel exemption be based on the barge capacity. We would recommend tank barges transporting non-persistent oils (gasoline, kerosene, diesel) of not more than 50,000 barrels be exempted. Tank barges are presently under inspection and monitored by the U.S. Coast Guard for safety, manning, and pollution prevention. They carry onboard pollution containment equipment, personnel are licensed/documented, and personnel are trained in oil spill response.

We agree with the uniformity of standards, as we transport not only petroleum products but deck cargo as well to and from Southcentral, Western, and Southeast Alaska. Requiring only one spill C-Plan for petroleum products for the Pacific region would be ideal. There are some standards that would be disadvantageous to industry and we have a disagreement with. Establishing routes that may exclude transit at night or dictate where a class of vessel must navigate; inspection standards for uninspected vessels; manning of vessels. The intent of establishing some of these standards is well meaning however industry must be included in any finalization of compact regulations. Research and studies should be done utilizing all data available and support agencies (Article VIII) should not be agencies of signatory parties. Parties outside the compact should be employed to do the research, as state agencies tend to be partial to the state government and its needs, rather than the needs of the overall people, including industry.

These are the immediate concerns of SB 102 that we have. If we can be of further assistance in this matter, please do not hesitate to call upon us.

Sincerely,



ALBERT M. SNELLING
Safety Officer

cc: Senator Eliason

Ginny Fay

Working for the Nature of Tomorrow.



NATIONAL WILDLIFE FEDERATION

750 W. Second Ave., Suite 200, Anchorage, AK 99501 (907) 258-4800

March 23, 1991

Dear Affiliate Leader:

I am writing to ask your support for legislation now pending in your state's legislature that will significantly strengthen your state's authority to prevent spills of oil and other hazardous substances in marine waters off your coast. The legislation is intended to ratify the Pacific Ocean Resources Compact.

The Compact is a united effort by the Pacific Ocean states to prevent spills of substances dangerous to the environment and fisheries of the Pacific Ocean. It will set standards for crews, equipment, and routes used for the shipment of oil and other hazardous substances in state waters within the Pacific Basin.

The Compact includes Alaska, Oregon, Washington, California and Hawaii. The Canadian province of British Columbia will also be invited to join the Compact which, with Congressional approval, will be able to propose and implement regulations affecting federal agencies, states and private industries operating in the Compact zone.

The Compact will have the authority to coordinate spill response plans and will maintain a directory of personnel, equipment, technical expertise, organizations and other resources available to assist in the event of a crude oil or other hazardous substance spill.

Legislators introducing bills supporting the Compact in the five participating states are:

Alaska--Senator Sam Cotten (SB 102)
Washington--Senator Jack Metcalf (SB 5428)
Oregon--Senator Bill Bradbury (SB 500)
California--Assemblyman Don Hauser (AB 393)
Hawaii--Senator Richard Matsuura (SB 862)
Representative Peter Apo (HB 1703*)

*Bill has been deferred to next session

To obtain copies of these bills, contact Ginny Fay of Senator Cotten's office (907-455-3711); Senator Metcalf's office (206-

**TELECOPIER COVER SHEET**

**National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036**

Date: February 20, 1991

To: Ms. Ginny Fay
Senator Cotten

Fax Number: (907) 465-4979

From: Rich Bechtel
National Wildlife Federation
(202) 797-6660

Sender's Fax Number: (202) 797-6646

NUMBER OF PAGES INCLUDING COVER SHEET: 4

SPECIAL INSTRUCTIONS/REQUESTS: Ginny, I wrote this analysis shortly after the conference committee vote on double hulls, so it is a little darker in outlook than if I were to write it today. Rich.

ANY PROBLEMS? PLEASE CALL (202) 797-6801.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

Ginny Fay

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786-7618); Mara Brown of the Oregon Senate Majority office (503-378-8700); Mary Morgan of Assemblyman Hauser's office (916-445-8360); Representative Apo's office (808-548-5730); or Senator Matsuura's office (808-548-6291).

For your information, I have attached a copy of a fact sheet on the Pacific Ocean Resources Compact prepared by Senator Cotten's aide Ginny Fay. In addition, I have attached a copy of the bill introduced in the Alaska Legislature.

One of the critical lessons we Alaskans learned in the wake of the Exxon Valdez oil spill was that the citizens most at risk from spills of crude oil and other hazardous substances MUST be involved in the decision-making processes for prevention of and responding to spills. The Pacific Ocean Resources Compact is an important step toward achieving greater involvement. We ask that you please give it your support. In addition, I would appreciate any suggestions you may have regarding other organizations in your state that would be interested in offering their support.

If you have questions or need more information, please feel free to contact me.

Best regards.

Sincerely,



Ann L. Rothe
Alaska Regional Representative

cc: Doug Miller, Director, NWF Alaska Natural Resources Center
Bruce Apple, Director, NWF Pacific Northwest Natural
Resources Center
Larry Schweiger, Vice President, NWF Affiliate Programs
Sharon Newsome, Vice President, NWF Resources Conservation
Rich Bechtel, NWF Department of Resources Conservation
Sheila Gottehrer, Executive Director, Regional Citizens
Advisory Council
Harry Bader, Chairman, State of Alaska Citizens Oversight
Council on Oil and Other Hazardous Substances
Ginny Fay, Senator Cotten's office
Mara Brown, Oregon Senate Majority Office

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TO: Colleagues Following the Double Hulls Issue

FROM: Rich Bechtel

RE: A Quick Analysis of the Double Hull Provision Adopted
by the Oil Spill Conference Committee

DATE: 18 July 1990

I. Double Hull Mandate: The Good News

1. The provision mandates double hulls for all new tank vessels over 5,000 gross tons (gt).
2. It requires vessels under 5,000 gross tons (inland barges) to have "double containment" systems which the Secretary of DOT certifies to be as effective as double hulls -- not quite as good news.

II. Retrofit Provisions: The Evisceration of the Mandate

1. It sets out an elaborate phase-out schedule for current tank vessels based upon age and size. Larger and older vessels must retire before ones that are smaller and younger. Below is a simplified sketch of the schedule:

SIZE	1995	2000	2005	2010	2015
5,000 to 15,000	40+ yrs	35+ yrs	25 yrs	END*	
15,000 to 30,000	40+ yrs	30+ yrs	25 yrs	END*	
30,000>	28+ yrs	23 yrs		END*	

If vessel has double bottom or sides, add 5 yrs.

*Lightering exemption ----- END

*LOOP exemption ----- END

*Tank vessels under 5,000 gt exemption ----- END

2. This means that when a tank vessel reaches its retirement age, it can opt to lighter (unload its oil cargo to a smaller tanker) or visit the Louisiana Offshore Oil Port (LOOP) until 2015. As a result, foreign vessels will visit LOOP and lighter in U.S. waters for another 25 years. These

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exemptions are most unfortunate since they will undermine the law's ability to drive the adoption of double hulls as an international standard.

3. Few new double hulled tankers will enter service until the old single hulled vessels retire, since new vessels can not compete with old, fully depreciated ones. However, a few will be built sooner, because oil companies must replace some of their vessels over time simply due to their age and fatigue. Other vessels will simply retire without being replaced because their capacity will not be needed as Alaskan production drops.
4. The provision calculates the age of a vessel from when it was delivered after construction, after completion of a major conversion, or after qualification under the wrecked vessel act. This will probably be a huge loophole -- a fountain of youth -- which will restart the clock on many vessels enabling them to operate with single hulls for another 25 years.

For example, the Exxon Valdez will have a new life of 25 years even though Exxon chose to replace its damaged hull with another single hull. The USCG currently determines on a case by case basis whether or not repair work qualifies as a major conversion. Now shippers will swamp it with requests to certify past repair work as major conversions.

5. Mr. Tauzin asked that report language be developed which would define broadly "major conversion." He reasoned, that if a vessel receives a major expenditure of cash, it must be safer environmentally and therefore should be considered a major conversion. This will be an evasion of the first order.
6. Mr. Tauzin and Mr. Breau added a section during debate which would require the Secretary of DOT to complete a rulemaking within 12 months "to require operational and structural requirements that the Secretary determines will provide as substantial protection to the environment as is economically and technologically feasible" while awaiting retirement or conversion (they probably have hydrostatic balance in mind).
7. The conferees dropped a provision (amending Title XI of the Merchant Marine Act) which would have required the Secretary to use a loan guarantee program to help capitalize shippers who must replace their vessels as a result of the retrofit requirements.

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8. They began and then delayed debate on an amendment developed by the Shipbuilders' Council that would require vessels which receive the off-loaded oil from the larger tankers to be built in the U.S. The USCG does not consider the "mother" lightering ship as a U.S. destination, so ship owners can escape the Jones Act requirement that vessels engaged in domestic trade must be built in the U.S. This loophole simply makes lightering more attractive and qualifies lightering vessels built in Japan and Korea under less rigorous environmental standards.
9. The provision kept the study sections found in the Senate and House offers which direct the Secretary of DOT: 1) to periodically review recommendations from the National Academy of Science; 2) to determine within 6 months whether other structural and operational requirements match or provide greater environmental safety than double hulls and forward his findings to Congress; and 3) to assess within 5 years the impact of the double hull requirement "on the safety of the marine environment and on the economic viability and operational makeup of the maritime oil transportation industry."
10. Many ship and barge builders think operators will seriously begin ordering new vessels in 2000, perhaps in 1998.

**ARCO PUBLIC POLICY VIEWS:
REVISED DRAFT DATED 3/13/91 OF THE PROPOSED
PACIFIC OCEAN RESOURCES COMPACT**

A proposal has been put forward by Senator Bradbury of Oregon which would modify the original language of the Pacific Ocean Resources Compact as introduced in the legislatures of Alaska, California, Hawaii, Oregon, and Washington. The proposal would modify the Compact, a concept which seeks to regulate oil and hazardous substance transportation, spill prevention and response, and other maritime and coastal concerns, including the extension of the State's coastal economic zones from three to two hundred miles. The Compact would enter into force only upon its ratification by two or more of the states and subsequent approval of the U.S. Congress.

Arco remains committed to the belief that the coordination of oil spill prevention and response plans, both among the Western States, as well as with the Federal Government is important in achieving optimal environmental protection. This goal is achievable by increased coordination of Western State policies, with an eye towards building upon, instead of supplanting, the Federal framework.

Although most of the proposed changes to the Compact move it in the direction of increased coordination among the participating states, along with more active participation in the Federal legislative and regulatory process, the concept of a formal, Congressionally approved, Compact is still troublesome. There are two primary concerns with the compact approach in this instance. Our major concern is that the Compact would supersede established and proven Federal laws and regulations which provide a uniform framework for ocean policy in Federal waters. Furthermore, the wide-ranging improvements in spill prevention and response which will arise out of the Federal Oil Pollution Act of 1990 are in the implementation process. Second, the addition of another layer of government, one which would come between state entities and the federal government is counterproductive. The current Federal/State review and regulatory process can be burdensome - an intermediary Compact layer would only further complicate the process.

If the primary thrust of the Compact is one of increased input into the Federal regulatory process while achieving uniformity among Western State regulations, ARCO believes that such goals are achievable without a Compact. Many states are active participants in Federal regulation development. Similarly, state coordination can be achieved through interstate working groups without the negatives associated the Compact process. The proposed compact would require increased and open-ended state administrative expenses, with questionable benefits to state citizens. This fact, coupled with the loss of individual state autonomy and prerogative, argues against the adoption of the Pacific Ocean Resources Compact.

ARCO MARINE

PACIFIC OCEAN RESOURCES COMPACT

February 15, 1991

Summary

Five West Coast states plan to extend their jurisdiction to regulate shipping through adoption of an agreement ("compact"), approved by Congress, that would establish a regional organization with quasi-federal authority to regulate (1) out to 200 miles from the coastline, and (2) to standards beyond those permitted by existing federal law. This is a radical departure from existing legal regimes involving states, but, in today's political climate, the five states could succeed in achieving part, if not all, of the extended jurisdiction they seek. The marine industry should actively oppose this plan, both in state capitals and in Washington.

Situation

The states of Alaska, Washington, Oregon, California, and Hawaii plan to adopt an agreement titled the "Pacific Ocean Resources Compact" and submit it to Congress for approval as required by the Constitution. The compact provides that the Canadian Province of British Columbia ("B.C.") may also become a party, first as an associate (without voting power) and later, upon request by B.C. and approval of Congress, as a full party with the same rights and powers as the U.S. member states. The announced intention of the compact is to protect marine and coastal resources in Pacific Ocean areas adjacent to the five states and B.C., and its main thrust is to regulate shipping in order to control ship-source pollution.

Legislation that will begin the process of compact adoption is already under active consideration in all five states. A bill was introduced in each of the five legislatures on January 31, 1991.

The Compact

Since our country was founded, some 200 compacts have been adopted by states and approved by Congress. The Pacific Ocean Resource Compact is notable in that it would go well beyond existing compacts in extending the geographic scope of state jurisdiction and in vesting federal powers in a regional authority administered by states. The unstated premise: The Oil Pollution Act of 1990 ("OPA 90") does not go far enough, and the compact is a way to go much further.

The compact sets the stage with this statement: "Parties now do not have an effective means to address mutual concerns related to transport of oil and hazardous substances in waters within and

beyond the party's jurisdiction that may jeopardize ocean resources and uses important to one or more coastal parties."

The compact notes the establishment of the U.S. Exclusive Economic Zone ("EEZ") as an opportunity for states to assert their responsibilities to protect ocean resources, and goes on to cite studies that support this conclusion: "the existing system of response to spills fails to provide adequate protection to ocean resources" The litany of inadequacies includes personnel training and qualifications, vessel design and integrity, traffic management, regulatory oversight, cost recovery, and information about the environment.

Under "the purpose of this compact" are 15 items, some very revealing, all directed toward correcting the inadequacies in the "existing system" through action to be taken by states in the Pacific region. The items listed under "purpose" speak in aggressive terms: uniform regulation of transportation within the compact zone, enhancing regional sovereignty, directing federal agencies to act, and enhancing supervision of and influence over spill prevention, transportation, response planning, and environmental monitoring and research. One of these items merits particular attention: "To provide a legal mechanism to regulate certain ocean activities within the [U.S. EEZ] that the parties cannot now individually regulate" (emphasis provided).

The authority of the compact organization would include the following, applicable to operation of vessels transporting oil and hazardous substances in the compact zone:

- ° establish uniform safety standards for routes, crews and equipment to the extent that the parties and the federal government have such authority within the compact zone
- ° establish requirements for contingency plans as least as stringent as those in OPA 90
- ° establish and enforce sanctions and civil penalties for violations of compact regulations
- ° request the Coast Guard to enforce compact regulations
- ° the power to subpoena
- ° adopt regulations in accordance with federal procedures

Activities under the compact would be funded by contributions from member states and would be managed by an organization administered by representatives appointed by member states. Federal agencies would be represented, but without voting privileges.

Discussion

Uniformity of law and regulation among states in a region is certainly desirable from the perspective of the transportation industry, provided the states respect the long-standing bounds on their authority to regulate interstate and foreign commerce and

provided their uniform rules are consistent with federal law. The Pacific Ocean Resources Compact is a radical departure from that norm.

The compact would take more of a departure from conventional legal regimes than OPA 90 did. It would establish regional authority to regulate out to 200 miles. In that area, it would regulate shipping as to "routes" (navigation), "crews" (presumably manning, training, certification, watchkeeping), and "equipment" (an undefined and therefore flexible term). There is reference in the compact's preamble to regulation of "vessel design and integrity," so, at best, the intention to regulate design and construction standards is ambiguous.

This is an attempt by five states to create a means to perform federal functions and exercise federal powers. It is an attempt to regulate activities in interstate and foreign commerce on a sub-federal level.

Certainly the compact as drafted would authorize establishment of a floor for standards that could exceed what the states now can establish individually, and would allow enforcement in geographic areas far outside present state jurisdictional limits. Furthermore, under the compact, each member state could then set standards applicable in its territory that exceed the compact standards.

This compact is a revolutionary concept. For pollution control purposes, the compact would create a superstate, an entity falling somewhere between a state and the federal government in powers. While it is without precedent in the law of compacts, and while it raises many legal questions, including constitutional law issues, legal arguments against it will not necessarily prevail, at least in the short run. To many politicians and to certain environmental organizations, it will be powerfully attractive.

This initiative by West Coast states is serious, coordinated, and politically shrewd. Its chances of success should not be underrated.

Many arguments can be made against the adoption of the compact as drafted, including the following:

- ° OPA 90 provides a high degree of protection of ocean resources, and many of its provisions have yet to be implemented. The individual states are not impeded from imposing further requirements. There is no demonstrated need for another layer of regulation.
- ° The compact would burden interstate and foreign commerce, with no commensurate advantage to the environment.
- ° The compact amounts to a fundamental change in our way of regulating interstate and foreign commerce, with unpredictable consequences.

- ° The compact would not promote regulatory uniformity but would have the opposite effect.
- ° The compact violates the Constitutional principles that reserve admiralty and maritime jurisdiction and foreign relations to the federal government.
- ° The compact would impose requirements on foreign shipping that violate treaties to which the U.S. is party.
- ° The compact would create an intermediate bureaucracy not accountable to the electorate or its representatives on either state or federal level.
- ° The compact organization would be able to impose regulations on shipping without being subject to economics cost-benefit analyses comparable to those required of federal regulatory agencies.

An additional concern is the precedential value of the Pacific Ocean Resources Compact in the eyes of states outside the Pacific area. It may be expected that states in regions such as New England or the Gulf of Mexico may see the compact as a model that could be applied to develop compacts for ocean areas off their shores. If the compact for the Pacific enters into force, it would be difficult to resist efforts to establish similar regimes in other regions.

Recommendation

The marine industry should actively oppose the adoption of the compact and its approval by Congress, both in state capitals and in Washington.

PACIFIC FISHERIES LEGISLATIVE TASK FORCE

**SENATOR BILL BRADBURY
PACIFIC OCEAN RESOURCES COMPACT**

**AMENDMENTS TO SB 500 AND POLICY IMPLICATIONS OF
PROPOSED AMENDMENTS.**

SB 500-1

ACTION: AMEND THE COMPACT TO ADOPT THE DEFINITION OF "VESSEL" THAT IS CONSISTENT WITH THE FEDERAL OIL POLLUTION ACT, AND DELETE THE VARIANCE ALLOWING ECONOMICALLY NECESSARY ACTIONS WHICH ALSO DO NOT HAVE A REGIONAL IMPACT.

POLICY IMPLICATION: DOES THE COMPACT WANT THE SIMPLICITY OF CONFORMING TO FEDERAL LAW AND THUS AUTOMATICALLY EXEMPTING VESSELS LESS THAN 5,000 DEAD WEIGHT TONS, INCLUDING SMALL TUGS AND BARGES, FROM THE REGULATIONS ADOPTED BY THE COMPACT.

PRO-AMENDMENT: THOSE STATES WHICH HAVE SPECIFIC REGULATIONS PERTAINING TO VESSELS LESS THAN 5000 DEAD WEIGHT TONS IN PLACE WHICH ARE ALREADY AS STRINGENT AS FEDERAL LAW, WILL BE ABLE TO HAVE CONTROL OVER THESE VESSELS. THE COMPACT WON'T RUN THE RISK OF OVERLAPPING JURISDICTION WITH THE STATES IN REGARD TO THESE SPECIFIC VESSELS.

AGAINST-AMENDMENT: THE COMPACT MAY BE REDUCING ITS AUTHORITY TO REGULATE VESSELS WHICH COULD ADVERSELY IMPACT THE RESOURCES OF THE REGION.

SB 500-1
(LC 20)
3/1/91 (JK/sm)

**PROPOSED AMENDMENTS TO
SENATE BILL 500**

- 1 On page 4 of the printed bill, line 10, after "(a)" insert "(A)".
- 2 In line 11, delete "(b)" and insert "(B)".
- 3 In line 12, delete the period and insert "; and
- 4 "(b) Is greater than 5,000 dead weight tons."
- 5 On page 6, delete lines 11 through 16.

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SB 500-2

AMEND THE COMPACT TO GIVE THE COMPACT AUTHORITY TO ASSESS A SCHEDULE OF REASONABLE FEES FOR THE REVIEW OF CONTINGENCY PLANS, TO BE ASSESSED IN INCREMENTS UP TO THE MAXIMUM AMOUNT.

POLICY IMPLICATIONS: DOES THE COMPACT WANT THE AUTHORITY TO ASSESS FEES FOR THE REVIEW OF THE CONTINGENCY PLANS?

PRO-AMENDMENT: THE COMPACT WILL MOVE IN THE DIRECTION OF BEING A SELF-SUFFICIENT BODY. THE USER WILL BE RESPONSIBLE FOR PROVIDING COMPENSATION FOR THE COSTS INCURRED BY THE COMPACT WHICH ARE OF A DIRECT BENEFIT TO THEM. EACH INDIVIDUAL STATE WILL BE RESPONSIBLE FOR A PORTION OF THE BALANCE.

AGAINST-AMENDMENT: A DETERMINATION WILL HAVE TO BE MADE AS TO THE AMOUNT AND FREQUENCY OF FEES ASSESSED, AND AS TO WHICH PARTIES MUST PAY THE FEES.

SB 500-2
(LC 20)
3/1/91 (JH/sm)

**PROPOSED AMENDMENTS TO
SENATE BILL 500**

1 On page 5 of the printed bill, after line 39, insert:

2 "(L) Establish a schedule of reasonable fees to be assessed for the review
3 of a contingency plan submitted under paragraph (c) of this subsection. The
4 fees shall be sufficient to recover the costs of reviewing the plans and con-
5 ducting any related inspections. The fees shall be assessed in increments up
6 to the maximum amount."

7

SB 500-3

ACTION: THE COMPACT WILL BE AMENDED TO CLARIFY ITS INTENT IN RELATION TO COMPACT AUTHORITY TO REQUIRE VESSEL CONTINGENCY PLANS.

POLICY IMPLICATION: SHOULD THE COMPACT BE AMENDED TO CLARIFY THE INTENTION TO BECOME THE SOLE AUTHORITY OVER THE REGULATION OF CONTINGENCY PLANS AS SPECIFICALLY ADOPTED BY THE COMPACT AND TO CLARIFY THE INTENTION NOT TO INTERFERE WITH SPILL RESPONSE PLANS THAT HAVE CAREFULLY BEEN DRAWN UP BY THE INDIVIDUAL COMPACT PARTIES?

PRO-AMENDMENT: THE AMENDMENTS WILL SIMPLIFY THE COMPACT AND ELIMINATE CONFUSION WITH REGARD TO THE SUBMISSION OF CONTINGENCY PLANS. THIS AMENDMENT WOULD CLARIFY THAT ONLY ONE CONTINGENCY PLAN WOULD BE REQUIRED FOR TRANSPORTATION WITHIN THE COMPACT ZONE. THIS ALSO MAKES CLEAR THAT THE PLAN SUBMITTED TO THE COMPACT SUPERSEDES ALL STATE PLANS.

SB 500-3
(LC 20)
3/1/91 (JH/bg)

**PROPOSED AMENDMENTS TO
SENATE BILL 500**

- 1 On page 5 of the printed bill, line 9, delete "spill".
- 2 In line 12, after "and" insert "shall supersede".
- 3 _____

SB 500-4 (PART ONE)

**ACTION: ELIMINATING COMPACT AUTHORITY OVER "ROUTES";
CLARIFYING COMPACT AUTHORITY TO REGULATE VESSELS,
CREWS, AND EQUIPMENT FOR SPILL RESPONSE, NAVIGATION
AND COMMUNICATION.**

**POLICY IMPLICATION: DOES THE COMPACT WANT THE
AUTHORITY TO COORDINATE AND DEAL WITH AN ENTIRE BODY
OF MARITIME LAW THAT ALSO COULD INCLUDE
INTERNATIONAL LAW?**

*PRO-AMENDMENT: THE COMPACT WILL NOT BE DIRECTLY INVOLVED IN
A COMPLEX SERIES OF LAWS AND TREATIES, BUT WILL BE ABLE TO
ASSIST THE COAST GUARD IN IMPLEMENTING THE SAFEST ROUTES
POSSIBLE.*

*AGAINST-AMENDMENT: THE COMPACT IS GIVING UP AUTHORITY TO
REGULATE AND SPECIFY ROUTES FOR THE TRANSSHIPMENT OF OIL AND
MAY BE REDUCING SOME OF ITS ABILITY TO PROTECT THE COMMON
RESOURCES.*

SB 500-4 (PART TWO)

ACTION: AMEND THE BILL TO SPECIFY THAT NOTHING IN THE COMPACT IS INTENDED TO LIMIT LOCAL AUTHORITY OF PARTY TO ESTABLISH PILOTAGE, NAVIGATION OR SHIP ASSISTANCE REQUIREMENTS FOR PORTS, BAYS OR RIVERS.

POLICY IMPLICATION: DOES THE COMPACT WANT TO CONTINUE TO ALLOW LOCAL AUTHORITIES THE ABILITY TO REGULATE PILOTAGE, NAVIGATION OR SHIP REQUIREMENTS WITHIN HARBORS, PORTS, BAYS, AND RIVERS WHILE RETAINING COMPACT AUTHORITY OVER CREWS, VESSELS, AND EQUIPMENT WITHIN THOSE AREAS.

PRO-AMENDMENT: THE AMENDED LANGUAGE WOULD PRESERVE THE INTEGRITY OF LOCAL CONTROL, AND TRUST THAT LOCAL AUTHORITIES HAVE THE BEST JUDGEMENT AND ABILITY TO REGULATE VESSELS WITHIN THE PORTS, BAYS AND RIVERS OF THE STATE ABOUT WHICH THE LOCAL AUTHORITIES ARE MOST KNOWLEDGEABLE.

AGAINST-AMENDMENT: THE COMPACT WOULD BE GIVING UP SOME AUTHORITY WITHIN THESE AREAS AND POSSIBLY LEAVING SOME BAYS OR HARBORS WITHOUT ADEQUATE PROTECTION AGAINST OIL SPILLS.

SB 500-4
(LC 20)
3/1/91 (JH/se)

**PROPOSED AMENDMENTS TO
SENATE BILL 500**

1 On page 5 of the printed bill, line 2, delete "routes," and after the first
2 "and" insert "spill response, navigational and communication".

3 On page 6, line 44, after the first "to" insert a colon and begin a new
4 paragraph and insert "(1)".

5 On page 7, after line 2, insert:

6 "(2) Transfer to the compact any local authority of a party to establish
7 pilotage, navigation or ship assistance requirements for a harbor, bay or
8 river within the territorial sea of the party.".

9

**ARCO PUBLIC POLICY VIEWS:
PROPOSED PACIFIC OCEAN RESOURCES COMPACT**

SUMMARY

Legislation has recently been introduced in the states of Alaska, California, Hawaii, Oregon and Washington that would establish an interstate compact on oil and hazardous substance transportation, spill prevention, spill response, and for other purposes, including extending the current three mile state coastal economic zone to the Federal 200 mile limit. The compact is to become effective when one or more states ratify it and it is approved by the U.S. Congress, and would supersede existing state and Federal law.

ARCO believes that coordination of Pacific coastal state oil spill prevention and response plans among the states and with Federal law is important to effective spill protection for the marine environment. However, a broad ranging formal interstate compact that would seek to supersede recently passed comprehensive Federal and state oil spill prevention and response laws, which are in the process of implementation, and further emerging state laws in Alaska, Washington, and Oregon, is premature, unnecessary, costly to state consumers and taxpayers, and could even worsen spill prevention and response capability. Thus, ARCO is opposed to the Pacific Ocean Resources Compact.

ARCO believes that the same objectives can be accomplished more effectively and efficiently through a different mechanism. That mechanism is the establishment of an inter-state coordinating working group on spill prevention and response. Its membership should be small, and should include key legislative and administrative staff, as well as limited technical expert participation from industry and other pertinent groups. Its scope should include discussions of spill prevention and response implementation, regulation and legislation. Federal agency advisory participation should also be sought.

Such a group could be termed the Pacific Ocean Spill Prevention and Response Group (POSPRG). This group would significantly improve interstate spill prevention and response coordination, but without individual states giving up their own state legislative authority, without changing national or international law for Pacific coastal states only, without having member states bear a potentially large financial burden for compact implementation and operations, and without lessening the individual member states' ability to respond to local changes that may be necessary over time. With advisory participation from Federal agencies, this group would also improve state-Federal oil spill prevention and response coordination for the Pacific coastal states.

ARCO strongly recommends that a POSPRG be established in lieu of the Pacific Ocean Resources Compact

BACKGROUND

Overview

This compact seeks to achieve some 15 purposes for the participating states. Included among them are: To provide uniform regulation of oil and hazardous substance transportation, to provide a legal mechanism to regulate "certain ocean activities...that the parties cannot now individually regulate, to "enhance regional sovereignty," to "direct federal agencies...", "to address issues of mutual concern...and enhance ...influence over activities of concern not now addressed...", to insure the opportunity for regional citizen participation in regional ocean resources issues, to establish a regional system of maintenance and protection of common ocean resources and oil and hazardous substance vessel transportation, and, in effect, to extend the current state three mile coastal economic zone out to the Federal 200 mile economic zone limit.

To achieve these purposes, the compact seeks to provide collective legal authority and responsibility for the signing states to override existing state law and federal law in some 19 broad areas. The participating states would give up individual state legislative and regulatory authority to the compact in these areas, and the Federal government would allow their existing law to be superseded while sanctioning whatever changes in international law would be necessary.

Among these areas are: Authority to establish uniform safety standards for routes, crews and equipment for vessels transporting oil or hazardous substances, insure coordinated oil and hazardous spill response plans and programs, establish contingency plan requirements for oil vessels and hazardous materials transportation, establish and maintain a spill response clearinghouse, provide a forum for resolving ocean resource program conflicts, provide opportunities for public comment and meetings on compact activities, designate officials to collectively represent the signing states to federal agencies, identify and recommend compiling ocean resource data needs, recommend adoption of ocean resource management rules and regulations, establish and impose sanctions and civil penalties for violations, accept gifts and grants, enter into contracts, conduct and prepare compact related studies, investigations, research and programs, conduct public hearings, issue subpoenas, appoint technical and advisory committees, and adopt all regulations to carry out duties and exercise authority.

Comprehensive oil spill prevention and response legislation was passed in 1990 at the federal level (Oil Pollution Act of 1990), in California (Lempert-Keene-Seastrand Oil Spill Prevention and Response Act) and in Alaska (a comprehensive package of more than 10 laws passed in 1989 and 1990). Implementation is just getting

underway. This inter-state compact, in effect, assumes that federal and state implementation will fail, without giving it a chance to be implemented. And, coming at this point in the implementation process, the compact would impede, rather than enhance, the implementation process, particularly confusing and potentially further delaying the regulation of domestic and foreign vessels.

Funding

Funding for the implementation and administration of this compact would be provided by the states that sign it. State expenses would be shared in proportion to each state's gross state product, except that no state would provide more than 50 percent of the funding nor less than 10 percent. Regardless of funding shares, each participating state would have one vote, and a majority of all participating states would be required for any action or decision.

In 1986, shares of total Gross State Product for the states in the region were: Alaska (2.8%), California (77.2%), Hawaii (2.8%), Oregon (6%), and Washington (11.2%). While the details would need to be negotiated, if California were limited to a 50% share of costs, Alaska, Hawaii, Oregon, and Washington could pay 12.5% of the costs each.

This compact would not replace existing state law on oil spill prevention and response, but would only replace certain portions of it. The compact would also replace the Federal role and increase regulations in certain spill prevention and response areas, and in addition, as noted above, provide for regulatory activities for ocean resources and other functions. In addition, there is no requirement that the compact use any of the cost benefit or other economic analysis required by federal regulatory and some state agencies before issuing its rules and regulations.

State consumers and tax payers would have to bear this increased cost, in addition to the costs of existing and proposed federal and state oil spill prevention and response law. And if states failed annually to appropriate sufficient funds for compact operations after drawing the new powers and authorities from state and federal law, enforcement responsibility and oversight would be confused, marine operations would be made more difficult, and the potential spill risk could be increased.

An Alternative Approach

Clearly it is in the best interests of the Pacific coastal states coordinate state oil spill prevention and response legislation, standards, and regulations among themselves. Since the marine industry is interstate, national and international in scope, it

also would be useful for the Pacific coastal states to actively work with the U.S. government, and in particular the Coast Guard, to rapidly implement Federal law.

To accomplish these ends, it is recommended that the Pacific coastal states establish an interstate coordinating working group on oil spill prevention and response legislation and implementation, which could be termed the Pacific Ocean Spill Prevention and Response Group (POSPRG). The group should be kept relatively small to be effective. Each concerned state would have membership, which should at least be at the senior administration and legislative staff level. Limited technical participation also should be sought, as needed, from industry and other pertinent groups. Additionally, it is recommended that limited Federal agency participation (ie, Coast Guard, EPA) be sought as well.

This group would serve as the focal point for Pacific coastal state spill prevention and response cooperation and coordination. It would seek to improve the quality of state spill prevention and response by improving state consistency in standards, planning and procedures, including contingency planning, while seeking to remove overly redundant and unnecessary requirements. It would serve as a forum for discussion of state implementation problems and recommended legislative and regulatory improvements, including model state spill legislation and regulations.

With Federal agency participation, Pacific coastal states would receive timely information on Federal plans and regulations, as well as provide coordinated state input into the Federal process.

Such a group would meet the key objectives of the compact, while facilitating coordination and implementation of existing law. It would also avoid setting up and funding a major new bureaucracy with new rules and regulations, thereby adding confusion to existing oil spill prevention and response law.

Government Affairs
Public Issues
ABB: 2/27/91

PACIFIC OCEAN RESOURCES COMPACT

Multi-State Compacts

A compact is a multi-state agreement consented to by Congress, through which states form a governing body pertaining to issues of regional concern.¹ Multi-state compacts have been used to address problems such as air pollution, land use planning, and water allocation. The one consistent theme of all multi-state compacts is the presence of a regulatory problem which transcends state boundaries. In the case of the proposed Pacific Ocean Resources Compact, the states of Alaska, California, Hawaii, Oregon, and Washington (and potentially British Columbia as a non-voting member) would join in a multi-state compact for the purpose of the regulation of shipments of oil and hazardous substances which impact the region. The Compact does not address resource management or allocation, or the regulation of fisheries.

In structure, compacts are formal agreements enacted by statute in the legislatures of the separate states--the wording of each state's statute is essentially the same. Once ratified by each state and approved by Congress, the compact cannot be altered, repealed, revoked or ignored by a member state. Because it is approved by Congress, the compact is a federal rather than state law as it relates to legal, Constitutional objectives. As a result of Congressional approval which bestows federal authority, a multi-state compact, by definition, does not interfere with interstate commerce. Therefore, the multi-state compact agency can address resource problems with regulations that compact members could not do as individual states.²

The Pacific Ocean Resources Compact as currently proposed will have three members from each of the states of Alaska, California,

¹Much of the information contained in this overview summarizes, Harry Bader, "Potential Utility of and Interstate Compact as a Vehicle for Oil Spill Prevention and Response," and Alison Rieser, "Federal Pre-Emption Considerations for State Oil Spill Prevention and Response Arrangements," in Alaska Oil Spill Commission, SPILL, The Wreck of the Exxon Valdez, Appendix M, State of Alaska, February 1990.

²For example, many of the regulations Alaska enacted in 1976 concerning oil tanker safety standards, the coastal protection fund, and tanker searches that were prohibited in Chevron v. Hammond in 1979, or removed from statute after Ray v. Atlantic, could theoretically have been permitted had they been enacted by a compact to which Alaska was a member.

Hawaii, Oregon, and Washington. Fiscal support of the compact agency is in proportion to each state's portion of the total gross states' product with no state paying more than 50 percent or less than ten percent of the agency's annual budget. Selection and compensation of each state's members is the discretion of the states.

Benefits to Alaska of Joining the Pacific Ocean Resources Compact

Alaska can benefit in numerous ways from joining the Pacific compact. The primary benefit is enhanced state sovereignty over issues of critical importance to the state such as the prevention of oil and hazardous waste spills, transportation of oil and hazardous wastes, oil spill contingency planning, and environmental monitoring and research. By forming a multi-state compact approved by Congress, regulatory authority that was previously the exclusive domain of the federal government is transferred to the compact agency. Of particular relevance to the Pacific compact is the jurisdiction over the ocean waters from the state's three-mile limit to the 200-mile limit. Regional spill response and prevention contingency planning would be extended into this 200-mile zone. The compact agency will have the authority to regulate activities related to oil and hazardous substances within this zone.³

Of particular concern to Alaska is the compact's ability to influence or regulate aspects of oil tanker transportation such as tanker design, tug escorts, safety equipment, and crew size and training. Undoubtedly, the multi-state compact will have greater authority than the individual states currently have. To the extent that the compact regulates regional North Slope tanker traffic, the compact would not conflict with the federal Ports and Waterways Safety Act which sets tanker safety standards to avoid international conflicts. However, this regulatory authority would be contingent upon North Slope tanker traffic continuing to be confined to the compact region as a result of the export ban. Certain aspects of tanker standards such as double hulls, is likely to receive legal challenge as a result of questions remaining from Ray v. Atlantic Richfield Company and Chevron v. Hammond.

In addition to establishing uniform vessel safety standards, the compact will have the authority to coordinate the oil and hazardous substance spill response plans and programs of the states, federal agencies and private organizations. The compact also establishes requirements for the submission and approval of contingency plans

³In the early 1980s, the Alaska Department of Fish and Game completed a study on the potential effectiveness of multi-state compacts and concluded that they offer little benefit. Since that time, however, the lawsuit Seattle Master Builders v. Pacific Northwest Power and Conservation Council 786 F.2d. 1359 (1986), explicitly established the authority of multi-state compacts.

for vessels transporting oil and hazardous substances in the compact zone. These requirements must be at least as stringent as those required under the federal Oil Spill Pollution Act of 1990.

Alaska's sphere of influence would also be significantly increased because Alaska would comprise one-fifth of the voting power within the compact agency with each party having one vote. In contrast, Alaska holds less than one half percent of voting power in Congress.

In general, industry has expressed support for the uniform set of standards that would result from the Compact. For example, only one vessel contingency plan would be required to operate in the region. Similar legislation has been introduced in the states of California, Hawaii, Oregon and Washington.

G. Fay
2/1/91

cc: JAA, Kurt Oxley, OFW, Bob
Lewine
(by FAX)

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ARCO MARINE

February 21, 1991

BY FACSIMILE

Susan Liebson, Esquire
ARCO Transportation Company
300 Oceangate
Long Beach, California 90802

Re: Pacific Ocean Resources Compact:
Procedures for Congressional Approval

Dear Susan:

You have asked us to describe the procedure for the approval by the United States Congress of the Pacific Ocean Resources Compact under the Compact Clause of the United States Constitution.

The Compact Clause is a prohibition on compacts between states without the "consent of Congress." While courts have ruled that not all compacts require the consent of Congress, an agreement such as the Pacific Ocean Resources Compact, which encroaches upon the authority of the Federal government, clearly does.

Normally compacts are approved by the Congress through the enactment of consent legislation, which like other legislation requires the signature of the President. The Compact clause requires merely the "consent of Congress", however, and some Congressional staffers have expressed the opinion that the President's signature might not be required. It is difficult for us to envision a truly effective compact unless it is approved by legislation that requires the President's signature. A concurrent resolution, which does not require the signature of the President, does not have the force and effect of law, and nothing in the Constitution explicitly gives a compact that status. If a compact proposes to supersede or alter Federal laws or regulations in any

Susan Liebson, Esquire
February 21, 1991
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way, it would appear that Congress must approve it through the enactment of legislation. One court has ruled that consent legislation with the signature of the President is necessary to delegate Federal authority, and our research has failed to reveal any compacts that were approved by the Congress with a mere concurrent resolution.

The legislation approving a compact can take several different approaches to approval: express, advance, conditional and implied. Express consent is the usual form and it follows adoption of the compact by one or more of the state parties. A certified copy of the compact is transmitted to the Congress by a state party, and legislation expressly approving that compact is then introduced. The legislation may also include conditions on the approval of the compact, such as preserving where necessary the foreign policy prerogatives of the President.

The legislation is generally referred to the Judiciary Committees of each House for report and recommendation. A compact may also be referred to other Committees, particularly in the House of Representatives, where the consent legislation contains amendments to other Federal laws within their jurisdiction or otherwise affects issues within their subject matter jurisdiction.

Staff of the Judiciary Committees inform us that compacts are typically approved in a routine fashion. The House Judiciary Committee typically holds hearings on compacts pending before it, but the Senate Judiciary Committee rarely does, relying instead on the record of state and House action. Therefore, it appears that we should focus our efforts on the Administration, through the Coast Guard and the State Department, and on the individual states. It may be extraordinarily difficult to stop the Pacific Ocean Resources Compact altogether, and ultimately we may have to emphasize amending the Compact to make it more acceptable to the Administration and the marine and energy interests it would affect.

The first order of business should be to deal with the compact in state capitals in an effort to stop or, if that proves impossible, to amend it to a more acceptable form.

Sincerely,


Warren L. Dean

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*NOT ADMITTED IN D.C.

ARCO MARINE

February 12, 1991

BY FACSIMILE

Captain Jerry Aspland
President
ARCO Marine, Inc.
300 Oceangate
Long Beach, CA 90802-4341

Re: Proposed Pacific Ocean Resources Compact

Dear Captain Aspland:

You have asked us to review the law on state compacts and to answer the questions itemized below with respect to the Pacific Ocean Resources Compact, a proposed compact pending before the Oregon legislature. Many of the issues raised by the Compact are complicated issues of first impression that have constitutional implications. This letter sets forth our preliminary views on these issues. We will continue our research and supplement our analysis as required.

Compacts are fairly common mechanisms through which states accomplish a variety of purposes that require collaboration. Normally, compacts address activities within the existing authority of the constituent states, but they may include activities beyond the authority of those states if Congress, in addition to approving the compact, explicitly authorizes those activities. The proposed Pacific Ocean Resources Compact is novel in that it would provide a broad array of powers to the Compact that is unprecedented in previously approved compacts. Further, some of the powers under

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the Compact not only are traditionally within federal authority but also may impinge on functions reserved to the federal government by the Constitution. Any attempt by Congress to authorize the Compact to exercise these powers will subject the Compact to constitutional challenge. In addition, the Compact's potential for detracting from the required uniformity of laws governing admiralty and maritime affairs raises constitutional issues not implicated by previous compacts.

Compacts are typically used by two or more states to create organizations for regulatory purposes. In its most basic form, an interstate compact is simply a formal, legally binding instrument among two or more states establishing a regular method of addressing an issue of shared interest. Interstate compacts date back to the Articles of Confederation. Their use for regional water management began in the 1920s with the adoption of the Port Authority of New York and the Colorado River Basin compacts. The use of interstate compacts has grown dramatically in recent years. For instance, from 1941 to 1975, 100 new compacts were adopted relating to a wide variety of state concerns, including extradition and environmental matters. In the area of interstate water compacts, there are four general categories of existing compacts: (1) water allocation compacts; (2) pollution control compacts; (3) flood control and planning compacts; and (4) comprehensive regulatory and project development compacts. The compacts within these four areas evolved through the normal compact process of state negotiation, leading to passage of identical state enabling legislation, and finally approval of the compact by Congress through enactment of a public law.¹

A cooperative agreement among states may or may not be covered by the compact clause of the United States Constitution (Article I, § 10 cl. 3) which provides, "No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power" The only interstate agreements that fall within the scope of the compact clause are those "tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." If the joint activity does not affect the federal sphere, no approval by Congress is needed. If it affects the fed-

¹ Hill, The Great Lakes Quasi Compact: An Emerging Paradigm for Regional Governance of U.S. Water Resources?, Detroit College of Law Review 1 (Spring 1989).

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eral sphere, then Congress must authorize the activity.² Thus, in upholding the constitutionality of the Multistate Tax Commission, which coordinates, without congressional consent, the taxation of interstate corporations by twenty-one member states, the Supreme Court noted that although the Commission "increase[s] . . . the bargaining power of the member States [with respect to] the corporations" subject to regulation, it does not do so with respect to the federal government or non-member states.³

"[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."⁴ Such "consent legislation" requires a majority vote of both houses of Congress and the signature of the President.⁵

The Supreme Court has also identified several formal criteria for defining the range of agreements not subject to the clause's congressional approval requirement. In rejecting a compact clause challenge to a system that facilitated interstate banking, the Court stated that the system lacked "several of the classic indicia of a compact," noting in particular that the statutes involved were

² Seattle Master Builders v. Pacific N.W. Elec. Power, 786 F.2d 1359 (9th Cir. 1986) citing Cuyler v. Adams, 449 U.S. 443, 440 (1981).

³ United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978).

⁴ Cuyler, 449 U.S. at 440. There is potential for overlap where both tests are met: "state agreements whose subject matter is appropriate for federal legislation but which do not threaten to increase the political power of the states at the expense of the federal government. Within this area, apparently, a compact that does not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law." Washington Metro. Area Transit Authority v. One Parcel of Land in Montgomery County, Maryland, 706 F.2d 1312 (4th Cir. 1986).

⁵ One Parcel of Land, 706 F.2d at 1319.

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unilaterally revocable and did not interpose a new authority between federal and state governments.⁶

1. If the Compact enters into force, will the federal legislation approving the Compact and the regulations adopted under terms of the Compact supersede pre-existing federal law and regulations?

Yes. In Cuyler v. Adams, 449 U.S. 433 (1981), the Supreme Court held that the test for whether an interstate compact becomes federal law is whether it "is a congressionally sanctioned interstate compact within Art. I, § 10 of the Constitution." "Where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the State's agreement into federal law under the Compact Clause."⁷ The Pacific Ocean Resources Compact affects interstate commerce and admiralty and maritime affairs, both of which are appropriate subjects for congressional legislation. Thus, upon its approval by Congress through enactment of a statute, the Compact's terms would have the force and effect of subsequent federal legislation that would supersede pre-existing law to the extent the terms overlapped.

Because a compact is a contract, congressional intent is determined according to the terms of the compact itself and the language of the consenting legislation.⁸ Congress may make its consent to a compact conditional upon the states' compliance with specified terms. Congress may, in the context of a compact or otherwise, subject federal government activities to state law by enacting legislation that makes the authorization of state control clear and unambiguous.⁹

2. May the Coast Guard be authorized to enforce the regulations adopted under terms of the Compact? May the Coast Guard be required to do so?

⁶ Northeast Bancorp v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159, 175 (1985).

⁷ Cuyler, 449 U.S. at 440.

⁸ Texas v. New Mexico, 482 U.S. 124 (1987).

⁹ Seattle Master Builders, 786 F.2d at 1364 (citation omitted).

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The answer is "yes" in both instances, but such authority or requirement must be explicitly provided for by Congress in the consenting legislation or otherwise. "There is no bar against federal agencies following policies set by nonfederal agencies."¹⁰ While our research has not revealed cases directly on point, it is "not unusual for the federal government to be involved in or to be directly affected by compact-created agencies. . . . The federal government has even participated as a member of interstate compact agencies."¹¹

This issue is one that Congress must specifically address. For example, in legislation consenting to the Great Lakes Basin Compact, the bill specifically provided that nothing in the compact would affect the jurisdiction, powers or prerogatives of any department, agency or officer of the federal government with respect to the Great Lakes Basin.

3. What is the relationship between OPA 90 and (1) the federal legislation approving the Compact and (2) the regulations adopted under the Compact?

(1) With respect to the consenting federal legislation, the relationship to OPA 90 will be determined by the terms of the Compact itself as approved by Congress. If the Compact language is irreconcilably inconsistent with OPA 90 or implementing regulations, it would supersede the pre-existing provisions.

(2) Giving regulations adopted under the Compact the force and effect of federal regulations would raise serious constitutional issues. Normally federal regulations can be promulgated only by the Executive Branch of the Federal government. At a minimum, congressional intent to permit the Compact to promulgate such regulations must be explicit. Even then it is unclear whether such regulations would withstand constitutional challenge under the appointments clause, which, in general, requires all executive action to be taken by persons appointed by, and subject to the authority of, the President.

4. Had OPA 90 not been enacted, would it have been possible to form the Compact?

¹⁰ Seattle Master Builders, 786 F.2d at 1364.

¹¹ Id.

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Yes. The states do not derive their authority to form a compact from OPA 90 but rather from the Constitution. In any event, because the Pacific Resources Compact implicates areas of federal concern, the Compact must receive congressional approval to be valid.

5. What is the status of international treaties covering the same substantive issues as those the Compact purports to cover: (1) under domestic law? (2) under international law?

(1) A compact has the same effect on treaties as any other federal law. Under the Constitution, a treaty has the force and effect of federal law. A compact, and the federal legislation approving it, can supersede a treaty as could other subsequent federal law. (2) Under international law, the obligations of a treaty remain despite enactment of conflicting federal law (or approval of conflicting compact terms). The conflict between a federal law and a treaty obligation could result in the United States being in violation of those obligations and thus would give rise to serious foreign relations concerns.

6. Are compacts by their nature all-inclusive or are they governed by the express provisions of the approving federal legislation?

Because a compact is considered a contract, it is governed by its express terms to the extent approved by Congress. Also see response to question 1.

7. Must state laws and regulations within the states that are party to the Compact conform to the regulations adopted under the Compact?

Upon entering into a compact, the member states effectively surrender a portion of their sovereignty. The compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Therefore, one party may not enact legislation that would impose burdens upon the compact absent the concurrence of the other parties.¹²

Because a compact organization is considered the state-created agency of each member state, a state can impose state law on a compact organization only if the compact specifically reserves the

¹² Hellmuth v. Washington Metro. Area Transit Authority, 414 F. Supp. 408, 409 (D. Md. 1976).

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right to do so. A compact constitutes not only law but a contract that may not be amended, modified or altered without the consent of all parties. If a state wishes to enact stricter standards, it must ensure that the compact language permits it, as did the compact creating the Tahoe Regional Planning agency that contained the following language:

Every such ordinance, rule or regulation [adopted by the compact agency to effectuate its regional plan] shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of the regulation in its territory.¹³

8. How would the Compact affect Ray v. Atlantic Richfield Company and CHEVRON U.S.A. v. Alaska?

If the Pacific Ocean Resources Compact were implemented, it would give the Compact the ability to regulate (consistent with the terms of the Compact and approving federal legislation) in areas that the courts in these two cases ruled had been pre-empted by federal legislation.

9. Can the Compact, as approved by Congress, extend the geographic scope of states' jurisdiction; e.g., to the EEZ? Can it extend the authority of states to regulate shipping beyond present limitations on state authority imposed by federal law?

Congress can, in legislation approving a compact or otherwise, authorize a compact to exercise any power that it could authorize a state to exercise. The power to enact and enforce regulations governing activities off the coasts has inherent foreign policy implications, and there is, therefore, a constitutional limit on the extent to which Congress may authorize a state to exercise that power. The delineation of that limit has been the subject of controversy for many years, and any attempt by Congress to extend state authority to the EEZ would substantially intensify that controversy.

10. Would inclusion of a "foreign power," British Columbia (B.C.) in this case, have an effect on the terms, conditions, or legal

¹³ California Dep't of Transp. v. South Lake Tahoe, 466 F. Supp. 527 (E.D. Cal. 1978).

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status of the compact, as contrasted with existing compacts (U.S. states only)?

The international aspects of the compact must be considered by Congress. This issue has been addressed in the Great Lakes Basin Compact, which contemplated membership by the Canadian provinces of Ontario and Quebec with Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Pennsylvania, in a compact relating to the development, use and conservation of the water resources of the Great Lakes Basin. That compact was stated to be "solely a consultative and recommendatory agency which will cooperate with the United States."

The House report on the bill by which Congress consented to the compact specifically states that the consent given by Congress to the compact does not extend to the paragraph providing for membership by the Canadian provinces, nor does it "purport to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies." It also provided that nothing in the compact

shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the Federal Government or any international commission or agency over the Great Lakes Basin . . . nor shall anything contained in the bill be construed to establish an international agency or to limit or affect in any way the treaty-making power or right of the United States.

H.R. Rep. No. 1640, 90th Cong., 2d Sess. 3-4. The language of the compact itself, therefore, makes clear that the compact does not affect international treaties. The inclusion of similar language in legislation consenting to the Pacific Resources Compact would nullify any provisions of the compact that were inconsistent with the obligations of the United States under international law.

Although the Compact Clause of the Constitution clearly envisions the possibility of agreement or collaboration between states and foreign powers, the Pacific Ocean Resources Compact extends the possible scope of this cooperation beyond the extent previously allowed. For example, existing compacts allow for cooperation between states and foreign powers to build connecting bridges or tunnels and permit cooperation for the operation of these structures. The cooperation envisioned by the Compact at issue, however, has serious implications for the constitutional right of the federal government to conduct the foreign relations of

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the United States and, as such, may be subject to challenge on constitutional grounds even with congressional consent. The prospect that the Coast Guard may be called upon to enforce compact regulations in British Columbia (or that British Columbia police may be called upon to enforce those regulations in United States) presents unprecedented problems in this regard.

Please let us know if you have further questions.

Sincerely,



Warren L. Dean

MARITIME JURISDICTION

The maritime jurisdictional areas of the United States are (i) internal waters; (ii) the territorial sea; (iii) the contiguous zone; (iv) the exclusive economic zone; and (v) the continental shelf. With the exception of the continental shelf, the outer boundary of these jurisdictional areas is defined by reference to the "baseline from which the territorial sea is measured," commonly known as the "baseline." The placement of the baseline is determined in accordance with principles of international law. See 33 C.F.R. § 2.05-10; Articles 3-13, 1958 Convention on the Territorial Sea and Contiguous Zone. See generally, A. Shalowitz, *Shore and Sea Boundaries* (1964). In general, the baseline is the low water mark along the coasts plus closing lines across the mouths of rivers, inlets, bays and other similar indentations.¹

Internal waters comprises all waters inside the baseline. The extent of the territorial sea is uncertain. As a matter of foreign policy, the outer limit of the territorial sea was recently extended from three nautical miles beyond the baseline to 12 nautical miles.² Apparently, however, the outer boundary of the territorial

¹ The baseline should not be confused with the "lines of demarcation," which divide the high seas from inland waters for purposes of the rules of the road, see 33 U.S.C. § 151; 33 C.F.R. part 80, nor with the "boundary lines," which delineate the areas where various federal statutes apply, see 46 C.F.R. part 7.

² Presidential Proclamation No. 5928, 57 Fed. Reg. 777 (December 27, 1988). By its terms, the proclamation did not, in itself, "extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom."

sea remains at three miles for purposes of domestic law.³

The contiguous zone extends from the outer limit of the territorial sea (three miles) out to 12 miles from the baseline.⁴ The outer boundary of the EEZ is a line 200 nautical miles from the baseline.⁵ All waters beyond the territorial sea (including the exclusive economic zone) are "high seas."⁶

Several other terms are often used in the context of maritime jurisdiction. The term "territorial waters" encompasses all waters landward of the outer limits of the territorial sea; that is, the territorial sea plus internal waters. The term "customs waters" means all waters between the baseline and the outer limit of the

³ See generally, Alexander, The Territorial Sea of the United States: Is It Twelve Miles or Not?, 4 J. Mar. Law & Comm. 449 (1989) and authorities cite therein (concluding that the presidential proclamation has the effect of extending the territorial sea only as a matter of foreign policy.

⁴ Department of State Public Notice 358, 37 Fed. Reg. 11,906 (June 1, 1972). International law now recognizes a contiguous zone out to 24 miles, but the United States has not extended its zone.

⁵ Except for purposes of fishery management and conservation, the inner boundary of the exclusive economic zone is the outer limit of the old territorial sea (three miles from the baseline). Presidential Proclamation No. 5030 (March 10, 1983). For purposes of fishery management and conservation, the inner boundary of the exclusive economic zone is "the seaward boundary of each of the coastal states." 16 U.S.C. § 1802(6).

⁶ In some contexts, mostly in older statutes and cases, the term "high seas" is used to refer to all waters beyond the headlands, "the open ocean, where the dominion of the winds and waves prevails without check or control." United States v. Bevans, 16 U.S. (3 Wheat.) 336, 341 (1818) (Daniel Webster, arguing for the defendant). This includes the territorial sea and some internal waters, such as the Great Lakes. See, e.g., 18 U.S.C. § 7 (defining the special maritime and territorial jurisdiction of the United States); United States v. Rodgers, 150 U.S. 249 (1893) ("high seas" construed to include unenclosed portions of the Great Lakes). In most modern contexts, and certainly in international law, "high seas" refers to the waters beyond the territorial sea of any nation.

contiguous zone; that is, the territorial sea plus the contiguous zone. The term "inland waters" is often used as being synonymous with "internal waters"; more appropriately, "inland waters" should be reserved for use in describing those waters in which use of the "inland rules of the road" is prescribed.

Maritime jurisdiction is generally stated in relation to national governments, in this case the United States. In general, the United States has plenary power to enact and enforce laws relating to United States vessels without regard to location.⁷ The power of the United States to enact and enforce laws relating to foreign vessels varies with the vessel's location and activity.⁸

Absent a delegation of federal authority,⁹ the power of an individual state of the United States to enact and enforce laws relating to vessels extends only to the waters within its territorial limits, that is, its internal waters and that portion of the territorial sea over which it may claim authority under federal law.¹⁰ Even there, the states' powers are subject to the paramount

⁷ Of course, the United States must obtain permission from a foreign government before exercising its enforcement jurisdiction while a vessel is in that foreign government's territorial waters.

⁸ This complex subject will be addressed in a separate paper.

⁹ The extent to which the federal government may delegate its authority to enact and enforce laws within maritime jurisdictional areas beyond the state's territorial limits is uncertain.

¹⁰ The Supreme Court's decision, in United States v. California, 332 U.S. 19 (1947), that the United States held paramount rights in the lands under the territorial sea was changed in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315, which granted all coastal states a right to claim a boundary out to three miles. See United States v. Louisiana, 389 U.S. 155, 156 (1967). That Act further granted states bordering on the Gulf of Mexico a right to claim a boundary beyond three miles (to a maximum of three marine leagues, approximately nine miles) based on the extent of

interests of the federal government."¹¹ In general, a state may exercise its police powers to enact and enforce any law governing maritime activities that does not present an active conflict with federal law. Askew v. American Waterway Operators, Inc., 411 U.S. 325 (1973). In the absence of such a conflict, a state law is valid unless it prejudices "the characteristic features of the maritime law [or] interfere[s] with its proper harmony and uniformity [with respect to] international and interstate relations." Just v. Chambers, 312 U.S. 383, 389 (1941).

their marine boundary at the time they were admitted into the Union. Id. Based on this latter provision, the marine boundaries of Texas and Florida (in the Gulf of Mexico) have been set at three marine leagues. United States v. Louisiana, 363 U.S. 1 (1960) and 389 U.S. 155 (1967); United States v. Florida, 363 U.S. 121 (1960).

¹¹ A state may enact laws governing the conduct of its citizens (individual and corporate) on waters beyond its territorial limits. The Hamilton (Old Dominion S.S. Co. v. Gilmore), 207 U.S. 398 (1907) (involving authority over a corporate citizen); Skiriotes v. Florida, 313 U.S. 69 (1941) (involving authority over an individual citizen). This power too is subject to the paramount interests of the United States. And the extent of the state's power to actively enforce such laws beyond its territorial limits is uncertain. Id., 313 U.S. at 78-79.

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SCOMM

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LEGAL RESEARCH REPORT

No. 9.2

"POTENTIAL UTILITY OF AN INTERSTATE COMPACT
AS A VEHICLE FOR OIL SPILL PREVENTION AND RESPONSE"

Submitted: December 1989

Principal Investigator: Harry Bader

The contents of this report are presented in draft form subject to amendment and supplementation, intended for the use of the State of Alaska Oil Spill Commission, and may not be quoted or used in any manner without the permission of the Legal Research Team.

The author wishes to note that typographical errors were made in final production.

FINAL

I. PROSPECTUS

Federal Courts, in the past decade, have breathed renewed vitality into compact clause theory. This judicial activity, coupled with recent creative applications of the compact clause by Congress to mounting regional problems, offers the state of Alaska a wide range of options which permits conduct otherwise prohibited within the stream of interstate commerce.

Through compact, the state can achieve enhanced sovereignty via regulations which have the force of federal law and exert a controlling influence over federal agency conduct. Compacts also permit the pooling of resources generating the synergistic effect of creating a sum greater than its parts. Compacts also can be designed to increase responsiveness to local needs.

This paper addresses the utility of compacting as a means for protecting natural resources, notably the abundant fishery, through enhanced regulation of oil transshipment in Pacific waters and terrestrial pipelines, terminal operations, and production areas. The application of compact concepts in this analysis is, therefore, directed toward resource protection, not resource allocation. Thus, the involved states should find little opportunity for internal conflict within the compact structure.

organization. The forms of compact may be a self-sustaining service compact such as the New York Port Authority, which operates the New York City commercial port, or the nonregulatory cooperative management agreement such as the Atlantic States Fisheries Commission, 56 Stat.267(1942), or a regulatory compact with substantive teeth such as the Northwest Power Planning Council, 16 USC 839. **An effective compact among the Pacific states and provinces for the regulation of oil shipments would most effectively be an amalgamation of the regulatory and management forms**

Alaska is no stranger to the compact. Indeed the state is currently a partner in seventeen compact organizations, such as the Pacific States Fisheries Compact and the Interstate Oil and Gas Compact. All of these compacts, however, predate the judicial pronouncements which brought forth the new principles enabling compacts to serve as dispensers of federal law; therefore, our state's current agreements lack the ability to be an effective forum for enforcing Alaska's appropriate role in resource management.

III. PROSPECTS

WHAT IS A COMPACT?

A compact is a multi-state agreement, (or multi-state/federal agreement) consented to by Congress, whereby states may coalesce to form an authoritative body governing issues of regional concern. They have been employed to solve problems of air pollution, land use planning, water allocation, and a myriad of other applications. The one consistent theme, always, is the presence of a regulatory problem which transcends state boundaries.

The constitutional basis for compacts is found in article, I, section 10 clause 3, which holds that "... no state shall, without the Consent of Congress...enter into any Agreement or Compact with another state or with a foreign power." Through this simple clause, the Constitution recognizes the inherent sovereign power of

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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II. INTRODUCTION

Alaska has assumed a premiere role as nation's steward by virtue of the incalculable natural resource wealth within her borders. Whether those resources are unscathed wilderness, alluring placer deposits, the oil which drives industry, or the remarkable yet still not entirely understood anadromous fish, these resources are Alaskan from whom the future of a nation is fashioned. Due to the importance of these resources to all American, Alaska has often been forced to accept resource policies not of her own choosing. It is incumbent upon this state to protect its sovereignty by demonstrating a willingness and an ability to ensure the protection and wise use of resources vital to both Alaska and the rest of the country. Pursuant to this end, leaders in the state must apply proven mechanisms in innovative ways which will enable the state to emblazon her own vision to her own future.

The interstate compact is a potentially valuable instrument for ensuring Alaska's rightful place as chief architect of resources planning management. As U.S. Supreme Court Justice Felix Frankfurter championed in a 1925 Yale Law Review article, "Conservation of natural resources is thus making a major demand on American statesmanship. An exploration of the possibilities of the compact idea furnishes a partial answer to one of the most intricate and comprehensive of all American problems." Indeed, the federal judiciary recently heralded the compact as an "...innovative system of cooperative federalism..." in which states can substantively participate in natural resource decision making. Seattle Master Builders v. Pacific Northwest Power and Conservation Council 786 F.2d. 1359 (1986).

There are basically two types of compacts which can take on any one or part of three forms. The traditional compact is the multi-state agreement. A newer type, pioneered under the Delaware River Compact is a multi-state/federal

organization. The forms of compact may be a self-sustaining service compact such as the New York Port Authority, which operates the New York City commercial port, or the nonregulatory cooperative management agreement such as the Atlantic States Fisheries Commission, 56 Stat.267(1942), or a regulatory compact with substantive teeth such as the Northwest Power Planning Council, 16 USC 839. **An effective compact among the Pacific states and provinces for the regulation of oil shipments would most effectively be an amalgamation of the regulatory and management forms**

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The constitutional basis for compacts is found in article, I, section 10 clause 3, which holds that "... no state shall, without the Consent of Congress...enter into any Agreement or Compact with another state or with a foreign power." Through this simple clause, the Constitution recognizes the inherent sovereign power of

states to form agreements aimed at regional problem solving. Because a compact is essentially a contract between states, the basic tenets of contract law have traditional been applied to compact relationships. Pursuant to these agreements, the Supreme Court has confirmed that states have the ability to delegate their political powers to, and to devise financing for, the activities contemplated by compacts. *Dyerv. Sims* 341 US 22 (1951).

Because Congressional consent transforms compact provisions into federal law, compacts can authorize state conduct which would otherwise be constitutionally invalid. *Cuyler v. Adams* 449 US 433 (1981) and *Intake Water Company v. Yellowstone River Compact* 590 F.Supp. 293 (1983).

In structure, compacts are formal documents made between the states in an identifiable text. This document is enacted by statute in the legislatures of the separate states. The wording of these statutes must be essentially the same for each state. Once ratified by the requisite states and approved by Congress, the compact cannot be altered, repealed, revoked or ignored by a member state. Disputes arising under compacts are taken to the federal courts, not state courts, for final interpretation. Unlike reciprocal agreements, the statutes ratifying compacts are conditioned upon conduct by the members. *Seattle Builders* at 1372.

WHAT ARE THE POWERS OF A COMPACT?

Because a compact is approved by congress, the compact is federal, not state, law for consideration of Constitutional objections. *Cuyler* at 438. Therefore, a compact cannot, by definition, be a state law impermissibly interfering with interstate commerce or federal supremacy interests, nor do traditional pre-emption problems apply. This transformation occurs because Congress, in approving the agreement, exercises its legislative power that the compact threatens to encroach upon, and declares the compact to be consistent with Congress's supreme power in that area. *Intake Water Company* at 297. Therefore the compact agency may

address resource problems with regulations that compacting members could not do as individual states. For example, many of the Alaska state regulations (SB 406) concerning oil tanker regulation, risk avoidance charges, the coastal protection fund, and tanker searches, prohibited by federal district judge Fitzgerald in *Chevron v. Hammond* in 1979, or dropped by the state after *Ray v. Atlantic Richfield* could, theoretically have been permitted to stand had they been enacted by a compact to which Alaska was a member. Likewise Alaska, through authority delegated by the compact commission, could exert regulatory controls over the North Slope production areas, the pipeline, terminal operations and off-shore production, even in areas otherwise pre-empted.

Not only may compacting states enter the realm usually reserved for the federal government, compact agencies may even exert a controlling influence over federal agencies when Congress has given a clear and unambiguous mandate to that end in the consent legislation. *Seattle Master Builders* at 1364. Currently, two compacts are now operating which possess and wield this impressive authority. One is the Northwest Power Council (16 USC 839) and the other is the Columbia River Gorge Commission (16 USC 544). The more powerful multi-state compact is the Northwest Power Council. Charged with the duty to develop and implement an energy and conservation plan for the states of Washington, Oregon, Idaho, and Montana, the Council is also empowered to oversee the operations of the federal Bonneville Power Administration, at least to the extent necessary as to ensure federal compliance with the compact's plan. Oversight authority is manifested through several provisions within the consent legislation. The Council may review the actions of BPA to determine whether BPA is consistent with the compact's goals and regulations. The Council may notify BPA if the Council deems federal conduct inappropriate in light of the plan's provisions. In such cases, the BPA may to continue with proposals or activity unless a formal written

justifiability, subject to all the structures of administrative procedure law, is proffered by the federal agency.

POLICY BENEFITS OF A COMPACT ORGANIZATION

Several benefits accrue from the structural organization and inherent powers of a compact. Chief among these benefits is enhanced state sovereignty over issues of critical importance to the state. Contrary to the intuitive belief that compacts truncate state power through binding agreements, the compact is a latch key which opens a door into an entirely new sphere of influence otherwise inaccessible to states. Oklahoma's governor, Johnson Murrasy, understood this attribute while advocating Red River Compact. Murray believed a compact "...an effective block against federal encroachment on state sovereignty...and an inspiration to many who are tired of federal intervention in every field imaginable." Reviewing the sad history of Coast Guard supervision over tanker and crew safety monitoring, federal supervision may not only be a benign nuisance, but incompetent and dangerous as well.

Compacts can also prevent federal agencies from acting cavalierly toward state interests. The Northwest Power Council was designed to prevent this problem. Recently, Alaska has again felt the brunt of federal insensitivity to state regulatory organs. In another natural resource field, wildlife management, the National Park Service violated the spirit of cooperative game management, enunciated after ANILCA, by unilaterally ending the land and shoot wolf hunting in National Preserve lands without first consulting the state Game Board last year. Whether one opposes or advocates wolf hunting, this lesson of federal condescension towards Alaska's state authorities bodes ill for hopes of amicable federal agency cooperation in oil activity regulation.

In addition to allowing states to travel waters normally reserved as a federal province, a compact necessarily increases an individual state's

representational power within a given context. Alaska, for example, is only a voice of 3 within a din of 535 legislators in the federal Congress. Whereas in a Pacific states compact, Alaska could compose fully 25% of the decision making body as one of four equal partners.

Equally important is a compact's role in increasing regulatory responsiveness to community needs and values. This sensitivity to the local population is achieved because of the great accountability with a compact organization. Citizens can have direct access to the compact representatives appointed by their governor, much like contacting their state legislator, rather than having to deal with the labyrinth channels of a faceless bureaucracy. Due to the traditional tie between compact representatives and a governor, there is a closer link with the electoral process than would be under a bureaucratic regulatory regime. Because of this responsiveness, compact decisions would be expected to be more narrowly tailored to the specific needs of the region, and therefore more effective and efficient than generalized federal policy decisions. Sensitivity to local needs is a mandate in the wake of the Exxon Valdez, yet as Attorney General Doug Baily has pointed out, there is now a fear that the Trustee Council, established under federal law after the spill, may be frustrating the interests of the local communities in Prince William Sound.

The responsiveness of an interstate compact also outshines the effectiveness of the judiciary in most circumstances. The judicial instrument is simply too sporadic and static to deal with the dynamics of the continuously adjusting environment of regional resources management.

Enhanced oversight is another benefit. A good industry record for 12 years in Prince William sound led to complacency in enforcement of safety standards and preparedness which led to unsafe conditions and an inability to respond to the Exxon Valdez tragedy. If a particular state or agency is lulled into an ineffective

enforcement role, the interests and agents of other states could stimulate additional oversight. Compacts increase the number of watch dogs by increasing the number of participant within the regulatory and enforcement scheme.

Likewise, compacts pool the resources (personnel, equipment, financing, expertise, etc.) of member states, enabling activity impossible for any one state to accomplish on its own.

Compacts provide a unified and cohesive agency through which decision making is streamlined and coordinated. Such a management scheme would have enhanced oil spill recovery efforts this past March. The Skinner-Reilly Report, prepared by the National Response Team for President Bush, found that the various contingency plans for Prince William Sound did not refer to each other or establish a workable response command hierarchy. This situation resulted in confusion and delay during the critical first days of the response in the Exxon oil spills, exacerbating the devastating environmental consequences.

Another benefit of compacting as a means of dealing with regional problems is its role in reducing peripheral interests. In the compacting process, states negotiate directly with each other about issues which immediately affect them. This operational milieu excludes centrifugal forces beyond the region which may otherwise intervene if the controls were to take place on a national level.

Finally, compacts foster synchronization of state efforts in controlling regional problems. If states pursue their own independent regulatory program, Balkanization and duplication can undermine effective controls. More importantly, in the absence of a compact, the vigilance of one state may be thwarted by the inaction or lax administration of adjoining state.

HOW IS A COMPACT FORMED?

...questions of joining or not joining an interstate compact, or creating one, renewing or not renewing it, of appropriating money for its support, of sanctioning

and implementing activities, are uniquely the responsibilities of the states and their people, and it is the state and their people which should have an intense concern for what they may be gaining, losing, delegating or benefiting through the path of interstate compacts ...

M. Ridgeway

Interstate Compacts: A Federal Question

1971

There is no form or pattern for a proper compact, the process of its genesis is free from restriction aside from the Congressional consent criterion. Thus, states are arbiters of their own destiny. With over a hundred compacts now in existence, compacts of the future have a rich history to learn from in constructing agreements to meet the needs of emerging regional problems. The primary obstacle to effective use of compacts as regulatory device is the time period traditionally involved in bringing a compact to fruition. Often times, the period from initial negotiations to federal consent, has consumed more than eight years. Glacial slowness need not be the rule, and the avoidance of some common pitfalls can serve to greatly reduce delay.

One contemporary practice which has shortened the time frame for compact formation has been the shift away from formal compact negotiation commissions to extra-legal organizations composed of various state officials who share a common desire to rectify a particular problem. A most effective start is for each state's negotiating team to draft its own provisions for inclusion in an agreement to serve as a basis for negotiation.

Because Congressional consent to begin negotiations is not mandated by the Constitution, a compacting team ought not to seek this protracted strategy before beginning substantive consultations. Many feel that having prior Congressional

approval for negotiating enables Congress to guide the states and contributes significantly to eventual federal ratification chances. However, this advantage can typically be gained with the inclusion of a nonvoting federal official in the negotiating team.

Crucial to success has been the involvement of local leaders from potentially affected communities and interest groups. This does not mean allocating formal positions to such groups, but it does require the creation of a standardized mechanism of communication and meaningful participation. This approach not only expands the information horizon contributing to better compacts, but serves a legitimization function, thereby reducing potentially disorientating opposition from within state. Rarely will Congress give its stamp of approval to a compact perceived as eviscerated internally by intra-state strife.

The experience of the Red river compact found that the early establishment of both legal and technical advisory committees for information gathering and processing was helpful in facilitating the negotiating process. The Red River example also demonstrated the need to guard against information gathering becoming an end unto itself, stymieing progress.

Once the compact document has been drafted, each state must pass enabling legislation conditioned upon the consent of the other involved states. Each statute will require reciprocal action to be effective. Northeast Bancorp, Inc. V. Federal Reserve Board 86 LEd.2d. 112 (1985). Each statute must be virtually identical in form and wording. After approval by the appropriate governors, the compact is subject to federal consent.

Congressional approval is not required of all interstate agreements. Only those arrangements which are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States" require consent under

the Constitution. Washington Metro Area Transit Authority v. One Parcel of Land 706 F2d. 1312, 1316 and Cuyler at 448. an agreement intended to regulate oil shipments on land and water within the Pacific states will most certainly encroach upon the federal province, and therefore must receive consent under the compact clause.

It is this encroachment which serves as the vehicle through which compact provisions become federal law. When Congress approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area. Intake Water Co. at 297.

After congress has bestowed its consent, tradition holds the President reserves a right to participate in the approval process, though presidential involvement probably could be avoided through a concurrent resolution serving as Congress's consent mechanism.

Congress has a duty to ensure that compacts do not proceed to impermissibly infringe upon critical federal interests not contemplated in the consent resolution. Therefore, Congress retains the power to alter, amend, or repeal a compact. Cuyler at 439-440. Also, Congress may enact subsequent legislation which is expressly inconsistent with an interstate compact to which it had previously given its consent.

The extent of federal power to intervene in the internal affairs of an approved compact is the subject of much debate. While the courts have sidestepped this constitutional issue, dicta provides insight to the judiciary's hesitancy to permit wholesale federal intrusion into compact operations. "We have no way of knowing what ramification would result from a holding that congress has the implied constitutional power to alter, amend, or repeal its consent to an interstate compact. Certainly, in view of the number and variety of

compacts in effect today, such a holding would stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts. No doubt the suspicion of even potential impertinency would be damaging to the very concept of interstate compacts." Tobin v. United States 306 F.2d 270 at 273 (1962).

WHAT ELEMENTS ARE NECESSARY FOR AN EFFECTIVE COMPACT DOCUMENT?

After the Clean Air act, a flurry of compacting activity erupted in the attempt to control regional air pollution. to assist congress in sifting through the flood of compact proposals, the Department of Health, Education, and Welfare created a set of Guidelines denoting key indicators of competent compact drafting. The indicators were expected to reveal which documents showed the highest potential for achieving their stated goals. See: Air Pollution, 1968 Hearings on Air Pollution Compacts, S2350, S.J. Res. 95 Before the Subcommittee on Air Pollution, 90th Congress, 2nd sess. 3 (1968). Combined with subsequent Compact debates, a beacon can be constructed which provides safe passage for would be compact drafters. An enumerated discussion of important draft criteria, based upon the foregoing, follows.

1. Any agency establishes by the compact should have broad standard-setting monitoring, and enforcement powers.

A compact document must articulate the mission and duties for which it is created and demonstrate the means by which these goals will be realized. The document should demonstrate that the mechanisms specified as tools for compact operation will both be effective in achieving the goals as well as being the best possible option available.

The multistate agreement needs to also explain what type of administrative agency will effectuate its purposes. Two basic options are available. Each party

state may use its own agencies if they appear to be fully equipped to carry out compact policy, or if the complexity of the arrangement necessitates, a special interstate agency may be created. The compact should be able to delegate authority, but it should not be required to refrain from taking enforcement action until other entities have had an opportunity to do so. In order to coordinate its activities with the federal government, the compact ought to be authorized to designate liaisons to work and communicate with federal agencies involved with the same regional problems.

In order to attain its true potential, the compact document must contain a provision ensuring that federal activities and projects will be coordinated to the fullest extent possible with the policies of the compact.

Finally, in order to retain the flexibility demanded in the field of resource protection, a host of housekeeping provisions must be contained within the documents. The organization should have the power to conduct investigations, make studies, hold hearings, prepare findings, adopt rules and regulations, carry out enforcement actions (including litigation), and the ability to enter into contracts.

2. Each state must have equal representation

It is well settled that compacting states possess equal voting power, despite economic, population, and geographic disparities. Allocating several voting representatives to each state allows a greater range of expertise to be present on the authoritative body, as well as minimizing the potential of special interest capture of a particular state or representative. Another important provision concerning representation involves the ability of states to render their representative accountable and sensitive to their constituency. the accountability dilemma is a real quandary because interstate compacts transcend state lines and political units, thereby circumventing the accustomed channels and structures of

responsibility in the American political system. The apparent freedom that compacts enjoy from their home legislatures must be circumscribed to prevent administrative tyranny without emasculating the agency, rendering it unfit for achieving its mission.

3. Enforcement and business actions by the compact should not require unanimous consent.

Business and enforcement actions should not require unanimity on the part of the decision making board; however, a simple majority is just as undesirable due to the lack of protection it affords minority interests. Thus, a common trend is the 3/4 majority requirement. The requirement concerns the total number of voting representatives, not three-quarters of member states, permitting state delegations to split on a particular vote.

4. The compact must be able to demonstrate financial integrity.

Financial integrity incorporates the needs to be able to receive and dispense funds. It is imperative for a compact to be able to obtain financing beyond simple allocations by member states.

5. The federal government ought to have an avenue to participate in a nonvoting fashion.

6. A valid regionalist justification must be presented.

Compacts are intended to provide a solution for a problem of regional character which defies both federal and state oriented approaches. Congress must see that a set of unique forces (economic, social, ecological, or geographic) frustrates conventional contrivances. Regional interests, regional wisdom, and regional pride must serve as the foundation from which the most effective devices will spawn. It is imperative that the uniqueness of the region be clearly defended when proposing a compact, or the federal judiciary has left no doubt that differing

conditions in different geographic areas may provide a reasonable basis for different legislative treatment.

7. Miscellaneous

A host of other conditions require treatment in a compact document. Of particular importance will be the dedication of drafters in articulating clear definitions and intent for the articles of the compact. Because it is the federal court system which is the final arbitrator in compact disputes and interpretation, care must be taken to ensure that alternative constructions of compact articles do not wreak violence upon the purposes envisioned by the agreement's framers.

No clearer example exists of the consequences to Alaska due to curt misinterpreting of state intent than the Ninth circuit's inquiry into Alaska's definition of "rural" under the subsistence provisions found in ANILCA. Kenaitze Indian Tribe v. Alaska 860 F.2d. 312,316 (1988). In that case the court paid no special attention to the uniqueness of Alaska's remote bush regions, and held that what constituted rural in Iowa would serve as an appropriate definition for rural in Alaska. This decision, which devastated Alaska's state subsistence provisions in 1988, was a result due in part to the state's failure to adequately explain the rationale employed in reaching this particular definition. The lesson of this case ought not to be lost on compact designers attempting to protect resources under the unique conditions faced in the Pacific Rim Region.

IV POLICY APPLICATIONS FOR RESOURCE PROTECTION

This section attempts to portray the spectrum of possibilities available under compact theory for regulation of the oil industry, federal agencies, and state government, in order to protect the natural resources for which the Pacific Rim is famed. This is by no means an exhaustive analysis, rather, its intent is merely

informative and designed to reveal the changes that can be reaped, both minor and radical, under the case law offer by Cuyler and its progeny.

Establishment of the uniqueness of this region, justifying compact treatment should not be difficult. The presence of an extensive aboriginal population extremely dependent upon the anadromous fishery for subsistence and cultural survival, coupled with the large non-native subsistence population in Alaska, would alone justify special action. But there are other ties that bond these states as well. Economically, the fishing industry in Alaska, Washington, and Oregon are entirely dependent upon the harvest in Alaska coastal waters. Indeed, these are the most important fishing grounds in the nation and the continent. Sea Grant has estimated that over 70% of the Seattle based industry derives its fish from Alaska. Oregon's fishing industry is similarly dependent. This condition creates the economic bonds definitive for regionalism. Also, the unspoiled coastlines of the Pacific Coast, from the glaciated wilderness fiords of Alaska to the wild shores of Washington's Olympic Peninsula down to Oregon's protected ocean beaches and California's Big Sur, reveal a unique ecological treasure preserved for the world. Travelling past these environmentally sensitive shores, tankers carry one-fifth of the country's crude oil consumption. Cumulatively, these factors form a regional portrait, separate from the broad stroke of the federal brush.

Canadian provinces, as well as states, may share in interstate compacts, serving as full participating members. This is currently the case in the Northeast Forest Fire Protection Compact, in which Quebec and New Brunswick are members. A regional compact could envision British Columbia and the Yukon Territory as potential members as well as the Pacific states.

when assessing these policy applications, bear in mind that some would require express federal consent acknowledging subtle changes to the scope of the Ports and Waterways Safety Act and the Clean Water Act. Finally, it is prudent

to note that the Alaska legislature has already invited the application of compact to the task of oil pollution control through AS Section 47.04.100 (1984), authorizing the Governor to pursue compacting in order to achieve the purposes of oil pollution protection. The basis of a compact may be premised upon the very effective Pacific Oil and Ports Group created in 1975 by Dennis Dooley of the Alaska Oil Tanker Task Force under the direction of Walt Parker. The group involved Alaska, California, Idaho, Oregon, and Washington, and promulgated a set of Tanker standards.

After the Exxon Valdez debacle, a host of federal, state, and independent entities conducted investigations and studies to determine what went wrong in Prince William Sound. Interestingly through the morass of accusations and finger pointing, several common themes surface with striking consistency. These findings can be organized into four general categories which shed light on a set of corrective recommendations.

Findings:

1. Contingency Planning

The sheer multitude of plans and agencies involved in oil recovery stymied effective response because of a fundamental failure to unify under a coordinated command hierarchy. Organizational responsibilities were unclear, decision making wallowed as a "team concept" broke down into adversarial relationships.

2. Coast Guard

The Coast Guard routinely approved reductions in the number of sailors required on oil tankers, as well as reducing the level of experience for tanker operations. Pilotage standards for Prince William Sound were lowered to meet nationwide general standards. It appears that Coast Guard decision making is driven by industry initiative, rather than agency fact finding. Finally, the Coast

Guard failed to carry through its promises to develop radar installations and stricter tanker design standards.

3. Department of Environmental Conservation

The agency lacks the financial and personnel resources to effectively evaluate industry response capabilities and preparedness. In part, this is due to other priorities which DEC has responsibility towards. However, DEC apparently failed to enforce violations and deviations it detected with Alyeska operations.

4. Industry

The oil companies ignored recommendations to improve spill prevention and response. Alyeska, the company, cancelled contract with a company to maintain dedicated response teams in 1981, and disbanded its own teams in 1984. Equipment inventories were allowed to fall below what was adequate to deal with even moderate sized spills.

5. Interior Pipeline Maintenance and spill Prevention

Over the past 12 years, more than 1.5 million gallons of hot crude oil have boiled across fragile tundra and fouled miles on Interior streams. Innovations in leak detection and response technology have not been adopted by Alyeska. DEC has not pursued inspection of strategic spill equipment caches. A litany of spill examples bodes ill for the lands traversed by the pipeline. Past terrestrial spills have been surprisingly large, due in part to the company's reliance on visual or olfactory detection of leaks. The 650,000 gallons that poured out at Steel Creek and the 240,000 gallons that polluted 30 miles of the Atigun Valley were all detected by human inspection, rather than electronic or mechanical means. Pipe check valves and bends have all been the source of major spills totalling 1000,000's of gallons. Aging equipment and corrosion offer new sources for concern and need immediate regulation and monitoring. A spill on the Yukon or

Tazlina and their many tributaries could devastate the subsistence fishery upon which tens of thousands of rural Alaskans and an ancient culture depend.

Recommendations

1. Adoption of response equipment inventory system, which also monitors equipment readiness and maintenance.
2. Development of a comprehensive contingency plan incorporating all effected parties to stimulate a streamlined coordinated command structure
3. Creation of a single mission enforcement unit.
4. Move oil spill responsibility from the industry. An independent dedicated response team permanently stationed to respond to spills, both terrestrial and marine, is essential.
5. Establish an entity with oversight authority concerning Coast Guard standard setting.
6. Invoke technology forcing provisions which mandate the application of spill prevention and recovery innovations when they become available.
7. Adopt strict crew size and qualification standards.
8. Adopt an emergency requisitioning authority capable of mobilizing equipment, personnel, and logistical services
9. Develop a pre-authorization procedure for streamlined decision-making under exigent circumstances for burning and dispersant use.
10. Implement on-site and on-tanker surprise inspection authority vested in the appropriate state regulatory agency.

COMPACT APPLICATION OF RECOMMENDATIONS

1. Comprehensive Monitoring and Water Protection Interstate Authority

The duty of this compact option would be to provide a coordinated and unified command, regulating industry spill prevention and response capability along the TAPS route. The authority would be responsible for drafting a comprehensive contingency planning process and command hierarchy, superseding the fractured planning currently in place.

This entity would have authority to invoke priorities, regulatory criteria, and monitoring capability, which is binding on all member states, to ensure that adequate equipment, crew, and maintenance are available for spill prevention and clean-up. It could maintain a standing dedicated crew of its own, pooling the financial, personnel, equipment, and expertise resources of its member states and provinces; or, it could oversee and enforce standards controlling industry and state agency contingency operations.

Finally, a compact could, foreseeably, enact uniform tanker safety standards for the Alaska Oil Trade. Because this trade is domestic by nature and law, compact standards would not conflict with the PWSA, an act intended to achieve international uniformity. Compacts would provide the consistency in regulation which foreclose the argument that federal requirements are needed to prevent the costly impacts of diverse state standards.

In addition to streamlining regulatory mechanisms and molding them into an effective unified whole, the organization could be endowed with emergency requisitioning power to prevent industry lockup of response resources.

This approach would permit the flexibility to deal with all five sectors of oil activity, the North Slope, the pipeline, the Valdez terminal, tanker shipping in Cook Inlet and Prince William Sound, and off-shore activity.

2. Oil Pollution Control Standards and Review Council

A compact may be empowered to develop standards and regulations pertaining to crude oil shipment in the member states on both land and water.

The regulations may be embodied in a region-wide comprehensive plan, modeled after the Northwest Power council. For example, the plan could establish policies regarding oil spill prevention, tanker design, crew size and qualifications, mandatory response and navigation equipment, etc.

The compact would be vested with the authority to review Coast Guard and other federal agency actions to determine whether their conduct was consistent with the plan. If the federal agency were found deficient in promulgating the plan's policies, the compact could hold hearings and issue a reviewable decision. Federal conduct determined to be inconsistent with plan mandates would be inconsistent until the Coast guard issued a formal, reasoned justification clearly and unambiguously articulating the compelling reason for the inconsistency, linking the agency's activity to specific finding of fact.

This approach has enforcement teeth, and therefore, embodies a substantive advantage over any localized citizen's advisory councils currently contemplated in federal legislation. Due to its standardized and formal process, this approach achieves legitimization and formal realizability functions.

3. Risk Avoidance Charges and A Waters Protection Fund

A compact can accomplish what the Attorney General's office stipulated away in 1979 after the Ray decision and the Chevron litigation. The compact authority may establish its own fees for crude oil shipped across member's territory, regardless of origin, for the purposes of establishing a permanent fund to be utilized in spill recovery and mitigation, or prevention. An adjustable fee system may be used to create incentives for spill prevention technology. Alaska's dedicated funding prohibition could easily be avoided through direct fees imposed by the compact, or through the delegation of compact power to the state. See Washington Metro Area Authority at 1321-3122.

V. CONCLUSION

Interstate compacts are formal agreements, ratified by Congress which enhance the power of member states. Compacting states may express regulations which carry the force of federal law, thus immunizing compact conduct from pre-emption and interstate commerce challenges. With this enhanced regulatory authority, compacts enable states to cooperatively resolve regional problems with powers unavailable to solitary states.

Compacts may serve as an effective vehicle permitting Alaska to regulate the oil industry in a unitary fashion consistent with the mandate encapsulated within AS 46.04.200, requiring a coordinated, master stateside plan.

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LEGAL RESEARCH REPORT

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"FEDERAL PRE-EMPTION CONSIDERATIONS FOR STATE OIL SPILL
PREVENTION AND RESPONSE ARRANGEMENTS"

Submitted: December 1989

Principal Investigator: Alison Rieser

The contents of this report are presented in draft form subject to amendment and supplementation, intended for the use of the State of Alaska Oil Spill Commission, and may not be quoted or used in any manner without the permission of the Legal Research Team.

The author wishes to note that typographical errors were made in final production.

INTRODUCTION

In the aftermath of the Exxon Valdez oil spill disaster, States are reexamining their legal and institutional structures for preventing and responding to oil spills in marine and coastal waters. In particular, the question has arisen to what extent existing federal laws and regulations constrain the scope of State statutory and regulatory measures to improve oil spill prevention and response activities of oil tankers, marine terminals, and government agencies. A general answer to this question is that the States have considerable authority to enact tough controls and to require effective contingency arrangements. These standards must be designed, however, recognizing the strong possibility that oil shippers will challenge these enactments as preempted by federal law.

The federal preemption doctrine, as courts have developed it in the field of oil spill prevention and response, does not pose a significant barrier to most requirements that a State is likely to want to implement. There are some clear limitations on what the States may enact, but these are in a very narrow area of regulation. The federal courts and the Congress have recognized the extensive authority of States under their police power and public trust responsibilities to protect the resources of their coastal regions.

To clarify the effect the preemption doctrine has on State law it is necessary to consider two major oil pollution control decisions of the U.S. Supreme Court. It is also instructive to examine the federal court review of the State of Alaska's comprehensive oil spill prevention legislation, enacted in contemplation of the extensive crude oil shipments from the the Valdez terminus of the Trans-Alaska Pipeline. The bases for the court's invalidation of many of the law's provisions will be considered to for its possible influence on future enactments of the State. Finally, the legislation under consideration in California, whose ports receive crude oil shipments from the Trans-Alaska Pipeline, will be discussed, as a possible guide to the design of other State enactments.

SUMMARY OF FINDINGS

Under existing federal statutes, as interpreted in Supreme Court decisions in the 1970s, the State is precluded from the direct imposition of oil tanker design and construction standards, such as double hulls and segregated ballast tanks, as well as requirements for specific navigational equipment. The State is also precluded from adopting vessel traffic control systems that go beyond what federal authorities have consciously concluded are needed for a particular port. The State has greater latitude, however, in the field of oil spill contingency planning and the requirement of containment equipment and preparedness. The overlap between these two regulatory domains may cause to uncertainty with respect to a particular measure. The intersection of tanker design and equipment standards and spill contingency planning could take the form of a requirement of specific, on-board containment equipment and certification of crew training in the use of the equipment pursuant to a contingency plan. Such state requirements are likely to be upheld as long as they do not conflict with federal requirements. "Conflict" in this instance means the state requirement makes it impossible to meet the federal standard.

One of the two major court decisions from which these parameters are drawn, Ray v. Atlantic Richfield Co., in which several provisions of the Washington Tanker Act were invalidated under the preemption doctrine, would probably be decided differently today. A number of factual circumstances now exist that would support a court ruling that looked more favorably upon concurrent state regulatory jurisdiction in the field of oil spill prevention regulation. Just one indication that federal policy has shifted in favor of State power is the 1987 Executive Order, signed by President Reagan, that calls upon federal agencies to exercise their authority in a manner that does not interfere with the authority of the States over matters of critical importance to them.

Also, federal law is changing with respect to oil spill prevention and liability. Since much of the recent debate in Congress has centered around the question of state authority, and since non-preemption of state liability law seems a likely outcome, the new federal oil pollution legislation could reflect a different intent in Congress, one that is more favorably inclined toward state regulation, one that would supplant the preemptive intent that was found in Ray.

The pending federal oil pollution legislation includes specific provisions concerning vessel and terminal operations in Prince William Sound. It is possible, therefore, that the enumeration of federal protective standards specific to Prince William Sound will preclude the adoption of state regulations imposing different standards if those pose a conflict. If the federal provisions are enacted it will be necessary to analyze each one to determine if any actual conflict between federal and state law exists. An analysis favorable to state regulation would be aided by any language in the statute or in committee reports or floor debate supporting broad state regulatory authority.

Given the uncertainty with respect to the "preemption-sensitivity" of any particular new requirement or institutional arrangement and the likelihood that courts will view recent events as demonstrating the need for the strongest and most effective oversight of oil shipment activities, it is recommended that the State proceed, as the State of California is doing, with the drafting of a comprehensive system of spill prevention and response control mechanisms without constraint under fear of federal preemption. Those areas of the recommended new control system that fall within the exclusive federal domain can be pursued through a multi-state strategy of legislative lobbying and administrative agency petitioning for significant improvements in Coast Guard regulatory controls and surveillance to complement a stronger, more vigilant system of State risk reduction and monitoring.

ANALYSIS AND DISCUSSION

A. Basic Principles

The doctrine of federal preemption is based upon the supremacy clause of Article VI of the U.S. Constitution which states that the Constitution and the laws enacted pursuant to it, as well as treaties made by the U.S., are the supreme law of the land. Thus, laws enacted by the Congress pursuant to one of its constitutionally delegated powers, such as the commerce power, take precedent over state law.

The basic criteria for federal preemption have been summarized by the Supreme Court in the following terms:

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)(citations omitted).

In addition to the above, there is a third form of preemption wherein Congress includes language in a federal statute making it clear that state law on a particular topic is prohibited. The three forms of federal preemption may be described as (1) express preemption where Congress spells out its intention to preclude state law, (2) implied preemption where congressional intent to preempt is made evident by its enactment of a comprehensive scheme of federal regulation that leaves no room for state law on the same subject (so-called "occupation of the field"), and (3) conflict preemption that occurs because the state law poses an actual conflict with federal law or regulation or stands as an obstacle to accomplishment of federal objectives. Tribe, American Constitutional Law (2d. 1988) at 481, n.14. Frequently Congress includes language in a statute that is ambiguous or which only partially addresses the question of concurrent state jurisdiction. Thus, preemption analysis must take place on a case-by-case basis, looking at the entire statute and comparing it against specific provisions of state law to determine whether any fatal conflict exists. It is also necessary to look at regulations enacted pursuant to the federal statute to find if any actual conflict exists.

B. The Supreme Court Decisions of 1973 and 1978

The U.S. Supreme Court addressed the preemption of state law to prevent oil spills in two major cases in the 1970s: Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), considering state oil spill liability and clean-up laws in light of the Federal Water Pollution Control Act of 1970, and Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), addressing state oil tanker regulation and the federal Ports and Waterways Safety Act of 1972. (The Ray decision was responsible in large part for the federal district court's invalidation of the 1976 Alaska oil spill legislation which is discussed in Subpart B below.) A comparison of the two decisions indicates that the outcome of the preemption analysis depends upon the structure, comprehensiveness, and specific language of the federal statute. The court's consideration of these factors is likely to be influenced by its view of the nature of the problem the laws address and the comparative institutional capacities of federal and state authorities. Since these conditions have changed since the 1970s it is likely that a 1990s preemption analysis would reflect current realities, including the poor federal performance to date and the poor prospects for its improvement given budget and other institutional limitations, and could lean more favorably toward state protective regulation.

In Askew, the Supreme Court found the federal water pollution statute to reflect an intent by Congress that a coordinated federal-state effort be employed to combat the threat of coastal oil spills. The Florida Oil Spill Prevention and Pollution Control Act of 1970 imposed strict and unlimited liability for any private or state damages incurred as a result of an oil spill in Florida waters. The Act also authorized the Florida Department of Natural Resources to enact regulations requiring marine terminals and oil tankers to maintain oil spill containment gear and equipment to prevent oil spills. Shortly before the Florida law was enacted, the Congress adopted the Water Quality Improvement Act of 1970 (a predecessor to the Federal Water Pollution Control Act of 1972, now commonly referred to as the Clean Water Act, 33 U.S.C. 1251-1356). The 1970 federal law included a provision (now at 33 U.S.C. 1321) imposing strict but limited liability on marine terminal facilities and vessel operators for federal clean-up costs (up to \$14 million and \$8 million,

respectively). It also authorized the President to promulgate regulations requiring terminal facilities and vessels to maintain spill prevention equipment.

The Supreme Court rejected the oil shippers' claim that the Florida Act was preempted by the federal provision, noting that the federal law was concerned solely with the recovery of actual, federal clean-up costs, not damages to other parties. Writing for a unanimous Court, Justice Douglas found the federal act to contain a waiver of preemption in the following language, which is still present in the federal oil spill contingency planning and liability provisions of the Clean Water Act (section 1321(o); bills pending before Congress this session would, however, alter this provision):

(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 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).

Justice Douglas found that the Act's directive that the President prepare a National Contingency Plan for the containment, dispersal, and removal of oil, contemplates cooperative actions with the states. Other evidence of intended state-federal cooperation is found throughout the statute. In his view the language in section (o)(2), quoted above, was included because "the scheme of the Act is one which allows-- though it does not require-- cooperation of the federal regime with a state regime. If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use ... the [Florida] Act and recoup her cost from those who did the damage. ... It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and

recouping, at least within federal limits, so far as vessels are concerned, her costs. ... If the coordinated federal plan in actual operation leaves the State of Florida to do the cleanup work, there might be financial burdens imposed greater than would have been imposed had the Federal Government actually done the cleanup work. But it will be time to resolve any such conflict between federal and state regimes when it arises." 411 U.S. at 332, 336.

With respect to Florida's ability to require specific containment gear of vessels and terminal facilities through regulations, Justice Douglas found that the Presidential authority to impose similar requirements did not strip the State of its spill prevention regulatory power, absent any specific conflict between federal and state requirements. The subject of oil spill prevention was not one in which uniform federal standards were required. Any finding of preemption would have to await a reviewing court's finding of a serious conflict between a specific Florida regulation and Coast Guard regulations promulgated under the federal statute. (These regulations, 33 C.F.R. Chapter I, subchapter O, had been promulgated only a few months before the Court's decision, thus the issue of any actual conflict between state and federal spill prevention regulations had not been litigated.)

Justice Douglas also found no per se conflict between applicable federal legislation and Florida's requirement of terminal facility licenses. The federal water pollution statute clearly contemplated state licensing, which the Justice referred to as "a traditional state concern," by requiring state certification of consistency with state water quality standards before issuance of federal discharge licenses. Moreover, Congress has recently enacted the Ports and Waterways Safety Act of 1972, Title I of which explicitly provided that the States were not precluded from prescribing for "structures" higher safety equipment requirements or safety standards. 33 U.S.C. 1222(b). While not elaborating on the meaning of this provision, Justice Douglas took it as supporting evidence of congressional intent to allow state regulation of marine terminal facilities to prevent oil spills. It is very likely that the Court was influenced by the limited scope of the federal

regulatory scheme under the federal statute. It was probably reluctant to create a significant legal vacuum by finding state regulation in the same field to be preempted. *Tribe, supra*, at 497, citing *Askew* at 336-37.

The Florida and federal statutes were enacted in 1970 in response to the growing threat of oil spill damage to the marine and coastal environments. Recent catastrophic oil spills such as the Torrey Canyon disaster and the tremendous growth in oil tanker shipments and the advent of super-tankers prompted their enactment. The State of Washington's Tanker Act was passed in 1975, in response to these as well as factors peculiar to the region. Canada had just announced that crude oil shipments to oil refineries along the Puget Sound would be curtailed. The State of Washington expected to replace these shipments with deliveries of North Slope crude oil through tankers loaded at the Trans-Alaska Pipeline terminal in Valdez, Alaska. Concerned about the devastating effect that a tanker accident and spill would have on the productive and fragile waters of Puget Sound, the State adopted a number of direct and indirect controls on the size, design, equipment, and operation of oil tankers.

The Washington law was challenged on the day it took effect by the owners of one of the Puget Sound refineries. They were joined by a major tank vessel owner and shipbuilder. The plaintiffs claimed the entire statute was preempted by the Ports and Waterways Safety Act of 1972, another law enacted at least partially in response to the North Slope oil discoveries. A three-judge federal district court agreed and found the law to be completely preempted. On appeal, the Supreme Court affirmed the lower court ruling in part and reversed it in part, upholding certain provisions of the state law. In Ray v. Atlantic Richfield Co., the Supreme Court found Congress' enactment of the 1972 law to signify an intent to establish uniform national standards for the design and construction, maintenance, and operation of oil tankers to provide vessel safety and to protect the marine environment, thus preempting more stringent state requirements. See *Tribe, supra*, at 486-487. It is from this ruling that the principal indices of federal preemption of state tanker controls are drawn.