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The Expanding Role of State Government in Oil Pollution Prevention Through Regulation of the Coastal Tug and Barge Industry

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THE EXPANDING ROLE OF STATE GOVERNMENT IN OIL POLLUTION PREVENTION THROUGH REGULATION OF THE COASTAL TUG AND BARGE INDUSTRY

BY

ELISE ERICA GOLDEN

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS IN MARINE AFFAIRS

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Abstract

The Oil Pollution Act of 1990 was enacted by Congress in order to streamline the legislative and regulatory framework governing oil spill prevention, liability, and response. However, in the six years since this law was enacted, a proliferation of oil pollution prevention laws have been enacted at the state level. Many of these state laws directly target the oil transportation industry, and such legislation has ignited controversy among marine safety experts as to the appropriate role of state government in preventing oil spills through industry regulation. This thesis examines one such law, recently enacted by the State of Rhode Island in response to the North Cape oil spill. Contents of the new Rhode Island law will be analyzed and compared to contents of oil pollution statutes in place in other states, in order to determine whether the contents of such legislation may be used to indicate areas in which the federal Oil Pollution Act requires amendment.

This analysis of pollution prevention strategies in place at both the state and federal level will facilitate a discussion of how to balance effectively the need for pollution prevention at the state level with the need for uniformity in regulations governing industries involved in interstate commerce. This thesis attempts to clarify the jurisdictional boundaries between state and federal regulatory authority in order to establish whether the body of state-level oil pollution legislation enacted since 1990 has undermined the intent of the Oil Pollution Act to provide a comprehensive, national scheme for oil spill prevention.
Acknowledgement

This project is an outgrowth of research which I began as a Marine Policy Fellow in the Rhode Island Senate Fiscal and Policy Office. Without the contributions, research efforts, and support of Louise Kane, my fellow Fellow and dear friend, this thesis would not have been possible.

Several other individuals also played key roles in the drafting and passage of the spill bills discussed herein. I would like to thank John Torgan and the staff at Save the Bay, for their strong, public endorsement of the oil spill bills. The support of Save the Bay, combined with the “rhetorical flourishes” of Dennis Nixon, were of paramount importance in passing 96S-3304. If it weren’t for their combined efforts, I would still be searching for a thesis topic.

I wish to thank Dr. Niels West for his guidance and support. This project was completed under considerable time constraints, and I thank Dr. West for meeting head-on the formidable task of accommodating my aggressive time-table. I would also like to thank Tim Hennessy and Tom Grigalunas for working with me as committee members. I must finally thank Dennis Nixon for always having the highest expectations of me. Living up to these demands has not been easy, but it has been extremely rewarding, and I am leaving this program with a higher level of self-assurance than I had upon entering.

Most importantly, this project would not have been possible without the support and encouragement of my family and friends. I thank my parents for their unwavering pride and confidence in my abilities. And I thank Pete for providing me with the incentive to complete this degree and move on.
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I. INTRODUCTION

On March 24, 1989, the oil tanker Exxon Valdez ran aground in Prince William Sound, Alaska. The tanker struck a well-known navigational hazard, and began to discharge 11 million gallons of crude oil into the pristine waters of Prince William Sound. The Valdez event was followed, within months, by three additional serious spills in U.S. coastal waters, and the cumulative effect of these environmental disasters spurred the U.S. Congress to pass the Oil Pollution Act of 1990 (OPA 90). The passage of OPA 90 represented a breakthrough in U.S. pollution prevention legislation by introducing a comprehensive scheme for oil spill liability and response. The Exxon Valdez event, followed by the trilogy of smaller spills, served to break the gridlock in Congress which for fourteen years had precluded the passage of a federal oil pollution statute.

The Oil Pollution Act of 1990 was developed in an attempt to streamline the statutory framework governing oil spill pollution which had existed in the United States previous to the passage of this law. Before OPA 90 was enacted, water pollution and oil spill regulation involved a complicated array of overlapping federal and state statutes as well as general principles of maritime law.


3 Jeffery D. Morgan, “The Oil Pollution Act of 1990; A look at its impacts on the oil industry,” Fordham Environmental Law Journal 6(1994):1. See also 135 Cong. Rec. H 7954 (1989). Comprehensive oil spill prevention, liability, and response legislation was introduced into Congress several times between 1975 and 1989. Such legislation had passed the House of Representatives, however it always died in the U.S. Senate. OPA 90, by comparison, actually passed the Senate first, by a vote of 99 to 0.
While a primary goal of Congress in passing the Oil Pollution Act was to establish one comprehensive national policy which addressed oil spill prevention, liability, compensation, and response, many states feared that this sweeping federal law would preempt the ability of individual states to enforce their own environmental protection and liability standards. Senator Majority Leader George Mitchell and Representative Gerry Studds led these states in arguing before Congress that OPA 90 should contain provisions which allow for the preservation of states' rights to develop standards and liability schemes in addition to the requirements set by OPA.

Despite a great deal of division on this issue, the argument against preemption was successful, resulting in the inclusion of the following non-preemption language in the Act: "...nothing in this Act shall affect or be construed or interpreted as preempting the authority of any state or political subdivision from imposing any additional liability or requirements respecting the discharge of oil..." These "requirements respecting the discharge of oil," as they have been implemented by various states since OPA was enacted, include a vast array of preventative measures, including vessel safety standards.


7 33 U.S.C. sec, 2718 (a), (c).
which target the industry responsible for the coastwise transport of petroleum products.  

The preservation of state regulatory authority provided by the Oil Pollution Act has enhanced the ability of states to prevent oil spills in their territorial waters by developing regulations and policies which recognize environmentally sensitive areas and other regionally specific concerns. The non-preemption provision in OPA 90 has also been crucial to the ability of individual states to recover damages and removal costs and to settle claims following oil spills.  

Since individual states have chosen to exercise this regulatory authority through a wide variety of legislative actions, a condition has begun to develop in this country which can be described as a piecemeal adoption, state by state, of pollution prevention strategies that are far more aggressive and, many argue, effective, than the federal oil pollution statute.  

One author has characterized this situation as representing a fundamental shortcoming in OPA, a law which was originally intended to provide one comprehensive federal standard. Instead, by providing for non-preemption of state laws, the Oil Pollution Act has created a situation which one author has describe as a “new hodgepodge of one federal statute overlapping numerous provisions and general maritime and common law remedies.”

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11 Wagner, 585.
On January 19, 1996, the single-hulled tank barge *North Cape* grounded within a few hundred yards of the Rhode Island shoreline and spilled over 800,000 gallons of fuel oil into that state's coastal environment. The State of Rhode Island responded to the spill by drafting an oil pollution prevention statute which directly targets the coastal tug and tank barge industry. The introduction and eventual passage of this legislation opened the debate between industry representatives, state government, and environmental experts as to the appropriate role of the state as a regulatory body in the oil transportation industry. The controversy which has surrounded this legislative initiative provides an opportune example of the jurisdictional conflicts which may occur when an individual state assumes a proactive role in oil pollution prevention by attempting to regulate those industries involved in the interstate transport of the petroleum products.

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12 The *North Cape* spill occurred on January 19, 1996, when the tugboat *Scandia*, which carried the barge in tow, caught fire and began sinking. Both vessels were forced toward shore and grounded only hundreds of yards from Moonstone Beach, a pristine beach on Rhode Island's southern shore which protects several coastal ponds. This area contains part of a federal wildlife preserve, and is also home to the piping plover, a threatened shore bird which nests on Moonstone Beach. See Gerald Goldstein, “Tug, oil barge go aground: Leaking oil threatens South County shore,” *The Providence Journal-Bulletin* 20 January (1996): A1, A6.


14 This controversy has been documented in the local Rhode Island press, and has also been carried out within various tug and barge industry publications. See, for example, Elizabeth Abbott and Christopher Rowland, “North Cape spill: tugs, barges face few regulations; Congress, Coast Guard slow to push for reforms,” *Providence Journal* 28 January (1996), A1; Thomas Allegretti, “American Waterways Operators Introductory Remarks,” in *Proceedings of Tank Barge/Towing Vessel Safety Workshop, Massachusetts Maritime Academy, June 5-6, 1979*, sponsored by United States Coast Guard, Massachusetts Maritime Academy, American Waterways Operators, and the Northeast States, tab 8.; Kate Thomas, “Spill response: legislators set sights on tank barge operators,” *Workboat* July/August (1996): 72.
This thesis examines the evolution of state regulatory authority over industries involved in interstate oil transportation as it has occurred since the passage of the Oil Pollution Act of 1990. In so doing, this thesis utilizes the controversy and debate which has surrounded the State of Rhode Island’s legislative response to the *North Cape* oil spill as a model through which to explore the implications of the non-preemption language included in OPA 90 to the jurisdictional framework for oil spill prevention in the United States today.
II. STATEMENT OF THE PROBLEM

There has been a great deal of debate among marine safety experts as to the appropriate role of the state government as a regulatory agent within the oil transportation industries. The jurisdictional limits of a state’s regulatory authority over industries involved in interstate commerce have expanded and evolved over time as coastal states have attempted to balance local interests, including prevention of oil spills and pollution, with the well-recognized need to maintain the free and unimpeded flow of interstate commerce. The legislative response to the North Cape oil spill which was crafted by the Rhode Island Senate effectively tested those jurisdictional limits by attempting to impose structural and operational requirements for all tank barges entering state waters.

Traditionally, the federal government has reserved exclusive jurisdiction over all issues which impact upon interstate commerce, including standards and operating procedures for all U.S. vessels. The Ports and Waterways Safety Act (PWSA) of 1972 delegates authority to the Secretary of


16 This expansion of state regulatory authority will be discussed at length in the body of this paper, beginning with a discussion of the non-preemption language in the Oil Pollution Act of 1990, and followed by a discussion of a line of Federal Court holdings which have effectively expanded the interpretation of the state police powers. See also Eubank, 149-176, and Beaver, et. al, “Stormy Seas: Analysis of new oil pollution laws in the west coast states,” 791-845.

17 The U.S. Constitution recognizes the need for uniformity in regulations governing interstate commerce in several sections. The first and third clauses of the eighth section, first article; the first and second clause of the tenth section, article one; and the fifth clause of the ninth section of article one all address this need for uniformity by providing the federal government with regulatory and legislative authority in areas which impact upon the flow of goods and services among states.

Transportation to regulate the design standards of U.S. vessels. This Act further designates the U.S. Coast Guard as the federal agency responsible for enforcement of these regulations. The Coast Guard is responsible for carrying out all of the rulemaking mandates in the Oil Pollution Act of 1990 which involve vessel construction and design standards. The Coast Guard, however, is years behind schedule\(^{19}\) in developing and implementing many of the rulemaking directives contained in OPA which are intended to improve the level of safety within the industries responsible for the coastwise transport of oil and other petroleum products.\(^{20}\)

The Rhode Island legislature, in the wake of the North Cape spill, attempted to remedy several of the shortcomings in the federal regulatory structure governing vessel standards for pollution prevention by enacting a law which requires more stringent safety standards aboard tank vessels operating in state waters than are currently required under federal law.\(^{21}\) Although on the surface such action appears clearly inconsistent with the federal authority

\(^{19}\)The Coast Guard did, in 1993, submit a notice of proposed rulemaking which would raise safety standards and equipment requirements on uninspected towing vessels, however this notice was eventually withdrawn, and the new rules were never implemented. The Coast Guard admitted that this effort was cut short due to extreme industry opposition. See 60 Fed. Reg. 55904.

\(^{20}\)Several environmental protection organizations have brought suit against the Coast Guard and NOAA for failing to implement OPA mandates according to statutory requirements. See amended complaint No. CV-94 4892 (RJD): Natural Resources Defense Council et. al. v. United States Coast Guard et al.

\(^{21}\)The Rhode Island Oil Spill Pollution Prevention and Response Act requires that all oil barges operating in state waters carry at least crew members onboard and have an operable anchor system. The law also requires that as of January 1, 1997, all tank barges operating in state waters during conditions of limited visibility must be of double hull construction, unless accompanied by an escort tug, and that by January 1, 2001, all tank vessels operating in state waters must be of double hull construction unless accompanied by an escort tug. The federal double hull phase-in requirements set by OPA 90 do not require double hulls on oil barges until 2015, and there are currently no federal requirements for manning of tank barges or anchoring equipment on tank barges. See discussion of contents of Rhode Island oil spill prevention law in subsequent chapters of this text.
derived from the Ports and Waterways Safety Act, several other legal precedents suggest that Rhode Island's oil spill legislation is indeed a legal expression of that state's regulatory authority as provided by the non-preemption language in the Oil Pollution Act of 1990, as well as a long line of Federal Court rulings. Likewise, Rhode Island is only one of several states to enact aggressive oil pollution prevention statutes in the years since the passage of OPA 90. Taken in context, this body of state-level oil spill prevention laws may be interpreted as an indication that the federal government has failed to regulate the oil transportation industries in a manner which satisfies the needs of U.S. states to prevent the occurrence of oil spills in their own coastal waters.

These rulings include Huron Portland Cement Co. v. City of Detroit et al. (362 U.S. 440 (1960)), Askew v. American Waterways Operators (411 U.S. 325 (1973)), Ray v. Arco (435 U.S. 151 (1978)), and Chevron v. Hammond (726 F.2d 483 (1984)). The courts' rulings in these cases suggest that the federal interest in environmental protection is not so dominant as to preclude the enforcement of state environmental protection laws, even in areas which may impact upon interstate commerce.
III. SCOPE OF RESEARCH OBJECTIVES

The research objectives of this project are threefold. The first goal of this study is to clarify the regulatory authority of the state government over industries involved in the interstate transport of oil. Although the oil spill law recently enacted in Rhode Island has thus far not been challenged in court, the State of Washington was recently sued by an international tanker organization which asserted that components of Washington's oil spill prevention law are unconstitutional and overstep the regulatory authority of the state government.\(^\text{23}\) An examination of the jurisdictional issues common to these and other such debates may help to avoid future litigation in this area of maritime law.

A second research objective is to document the evolution of regulatory control over oil transportation industries as it has occurred since the passage of the Oil Pollution Act of 1990. A third goal of this research is to analyze the contents of and intent behind state-level pollution prevention laws in an effort to identify areas in which OPA 90 is perceived by state governments as offering insufficient preventative measures, particularly involving industry regulation. The results of this study may be used to identify whether or not

\(^{23}\) *Intertanko v. Lowry*, case no. C 95-1096 was filed in Washington State on July 17, 1995. When the original draft of this thesis was first completed, no decision had been rendered in that case. However, shortly after this thesis was first completed, on November 18, 1996, the United States District Court in Seattle, Washington, granted the motions for summary judgment filed by the State of Washington and several interveners (primarily environmental organizations) upholding the Washington State Best Achievable Protection Standards as constitutionally valid. The content of this thesis has been amended slightly to reflect this decision, which supports many of the conclusions drawn herein regarding the expanding regulatory authority of the state over oil transportation industries.
recently enacted amendments to the Oil Pollution Act\textsuperscript{24} adequately address the concerns of state governments regarding the level of safety aboard vessels which transport oil through state waters. By comparing provisions contained in state legislation, and particularly in the new Rhode Island law, with the contents of the OPA 90 amendments as passed, it will be possible to identify whether these amendments effectively reduce the need for further legislation by state governments, or whether additional improvements to the federal law are necessary in order to reduce the need for overlapping state and federal regulations. This study will attempt to balance the need for local environmental protection with the need to maintain national consistency in areas involving interstate commerce. In so doing, this thesis may facilitate a redefinition of the regulatory paradigm for oil spill prevention in this country today.

\textsuperscript{24} Several months after the \textit{North Cape} oil spill, U.S. Senator John Chafee introduced legislation during the second session of the 104th Congress which was intended to improve the Oil Pollution Act of 1990. S.1730, the Chafee \textit{Oil Spill Prevention and Response Improvement Act} was passed as a part of the Coast Guard Authorization Act, however several provisions which were present in the original bill were not included in the version signed into law. A discussion of the details of this legislation will be presented in the analysis which follows in the body of this paper.
Research Questions

The following research questions shall be considered in the text of this study.

1. Can Rhode Island's legislative response to the North Cape oil spill be considered as part of a larger trend whereby individual state governments have assumed a more aggressive regulatory presence in the coastal oil transportation industries since the passage of the Oil Pollution Act of 1990?

In considering this first research question, this thesis will also pose the following related questions.

A. Does the legislative package which was adopted by the State of Rhode Island in response to the North Cape oil spill expand the role of the state as regulator of oil transportation by the coastal tug and tank barge industry?

B. Are the contents of the newly enacted Rhode Island oil spill law similar to legislative approaches taken by other states since 1990?

C. Has the passage of aggressive oil spill prevention legislation in states such as Rhode Island caused other states to propose or introduce similar legislation?

2. Would the Rhode Island oil spill legislation withstand preemptive challenge based on careful consideration of the jurisdictional boundary between state and federal regulatory authority, the non-preemption language in OPA 90, and relevant court rulings and case law?
3. Does the proliferation of state level oil pollution prevention laws which have been enacted since the passage of the Oil Pollution Act of 1990 undermine the effectiveness of that federal law as a comprehensive, unified framework for oil pollution prevention in this country?

Within the framework of examining this final research question, the following, related research questions will also be posed.

A. Do the contents of or legislative intent behind state level oil pollution prevention statutes enacted since 1990 suggest areas in which the federal law offers insufficient protection against coastal oil spills?

B. Do the contents of the Chafee provisions for improvement of the Oil Pollution Act of 1990 address the concerns of coastal states as reflected by the contents of state-level oil pollution prevention statutes enacted since 1990?

25 These provisions, which originated as S.1730, The Oil Spill Prevention and Response Improvement Act, were incorporated into S. 1004, The Coast Guard Authorization Act, which passed Congress and were signed into law in October, 1996.
IV. METHODOLOGY

The research questions listed above will be considered by using the historical and conceptual analysis methodologies described in Mayer and Greenwood's *The Design of Social Policy Research*, as well as the qualitative case study methodology as presented in Robert Stake's *The Art of Case Study Research*. These are both commonly accepted research methods for non-experimental projects involving legal and policy analysis.

This project begins with a historical analysis of the statutory framework governing oil pollution prevention in the United States. This historical analysis provides the foundation for discussion of the three research questions which are central to the topic of this thesis. The first research question is considered, in this context, using a qualitative case study of the *North Cape* oil spill and the legislative response to that event within the Rhode Island General Assembly. The contents of the Rhode Island legislation will be summarized and analyzed qualitatively in order to determine the effect which the law has had on Rhode Island's regulatory presence in the coastal tug and barge industry. The contents of and legislative intent behind the Rhode Island law, as determined by the case study of the bill's legislative history, will then be compared to the contents of other state oil spill laws. Oil pollution legislation from other states will be analyzed qualitatively and preventative policies adopted in other states will be highlighted and then compared to the contents of the Rhode Island law. The results of these collective analyses will be used to characterize the extent to which a trend is occurring nationally whereby the role of the state


government as regulator of oil transportation industries has expanded for the purpose of pollution prevention.

The second major research question reviews scholarly writings on the subjects of preemption, admiralty jurisdiction, police power, and federal supremacy. An historical case study of the legislative intent behind the non-preemption language in the Oil Pollution Act is presented. This discussion focuses specifically on Congressional debates surrounding the inclusion of non-preemption language in OPA 90, and a consideration of the impact which that language has had in terms of expanding the role of state governments as regulators of oil transportation industries. This collective data is analyzed using the conceptual analysis methodology described by Mayer and Greenwood. A brief synopsis of relevant court rulings will follow this literature review and brief case study.

The final research question involves another historical case study of the legislative intent behind the Oil Pollution Act of 1990, this time focusing on the stated goals of pollution prevention and national consistency. This analysis builds upon the discussion of various legal doctrines and jurisdictional conflicts presented in the context of the second research question. The final research question is considered by comparing the conclusions of the first research question, regarding the content of various state oil pollution statutes, with an analysis of recently enacted amendments to the Oil Pollution Act. The analysis of this third research question, which is accomplished using a conceptual analysis methodology, reexamines many of the issues brought to light by the first two research questions. Discussion of the third research

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28 Stake, 71-90.

question shall lead to the formation of recommendations for strengthening OPA 90 such that the need for supplementary state oil spill laws is diminished.

The materials and resources required to complete this project were obtained through a variety of sources. A number of legislative documents, memoranda, and briefing papers prepared by the Rhode Island Senate Fiscal and Policy Office were compiled and analyzed in order to draw conclusions regarding the legislative intent behind various provisions in the Rhode Island law. Likewise, similar documents from other state legislatures were often acquired directly from their respective policy offices. This thesis also relies heavily on information and statements contained in testimony which has been given both in the United States Congress and the Rhode Island legislature.30

30 A great deal of the printed information which was utilized for the purpose of this research is unpublished, and was compiled by the author upon attending numerous hearings, meetings, and workshops which have addressed many of the topics central to this thesis. Whenever possible, references to unpublished works have included citations of published material where supplementary information may be obtained.
V. STATUTORY FRAMEWORK FOR OIL POLLUTION PREVENTION

Legislative “Patchwork” prior to the Oil Pollution Act of 1990

The threat of marine oil spills and pollution is one which will exist for as long as petroleum products are transported by seagoing vessels. Although the underlying causes of marine accidents which result in oil pollution vary, in the words of one author, “ships have been hitting rocks, and each other, since people began using water for transportation.”31 Likewise, ships have been spilling oil and hazardous substances into the marine environment for as long as there have been tank vessels transporting oil.32 It has been estimated that one third of all petroleum products transported through the world’s oceans pass through United States territorial waters.33 Therefore, the threat of oil spills is a very real one in this country, in offshore as well as coastal waters and inland waterways.

Despite the pervasive threat of vessel-source oil pollution, it was 1990 before the United States finally enacted a comprehensive law designed specifically to address issues of oil spill prevention, response, and liability. Prior to the Oil Pollution Act, a complicated tangle of state and federal regulations existed which governed the marine transport of oil through U.S.

32 Ibid.
federal and state waters.\textsuperscript{34} This web of overlapping laws and regulations focused primarily on liability and were generally considered inadequate in terms of oil spill prevention. Likewise, these laws contained few provisions which specifically addressed response or damage assessment issues.\textsuperscript{35} The Oil Pollution Act was intended to streamline the statutory framework for oil spill prevention, liability, and response by borrowing from, unifying, and amending various components of preexisting oil pollution laws into one comprehensive statute.\textsuperscript{36} The contents and focus of these earlier laws, then, are to some extent reflected in the provisions contained in OPA. Therefore, before the contents of and intent behind the Oil Pollution Act of 1990 are presented, this series of overlapping federal laws which governed marine oil transportation before OPA 90 will be summarized.

The Clean Water Act\textsuperscript{37} and Supplementary Federal Oil Spill Laws prior to the Oil Pollution Act of 1990

The Federal Water Pollution Control Act, more commonly known as the Clean Water Act, was adopted in 1972 in response to public outcry over severe pollution of U.S. rivers and coastal waters.\textsuperscript{38} The Clean Water Act was the

\textsuperscript{34} Rodriguez and Jaffe, 2.

\textsuperscript{35} John M. Mitchell, "The United States Coast Guard's proposed regulation of Certificated of Financial Responsibility under the Oil Pollution Act of 1990: Fostering a continued market of insurance for shipowners?" \textit{Administrative Law Journal}, 7 (Summer 1993): 125.

\textsuperscript{36} Rodriguez and Jaffe, 7.

\textsuperscript{37} The Federal Water Pollution Control Act, or FWPCA, P.L. 92-500, 86 Stat. 816 (1972).

\textsuperscript{38} The "focusing event" which ignited public concern and is generally credited with precipitating the passage of the Clean Water Act occurred when a severely polluted river actually caught on fire. See Wagner, 489.
primary law governing marine oil pollution prior to OPA 90. Oil pollution prevention and cleanup provisions in the Clean Water Act were complemented by requirements set forth by several other federal laws, including the Deepwater Ports Act of 1974,\textsuperscript{39} the Outer Continental Shelf Lands Act,\textsuperscript{40} and the Trans-Alaska Pipeline Authorization Act.\textsuperscript{41} Before the "polluter pays" principle of OPA 90 was enacted, federal liability and damage recovery policies were also contained in two other federal laws, the Rivers and Harbors Act of 1899 (also known as the Refuse Act)\textsuperscript{42} and the Shipowners' Limitation of Liability Act.\textsuperscript{43}

The Clean Water Act prohibited the discharge of any hazardous substances or oil into the navigable waters of the United States, its contiguous zone, or its shorelines, except under special circumstances.\textsuperscript{44} When a prohibited amount of oil or hazardous substance was discharged by a vessel, onshore, or offshore facility, civil penalties were assessed against the violator regardless of fault.\textsuperscript{45} In addition, criminal penalties could be assessed against polluters under the Clean Water Act as well as the Rivers and Harbors Act of

\begin{itemize}
\item \textsuperscript{39}P.L. 93-627, 88 Stat. 2126 (1975).
\item \textsuperscript{40}P.L. 95-372, 92 Stat. 629 (1978).
\item \textsuperscript{41}P.L. 93-153, 87 Stat. 584 (1973).
\item \textsuperscript{42}Chapter 425, 30 Stat. 1121 (1899).
\item \textsuperscript{43}Chapter 43, 9 Stat. 635 (1851).
\item \textsuperscript{44} 33 U.S.C. sec. 1321 (b)(3). The Clean Water Act allowed for discharge only when the quantities were less than those deemed to be harmful by regulation, and when such discharges were permitted by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Protocol), See Rodriguez and Jaffe, Supra note 6.
\item \textsuperscript{45} 33 U.S.C. sec. 1321 (b)(6)(a).
\end{itemize}
The Clean Water Act imposes criminal penalties only in cases of “willful or negligent” violations, whereas the Rivers and Harbors Act imposed strict liability against polluters. The dollar amount of criminal penalties assessed under the Clean Water Act were sometimes significant, however the Rivers and Harbors Act held little value in terms of oil pollution prevention because the courts have refused to apply the statute to oil discharges.

One aspect of the Clean Water Act that was considered by many to be a strength of the law was that the Act did not preempt the ability of states, foreign governments, or citizens to recover clean up costs after a spill. However, when the violator was a vessel, oil spill recovery claims could be limited by the Limitation of Liability Act, and this situation was often considered unsatisfactory by local, state, and federal government agencies, as well as by environmental advocates. Likewise, industry representatives found fault with many aspects of the Clean Water Act, such as the fact that in the aftermath of a spill, initial cleanup efforts which were funded by the

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46 33 U.S.C. sec. 1319 (c).

47 33 U.S.C. sec. 407. Strict liability holds the polluter accountable for the monetary value of damages caused by the pollution event.

48 For example, the United States government assessed a two million dollar criminal penalty against Ashland Oil in 1989 for an oil spill.


50 Mitchell, 125. The preservation of state liability policies which is provided by the Clean Water Act has been cited as a precursor to the non-preemption provisions which were ultimately incorporated into the Oil Pollution Act.

51 46 U.S.C. secs. 181-188.
responsible party could not be credited against the amount of money the government sought for reimbursement of government clean-up costs. For these reasons, among others, the Clean Water Act was considered by legislators, industry, and environmental groups to contain significant flaws with respect to oil pollution prevention and liability schemes.

One year after the Clean Water Act was adopted, Congress enacted the Trans-Alaska Pipeline Authorization Act (TAPAA), in an attempt to address the increased risk of oil spills which existed in Alaska as a result of the construction of the Trans-Alaskan pipeline. TAPAA effects owners and operators of vessels which transport oil from the Valdez pipeline terminal by holding them liable for spills which occur during transport. TAPAA limits the liability of vessel owners to $14 million, and the Act also authorizes the creation of a fund for federally mandated spill cleanup. The Trans-Alaska Pipeline (TAP) Fund is created from a 5 cent per barrel tax on all oil which is loaded onto tankers at the Valdez terminal. The TAP fund is intended to pay for cleanup costs and damage claims which exceed the $14 million liability cap

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52 Rodriguez and Jaffe, 5.


54 43 U.S.C. sec. 1653. The Alaska pipeline was constructed and is operated by the Alyeska consortium, which includes companies such as Exxon, Mobile, Phillips, and Unocal. The consortium agreed to accept strict liability for damages, under TAPAA, in exchange for a promise by Congress to forego certain aspects of the environmental impact analysis of the Pipeline which are required under the National Environmental Policy Act of 1969 (NEPA), P.L. 91-190, 42 U.S.C. 4321-4347 (1970).

55 43 U.S.C. sec. 1653 (c)(3).

afforded to vessel owners, up to $100 million.\textsuperscript{57}

The Trans-Alaska Pipeline Authorization Act supplements the ability to recover for damages incurred as a result of vessel traffic created by the pipeline. TAPAA does not allow for a direct action against insurers, as does the Clean Water Act, however vessels subject to TAPAA liability are also still subject to liability under the Clean Water Act. In addition, claims which exceed the TAPAA liability limit may be brought under applicable state laws or under general maritime law.\textsuperscript{58} The Limitation of Liability Act is considered to be completely repealed in cases where TAPAA applies.\textsuperscript{59}

The Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA) also address oil pollution by regulating the discharges of oil from offshore facilities or vessels that transport oil from facilities on the Outer Continental Shelf. The OCSLA imposes several liability schemes\textsuperscript{60} on offshore facilities and vessels, with liability limits for vessels established based on tonnage of the vessel.\textsuperscript{61} The OCSLA does not preempt other liability requirements imposed by state and federal law,\textsuperscript{62} and the liability limits set by OCSLA do not apply when a spill is caused by "gross negligence or willful misconduct...within the privity or knowledge of the owner or operator."\textsuperscript{63} The OCSLA does provide for

\textsuperscript{57} 43 U.S.C. sec 1653 (c)(3).

\textsuperscript{58} In Re the Glacier Bay, 741 F. Supp. 800, (1990).

\textsuperscript{59} 43 U.S.C. 1653(c).

\textsuperscript{60} These include strict, severe, and joint liability structures. 43 U.S.C. Sec. 1814(a).

\textsuperscript{61} 43 U.S.C. sec. 1814(c).

\textsuperscript{62} 43 U.S.C. sec., 1820(a).

\textsuperscript{63} 43 U.S.C. sec. 1814(b).
direct action by a claimant against the insurer or owner/operator of a vessel or facility.64

The Deepwater Ports Act of 1974 (DWPA) adds yet another layer of complexity and confusion to this already complicated array of overlapping federal statutes. The DWPA made owners and operators of vessels or deepwater ports65 strictly liable for costs associated with oil spills from a deepwater port itself or from vessels carrying oil to a deepwater port or located within a deepwater port’s safety zone.66 The Deepwater Ports Act established a cleanup fund and established liability limits which are both similar to provisions of the Clean Water Act.67 The DWPA, however, also allows the United States government to pursue class action suits for damage to property, and to recover damages for injuries to the marine environment.68

While most of the legislation governing oil pollution prior to OPA 90 contained various liability schemes and limitation, the 1851 Shipowners’ Limitation of Liability Act (SLLA) was still considered valid in the cases of certain oil pollution claims. The SLLA limited a vessel owner’s liability for loss or damage which occurred as the result of an incident beyond the vessel...

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64 43 U.S.C. 1815(c)(1).

65 The Act defines a deepwater port as a fixed or floating manmade structure other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any state. This includes all associated components and equipment, such as pipelines, pumping stations, service platforms, mooring buoys, and similar objects to the extent that they are located seaward of the high-water mark. 33 U.S.C. sec. 1501.


68 33 U.S.C. sec. 1517(i).
owner's "privity or knowledge" to the value of the vessel and cargo at the time of the incident.69 This law was enacted over a century ago, when maritime commerce was vital to the national economy, and the Act was intended as an incentive for maritime trade and commerce. Although the intent and provisions of this law were considered outdated for many years previous to OPA 90, it was still occasionally invoked to limit oil spill damage recovery.70

The Oil Pollution Act of 1990

On March 16, 1989, Congressman Walter B. Jones from North Carolina introduced H.R. 1465, The Oil Pollution Prevention and Liability Act of 1989.71 This was not the first occasion on which oil spill legislation was introduced in Congress. On the contrary, almost every Congress since 1975 had considered some form of a comprehensive oil pollution control bill.72 Many have speculated that had it not been for the events which occurred eight days after H.R. 1465 was introduced, this bill may have suffered the same fate as its many predecessors and died in Committee in the Senate.73

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69 46 U.S.C. app. sec. 183(a). Judicial interpretation has determined that valuation is actually based on the vessel and cargo's condition after the accident, which in some cases may be virtually nothing. See Place v. Norwich & N.Y. Transport Co., 118 U.S. 468, 492 (1886).


72 Alcock, 136.

73 Comprehensive oil spill prevention, liability, and response legislation was introduced into Congress several times between 1975 and 1989. Such legislation had passed the House of Representatives, however it always died in the U.S. Senate. OPA 90, by comparison, actually passed the Senate first, by a vote of 99 to 0. See 135 Cong. Rec. H 7954 (1989).
1989, however, the oil tanker Exxon Valdez ran aground in Prince William Sound, Alaska. The tanker struck a well-known navigational hazard, and began to discharge 11 million gallons of crude oil into the pristine waters of Prince William Sound. The Valdez event was followed, within months, by three additional serious spills in U.S. coastal waters, and the cumulative effect of these environmental disasters served to break the gridlock in Congress which for fourteen years had precluded the passage of a federal oil pollution statute. On August 18, 1990, President Bush signed into law the Oil Pollution Act of 1990 (OPA 90).

Overview of Contents of the Oil Pollution Act

The overall success of OPA 90 has been called into question by many. Critics of the bill include representatives of a variety of interests, such as state and federal legislators and agency personnel, officers in the United States Coast Guard, environmental protection groups, and the oil transportation industry. The overall focus of this project is to identify areas in which the Oil Pollution Act may be considered deficient in spill prevention through industry regulation, and to offer suggestions for amendments to the federal law which


76 It should be noted that after passage of OPA 90, a backlash occurred among representatives of the oil transportation industries, who charged that the financial responsibility requirements contained in the act would make it virtually impossible to obtain insurance, and that the industry would never be able to comply with such requirements. However, the final rules for Certificates of Financial Responsibility were adopted in 1993, and thus far the oil transportation industries have continued to operate with a consistent profit margin. See "Crippling burden seen in OPA," *Oil and Gas Journal* 92 no. 1 (1994):22.
may eliminate such deficiencies. However, before any shortcomings in the Oil Pollution Act can be effectively identified, it is important first to summarize the contents and highlight the accomplishments of the Act.

The Oil Pollution Act of 1990 is divided into nine titles, each of which sets forth a different category of provisions. Title I of the Act addresses liability and compensation issues. This section imposes upon each responsible party strict liability for the costs of removal and damages for discharges of oil from vessels and facilities “into or upon the navigable waters or adjoining shorelines or the exclusive economic zone.” Under Title I, the responsible party is liable not only for removal costs, but also for injury to natural resources. Liability also extends to injury to personal or real property, including economic losses, loss of subsistence use of natural resources, loss of earnings on the use of natural resources and real or personal property, impairment of earning potential and profits resulting from pollution, and for the costs associated with providing extra public services during or after the removal procedures. This is a significant expansion upon recovery for damages which was previously allowed under maritime tort law. Under traditional maritime law, claimants were allowed recovery only for those economic losses associated with direct physical damage to proprietary interests. OPA expands greatly upon these traditional limits to recovery by allowing for recovery for lost profits or

78 Id., sec. 1002(a).
79 Id., sec. 1006.
80 Id., sec. 1002(b)(2).
impairment of earning capacity. The law, however, does not clarify the classes of claimants who may recover such damages.

Another important component of Title I of OPA 90 establishes a liability limitation scheme, except in cases of gross negligence or willful misconduct. For tank vessels greater than 3,000 gross tons, liability is limited to $1,200 per gross ton or $10 million, whichever is greater. Liability is limited to the greater of $1,200 per gross ton or $2 million for vessels under 3,000 gross tons. For all other vessels, OPA liability is limited to $600 per gross ton or $500,000, whichever is greater. For offshore facilities, the liability limit is $75 million plus removal costs, and for onshore facilities and deepwater ports, the liability limit is $350 million.

Title II of OPA contains conforming amendments which repeal various preexisting funds and which preempt provisions of other federal laws. Title III defines the role of the United States in international pollution prevention and removal, requiring the Secretary of State to review existing international agreements and treaties regarding oil spills. This Title suggests that the

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81 The principle of maritime law which governed recovery of damages in admiralty previous to OPA 90 is the Robin's Drydock Bright Line Rule, which states that a claimant must be in a "direct line" of, or physically touched by, an event in order to recover damages. While Robin's Drydock still holds in other aspects of maritime law, the removal of this principle in instances of oil pollution vastly expands the potential liability which a polluter faces.

82 See Rodriguez and Jaffe, 14. This exception to the Robin's Drydock principle was developed in order to protect commercial fishermen, who may recover lost profits as the result of an oil spill. However, other parties who suffer economic losses following an oil spill may not recover. These may include shipping interests who can not travel their routes, marina and boat rental operators, wholesale and seafood businesses, tackle and bait shops, seafood restaurants, and recreational fishermen.


84 Id., sec. 1004(a).

United States should participate in an international oil pollution liability and compensation regime that is at least as effective as federal and state laws.\textsuperscript{86}

Title IV of the Oil Pollution Act contains an assortment of provisions which address both the prevention and clean up of oil spills.\textsuperscript{87} With respect to prevention, this section establishes policies relating to alcohol and drug use, and requires rule making by the Secretary of Transportation regarding manning, training, and watch keeping standards aboard tank vessels.\textsuperscript{88} This Title also calls for several studies and rulemaking responsibilities, such as a Coast Guard study and recommendations regarding the use of Vessel Traffic Services (VTS) in various U.S. ports.\textsuperscript{89} The highlight of Title IV, however, and undoubtedly one of the most controversial components of the Oil Pollution Act, is the double hull requirement. This provision requires a double hull on any new, or substantially converted tank vessel which is constructed after June 30, 1990. This section establishes a phase-out period for existing single-hulled tank vessels which exempts most classes of tank vessels from the double hull

\textsuperscript{86} 46 U.S.C. secs. 3001-3005. One of the largest sources of debate surrounding the Oil Pollution Act in Congress was whether to ratify the International Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, and the Protocol of 1984 to amend the International Convention for the Establishment of a Fund for Compensation for Oil Pollution Damage, 1971. These conventions were not ratified, and instead this section was included, which established a general philosophy that recognizes the importance of international pollution prevention, but mandates no specific action in this regard.

\textsuperscript{87} 46 U.S.C. secs. 4101-4306.

\textsuperscript{88} Id, secs. 4102(b);(d).

\textsuperscript{89} Id, sec. 4114.
rule until 2010 or 2015, depending on size and construction.90

Title V of the Oil Pollution Act relates specifically to Prince William Sound in Alaska,91 and Title VI is considered a "miscellaneous" section,92 providing for appropriations, and for various activities including cooperative development of common hydrocarbon-bearing areas and for restricted drilling on the Outer Banks of North Carolina.93 Title VII of OPA creates the Oil Pollution Research and Development Program, which is a government interagency coordinating committee to pursue a comprehensive program of oil pollution research and technology development, and to foster research mechanisms in cooperation with industry, academia, and government.94 Title VIII is specific to the Trans-Alaska Pipeline system, amending provisions of the Trans-Alaska Pipeline Authorization Act and creating new provisions which conform to OPA.95 Finally, Title IX defines the funding and spending procedures for the newly designated Oil Spill Liability Trust Fund.96 This fund consolidates several previously established federal funds for the purpose of

90 Id., sec. 4115(a). For example, vessels over 5,000 gross tons are exempt until 2010. Vessels under 5,000 gross tons are exempted until 2015. Existing double-sided or double-bottomed vessels may continue to operate in United States waters until 2015. similarly, vessels unloading oil at deepwater ports more than 60 miles offshore are also not required to have double hulls until the year 2015.


94 Id., sec. 7001.

95 Id., secs. 8001-8302.

96 Id., secs. 1012, 9001.
paying claims or removal costs when the responsible party is unable or unwilling to do so. The fund may not be used to pay claims which result from a claimant’s gross negligence of willful misconduct. A claimant must usually present his claim first to the responsible party or guarantor of the source of discharge before attempting to recover from the fund.

**Perceived Successes and Failures of the Oil Pollution Act**

The passage of OPA 90 represented a breakthrough in U.S. pollution prevention legislation by introducing a comprehensive scheme for oil spill liability and response. The main purpose of the Oil Pollution Act was to prevent future spills and to force responsible parties to pay for cleanup costs and environmental damage. Among the contents of OPA are provisions addressing liability of responsible parties, removal responsibilities, civil and criminal penalties, claims procedures, natural resource damage assessment protocol, establishment of a federal oil spill response fund, and structural and operational measures for improving safety in the oil transportation industries.

While the Oil Pollution Act clarifies many of the redundant and confusing aspects of oil pollution prevention and liability which existed under the previous statutory patchwork of the Clean Water Act and other federal laws, OPA 90 has been criticized on a number of levels, one of those being that the Act does not completely remove the possibility for legislative duplication or inconsistencies. Oil pollution bills which were introduced in Congress in earlier

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97 Id., sec 1012(f).

98 Id., sec 1012(b).

99 Id., secs. 1013(a); (c).

100 Mitchell, 127.
years generally cited as their primary objective streamlining the existing statutory framework governing oil spills. OPA 90, however, was drafted with a non-preemption provision that allows for preservation of state regulatory authority and additional liability schemes. This change is attributed at least partially to public reaction to the Valdez spill, which helped to shift legislative priorities from simplifying the existing system to simply adding a new layer of protection. 101 Many members of Congress were willing to accept some continued inconsistency and duplication in return for a "safety net" which would ensure increased protection and appropriate victims' compensation. One author has characterized this as a "pile it on" strategy, aimed at ensuring that plenty of legal remedy and compensation is available in the event of a future oil spill. 102 Therefore, while the Oil Pollution Act does successfully clarify many of the formerly inconsistent provisions of earlier pollution laws, the non-preemption provisions in the Act have allowed for confusion between state and federal jurisdiction. 103

One author has described the situation in the following manner.

"The most glaring deficiency of the Oil Pollution Act is its failure to promote a uniform national and international approach through its relationship with domestic and international laws... The Act replaces the former patchwork of inconsistent federal programs with a new hodgepodge of one federal statute overlapping numerous state provisions and general maritime law and common law remedies." 104


103 Wagner, 585.

104 Ibid.
The non-preemption provisions in the Oil Pollution Act have certainly had a significant impact upon the perceived success of the law, however, these provisions are not the only aspect of the federal law which have been criticized as flawed. One author has cited the failure to implement key aspects of the federal oil spill law as another cause for failure, and critics of the Act commonly refer to the exceedingly long phase-in period for certain structural improvements to tank vessels as another shortcoming of OPA. The Coast Guard has also been widely criticized as contributing to the weakness of the Act as a preventative strategy, by failing to implement interim safety measures for single-hulled tank vessels until nearly five years after the OPA-mandated deadline. Shortly after the Oil Pollution Act was signed into law,

105 In general, state governments and environmental advocates felt that the inclusion of non-preemption language in OPA was a victory in terms of protecting the environment. Industry representatives fought against non-preemption, claiming that dual regulatory and liability schemes at the state and federal level unduly burden industry. A more detailed discussion of the implications of non-preemption for state legislators is discussed in later sections of this thesis. See also Grumbles and Manley, 38-40.


107 The Oil Pollution Act of 1990 requires that all new U.S. oil transportation vessels (tank barges and tankers over 5000 gross tons) constructed after enactment of that law be of double hull construction. The law contains a phase-out period for existing single-hull vessels which marine safety experts have generally criticized as far too liberal, with a final deadline of 2010 for tank vessels and 2015 for tankers. P.L. 101-380, sec. 4115 (c), 4116 (b), 4111, 1006 (e). See, for example, Rodriguez and Jaffe, 7.

108 OPA mandated that double hulls be phased into the U.S. fleet unless another technology for preventing oil spills was identified as more cost-effective. In 1991, the National Research Council undertook a study to investigate alternatives to double hull construction, and based on this study the Coast Guard, in 1992, determined that double hulls are the most effective technology for preventing spills caused by groundings. P. Britton, “New designs for oil tankers,” Popular Science. 242: 28, (1993).

109 OPA 90 instructed the Coast Guard to develop interim safety measures for single-hulled tank vessels by August 18, 1991. At the time of the North Cape spill, the Coast Guard had still not satisfied this requirement. See 136 Cong. Rec. H6271 (Aug. 1, 1990).
one author described its contents as "so riddled with problems that unless several serious faults are corrected, it may only worsen an already confused situation." More recent discussions of the success of the Oil Pollution Act often paint a similarly bleak picture.

Issues of jurisdictional overlap aside, the Oil Pollution Act has been praised, in the professional literature, for various accomplishments, including its establishment of a more effective framework for oil spill response than existed under the previous web of overlapping federal laws. Likewise, the Act, through its rulemaking requirements, has provided for the development of a unified protocol for natural resource damage assessment. The Oil Pollution Act has also imposed financial responsibility requirements which force vessel owners to provide evidence that they carry enough insurance to cover their potential liability under OPA in the event of an oil spill. This financial responsibility requirement is often cited as an important accomplishment of

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110 Brown, 9.


112 See Wagner; see also Rodriguez and Jaffe.

113 The final rules for Natural Resource Damages Assessment (NRDA) protocol were, in fact, published by the National Oceanic and Atmospheric Association within weeks of the North Cape oil spill, in January of 1996.

114 OPA requires that tank vessel operators possess Certificates of Financial Responsibility (COFR) which document that the vessel owner carries enough insurance to cover potential liability. When these COFR requirements were first implemented, vessel owners and protection and indemnity clubs (P&I clubs, or marine insurance syndicates) complained that these financial responsibility requirements would cripple the industry. However, the final rules on COFR's were issued in 1993, and oil transportation companies have continued to operate successfully in the United States since that time. See John Mitchell, "The United States Coast Guard's proposed regulation of Certificates of Financial Responsibility under the Oil Pollution Act of 1990: Fostering a continued market of insurance for shipowners?" Administrative Law Journal 7(1993): 121-139.
In general, then, reviews of the Oil Pollution Act’s preventative policies have been widely mixed. The long phase-in for double hulls and failure to implement important interim safety rules have compromised the effectiveness of the Act in terms of vessel-source oil pollution prevention. However, provisions such as the financial responsibility requirements and the preservation of state unlimited liability laws are viewed by many as providing effective incentives for safer operating procedures aboard tank vessels. This brief discussion of the strengths and weaknesses of the Oil Pollution Act of 1990 is meant to provide a context for consideration of the nature and content of the state-level oil pollution prevention statutes which shall be discussed in subsequent sections of this text.

115 Mitchell, 127.

116 Wagner, 2013. Several authors have noted that in the years since OPA 90 was enacted, the amount of oil spilled into the marine environment has decreased substantially when compared to average amounts spilled before 1990. It is not unreasonable to cite this reduction in oil spills as evidence of the success of the preventative measures contained in OPA 90. However, since the double-hull phase-ins required by that law will not begin to occur for several more years, and because many of the interim preventative measures required by OPA 90 were not implemented until several years after the law was enacted, it is difficult to draw conclusions about causation for this reduction in the amount of oil spill. Many authors speculate that the increase in potential liability has had some intangible effect on operating procedures and general level of safety precautions taken aboard tank vessels. Again, such a discussion involves primarily anecdotal evidence. However, in discussing the successes and failures of OPA 90, it would be unfair not to note that, if success is determined by the number of gallons of oil spilled annually, then OPA has perhaps been successful in this manner.
VI. THE NORTH CAPE OIL SPILL

The Grounding of the Scandia and North Cape

At 6:00 pm on Thursday, January 18, the tugboat Scandia left port in Bayonne, New Jersey, bound for Providence, Rhode Island. The Scandia towed behind her, at the end of 1,800 feet of tow wire, the 340-foot single-hulled barge North Cape, laden with four million gallons of number two home heating oil. The tug and barge began their journey in the face of a severe winter storm, which had been forecasted to hit southern New England the following day. By 2:00 pm on Friday, January 19, when a fire broke out in the engine room of the Scandia as it traveled five miles off the Rhode Island coastline, seas were at fifteen to twenty feet, and winds were gusting over 50 knots. The tug and barge were approximately five miles southwest of Point Judith, R.I. when the fire broke out and one hour later, when the crew sent out a distress call to the Coast Guard, they reported that the tug had begun to sink. When the Coast Guard arrived on-scene, the crew of six aboard the Scandia were huddled on the bow in survival suits. An explosion on board forced them to abandon ship, and all six crew members were successfully rescued by the Coast Guard as they floated in the churning winter sea.

As the rescue of the Scandia crew progressed, the tug and barge, still tethered by the tow line, began to drift toward the Rhode Island shoreline.


118 Matt Bai, “Barge lacked critical gear; spill might have been avoided, official says,” Boston Globe (January 26, 1996): 21.

119 “Maritime casualties,” 49.
Once the crew had been returned to shore, a Coast Guard patrol boat returned to the *North Cape* barge with two of the *Scandia* crewmembers, in an attempt to deploy the barge's anchor and slow its progress toward shore.\(^{120}\) At 4:45 pm, the Coast Guard put the two crewmembers aboard the drifting barge, where they attempted to deploy the anchor. The *North Cape*’s anchor, however, was affixed to the deck due to a broken windlass, and despite the valiant efforts of the two crewmembers aboard, they were unsuccessful. The high seas and gusting winds made it virtually impossible to unbolt the anchor from its steel sled, and the anchor remained in its casing as the barge made its way toward shore.\(^{121}\)

At 6:17 pm, less than four hours after the initial distress call from the *Scandia*, the tug grounded on Brownings Beach. Soon after, the barge hit ground as well. Both tug and barge were soon dislodged from their initial grounding point, and drifted further down shore until they reached their final resting point on Moonstone Beach, within a few hundred yards of the National Wildlife Preserve at Trustem Pond. At 8:40 pm, the Coast Guard reported that the *North Cape* had begun to leak oil.\(^{122}\)

Due to the series of events just described, approximately 828,000 gallons of home heating oil spilled into Rhode Island’s coastal waters, constituting the largest oil spill ever in that state. The leaking oil traveled quickly, threatening miles of pristine coastline and several coastal ponds in

\(^{120}\) "Maritime casualties," 50.

\(^{121}\) Ibid.

\(^{122}\) Goldstein, A6.
southern Rhode Island, as well as the coastal environment of Block Island, R.I., twelve miles from the site of the grounding. Over three miles of containment booms were deployed in attempt to slow the spreading of the oil and to protect vulnerable coastal ponds. Many of the tidal ponds along the southern beaches had breached during the storm, therefore with each high tide, ocean water and the oil which now saturated it poured into these ponds. Marine life kills in many of these ponds were devastating.

**Economic and Environmental Impacts of the North Cape Spill**

Despite the efforts of hundreds of cleanup workers, little was accomplished in terms of containing the spill or recovering oil from the marine environment. The type of oil which the North Cape carried does not float like crude oil does; rather, it dissipates quickly and mixes with seawater. The windy weather and rough seas sped up both the dissipation and evaporation of the

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123 The southern shore of Rhode Island consists of a series of barrier beaches. Coastal ponds are located immediately inland from several of these beaches, and the ponds occasionally breach, allowing for ocean water to enter the pond. The ponds may later close, as the breaches fill in with sand, and once again become isolated from the ocean for a period of time. This cycling makes coastal ponds extremely vulnerable to spilled oil, which may be washed in by the tide while the pond is breached, and later the breachway may close, entrapping contaminated water in the pond.


126 Goldstein, A6.

127 Tom Mooney, “Most of the oil got away: Cleanup ‘not as sophisticated as one might think,” Providence Journal (29 January 1996):A1. Coast Guard CAPT and Captain of the Port of Providence Barney Turlo reported to the media that booming efforts were undertaken despite the knowledge that booming is generally unsuccessful in containing light oil, such as #2 home heating oil.
large quantity of oil spilled, and it is estimated that between 60 and 80 per cent of the oil that spilled became suspended in the water column. This fact helps to explain why booming efforts failed, because booms are only effective in catching oil as it floats on the surface. The Coast Guard estimates that much less than 10 per cent of the 828,000 gallons spilled by the North Cape were actually recovered.

The long-range natural resource damages caused by the North Cape spill are still being tallied, however the immediate toxic effects of the spill on local wildlife were quite dramatic. Thousands of dead and dying lobsters, clams, and starfish washed ashore in the days following the spill. Over one hundred oiled sea birds were treated by wildlife rehabilitators, although the vast majority of those birds did not survive. Cards Pond, one of the coastal ponds which breached during the spill and then closed, trapping in large amounts of oil, experienced a massive wildlife kill. Thousands of dead fish, crabs, sand fleas and other crustaceans were reported, and scientists characterized the situation as a "massive die-off."

The local fishing industry, and particularly the inshore lobster fishery, were devastated by the oil spill. A 250-square mile area of Block Island Sound was closed to all seafood harvesting for several weeks, and shellfish harvest was banned in all coastal ponds. An estimated 2,000 workers, primarily

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130 Baker, 8.
fishermen and seafood retailers, suffered economic losses due to the closures and public perception problems associated with the spill. The commercial fishing industry in Rhode Island employs between 3,000 and 4,000 workers, and generates $500 million in economic activity annually. Even those fishermen who fished well beyond the closed areas suffered from the spill, both due to consumer fears regarding any Rhode Island seafood product, and because ships which intake seawater for their fish holds were forced to avoid even traveling through the closed areas. During the weeks following the spill, the Rhode Island Department of Health embargoed over 43,000 pounds of lobster and 9,000 pounds of crab. Seafood harvested from beyond closed areas was vigorously inspected as well.

As the environmental damage and fish kills caused by the spill were graphically displayed in local and national media accounts, the North Cape and Scandia both sat grounded just off Moonstone Beach. Removal of both tug and barge were complicated by the rough weather which continued for days after the spill. On January 26, the North Cape was finally removed from its grounding site, both the fire-torn Scandia remained within public sight until February 12, serving as a constant reminder of the past few weeks' events.


136 Baker, 8.

137 Lelyveld, "Oil cleanup faces sticky problems," 1.
VII. THE RHODE ISLAND SENATE'S LEGISLATIVE RESPONSE TO THE NORTH CAPE OIL SPILL

The Special Senate Commission

While the *Scandia* and *North Cape* lay grounded off Moonstone Beach, Rhode Island's political leadership had already begun to consider how and whether the state would respond to the oil spill legislatively. On January 23, 1996, Senate Majority Leader Paul S. Kelly convened a Special Senate Commission to investigate the events which led up to the *North Cape* oil spill, and to identify measures which might be taken to prevent future spills in Rhode Island waters. The Special Senate Commission Investigating the *North Cape* Oil Spill was composed of eight members, and was chaired by Senator Domenic DiSandro. The bipartisan committee was charged with conducting a series of investigative hearings focused on identifying the causes of the oil spill and evaluating the effectiveness of state-level response to the spill. The information brought to light through these hearings was to be used by the Commission members to determine whether the state should develop a legislative proposal designed to protect the state against the threat of future oil spills.

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139 Senator DiSandro represented Narragansett and South Kingstown, and many of his constituents are commercial fishermen. The other seven senators on the Special Committee were Sen. Charles J. Fogarty (Burriville/Glocester), Sen. John M. Roney (Providence), Sen. Dennis L. Algieri (Westerly), Sen. Edward F. Holland (South Kingstown/New Shoreham), Sen. M. Teresa Paiva-Weed (Newport/Jamestown/Middletown), Sen. J. Clement Cicilline (Newport), and Sen. Eleanor C. Sasso (Cranston).
The Commission conducted a series of three investigative hearings. The first hearing occurred on February 2, 1996, at the Rhode Island Statehouse in Providence, R.I., where testimony was provided by representatives of various state and federal agencies, as well as by members of the academic community. The first hearing was well-attended, and was covered extensively by local television news stations as well as the local press. After opening remarks by Senator DiSandro, stating the intention of the Commission investigation, extensive testimony was presented by the first witnesses, the Rhode Island Department of Environmental Management (DEM). DEM Director Tim Keeney coordinated testimony which was presented by several attorneys for the Department, as well as by personnel who were involved with the on-scene response to the North Cape spill. The DEM testimony skirted the issue of damage assessments, noting that with several lawsuits pending, no affirmative statements about natural resource damages could be made. Instead, the testimony provided by DEM was primarily descriptive, recounting the protocol followed during the response effort.

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141 Specifically, faculty members from the University of Rhode Island and the Graduate School of Oceanography at U.R.I. were invited to testify throughout the hearing process regarding issues within their respective areas of expertise.


143 Rhode Island Senate Special Commission, “Final Report,” 16.
The DEM testimony was followed by testimony from U.S. Congressman Jack Reed, who together with Congressman Patrick Kennedy\(^\text{144}\) reintroduced the Towing Vessel Safety Act of 1996 into the House of Representatives on February 1, 1996.\(^\text{145}\) This legislation contained safety equipment requirements and personnel standards for uninspected towing vessels operating in U.S. waters, and would have required basic safety and navigational equipment aboard vessels such as the Scandia. In his testimony, Congressman Reed noted that the Towing Vessel Safety Act was only the first step, and that there was room for the state to proceed with its own course of action to further strengthen the regulatory framework governing vessels which transport oil through state waters.\(^\text{146}\)

During the first investigative hearing, testimony was also presented by Bruce Banks, President of Jamestown Marine Services, regarding suggested improvements to the state's contingency planning and response preparedness. Likewise, John Torgan, Narragansett Baykeeper for Save the Bay, testified regarding the role of his organization and various volunteers working through Save the Bay during the initial response to the North Cape spill.\(^\text{147}\) However, the testimony provided by Professor Dennis Nixon, from the Department of Marine Affairs at the University of Rhode Island, served to focus the legislative efforts of the Special Senate Commission more than any other statements

\(^{144}\) Congressmen Kennedy and Reed both represent the State of Rhode Island in the U.S. House of Representatives.

\(^{145}\) In 1994, identical legislation had been introduced by Massachusetts Congressman Gerry Studds, however the bill never made it through Congress.

\(^{146}\) "Final Report," 18

\(^{147}\) Ibid., 16-19.
made that day.148

In his testimony, Professor Nixon posed three questions which he suggested that the legislators consider in designing their response to the oil spill. Professor Nixon's first query considered why the Scandia would even leave the safety of port in the face of a well-forecasted, severe winter storm.149 The second question posed by Professor Nixon asked why a vessel such as the Scandia, which had itself suffered another serious engine fire less than one year earlier, was not equipped with a fire suppression system which could be operated remotely from the wheelhouse or galley.150 Finally, Professor Nixon's testimony questioned why an unmanned, single-hulled tank barge, with an inoperable anchor system, should be permitted to travel through state waters loaded with four million gallons of heating oil.151 In discussion of this last point, Professor Nixon noted that by operating under the conditions which led to the spill, neither the Scandia nor the North Cape were in violation of a single federal law. The sum effect of this testimony focused the attention of the Commission on several key regulatory issues, including double hull requirements for tank barges, requirements which would mandate that basic equipment such as anchors be aboard all vessels, personnel considerations such as placing crew aboard a tank vessel so that a spill might be avoided in the event that a tug is disabled, and ensuring that fire suppression systems

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148 Senator Domenic DiSandro and Senator Charles Fogarty, personal communication, 3 February, 1996.

149 The weather forecast had for several days prior to the Scandia's departure indicated that a violent storm would hit southern New England on January 19, 1996.


may be remotely operated from various locations aboard towing vessels.\textsuperscript{152}

Professor Nixon also suggested, in his testimony, that the Coast Guard consider redesignating the waters of Block Island Sound as offshore rather than "inland" waters. In inland waters, vessels may be more heavily loaded so that they sit deeper in the water with less freeboard. Vessels that travel through offshore waters are required to carry less cargo so that they have a higher level of reserve buoyancy. Professor Nixon asserted that if the Coast Guard were to change the designation of Block Island Sound, vessels which transited Rhode Island waters would be prepared for an open-ocean journey and be better prepared to react to the harsh winter storms such as the one which occurred on the 19\textsuperscript{th} of January.\textsuperscript{153}

The first hearing of the Special Senate Commission established a legislative agenda for the Rhode Island Senate. Largely due to the testimony of Professor Nixon, the legislators had now focused upon the possibility of creating legislation which would require stricter safety standards aboard the towing vessels and tank barges which transport oil through state waters.\textsuperscript{154}

The second investigative hearing conducted by the Special Senate Commission occurred on February 7, 1996. The testimony presented at this hearing focused on identifying and attempting to quantify the environmental and economic impacts of the spill. Marcel Valois, Executive Director of the Rhode Island Economic Development Corporation (EDC), discussed the considerable efforts which the EDC had undertaken to provide short and long-term financial relief for those individuals and businesses who had suffered

\textsuperscript{152} Ibid., 19.
\textsuperscript{153} Ibid., 20.
\textsuperscript{154} Ibid, 21.
losses as a result of the *North Cape* oil spill. Representatives of the lobster industry and shellfish aquaculture industry testified regarding the anticipated effects of the spill on various fisheries, especially the inshore lobster fishery.\(^{155}\) Testimony was provided by Marguerite Matera of the National Oceanic and Atmospheric Association (NOAA), regarding the Natural Resource Damage Assessment protocol which is mandated by federal law.\(^{156}\) A representative of the Graduate School of Oceanography at the University of Rhode Island also read testimony regarding the various *North Cape*-related research endeavors which had been undertaken by faculty since the spill occurred.\(^{157}\)

The second hearing of the Special Commission helped to identify several important issues related to the *North Cape* spill, such as the need for a uniform protocol for determining whether seafood is safe for human consumption, and providing for short-term economic relief for fishermen, similar to unemployment benefits for which other workers qualify. However, by the time the second Commission hearing had occurred, the Senators had already drafted an outline of what was to become the state's legislative response to the spill. In fact, Senator DiSandro opened the second hearing by announcing that in response to the testimony presented at the first hearing, the Commission had identified three major directives. The first two legislative actions proposed by the Commission were both memorializations to the U.S. Congress, one calling for passage of the Towing Vessel Safety Act of 1996, and the other asking that

\(^{155}\)The *North Cape* spill caused massive die-offs of juvenile lobster populations. Estimates of the number of lobsters killed ranged from 10,000 to 100,000. It is estimated that the impact of the *North Cape* lobster kill will be felt for many seasons to come, due to the large number of juvenile or immature lobsters that washed ashore. See Abbott, "Fishing, lobster industries crippled," *Providence Journal* 22 January (1996): A1.

\(^{156}\)“Final Report,” 25.

\(^{157}\)Assistant Dean Ken Hinga, Ibid., 26.
the Coast Guard change the designation of Rhode Island Sound from inland to offshore waters. The third legislative initiative identified by Senator DiSandro in his opening remarks was to draft state legislation which would address safety standards and operating procedures within the coastal tug and tank barge industry.\textsuperscript{158} All three of these directives, which followed from the testimony at the first investigative hearing, were ultimately incorporated into Rhode Island's legislate response to the \textit{North Cape} spill.

The legislative agenda thus established, the third hearing of the Special Senate Commission focused on specific safety measures and strategies which might be incorporated into state legislation. Josh Fenton, a lobbyist from the Department of Environmental Management, presented several suggestions for regulatory and legislative action. Mr. Fenton's testimony set the tone for the position which the DEM would assume during the course of the legislative response. The position of the DEM, and indirectly of the Governor of Rhode Island,\textsuperscript{159} was that any legislative action taken should not overstep the regulatory authority of the state, and that Rhode Island should not attempt to implement standards that would cripple the industry responsible for supplying the state with much-needed petroleum products. Mr. Fenton suggested that the state consider designating traffic lanes for barge traffic, and that tug escorts be considered as one method of spill prevention, provided they could be acquired at a reasonable rate to the vessel operator. Mr. Fenton suggested

\textsuperscript{158}"Final Report," 22.

\textsuperscript{159}In Rhode Island, the Department of Environmental Management operates at the direction of the Executive Office. Governor Lincoln Almond is generally considered to have significant input into policy decisions made by DEM. Because Governor Almond is a member of the Republican party, and both houses of the Rhode Island General Assembly have a Democratic majority, the relationship between the Executive Office and the State legislature is often less than cooperative.
that the state designate certain areas of the marine environment as off-limits based on their ecological sensitivity and vulnerability to oil pollution. Mr. Fenton's testimony contained a stern warning regarding any state-level requirement for manning of tank barges, noting that such unilateral action by the state could lead to an embargo of Rhode Island ports by the tug and barge industry.¹⁶⁰

Mike Rubin, Assistant Attorney General for the State of Rhode Island, testified before the Commission regarding the contents of the Oil Pollution Act of 1990, and the relationship of the federal law to the North Cape spill. Mr. Rubin focused specifically on the claims process for individuals impacted by the spill. The Senators questioned Mr. Rubin specifically about the legal implications of state action in attempting to regulate the tug and barge industry. Mr. Rubin indicated that as long as a state law or requirement does not directly conflict with an existing federal standard, it would likely withstand legal challenge. Mr. Rubin also indicated that, contrary to the assertions of Mr. Fenton, anti-trust laws would preclude any industry embargo of Rhode Island should the state implement stricter safety requirements.¹⁶¹

The U.S. Coast Guard had been invited to testify at the first hearing of the Special Commission, however they had declined this invitation based on advice from the U.S. Attorney regarding pending investigations and lawsuits.¹⁶² However, at the third hearing, Captain of the Port of Providence, CAPT Barney Turlo, U.S. Coast Guard, did present testimony regarding the role of the Coast Guard in oil spill response efforts. Captain Turlo prefaced his

¹⁶¹ Ibid., 30-31.
¹⁶² Ibid, 16.
remarks with the statement that he could offer very little specific commentary regarding the North Cape spill due to pending lawsuits. In addition to describing response protocol, Captain Turlo also discussed rulemaking initiatives regarding towing vessel and tank barge safety, and echoed a statement made by Vice Admiral Henn\textsuperscript{163} that a set of final rules for safety requirements aboard U.S. towing vessels should be issued by the Coast Guard in the summer of 1996. Captain Turlo's testimony suggested that the federal government, and specifically the U.S. Coast Guard, is the proper arena for creating and enforcing vessel safety standards, and that state legislative efforts are best focused elsewhere.\textsuperscript{164}

A panel of experts from the University of Rhode Island also presented testimony at the third hearing, as did the Manager of the Trustem National Wildlife Refuge. Members of the U.R.I. panel\textsuperscript{165} discussed their assessment of the level of natural resource injury, and Charles Hebert, from the Trustem Wildlife Refuge recounted the natural resource injuries which he had witnessed as well.\textsuperscript{166} One of the experts from U.R.I., Dr. Niels West, testified regarding

\textsuperscript{163}Vice Admiral Henn is the Vice Commandant of the United States Coast Guard. His remarks regarding future rulemaking were issued in the context of a U.S. Senate hearing conducted by the Committee for the Environment and Public Works. This hearing, like the state hearings, focused on the North Cape oil spill. However, the U.S. Senate hearing concentrated on identifying measures which would strengthen the Oil Pollution Act of 1990. A summary of this federal hearing is presented in Chapter XI, and a discussion of the amendments to OPA which resulted from that hearing is presented in subsequent sections of this chapter.

\textsuperscript{164}“Final Report,” 32-33.

\textsuperscript{165}The panel from U.R.I included Professor Peter Payton, an ornithologist and resident expert on seabird ecology, as well as Professor Joseph DeAlteris, a fisheries biologist who conducted extensive sampling following the spill, testing the level of hydrocarbons in the seawater and sediments at different time intervals after the oil spill.

\textsuperscript{166}Charles Hebert is the Manager of the Trustem National Wildlife Refuge, parts of which were severely impacted by the North Cape spill. Mr. Hebert provided detailed testimony regarding his perception of the impacts of the spilled oil on migratory bird populations, as well as on the various species which inhabit the coastal ponds near Moonstone Beach.
the utility of Harbor Safety Committees in promulgating safety regulations, and many of the suggestions offered by Dr. West were ultimately incorporated into the oil spill legislation drafted by the Commission.167

During the entire hearing process, and for many months thereafter, the staff for the Special Senate Commission conducted extensive research into oil pollution prevention statutes currently in place in other states.168 The results of this research, combined with the information gleaned through the investigative hearing process, were compiled by the Special Commission staff into a final document. This document is referred to as the “Final Report of the Special Senate Commission Investigating the Implications of the North Cape Oil Spill.”169 In their final report, the Special Commission describes the findings of the investigation in terms of four major issues.170 The Final Report then goes on to outline the legislative proposals developed by the Commission based on their findings.171

The Special Senate Commission investigation yielded four significant findings. First, the Commission determined that the coastal tug and barge industry, as it currently operates in the United States, is highly underregulated.172 The Commission also notes in their findings that although it is primarily the duty of the United States Coast Guard to promulgate regulations

168 Ibid., 11.
171 Ibid., 12-15.
172 Ibid., 6.
that affect the tug and barge industry, there are important legal precedents which allow for states such as Rhode Island to develop aggressive legislation in order to protect valuable marine resources from the threat of oil spills. The third finding of the Commission asserts that Rhode Island should follow the example set by states such as California, Alaska, Wisconsin and Washington, all of which have enacted aggressive pollution prevention statutes. The Commission’s final finding maintains that the legislation which Rhode Island shall propose in response to the *North Cape* spill should not take the place of federal law, but that in order for the marine environment to be sufficiently protected from the threat of future spills, tougher laws must be enacted regionally until stricter and more effective national standards are enacted.

**Components of the Special Commission Legislative Package**

The legislative package which was drafted in response to the *North Cape* oil spill actually includes four distinct pieces of legislation. Two of the bills are memorializations to U.S. Congress, the first regarding reclassification of Rhode Island coastal waters as offshore rather than inland, and the second encouraging Congress to pass the Towing Vessel Safety Act of 1996. The third bill included in the Rhode Island oil spill legislation expands the allowable

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173 Ibid., 7.

174 Ibid., 7.

175 Ibid., 8.

176 96-S 3300 and 96-S 3301.

177 Introduced by Rhode Island Congressmen Jack Reed and Patrick Kennedy, this bill was ultimately absorbed by the Chafee amendments to the Oil Pollution Act. See discussion in subsequent sections of this chapter, as well as in Chapter XI of this text.
uses of the Rhode Island Oil Release Response Fund to provide relief benefits to individuals and industries, such as commercial fishermen, severely impacted by an oil spill.\(^{178}\) The amended uses of the Oil Release Response Fund would allow for immediate availability of funding for response efforts,\(^{179}\) and would also fund the development of a Safety Committee for Narragansett Bay and Long Island Sound.\(^{180}\) The newly expanded Fund, which is capped at $100 million,\(^{181}\) is partially financed by a five cent per barrel tax on all petroleum products entering Rhode Island ports.\(^{182}\)

These first three legislative initiatives are considered by the Special Senate Commission Investigating the North Cape Spill to be integral components of the comprehensive oil spill prevention strategy designed by the state.\(^{183}\) However, the fourth bill drafted by the Special Commission, The Oil Spill Pollution Prevention and Control Act,\(^{184}\) is by far the most aggressive and controversial bill. This bill contains several equipment and manning requirements which exceed federal standards, and these specific provisions have ignited the greatest amount of controversy regarding the appropriate role of state legislation in oil pollution prevention.

\(^{178}\) 96-S 3299, See also “Final Report,” 14.

\(^{179}\) R.I.G.L. ch. 46-12.7-5.1.

\(^{180}\) R.I.G.L. ch. 46-12.7-13(2).

\(^{181}\) R.I.G.L. ch. 46-12.7-4.1(5).

\(^{182}\) R.I.G.L. ch. 46-12.7-4.1(4).

\(^{183}\) “Final Report,” 11.

\(^{184}\) Hereafter, the Act shall be referred to as The Oil Spill Act.
The Rhode Island Oil Spill Pollution Prevention and Control Act\textsuperscript{185}

On August 9, 1996, Rhode Island Governor Lincoln Almond signed into law the Oil Spill Pollution Prevention and Control Act. The Governor sat at a folding table on Moonstone Beach, near the site where the \textit{North Cape} sat, grounded and leaking oil, less than eight months earlier.\textsuperscript{186} The Governor characterized the new legislation as making Rhode Island tougher on the barge industry than the federal government, and that the passage of the law set an example for other New England states to follow.\textsuperscript{187} Although the signing ceremony was well-publicized and was attended by members of the Special Senate Commission and the Department of Environmental Management, among others, the bill caused considerable controversy as it moved through the Rhode Island General Assembly, and came very close to dying in the House of Representatives.\textsuperscript{188} Although all individuals in attendance at the signing ceremony offered strong support for the new Rhode Island law, many provisions of the law were harshly criticized by the American Waterways Operators, an organization representing the coastal tug and barge industry. Even the Department of Environmental Management has indicated in the months since the law was passed that they consider certain provisions of the

\textsuperscript{185}96S-3304 sub-A as amended, Rhode Island General Laws Ch. 46-12.5 (1996).

\textsuperscript{186}The signing ceremony was attended by Senators DiSandro and Fogarty, the bills' two primary supporters, as well as Curt Spaulding, Executive Director of Save the Bay; Tim Keeney, Director of the Department of Environmental Management; and Dennis Nixon, Professor of Marine Affairs at the University of Rhode Island and one of the bill's most vocal supporters. See Rowland, "R.I. toughens oil-barge rules," A1.


\textsuperscript{188}Rowland, "House approves petroleum barge safety regulations," B4.
Oil Spill Act to be flawed or inappropriate.189

Components of the Rhode Island Oil Spill Act

Before describing the more controversial elements of the Rhode Island Oil Spill Pollution Prevention and Control Act, other components of the legislation will be summarized, in order to illustrate the comprehensive nature of the bill. In drafting this legislation, the members of the Special Commission staff were determined to create a document which offered a variety of preventative strategies, and which amounted to more than a targeted reaction to one specific pollution event.190 Although media attention generally concentrated on the most controversial aspects of the Act, labeling them as “knee-jerk” reactions to the North Cape spill,191 a brief description of its legislative components should demonstrate that the Oil Spill Act does indeed include an assortment of preventative strategies designed to be effective in a variety of scenarios.192

The Rhode Island Oil Spill Act begins by creating an event reporting requirement at the state level, which requires that all vessel owners or operators notify the Rhode Island Department of Environmental Management of any vessel or barge."Task force set up to look at barge safety," Providence Journal, 7 June (1996): B4. Before the Rhode Island legislation was enacted, AWO, in cooperation with the Coast Guard, had organized a task force to examine towing vessel and tank barge safety issues. One of the driving factors behind the formation of this group was the desire, on the part of the industry, the Coast Guard, and the Rhode Island DEM, to develop tug and barge safety measures which were more acceptable to the industry and the Coast Guard than the Rhode Island oil spill legislation.

189 Peter Lord, “Task force set up to look at barge safety,” Providence Journal, 7 June (1996): B4. Before the Rhode Island legislation was enacted, AWO, in cooperation with the Coast Guard, had organized a task force to examine towing vessel and tank barge safety issues. One of the driving factors behind the formation of this group was the desire, on the part of the industry, the Coast Guard, and the Rhode Island DEM, to develop tug and barge safety measures which were more acceptable to the industry and the Coast Guard than the Rhode Island oil spill legislation.


192 Ibid, 16-17.
in the event of any collision, allision, grounding, or discharge of oil which occurs when a vessel is traversing state waters. The Act establishes personnel policies for vessels operating in state waters, including drug and alcohol use prohibitions, and provisions for random testing of crewmembers for drug and alcohol use. The Act also has record-keeping requirements, which require maintenance of personnel training and shipboard drill records aboard all vessels operating in state waters.

The Oil Spill Act also calls for a variety of operating procedures to be followed by vessels which transit state waters. These include navigational watch practices, the preparation of voyage plans, and technology requirements which mandate that certain equipment, such as functional radar and a global positioning systems, be present onboard all towing vessels operating in state waters. The Rhode Island Oil Spill Act creates a Narragansett Bay/Rhode Island Sound Safety Committee, which is an advisory committee charged with planning for and overseeing the safe navigation and operation of tank vessels in state waters.

Although all of these legislative components were viewed by the Special Senate Commission as essential to the success of the Act as a comprehensive

193 R.I.G.L. ch. 46-12.5-5.
194 R.I.G.L. ch. 46-12.5-18.
195 R.I.G.L. ch. 46-12.5-19.
196 R.I.G.L. ch. 46-12.5-21.
197 R.I.G.L. ch. 46-12.5-22.
198 R.I.G.L. ch. 46-12.5-23.
199 R.I.G.L. ch. 46-12.5-25(5).
pollution prevention law, there are four specific provisions which were viewed by the legislation's creators as crucial to the Oil Spill Act's effectiveness. These four provisions caused a great deal of protest among tug and barge industry representatives, and remain to this day a source of controversy among industry representatives. More specifically, these provisions have been at the center of many debates regarding the delimitation of jurisdictional boundaries between state and federal governments.

The first such provision requires that, as of June 1, 1997, "no tank vessel shall transport oil or hazardous material on or over waters of the state in conditions of limited visibility" unless the tank vessel either possesses a double hull, or is accompanied by an escort tugboat. Effective January 1, 2001, no tank vessel may transport oil through state waters in any weather conditions unless fitted with a double hull or accompanied by a tug escort. This requirement exceeds the federal regulations regarding double hulls, which do not require double hulls on most tank vessels until 2015.

200 See discussion in Chapter XI regarding Towing Vessel Safety Quality Action Team, and continuing efforts of the American Waterways Operators to bypass the requirements set forth by the Rhode Island law.

201 R.I.G.L. ch. 46-12.5-24(a). It should be noted that nowhere in the law is the phrase "limited visibility" quantified or defined, and that this fact has been cited as potentially complicating implementation of the regulation by the state.

202 R.I.G.L. ch. 46-12.5-24(b).

203 See discussion of contents of Oil Pollution Act of 1990, Chapter V. The Act establishes phase-in requirements for double hulls on tank vessels which would not require double hulls on tank barges like the North Cape until 2015.
The second controversial component of the Rhode Island oil spill law requires that tank barges operating in state waters must carry two crew members aboard the barge at all times. At the time the legislation was drafted, there existed no federal requirements for crew members aboard tank barges during normal operations. Surprisingly, one of the most controversial provisions of the Rhode Island law simply requires that all tank barges operating in state waters have an operable anchor system which may be deployed by a crew member. This provision was so controversial among representatives of the tug and barge industry that they successfully lobbied to insert a provision which requires either an anchor or "another method of retrieving a lost tow." The final provision of the Rhode Island law which elicited strong industry protest requires that all towing vessels transporting tank barges through state waters have on board functioning automated fire and flood detection and suppression systems which may be activated by the master or crew in event of an emergency.

204 The law only applies to those tank barges with capacity of greater than 7500 barrels of oil. R.I.G.L. ch. 46-12.5-21(d).

205 R.I.G.L. ch. 46-12.5-21(b)(ii).

206 Approximately one month after the Rhode Island law was adopted, the Chafee Improvements to the Oil Pollution Act were signed into law by the President. These amendments to OPA require that tank barges carry either two crew members and an operable anchor or a barge retrieval device or comparable safety system. This new federal regulation still falls short of an actual crew requirement aboard barges.

207 R.I.G.L. ch. 46-12.5-23.2.

208 R.I.G.L. ch. 46-12.5-23.2. This provision was inserted into the law during final reconciliation of the bill between the House and Senate versions. See discussion of differences between support for the bill in the Senate and House, supra note 211, below. The law contains no suggestions of what "another method of retrieving a lost tow" might include.

209 R.I.G.L. ch. 46-12.5-23.1(e).
Despite the controversy which surrounded the Rhode Island oil spill bill, only a few substantive changes were made to the legislation between May 5, 1996, when the bill was introduced into the Rhode Island Senate and August 9, when it was signed into law by the governor. However, certain provisions in the Rhode Island law were indeed weakened due to significant protest and lobbying by the American Waterways Operators. For example, the original draft of the bill offered no phase-in period for double hulls, but required double hulls or tug escorts for all tank vessels immediately upon enactment of the law, which was to be January 1, 1997. Likewise, criminal penalties for violation of requirements such as event reporting were included in the original bill, but were omitted from the version which Governor Almond signed into law. The changes to the language regarding anchor requirements also weakened the law. However, the overall objective of the Special Senate Commission, to increase the level of safety standards which apply to vessels transiting Rhode Island waters, was reached, even by the weakened version of the bill.


211 The Oil Spill Act easily passed the Rhode Island Senate, where it enjoyed broad-based support from the Special Senate Commission as well as many members of the Senate leadership. However, in the House of Representatives, where the bill had fewer vocal supporters, industry representatives came close to completely forestalling passage of the legislation. Instead, they were successful in convincing the House Committee which heard the bill to soften certain provisions and change language such that the bill was considered to most to be less aggressive than as originally written. Robert Bromley, personal communication, 20 August (1996).

212 Robert Bromley, personal communication, 20 August, 1996.
VIII. LEGISLATION INTRODUCED IN OTHER NEW ENGLAND STATES AND IN THE UNITED STATES CONGRESS IN RESPONSE TO THE NORTH CAPE OIL SPILL

The Rhode Island General Assembly was not the only legislative body to fashion a response to the North Cape oil spill. As the Rhode Island Oil Spill Pollution Prevention and Control Act was being drafted by the Special Senate Commission, a “flurry of legislative activity” had ensued in other New England States.213 During the 1996 legislative session, Connecticut and Massachusetts both introduced oil spill prevention targeting the coastal tug and tank barge industry. In addition to these state proposals, three pieces of federal legislation were introduced into U.S. Congress by Representatives and Senators from the State of Rhode Island who sought to strengthen federal regulations governing oil transportation. In reality, then, the legislative response to the North Cape oil spill occurred on a national scale.

Massachusetts

On April 8, 1996, the Massachusetts Executive Office of Environmental Affairs responded to the North Cape oil spill with legislation introduced into the Commonwealth of Massachusetts General Assembly by Governor William R. Weld. The legislation, entitled “An Act Establishing Safety Requirements for Tank Barges,” was characterized by Governor Weld as “provide[ing] the coast and waters of Massachusetts with enhanced protection by requiring barges

transporting petroleum and other hazardous materials to be manned and to have operating anchor systems.”214 This description effectively summarizes the contents of the Massachusetts oil spill bill, House Bill 5938, which contains only two requirements: that all tank barges operating in Massachusetts waters be equipped with and operable anchor system215 and that all such tank barges also be manned.216 The manning requirement in the Massachusetts bill, which does not specify how many crewmembers must be aboard the vessel, does not apply to tank barges which are equipped with double hulls.217

On May 7, 1996, a hearing was held on House Bill 5938 by the Massachusetts General Assembly Joint Committee on Natural Resources and Agriculture. Testimony was presented by various environmental organizations, including the Conservation Law Foundation and Save the Bay. Likewise, representatives of the Rhode Island Senate Fiscal and Policy Office, as well as the University of Rhode Island Department of Marine Affairs presented testimony regarding the contents of the Rhode Island Oil Spill Act, and amendments which would make the Massachusetts bill more compatible with certain aspects of the Rhode Island bill.218

A representatives of the American Waterways Operators, Vice President Linda O'Leary, presented testimony maintaining, as she had before


215 House Bill No. 5938, to amend Chapter 21 of the General Laws of Massachusetts, sec. 50C(a)(1).

216 Ibid, sec. 50C(a)(2).

217 Ibid, sec. 50C(b).

218 The author was among the witnesses invited to testify at this hearing, and therefore heard firsthand the testimony summarized herein.
the Rhode Island legislature, that any attempts by state government to regulate the tug and barge industry were unconstitutional intrusions into an area of maritime law strictly reserved for federal jurisdiction.219 The AWO representative also maintained that the coastal tug and barge industry is highly self-regulated, and that although there are no statutory requirements for double hulls or anchors, most barge operators already possess such safety equipment. This assertion by the industry representative prompted Representative Barbara Gray, chairwoman of the Joint Committee on Natural Resources and Agriculture, to question why the tug and barge industry so vehemently opposed the Massachusetts and Rhode Island bills, when many of the requirements of the Massachusetts bill represent common operating procedure. Ms. O'Leary responded to this inquiry by reasserting the AWO position that the federal government should be the sole source of regulation for the coastal tug and barge industry.220 The issues raised during the hearing on the Massachusetts bill were generally similar in nature to those raised during hearings on the Rhode Island Oil Spill Act.

The Massachusetts tank barge legislation never passed the General Assembly, and in fact was not considered a legislative priority by the Executive Office of Environmental Affairs (EOEA). There are two reasons why House Bill 5938 was not aggressively pushed through the Massachusetts General Assembly. First, another piece of environmentally significant

219 Linda O'Leary, "Statement of the American Waterways Operators before the Massachusetts General Assembly Joint Committee on Natural Resources and Agriculture," (Boston, Massachusetts: 7 May, 1996).

220 Ibid.
legislation was given top priority by the EOEA. More importantly to the discussion at hand, one of the most significant outcomes of the Joint Committee hearing on House Bill 5938 was the realization by the Committee members in Massachusetts that the Rhode Island oil spill bill was more broadly focused than the Massachusetts bill, and that Massachusetts might be best served by adopting additional oil spill prevention policies similar to those contained in the Rhode Island bill. The unofficial decision, then, within the Massachusetts General Assembly, was to watch closely the progress of the Rhode Island Oil Spill Act through that state's General Assembly. Once a final version of the Rhode Island bill was enacted, Massachusetts would consider drafting a more comprehensive bill which complemented the provisions of the Rhode Island Act. Unfortunately, the Rhode Island bill was not enacted until very late in the 1996 legislative session, at which point the final date for introduction of new legislation into the Massachusetts General Assembly had passed.

Connecticut

The State of Connecticut General Assembly initially responded to the North Cape spill with an aggressive bill entitled "An Act Concerning Pilotage

221 The Rivers Bill, as it was known, was a legislative priority of the Mass. EOEA, and the efforts of staff members as well as environmental lobbyists were primarily focused on passing the Rivers Bill. The tank barge legislation was considered a secondary priority. Martin Suuberg, General Counsel for Mass. EOEA, personal communication, 29 May (1996).


223 Ibid.
and Safety Requirements for Certain Tank Vessels." This bill required that all tank barges transporting oil or petroleum liquids through state waters be equipped with a double hull and a "redundant working ground tackle," or anchor, which was of sufficient quality to hold a fully-laden barge during a storm. The bill also required that all tank vessels operating in state waters be equipped with an emergency response positioning beacon which could transmit information regarding a vessel's position in case of a lost-barge emergency. In addition to these navigational aids, the Connecticut bill required that towing vessels and tank barges transporting oil through state waters both be equipped with fire suppression systems. The final provision of the bill required that no towing vessel or tank barge should refuse the assistance of another vessel if the towing vessel or tank barge was in distress and posed an imminent threat to the public health or safety due to the possibility of grounding, sinking, or spilling oil.

225 Ibid., Sec. 1(1).
226 Ibid., Sec. 1(2).
227 Ibid., Sec. 1(3).
228 Ibid., Sec. 2.
229 Ibid., Sec. 3. Following the North Cape spill, there was considerable public concern as to whether assist tugs were dispatched readily to the scene of the accident. Local media accounts reported that the burning Scandia had refused the assistance of a tug which was docked in nearby Jamestown, R.I. In fact, the Captain of the Port of Providence, who was in charge of the response command, reports that the severe weather forced several assist tugs which had been dispatched to the scene of the Scandia to turn back, and that the burning tug had not, in fact, refused the assistance of a rescue tug. See Thomas, "Spill response," 36.
This Connecticut bill, which contained a stronger double-hull requirement than either Massachusetts or Rhode Island,\textsuperscript{230} was significantly modified by the Connecticut General Assembly. The legislature ultimately passed a bill\textsuperscript{231} which simply calls for the formation of a standing committee to evaluate the feasibility of developing state regulations which target towing vessels and tank barges operating in state waters.\textsuperscript{232}

**The Kennedy-Reed Bills**

While legislative activity abounded in the New England states in the months following the *North Cape* oil spill, several legislative initiatives were introduced into the United States Congress as well. Two such legislative proposals which focused specifically on operational and structural measures on board towing vessels and tank barges were introduced into the 104th Congress by the Representatives from Rhode Island. The Reed-Kennedy bills, which include the *Towing Vessel Safety Act of 1996* and the *Barge Safety Act of 1996*, were introduced into the House of Representatives by Representatives Jack Reed and Patrick Kennedy.\textsuperscript{233}

\textsuperscript{230} Massachusetts did not have an explicit double hull requirement, although the Commonwealth exempted operators of double hull vessels from manning and anchor requirements. The Rhode Island law, as originally drafted, required double-hulls unless vessels were accompanied by an escort tug, and this provision was eventually weakened by a phase-in period. The Connecticut bill offered no alternative to double hulls and did not provide for any phase-in period.

\textsuperscript{231} Substitute Senate Bill No. 365.


\textsuperscript{233}Congressmen Reed and Kennedy both represent the State of Rhode Island in the House of Representatives.
On January 31, 1996, Reed and Kennedy introduced their first legislative response to the North Cape spill, the Towing Vessel Safety Act of 1996. The 1996 version of this bill represented the third time that towing vessel safety legislation had been introduced into the United States Congress. Representative Gerry Studds had introduced bills in both 1993 and 1994 which would have increased safety requirements for towing vessels. The Towing Vessel Safety Act of 1996 was identical to the version introduced in 1994, and contains both equipment and licensing requirements for towing vessels.

The Reed-Kennedy Towing Vessel Safety Act required that towing vessels be equipped with navigational equipment such as a functioning radar, electronic position-fixing device, and a compass or swing meter. The Act contained expedited casualty reporting requirements which raised the maximum penalty for not reporting a marine casualty from $1,000 to $25,000. The Towing Vessel Safety Act also directs the Secretary of

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234 The 1993 initiative to introduce towing vessel safety legislation was a response to two recent tug and barge casualties. The first occurred when a towing vessel pushing a hopper barge in New Orleans, Louisiana, struck a bridge, causing the bridge to collapse and kill a pregnant woman. The second casualty involved an Amtrak train accident near Mobile, Alabama earlier that year when a towing vessel struck a railroad bridge. The bridge collapse from the impact of the collision, and shortly thereafter an AMTRAK passenger train plunged off the bridge and into the water killing forty-seven people.

235 After an unsuccessful attempt to pass the towing vessel safety legislation in 1993, Congressman Studds reintroduced similar legislation during the following year. Again, the need for such legislation was punctuated by a January, 1994 oil spill which occurred off the coast of Puerto Rico when a barge broke away from its towing vessel twice during one tow, and ultimately grounded on a coral reef, spilling 750,000 gallons of heavy oil onto six miles of pristine beaches.


238 Ibid., Sec.3(b).
Transportation to develop licensing requirements for masters and mates of towing vessels, and requires that all tugboats have a licensed operator onboard. Finally, the Towing Vessel Safety Act mandates that the Coast Guard conduct inspection of towing vessels. Such inspections are currently conducted by other members of the towing vessel industry.

In the press release which announced the introduction of the Towing Vessel Safety Act of 1996, Representative Reed stated that “the owners of tugboats must be held more accountable regarding safety procedures...These regulations are long overdue. Similar legislation has been introduced in the past, but it has not been approved.” Representative Kennedy added, “This legislation is an important first step in prevention accidents like the North Cape oil spill.”

On March 5, 1996, Representatives Kennedy and Reed introduced a second bill into Congress which responded to issues raised by the North Cape spill. The Barge Safety Act of 1996 was intended to complement the provisions of the Towing Vessel Safety Act, by instituting safety measures for the tank barges transported by towing vessels. This bill targeted tank barges

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239 Id., Sec.6.

240 Id., Sec.7.

241 Various Class Societies, such as the American Bureau of Shipping (ABS), currently conduct inspections of towing vessels, however the ABS and other vessel class societies are private organizations which conduct voluntary inspections, and which have no regulatory authority.


243 Ibid.

which carry oil or hazardous material through U.S. waters, requiring that all such vessels be equipped with an operable anchor system\textsuperscript{245} and be manned.\textsuperscript{246} The manning requirement in the Barge Safety Act does not apply to double-hulled barges.\textsuperscript{247} The Act also directs the Secretary of Transportation to issue regulations regarding dimensions for anchoring equipment and training requirements for individuals manning tank barges.\textsuperscript{248}

Neither the Towing Vessel Safety Act nor the Barge Safety Act ever made it through Congress as such. Both bills were effectively absorbed by the Oil Spill Prevention and Response Improvement Act\textsuperscript{249} introduced by Senator Chafee in an attempt to amend the Oil Pollution Act of 1990. The Oil Spill Prevention and Response Improvement Act was, in turn, incorporated into the Coast Guard Authorization Act of 1996.\textsuperscript{250} By the time the two Reed-Kennedy bills were incorporated into the Coast Guard Authorization Act, most of the strongest legislative provisions originally contained in the bills had been removed or altered. A discussion of the oil spill prevention measures which were ultimately enacted as part of the Coast Guard Authorization Act will follow. First, however, a brief summary will be presented of the history and contents of the Chafee amendments to the OPA 90.

\textsuperscript{245} Barge Safety Act, Sec. 2(a)(1).
\textsuperscript{246} Ibid., Sec. 2(a)(2).
\textsuperscript{247} Id., Sec. 2(b).
\textsuperscript{248} Id., Sec. 2(c). It is interesting to note that the tank barge bill which was introduced in the Massachusetts legislature is identical in working to the Barge Safety Act introduced into Congress by Kennedy and Reed.
\textsuperscript{249} S. 1730 (1996).
\textsuperscript{250} S. 1004 (1996).
The Chafee Amendments to the Oil Pollution Act of 1990

"Mr. President, with passage of the Oil Pollution Act of 1990, the environment in which shippers of oil operate will change dramatically...I am very pleased that we are not waiting for another World Prodigy, which next time...may occur in the midst of a winter storm, instead of on a sunny afternoon. This legislation will help us prevent and respond more effectively to oil spills and represents a major legislative achievement of this Congress."252

The above statement, offered by Rhode Island Senator John Chafee in 1990 in support of the Oil Pollution Act, is wrought with ironies which the Senator could scarcely imagine as he made this remark. The irony lies in the fact that, six and a half years after the World Prodigy spill, "in the midst of a winter storm," the State of Rhode Island experienced a spill the size and impact of which has effectively eclipsed the World Prodigy event. Less than six years after the U.S. Congress passed the Oil Pollution Act of 1990, the tank barge North Cape grounded off of Moonstone Beach, within direct sight of Senator Chafee's Rhode Island summer home.

The state and federal agencies who were involved in the cleanup and response effort following the North Cape spill generally agree that the Oil Pollution Act of 1990 provided for response protocol which led to a more efficient and effective response than was provided after the World Prodigy

251 On June 23, 1989, the Greek-flagged tanker World Prodigy hit Brenton Reef and spilled almost 300,000 gallons of home heating oil into the waters of Narragansett Bay, R.I. The World Prodigy was one of three spills in U.S. waters which occurred during that weekend in June, 1989. The cumulative effect of these three spills which occurred within months of the Exxon Valdez spill, helped to maintain the momentum in Congress which led to the passage of OPA 90.

Likewise, the many residents and businesses within the state which were negatively impacted by the North Cape spill may file claims against the responsible party and may recover damages more readily today than before OPA was passed. In these respects, then, Senator Chafee's confidence in the improvements which OPA would bring about in the wake of a serious spill was justified. However, as many experts in the fields of maritime law and policy, environmental protection, and pollution prevention, have asserted, OPA 90 did virtually nothing to prevent this and other tank barge spills from occurring in U.S. waters. This assertion is central to the legislative response which the state of Rhode Island has drafted in the wake of the North Cape spill.

At the same time that the Rhode Island Senate was designing a legislative package to strengthen oil pollution prevention laws in that state, Senator Chafee began his own investigation into different mechanisms for improving the federal Oil Pollution Act. On February 14, 1996, Senator Chafee

253 Charles Hebert, U.S. Fish and Wildlife Service; Tim Keeney, Rhode Island Department of Environmental Management, and Captain Barney Turlo, U.S. Coast Guard, formal testimony before the Rhode Island Special Senate Commission investigating the North Cape Oil spill. Providence, R.I.: (February 2, 1996), unpublished. See also Morgan, 16.

254 OPA 90 allows for more expansive categories of claims than were generally recognized by the courts before this law was enacted. For example, the responsible party is now liable for claims resulting in purely economic losses. (33 U.S.C. 2702(b)(2)(E).) Before OPA, the courts generally applied the Robin's Dry Dock rule, which is a general principle of admiralty law which prevents the recovery of purely economic or financial injury when there has been no injury to property. See Eubank, 154, for discussion of this issue.

255 The author is aware that in May, 1996, Senator Chafee introduced legislation which would amend OPA90. This bill contains equipment requirements, incentives for early phase-in of double hulled vessels, and stronger mandates for development of Coast Guard towing vessel safety regulations. This author recognizes that if passed, the Chafee bill will make certain state policies redundant of federal law, and therefore eliminate the need for certain state requirements.

256 Dennis Nixon, formal testimony before the Rhode Island Special Senate Commission investigating the North Cape Oil spill. Providence, R.I.: (February 2, 1996), unpublished.
held a field hearing of the U.S. Senate Committee on the Environment and Public Works, which the Rhode Island Senator chairs. The field hearing was held in the Narragansett, R.I., town hall, and Senator Chafee, together with his fellow Committee member Senator Joseph Lieberman from Connecticut, convened three panels of experts from the Coast Guard, the National Oceanic and Atmospheric Association, the American Waterways Operator, the University of Rhode Island, Save the Bay, and the U.S. Fish and Wildlife Service, among others.257 Senator Chafee's mission in conducting the field hearing was similar to the mission of the Rhode Island Senate Special Commission: to identify the causes of the North Cape oil spill and to improve the ability to respond to and prevent future oil spills.258 Senator Chafee sought specifically to identify mechanisms for strengthening the Oil Pollution Act of 1990.259

Senator Chafee began the hearing with an opening statement which emphasized the connection between a healthy environment and a healthy economy. For this reason, Senator Chafee suggested that the committee would like to focus the hearing on identifying any legislative response that might strengthen the Oil Pollution Control Act of 1990 (OPA) and aid in the prevention of further devastating spills.260 Representative Jack Reed was also in attendance at the Senate hearing, and offered opening remarks to the effect


259 Ibid.

260 Id.
that the *North Cape* spill had provided the Committee with an opportunity to assess the effectiveness of OPA 90, and that the Senate Committee should take advantage of that opportunity.261

Among the first witnesses to testify before the Senate Environment and Public Works Committee were Rhode Island Governor Lincoln Almond, and DEM Director Tim Keeney. Both commented on the overall success of response efforts, and the Governor expressed his concerns that commercial fishermen be duly compensated for their losses due to the oil spill. Director Keeney presented testimony regarding hydrocarbon testing protocol for reopening of closed areas to shellfishing.

Vice Admiral Artur E. Henn, Vice Commandant of the United States Coast Guard, testified next, responding to questions from the Senators regarding the rulemaking record of the U.S. Coast Guard. The Admiral attempted to explain how the Coast Guard has fallen so far behind in meeting the rulemaking deadlines specified by OPA 90.262 The Senator asked the Vice Admiral why the Coast Guard is almost five years late263 in implementing interim regulations for single-hulled tank vessels.264 The Vice Commandant responded to the Senator's questioning by assuring the Senator that new rules for safety standards aboard uninspected towing vessels would be issued by the

261 Statement of U.S. Representative Jack Reed before the Senate Environment and Public Works Committee field hearing, 14 February (1996), photocopied.

262 Kerest, A7.

263 OPA 90 directed the Coast Guard to develop interim rules for oil-carrying vessels by August, 1991.

summer of 1996, and indeed this goal has been at least partially satisfied.265

Senators Chafee and Lieberman heard testimony from many other witnesses during the February field hearing, and the general tone of the testimony provided seemed to suggest that, although the response to the North Cape oil spill was far more organized than the response to the World Prodigy spill, which occurred before OPA 90, there is still room for improvement of the federal law.266 Senator Chafee held other follow-up hearings in Washington, D.C., during the next few months.267 The end result of this hearing process was the introduction of The Oil Spill Prevention and Response Improvement Act, S. 1730, into the second session of the 104th Congress. The Act directly responded to many of the issues brought to light by the North Cape spill, and specifically attempted to improve federal regulations governing towing vessels and tank barges.268

The stated purpose of the Oil Spill Prevention and Response Improvement Act, as originally drafted, was "to amend the Oil Pollution Act of 1990 to enhance prevention and improve response to oil spills and to ensure that citizens and communities affected by an oil spill receive prompt and full

265 A final rule on navigational safety equipment for towing vessels was issued on July 3, 1996. A proposed rule was also issued by the Coast Guard in June of 1996 regarding licensing requirements for towing vessel mates and masters (33 CFR Part 164). However, the Coast Guard has not issued any rules, to date, on structural measures for improving towing vessel safety.


267 Both hearings were held in Washington, D.C., one on March 27, 1996, and the next on June 4, 1996.

compensation.” The Improvement Act was organized into two titles, the first addressing prevention measures and the second focusing on improving response capabilities. It is the contents of the first title of the Chafee Improvement Act which is relevant to this discussion of federal regulation of oil transportation industries.

The first section includes interim measures for single-hull tank vessels which are in excess of 5,000 gross tons. This section primarily focuses on ensuring a timely implementation of final rules for operational and structural measures aboard single-hulled tank vessels over 5,000 gross tons. The Improvement Act contained deadlines of July 18, 1996 for issuance of a final operational rule, and December 18, 1996, for issuance of a final structural rule for single-hulled vessels. The language in S.1730 stated that if the Secretary of Transportation did not issue these final rules within 59 months of the July 18 deadline and within 64 months of the December 18 deadline, then the proposed rules for each of these measures would automatically go into effect. This automatic triggering of proposed rules if no final rules are issued was intended to serve as an incentive to the Coast Guard to develop final rules


272 The deadline for operational measures has been satisfied, at least in part, with the issuance of the Final Rule on navigational safety equipment for towing vessels issued July 3, 1996. See supra note 266.

273 S. 1730, Title I sec. 101 (1-2).
in accordance with these new deadlines.  

Title I of S.1730 also contained a requirement that single-hull tank vessels have either a crew member and operable anchor on board the vessel, or have an emergency barge retrieval system or some “other measure” which provides “comparable protection.” This language, of course, is quite a bit weaker than the manning and anchor requirements in the Rhode Island law, however it at least addresses the issue of crew and anchors aboard single-hulled tank vessels. Previous to the Improvement Act, there existed no federal standards for crew and anchors on barges. Finally, Section 101 of Title I of the Oil Spill Prevention and Response Improvement Act directs the Secretary of Transportation to consider, in issuing rules, not only those measures which are determined to be cost-effective, but also measures which protect human safety, prevent collisions, and reduce oil outflow after a collision has occurred. Although this is not a specific rulemaking directive, it reinforces the idea that Congressional intent is to provide for effective oil spill prevention and that economic feasibility should not be the deciding factor in issuing safety directives.

The second section of Title I of the OPA Improvement Bill creates an incentive for shippers to convert to double-hulled vessels. The environmental

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275 S. 1730, Title I, Sec. 101(3).


277 Odell, personal communication, 24 May, (1996). The Coast Guard is often criticized for tending to weight economic considerations of the impact of proposed rules on the oil transportation industry more heavily than environmental protection concerns. See Alcock. 124-140.
protection community responded particularly favorably to this provision because it attempts to speed up the phase-in process for double hulls by providing for liability incentives for operators of double-hulled vessels. Specifically, this section states that shippers who operate double-hull vessels are not subject to liability above a $5 million cap unless they engage in gross negligence or willful misconduct. The liability cap cannot be pierced for operators of double hull tankers in cases of violation of applicable safety, construction, or operating requirements.278

Title I of S.1730 also contains a section which addresses towing vessel safety issues. Again, the focus of this section is on ensuring that the Coast Guard meet final rulemaking requirements. In the case of safety rules for uninspected towing vessels, the OPA Improvement Bill requires that the Secretary of Transportation issue a final rule by September 30, 1996. This section further requires that in developing this final rule, the Secretary consider requirements for fire-suppression equipment.279 The final section of the OPA Improvement Act which addresses oil spill prevention calls for additional studies and research by the Secretary of Transportation and the Army Corps of Engineers.280 Specifically, the bill calls for the Secretary to direct a study regarding the designation of shipping lanes for oil transportation as one method of reducing the risk of oil spills to the coastal environment. The Army Corp of Engineers are also directed by Congress to study the findings of a Rhode Island Commission studying the feasibility of dredging the Providence River Channel, in order to identify whether such dredging would reduce the level

278 S. 1730, Title I, Sec. 102 (1).
279 S. 1730, Title I, Sec. 101(2).
280 S. 1730, Title I, Sec. 104.
of tank barge traffic and thus reduce the threat of coastal oil spills in Rhode Island.\textsuperscript{281}

The provisions of the OPA 90 Improvement Act, though not as strong in language and intent of many of the provisions of the Rhode Island law,\textsuperscript{282} were nonetheless considered to offer real possibilities for improving the federal Oil Pollution Act. Early drafts of S.1730 were extremely aggressive, and contained a provision which sped up the timetable for implementation of double hull requirements for every month that the Coast Guard lagged behind on issuing final rules for single-hulled vessels. However, many of the most aggressive provisions of the Improvement Act were removed from the version of the OPA 90 amendments which were ultimately adopted by Congress.\textsuperscript{283} The OPA 90 improvement provisions were signed into law by President Clinton in October of 1996 as part of the Coast Guard Authorization Act.\textsuperscript{284}

\textsuperscript{281} For the duration of the Rhode Island legislative response to the North Cape spill, the dredging issue came up as a possible “solution.” Proposals to dredge the Providence River channel have been fiercely debated in the State of Rhode Island for over two decades. Due to a high level of contamination in the sediments in Upper Narragansett Bay, the problems associated with siting these toxic dredge spoils has repeatedly slowed the progress of dredging projects. Proponents of dredging attempted to use the North Cape oil spill as further evidence of the need to dredge, citing as a reason the fact that petroleum products must come into Rhode Island via tug and barge because the channel depth is too shallow to allow navigation of tankers. However, this argument has been countered by many who assert that oil is transported along the Northeastern coast by tug and barge for purely economic reasons, because they are cheaper to operate than tankers, and regardless of whether the Upper Narragansett Bay is dredged to accommodate tankers, tug and barges will continue to dominate oil transportation in the Northeast. See Mooney, “Senate commission opens hearings on oil spills,” \textit{Providence Journal} 3 February (1996): A1.

\textsuperscript{282} For example, manning and anchor requirements in S. 1730 were weaker than the Rhode Island bill, and S.1730 offered incentives for double hull implementation, but did not provide for a speed up of phase-in periods, as did the Rhode Island law.


\textsuperscript{284} S.1004 (1996).
The Coast Guard Authorization Act

The legislative response of the United States Congress to the *North Cape* oil spill was initially quite impressive. Between the provisions of the Reed-Kennedy towing vessel and tank barge bills, and the OPA improvement provisions in Senator Chafee's legislation, many of the provisions of the Rhode Island oil spill act were addressed, in some form, by these federal legislative proposals. Had all three bills been adopted in their original forms, towing vessels transiting Rhode Island waters, as well as the territorial waters of all other U.S. states, would be forced to carry on board basic navigational equipment as well as functional fire suppression equipment. Likewise, adoption of the Barge Safety Act would have ensured that all tank barges entering Rhode Island waters either carried crew aboard, or were equipped with double hulls. All tank barges would carry operable anchors. The Chafee amendments to the *Oil Pollution Act of 1990*, as originally drafted, provided incentives for early implementation of double-hulled vessels, and would have forced the Coast Guard to complete rulemaking requirements in a timely manner.285

Unfortunately, rather than enacting each of the three bills described above separately, and thus providing several additional layers of oil spill prevention at the federal level, these three bills were fused and incorporated into the Coast Guard Authorization Act of 1990. During the process of combining these legislative proposals, many of the most important prevention measures contained in each bill were removed.286 The oil spill prevention

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285 See discussion of contents of these three bills in previous sections of this chapter.

286 John Torgan and Steve Odell, personal communication, September, 1996.
measures which were incorporated into the Coast Guard Authorization Act of 1996 are, in reality, quite minimal.

Senator Chafee announced the adoption of the oil spill prevention improvement measures in the Coast Guard Authorization Act with the following statements.

"On the prevention side...OPA can, and should, be strengthened so that we can avoid having to respond to an oil spill at all. The recent spills have only served to underscore the need for more effective prevention measures....Although the best way to prevent spills from vessels is to equip them with double hulls, it is quite expensive to build a new double-hull vessel or to retrofit a single hull vessel with a second hull."287

Senator Chafee also stated that because of the considerable costs associated with implementation of double hulls, when Congress enacted OPA 90, they instructed the Coast Guard to issue rules which would increase safety measures on existing single-hulled vessels. The Senator then explained that, although the provisions originally written into the OPA improvement act, which would have penalized the Coast Guard for not meeting new rulemaking deadlines, were not present in the Coast Guard Authorization Act, there is a firm expectation in Washington that the Coast Guard will honor its commitment to implement rules for structural safety measures on board single-hulled tank vessels by December, 1996.288

The assortment of legislative provisions originally present in the Towing Vessel and Barge Safety Acts, and in the Oil Spill Prevention and Response Improvement Act were reduced to two major oil spill prevention provisions incorporated into the Coast Guard Authorization Act. First, the Coast Guard


288 Ibid., S11796.
Act requires that all tank vessels operating in U.S. waters be equipped with either an operable anchor and a crew to deploy it, or an emergency retrieval system with no crew aboard the barge, or a “comparable measure” which will protect against grounding of the barge. This language is fairly vague, and certainly falls short of imposing either an actual manning requirement or an anchor requirement. Tank barges may continue to operate in U.S. waters if they are fitted with a retrieval system or comparable measure. The second major oil pollution prevention provision contained in the Coast Guard Authorization Act reads, “The Secretary shall require...the use of a fire suppression system or other measures to provide adequate assistance so that a fire on board a towing vessel that is towing a non-self-propelled tank vessel can be suppressed under reasonably foreseeable circumstances.”

The federal legislative proposals drafted in response to the North Cape oil spill were effectively reduced from double hull incentives and manning requirements to a requirement for a fire suppression system and some method of barge retrieval. The enactment of the Coast Guard Authorization Act of 1996, then, effects little change in the framework of federal regulations governing oil spill prevention.

289 S. 1004, Sec. 901(a)(1).
290 Ibid., Sec. 901(a)(2).
291 Ibid., Sec. 902(a)(3).
292 Retrieval systems may often be as simple as an extra tow line trailing off a barge in a manner such that it may be accessed by another tug in an emergency situation. It is difficult to imagine how such a mechanism could be considered as effective as an anchor in slowing the progress of a runaway barge, especially since a retrieval device of any sort requires the presence of another vessel to employ.
293 S. 1004, Sec. 902(f)(1).
IX. JURISDICTIONAL CONFLICTS IN POLLUTION PREVENTION: ENVIRONMENTAL OR MARITIME LAW?

Admiralty Jurisdiction, Preemption, and the Oil Pollution Act of 1990

The Federal Admiralty Jurisdiction

The United States Constitution bestows upon the federal court system jurisdiction over “all admiralty and maritime cases.” The U.S. legal system has historically recognized the need for “harmony and uniformity” of national maritime law, and for this reason the United States Congress possesses the ultimate authority to establish national maritime law and policies. When the Congress has not legislated on a particular maritime issue, the federal courts often become the source of maritime law.

Although it is well-recognized that a state-based scheme for admiralty jurisdiction would threaten the uniform nature of maritime law and thus interfere with interstate commerce, states are not completely precluded from enacting laws which effect maritime commerce. While the Constitution provides for the exclusively federal nature of admiralty jurisdiction, the U.S. court system has recognized, through a long history of case holdings, that there are occasions where a state may legally regulate or legislate with regard to issues of maritime law.

294 U.S. Constitution, article 3, sec. 2.

295 Eubank, 156.

296 Ibid.

297 This case law, which includes but is not limited to Cooley v. Board of Wardens, 53 U.S. 299 (1851); Kelly v. Washington, 302 U.S. 1 (1937); Huron Cement v. Detroit, 362 U.S. 440 (1960); and Askew v. American Waterways Operators, 411 U.S. 325 (1973); will be presented in forthcoming sections of the text of this paper.
Despite the existence of this line of case law, which serves to protect the ability of the state to regulate its interests in areas generally reserved for federal admiralty jurisdiction, a great deal of controversy continues to surround the question of where and when state regulatory powers should yield to admiralty jurisdiction, and where this federal jurisdiction should defer to state law. Critics of the preemption exceptions contained in the Oil Pollution Act of 1990 have expressed the view that by protecting state law from federal preemption under OPA, the constitutional foundation for maintaining admiralty jurisdiction as strictly federal is being undermined. One author writes that “while OPA 90 thus contributes to the uniformity of environmental law, it threatens the ‘general harmony and uniformity’ of national maritime law.”

**Preemption**

In order to understand the full implications of the non-preemption provisions which were ultimately incorporated into the Oil Pollution Act of 1990, a brief explanation of the doctrine of preemption, as it relates to maritime law and pollution prevention, is appropriate. The United States Constitution grants power to the Congress to preempt state laws in order

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298 Eubank, 153.

299 Article 6, the Supremacy Clause, is generally recognized as the source of preemptive power. However, there does exist a disparity of opinions, among legal scholars, about this fact, with certain authors citing that the Commerce Clause is actually the portion of the Constitution from which preemption power is derived. This conflict of opinion is duly noted, however it is beyond the scope of this work to address this disparity. For a more thorough discussion of these issues, see Steven A. Gardbaum, “The nature of preemption,” *Cornell Law Review* 79: 768-770 (1994).
to preserve consistent and effective national standards.\textsuperscript{300} The existence of preemption in a given area of law is determined by Congress in one of three generally recognized ways. Preemption may be indicated by direct Congressional intent, by implied intent, or through "conflict preemption." In the first case, Congress will explicitly state that it intends for certain legislation to preempt all state law in that area. The second condition, implied intent, has also been called "field preemption." Field preemption occurs when federal legislation in a certain area is so comprehensive that it does not allow room for any state legislation in that area. Conflict preemption occurs when state and federal laws conflict in a given area. In such an instance, the Constitution provides for federal preemption of state law.\textsuperscript{301}

Conflict preemption is an extension of the doctrine of federal supremacy. Both principles provide for a resolution of any potential conflicts which might occur as the result of concurrent federal and state jurisdictions. The first two forms of preemption, express and implied intent, do not involve any direct conflict between state and federal policies. Rather, these two preemptive conditions reflect a general deprivation of state power to legislate at all in a particular area.

\textsuperscript{300} Gardbaum, 768.

\textsuperscript{301} Gardbaum, 768.
The OPA 90 Preemption Debate

"Later today, I will be offering an amendment to protect the right of State governments to maintain their own oil pollution liability and compensation laws. I will do so because it simply makes no sense ... to preempt the right of State governments to protect their own people; to protect their own property and their own environment in the way that they feel is best."\footnote{302} 

"Preemption is needed to ensure that there is one unified, simple comprehensive system available to finance full cleanup and pay fully for damages. Without preemption, we are left with the existing patchwork of confusing and sometimes competing Federal and State laws which cause delays in cleanup and further damage to the environment."\footnote{303}

The preemption debate which surrounded the passage of OPA 90 primarily concerned liability issues. Under the Federal Water Pollution Control Act (Clean Water Act or FWPCA)\footnote{304}, one of the federal laws which governed oil pollution before OPA, individual states maintained the right to establish separate liability provisions, including unlimited liability\footnote{305}. Many states fought adamantly to ensure that these state liability schemes would not be preempted by OPA, which provided a cap on federal liability which could only

\footnote{302} Representative Gerry Studds, introducing amendments to the Oil Pollution Prevention, Response, Liability, and Compensation Act of 1989, which would prevent preemption of state liability laws by the act which would eventually be known as OPA 90. 135 Cong. Rec. H 7954 (1989).

\footnote{303} Representative Shumway, commenting on proposed Miller-Studds amendment which would prevent preemption under the future OPA 90. 135 Cong. Rec H 7954 (1989).

\footnote{304} P.L. 92-500, 86 Stat. 816 (1972)

\footnote{305} 33 U.S.C. Sec. 1370.
be exceeded in instances of gross negligence.\textsuperscript{306} Therefore, the preemption debate which ensued on Capital Hill, as the Oil Pollution Act of 1990 was debated in Congress, was centered on protecting the rights of states to develop their own liability scheme, unaffected by OPA's liability limits.\textsuperscript{307}

The non-preemption provisions in the Oil Pollution Act were originally attached to the Senate version of the OPA bill\textsuperscript{308}. This bill passed the Senate with non-preemption intact, but this issue was extremely controversial in the House.\textsuperscript{309} However, after a great deal of debate, the Miller-Studds amendments to H.R. 1465\textsuperscript{310} were incorporated into the House version of OPA, and the bill which left the conference committee to be signed by President George Bush “does not remove the rights of States to take whatever additional action they believe is necessary to protect their waters from oil spills.”\textsuperscript{311}


\textsuperscript{307} Ibid.

\textsuperscript{308} Senate bill S. 1465; House bill H.R. 1465.

\textsuperscript{309} During the fourteen years previous to the OPA passage, several House bills which proposed comprehensive oil spill prevention, liability, and response had been introduced and passed, but none of these bills made it through the U.S. Senate. It seems ironic that OPA 90 unanimously passed the Senate but caused such debate and disagreement in the House, since traditionally the House had been more supportive of oil spill legislation. However all of the House bills introduced in the past had failed for federal preemption of state law, and the non-preemption provisions included in the Senate version of 1465 were not well-received by many Representatives. See, for example, 135 Cong. Rec. H 7954 (1989).

\textsuperscript{310} Introduced in joint session of House Committees, 135 Cong. Rec. 7954 (1989).

Although the non-preemption provisions in OPA 90 were introduced primarily to protect state liability laws, in the years since this federal legislation was enacted, many states have developed oil pollution prevention legislation which accomplishes far more than merely expanding liability limits. Led by west coast states such as California, Washington, Oregon, and Alaska, a trend has begun to emerge in this country which suggests that the most aggressive arena for oil spill legislation is far removed from OPA 90. These west coast states and others are attempting to accomplish what critics charge that OPA 90 has been unable to do; to enact effective, proactive regulations, which will reduce the likelihood of spills in U.S. coastal and inland waters by regulating the industries which transport oil through these waters.

Gaps in Federal Regulations Governing the Coastwise Transport of Petroleum Products

Traditionally, the federal government has reserved exclusive jurisdiction over all issues which impact upon interstate commerce, including standards and operating procedures for all U.S. vessels. The Ports and Waterways

312 As of August, 1992, 36 states had imposed unlimited liability limits. Morgan, 10.

313 There is a general consensus, among marine pollution experts nationwide, that the most effective attributes of OPA 90 have been in the arena of improving response and cleanup protocol. However, the exceedingly long phase-in periods for double hull standards, and the failure of the U.S. Coast Guard to implement its rulemaking responsibilities in a timely fashion, have led to a common criticism among experts in the field that OPA 90 has largely failed in its attempt to prevent spills by regulating the industries involved in oil transportation. See, for example, prepared testimony of Natural Resources Defense Council before the Senate Environment and Public Works Committee (March 27, 1996). See also Morgan, p. 16, supra note 67.

314 Beaver, Butler, and Myster, 794.
Safety Act (PWSA) of 1972 delegates authority to the Secretary of Transportation to regulate the design standards of U.S. vessels. This Act further designates the U.S. Coast Guard as the federal agency responsible for enforcement of these regulations. Therefore, the Coast Guard is responsible for carrying out all of the rulemaking mandates in the Oil Pollution Act of 1990 which involve vessel construction and design standards. Many of these rulemaking mandates specified in OPA involved the promulgation of regulations effecting the operation and structure of the considerable fleet of single-hulled vessels which would continue to transport oil through U.S. waters during the twenty to thirty year double-hull phase-in periods which OPA established. However, the U.S. Coast Guard has failed to develop many of the standards for single-hull vessels which were mandated in OPA 90, and has been years behind in meeting many of the OPA-mandated rulemaking deadlines.


316 The phase-out period for single-hulled vessels which is contained in the Oil Pollution Act of 1990 has been criticized by marine safety experts as far too liberal. The final deadline for implementation of double hull requirements is 2010 for tank vessels and 2015 for tankers. P.L. 101-380, sec. 4115 (c), 4116 (b), 4111, 1006 (e).

317 The Coast Guard did, in 1993, submit a notice of proposed rulemaking which would raise safety standards and equipment requirements on uninspected towing vessels, however this notice was eventually withdrawn, and the new rules were never implemented. The Coast Guard admitted that this effort was cut short due to extreme industry opposition. See 60 Fed. Reg. 55904. In June, 1996 a Final Rule was issued by the Coast Guard on Navigation Safety equipment for towing vessels. See Fed. Reg vol. 61 no. 129 (June 3). In July, a final rule was issued regarding operational procedures for towing vessels. See Fed. Reg vol. 61 no. 147. (July 30).

318 Several environmental protection organizations have brought suit against the Coast Guard and NOAA for failing to implement OPA mandates according to statutory requirements. See amended complaint No. CV-94 4892 (RJD): Natural Resources Defense Council et. al. v. United States Coast Guard et al. .
One of the factors which has contributed to the shift in arenas for oil pollution prevention from the federal to the state level is a general sense of frustration, among state governments, toward the slow progress which has been made toward developing effective pollution prevention laws at the federal level. The Oil Pollution Act of 1990 itself was debated, in one form or another, for fourteen years before the Exxon Valdez and three other smaller spill finally spurred its passage. Likewise, efforts to require double hulls on tank vessels transporting oil and hazardous substances began almost twenty years before the federal Oil Pollution Act was finally signed into law.

On December 24, 1971, the Coast Guard issued a Notice of Proposed Rulemaking on prevention of oil spills. One of the measures proposed was to require double hulls on all inland barges built after Dec. 31, 1972. After a series of hearings on the issue, the Coast Guard suspended implementation of double hull requirements pending completion of a study by the Maritime Administration. The primary reason cited by the Coast Guard for stalling this initiative was the strong opposition of the industry. In the face of the 1971 double hull proposal, 25 years ago, the barge industry based their objection to double hulls on two reasons. First, they argued against the severity of cost. In retrospect, when one compares the cost of implementing double hulls in 1972 with the cost of the several catastrophic oil spills which have occurred in U.S.

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319 See discussion of legislative history in introduction to this paper.


waters since that time\textsuperscript{322}, it would seem that the price of implementation might have been more than made up during the past 24 years in the amount of oil which could have been prevented from spilling.

In 1972, the barge industry also argued there was not enough evidence which supported the effectiveness of double hulls. Today that evidence exists,\textsuperscript{323} yet they still argue against the implementation of double hulls. Clearly, the issue, then, is not the effectiveness of double hulls in oil pollution prevention, but rather industry resistance to double hull implementation is primarily financial.\textsuperscript{324}

The sizable gaps in Coast Guard oil spill prevention regulations have allowed many oil transportation industries, such as the coastal and inland tug and barge industry, to operate in a virtually unregulated climate.\textsuperscript{325} The failure of the Coast Guard to implement vessel safety standards as mandated by the Oil Pollution Act has provided an incentive for individual states to attempt to assume responsibility for oil pollution prevention in their local waters.\textsuperscript{326} Local governments are often left to deal with the initial response to

\textsuperscript{322} For example, the natural resource damages caused by the \textit{Exxon Valdez}, \textit{World Prodigy}, \textit{North Cape}, and dozens of other spills of smaller magnitude which have occurred in U.S. waters total millions upon millions of dollars.

\textsuperscript{323} A 1992 study by the National Research Council and the U.S. Coast Guard, entitled “Interim Report on Tank Vessel Designs,” concluded that double hulls are the most effective way to prevent oil spills caused by groundings. See Peter Britton, “New designs for oil tankers,” \textit{Popular Science} 242 no. 6 (1993): 28. U.S. Coast Guard casualty data for the first district indicates that 50\% of the marine casualties which have resulted in oil spills over the past five years were caused by groundings. Personal communication, CAPT Eric Williams, USCG, (21 October, 1996).

\textsuperscript{324} Alcock, 118.

\textsuperscript{325} Dennis Nixon, formal testimony before the Rhode Island Special Senate Commission investigating the North Cape Oil spill. Providence, R.I.: (February 2, 1996), unpublished.

an oil spill, and certainly a spill represents a localized hazard, therefore in the
wake of a serious spill, local governments are often left feeling dissatisfied with
the level of oil spill protection provided by the government.\textsuperscript{327} Many states,
particularly in the wake of serious spills which impact state waters, have
attempted to fill in the gaps in federal tank vessel safety regulations by
enacting state laws regulating safety standards on these vessels. The
majority of vessels involved in the coastwise transportation of petroleum
products in the U.S., including oil tankers, tank barges and towing vessels, now
confront a situation where state requirements or standards often exceed those
standards established by U.S. Coast Guard regulations.\textsuperscript{328} Indeed, this is now
the case in the State of Rhode Island.

Although it is interesting to speculate about the legal stature of these
aggressive state-level oil pollution regulations, it is ultimately the role of the
federal court system to determine the constitutionality of these statutes. The
International Association of Independent Tanker Owners (Intertanko)
recently filed suit against the State of Washington, based on the provisions of
that state’s oil pollution prevention statute.\textsuperscript{329} Intertanko claimed that
certain Washington State statutes and regulations relating to oil tankers
operating in state waters were unconstitutional. Intertanko challenged these
provisions of the Washington oil spill prevention laws claiming that they were

\textsuperscript{327} David Fischer and Louis Martinet, “Local government response to the \textit{American Trader}

\textsuperscript{328} For example, Washington has enacted a pollution prevention program which establishes
“Best Achievable Protection” standards for tank vessels operating in state waters. These
standards contain several provisions, such as crew requirements, technology requirements,
and bar crossing procedures which are more stringent than Coast Guard requirements. See
discussion in subsequent sections of this text. WA Admin. Code 317-21-345).

\textsuperscript{329} \textit{Intertanko v. Lowry}, case no. C 95-1096 was filed on July 17, 1995, in the United States
District Court, Western District of Washington at Seattle. The case went to trial in October,
1996, and a decision was rendered by Judge John C. Coughenour on November 18, 1996.
preempted by federal law and they violated the Commerce Clause of the Constitution.

When this thesis was first drafted, the Intertanko case had not yet been decided. The following section of this thesis contains a collection of Supreme and Federal Court decisions regarding the extent to which a state may legally regulate vessel traffic in order to prevent oil pollution in state waters. Many of these cases were examined by the court which recently decided the Intertanko case. A summary of *Intertanko v. Lowry* is included with these cases, and although the decision may yet be appealed to a higher court, the court’s reasoning in the Intertanko case builds upon many of the principals established in earlier case law. The Intertanko case also presents a thorough analysis of preemptive issues related to oil pollution prevention. This analysis is especially significant to the consideration of the oil spill law in Rhode Island and in other states, because it is the first time a court has attempted to interpret the preemptive doctrine since the enactment of the Oil Pollution Act of 1990. This thesis has asserted that the non-preemption language in OPA 90 would make it difficult to establish federal preemption of most state oil pollution prevention laws. The Court’s decision in Intertanko supports this assertion.

Although the Intertanko decision is most directly relevant to the legal stature of the Rhode Island oil spill prevention law and other, similar legislative initiatives, it is important to understand the progression of decisions which have been rendered by the Federal Court system regarding the jurisdictional boundaries between state and federal regulatory authority. In reading the following case summaries, it is useful to bear in mind the two factors which the court, in each case, is attempting to balance: the right of the state government to protect its local environment against the threat of vessel-borne oil pollution,
and the priority of maintaining national consistency and uniformity in maritime law, particularly those laws which impact upon vessels involved in interstate commerce.

Legal Precedents for State Regulation of Commercial Maritime Industries: An Analysis of Relevant Supreme and Federal Court Decisions

Aaron B. Cooley v. the Board of Wardens of the Port of Philadelphia

Cooley v. Board of Wardens is the first Supreme Court decision to recognize that federal protection of interstate commerce does not preclude the passage of certain state laws which might impact upon maritime commerce. This case was not specifically concerned with oil pollution; rather it involved a vessel owner challenging a Pennsylvania law which required pilotage in state waters. This law obviously impacts navigation, and as such it was argued that it violated the sections of the U.S. Constitution which govern uniformity of interstate commerce regulations. The court wrote that “the mere grant of the commercial power to Congress, does not forbid the States from passing laws to regulate pilotage. The power to regulate commerce includes various subjects; upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in Congress in the former, but not so in the latter class.”

330 53 U.S. 299 (1851).

331 The Pennsylvania law was challenged as violating the first and third clauses of the eighth section, first article; the first and second clause of the tenth section, article one; and the fifth clause of the ninth section of article one.

332 53 U.S. 299 (1851).
Cooley. v. Board of Wardens suggests that there are times when local concerns may be important enough to outweigh the need for uniform rules governing interstate commerce, and that in such cases a state may develop regulations which are specific to the waters of that state. This decision provides a building block for later cases, where the courts begin to define more clearly the circumstances under which a state may be justified in developing discrete regulations that directly impact interstate commerce.

Kelly, director, et al. v. Washington ex rel. Foss Co.333

In Kelly v. Washington, the Supreme Court considers whether a Washington State regulation, which requires inspection of the hulls and machinery of motorized tugs, are legal and valid. At the time of this decision, no federal law or regulation existed which addressed the inspection of this class of vessels. The Washington law334 was challenged based on the assertion that it interfered with interstate commerce. In deciding this case, the court identified three situations in which state regulation of interstate commerce should be considered invalid: (1) if the state regulation conflicts with an express regulation by Congress; (2) if the subject at hand requires uniformity of regulation so that state action is completely inappropriate in the absence of federal action, or (3) where federal regulation already exists. The court, in this decision, determined that because there was no provision in federal law which addressed the inspection of the hull and machinery of motorized tugs, that the state was free to legislate in that area in order to insure safety and determine seaworthiness of vessels. In this decision, however, the court attempted to

333 302 U.S. 1 (1937)

differentiate among situations where state regulation should be considered permissible, and those situations where rule-making should occur at the federal level. The language of the decision, however, leaves open for future consideration the issue of determining exactly when a state regulation might be inappropriate:

"...the State may protect its people without waiting for federal action, providing the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which...may...pass beyond what is plainly essential to safety and seaworthiness,...such requirements, if imposed at all, must be through the action of Congress...Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

The ambiguities in this language are addressed further in subsequent Court holdings.

**Huron Portland Cement Co. v. City of Detroit et al.**

The Huron Cement decision holds that a state may enact and enforce pollution prevention statutes which impact upon industries involved in interstate commerce when that state is exercising its police power to prevent ship-to-shore pollution. At issue in this case were the criminal provisions in the city of Detroit's Smoke Abatement Code. The Huron Portland Cement Corporation challenged the legal stature of these provisions after two of the corporation's ships were charged with violations of the Detroit ordinance. The two ships in question discharged smoke while docked in Detroit during the course of cleaning the boilers on board. The duration and density of the smoke

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335 Justice Hughes, 302 U.S. 1 (1937).

emitted violated the Smoke Abatement Code, therefore the two ships were charged with violations.

Huron Cement challenged the Detroit law based on the fact that the boilers and equipment on board the two ships which discharged the smoke were approved and licensed according to federal standards for interstate commerce. Huron Cement further claimed that the Detroit ordinance unduly burdened interstate commerce. However, the Supreme Court viewed the Detroit ordinance, which was enacted solely to protect the health and welfare of the city's residents, as a clear expression of local police power. Justice Stewart wrote that, "In the exercise of that [police] power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."337

The concept of concurrent state and federal jurisdiction over issues of interstate commerce and general maritime law is extremely important in the field of marine pollution prevention. Justice Stewart further elaborates on this concurrency, maintaining that although the Constitution gives Congress power to regulate interstate commerce, the States are not precluded from legislating on issues which impact the health, safety, and life of their citizens, even when such legislation might indirectly impact upon commerce. Lastly, the Huron Cement decision establishes that the mere possession of a federal license does not remove a ship from the jurisdiction of States and municipalities. Federally licensed ships must still respect local acts of police power, including local pilotage laws,338 local quarantine laws339, local safety inspections340, or the

337 Ibid.


339 Morgan's Steamship Co. v. Louisiana Board of Health, 118 U.S. 455.

local regulation of wharves and docks.\textsuperscript{341}

\textbf{Askew v. American Waterways Operators} \textsuperscript{342}

In 1973, the U.S. Supreme Court decided a case which involved an industry challenge of one state’s attempt at preventing oil pollution. In 1970, the state of Florida enacted the Florida Oil Spill Pollution Prevention Act\textsuperscript{343}. This law required that additional gear requirements for tankers operating in Florida waters, and imposed strict liability for oil spill damages within that State. This law was challenged by the American Waterways Operators, an organization of U.S. tank vessel operators. The Supreme Court overturned a District court ruling and held that there existed no Constitutional or statutory impediment which would prevent Florida from enacting such a law to protect its waters from the danger of oil spills. The language of this decision was quite clear in stating that federal admiralty jurisdiction should not overpower a state’s ability to prevent oil spills. The court wrote:

"we find no constitutional or statutory impediment to permitting Florida...to establish any 'requirements or liability' concerning the impact of oil spills on Florida's interests or concerns. To [do so]... is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage--an insidious form of pollution of vast concern to every coastal city."\textsuperscript{344}

\textsuperscript{341} Packet Co. v. Catlettsburg, 105 U.S. 559.

\textsuperscript{342} 411 U.S. 325 (1973)

\textsuperscript{343} Fla. Laws Ch. 90-54.

\textsuperscript{344} Ibid.
Ray, Governor of Washington, et al. v. Atlantic Richfield Co. et al.\textsuperscript{345}

The 1978 Ray v. Atlantic Richfield Co. (Arco) decision results from an industry challenge of the Washington Tanker Law\textsuperscript{346} which regulated the size, design, and movement of oil tankers in Puget Sound. This law included a pilotage requirement for all tankers over 50,000 DWT (dead weight tons); a requirement that all tankers between 40,000 and 125,000 DWT meet certain design and safety standards including minimum shaft horsepower, double bottoms, two radars, and navigational position location systems; a requirement that all tankers which do not satisfy these requirements use an escort tug; and a ban on the operation of all tankers over 125,000 DWT in Puget Sound. In this case, the Court held that the State was free to require state-licensed pilots and tug escorts\textsuperscript{347}, but that the State was preempted from enforcing state tanker design standards and from establishing maximum tanker size limits because these regulations interfered with the jurisdiction conferred upon the Coast Guard by the Ports and Waterways Safety Act of 1972.

In the Ray decision, Justice White recognizes that, in considering whether a state’s police power is preempted by federal law, it is important to determine whether Congress clearly intended that the states be prohibited from regulating the subject matter in question. The Court, in Ray, applies a two-stage analysis to determine whether state law is preempted in any given area. The first step is to consider whether Congress either implicitly or

\textsuperscript{345} 435 U.S. 151 (1978).

\textsuperscript{346} Ch. 125, 1975 Wash. Laws, Wash. Rev. Code sec. 88.16.170 et seq.

\textsuperscript{347} Although in the case of tug escorts, the Court notes that the Washington law is valid only unless and until the Secretary of Transportation establishes tug escort provisions for Puget Sound.
explicitly declared that the States are prohibited from regulating a certain issue. Congress may imply preemption by regulating an area so pervasively as to allow no room for state regulations. The second step in determining whether preemption applies is to determine whether the state law conflicts with any federal law. If such a conflict occurs, federal law will preempt any state law which might serve as an obstacle to implementation or enforcement of the federal statute.

In *Ray*, the Court determined that specific sections of the Washington Tanker Law were preempted because Title II of the Ports and Waterways Safety Act of 1972 expressed the intent of Congress that a uniform federal regime be established to control the design of oil tankers. This provision of the PWSA establishes the clear intent of Congress that construction and design standards for oil tankers be an issue of exclusively federal control. The *Ray* decision also discusses other considerations which might affect the analysis of state law preemption. In justifying the legitimacy of the tug escort provisions, the Court notes that such requirements, regardless of the fact that they may vary from port to port, do not impede the “free and efficient flow of interstate and foreign commerce.”

*Chevron U.S.A. v. Hammond* in *Chevron v. Hammond*, a Federal Court of Appeals reviewed an Alaska statute which prohibited the discharge of ballast water from tankers

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into the waters of Alaska. Chevron challenged this law, based on the fact that the tankers were in compliance with Coast Guard design standards which provided that the ballast discharge was “clean” by federal and international standards. However, the Court held that it was not physically impossible for a vessel to comply with both the Alaska statute and the relevant Coast Guard regulations, and that there is no conflict between the two laws.

This decision recognizes that state regulations may apply to vessel equipment, such as ballasts, if the regulations are intended for environmental protection. The court in this case considers the elements of preemption, as well as precedents such as Ray v. Arco, in making the following determination:

“While design standards need to be uniform nationwide so that vessels do not confront conflicting requirements in different ports and so that the Coast Guard can promote international consensus on design standards, there is no corresponding dominant national interest in uniformity in the area of coastal environmental regulation. Here, in fact, the local community is more likely competent than the federal government to tailor environmental regulations to the ecological sensitivities of a particular area.”

In the Chevron decision, the court is recognizing that a concurrent jurisdiction exists, whereby Congress intended that stricter state standards for oil pollution be enforced in state waters, in addition to Coast Guard regulations issued under the PWSA. The court here is suggesting that not only are the states not preempted from enacting pollution prevention regulations, there is a Congressional intent that such regulations be left to the states to enact, and that as long as no direct conflict exists between such laws and federal commerce laws, states are expected to legislate in the area of ship-borne pollution prevention legislation.

351 Ibid.
The International Association of Independent Tanker Owners (Intertanko) v. Mike Lowry, et al.352

Intertanko v. Lowry is the only case summarized herein which was decided after the enactment of the Oil Pollution Act of 1990. This fact is important because Intertanko v. Lowry involves a preemptive challenge of the Washington State Best Achievable Protection Standards (BAPS), a series of vessel standards and regulations which effect oil tankers operating in Washington State waters, asserting that these laws and regulations are preempted by federal law. This challenge leads the court to focus directly upon the non-preemption clause in OPA 90, which was discussed in previous sections of this thesis.353 Intertanko also claims that the Washington oil spill laws violate the Commerce Clause and the Foreign Affairs Clause of the U.S. Constitution. The Intertanko complaint charges that sixteen of the regulations promulgated by the Washington Office of Marine Safety as part of the BAPS are invalidated by federal law. These regulations include state-level requirements for event reporting, watch standing practices, navigational safety, engineering and monitoring practices, tests and inspections, shipboard emergency drills, written voyage plans, personnel training, drug and alcohol policies, personnel evaluation, work hour limits for crew members, language requirements for crew members, record keeping, management practices, navigational technology, and notification of potential onboard safety hazards.

Intertanko asserted that these requirements of the Washington law improperly intruded into an area controlled by the federal government, which establishes through the U.S. Coast Guard specific standards and requirements

352 Case No. C95-1096C. Decided November 18, 1996, United States District Court, Seattle, WA.

353 See discussion page 76.
for tankers operating in U.S. waters. The court tests this claim by analyzing the boundary between state and federal regulatory authority as it has been determined through past court rulings. The Intertanko court looks to the Ray v. Arco decision for direction, and includes the following quote from that 1978 Supreme Court ruling:

"[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." \(^{354}\)

Because the Oil Pollution Act of 1990 explicitly allow for concurrent jurisdiction of the state and federal government in the field of oil spill prevention, the court in Intertanko reasons that neither implicit nor explicit preemption of state regulatory authority may be inferred. The court continues with this reasoning and asserts that conflict preemption of a state law, which occurs when compliance with both a state and federal law or regulation is impossible, also does not apply in Washington State. The Intertanko court closely analyzes not only the wording of the non-preemption language in OPA 90, but also the placement of this clause within the legislation. The court reasons that because OPA 90 contains provisions for personnel qualifications, manning standards, vessel operation, design, and construction, the inclusion of an explicit non-preemption clause in the Act allow for concurrent state jurisdiction in all of these areas. The Oil Pollution Act clearly provides the opportunity for states to add to any area of the body of existing federal legislation, as long as such state regulations do no conflict with any provisions of existing federal law.

The Intertanko decision provides clear reasoning to support the validity of the Washington State oil pollution prevention standards. One important clarification made by the Intertanko court, which leaves an important question unanswered, relates to the distinction between design standards and operational requirements. The court notes that in the Conference Report for OPA 90, it was stated that the new law was not intended to eradicate the holding in *Ray v. Arco*. The Intertanko court interprets this as suggesting that state-level design and construction standards may still be preempted by federal law.\(^{355}\) However, the *Ray* decision, and the subsequent *Chevron v. Hammond* holding, are interpreted by the Intertanko court as indicating that although “state regulation of oil tanker design and construction is impliedly preempted by federal law,”\(^{356}\) “State regulation of tanker operations ‘arising from the peculiarities of local waters...’ is not subject to implied field preemption.”\(^ {357}\)

The *Intertanko* decision concludes that the Washington oil spill prevention statutes and regulations are constitutionally valid, and are not preempted by federal law. It is very likely, however, that the Intertanko decision will face an appeal in the near future.

\(^{355}\) See Supra note 5, *Intertanko v. Lowry*. Although the Intertanko court does note that the non-preemption language in OPA 90 may not specifically clear the way for state-level promulgation of vessel design and construction standards, there are other portions of the Intertanko decision which may be interpreted as suggesting that a state-level double hull requirement could be upheld if it were presented in a certain manner. Overall, the Intertanko decision suggests that many of the provisions of the Rhode Island oil spill act would likely be upheld in a similar court challenge. However, despite the speculative language in the Intertanko case, a federal court has not yet ruled on a state-level double hull requirement such as that in place in Rhode Island, in light of the non-preemption clause in OPA 90.

\(^{356}\) *Ray*, 435 U.S. at 164-64.

\(^{357}\) *Ray*, 435 U.S. at 171.
Environmental Law meets Maritime Law

In attempting to delineate the boundaries between state jurisdiction for the purpose of pollution prevention and federal admiralty jurisdiction, one author notes that state laws which “contravene the uniform maritime law of the United States may run afoul of the U.S. Constitution.” It is this very conflict between the need for uniformity in maritime law, and the transfer of regulatory authority to state governments in issues of environmental law which make these boundaries so difficult to demark. The “polluter pays” principle is central to the Oil Pollution Act of 1990 as well as several other environmental laws, and indeed this concept has been characterized as “the crux of environmental policy as it has evolved in the United States.”

Polluter pays policies, which focus on punishing the polluter by attaching considerable liability and penalties to the individual or company responsible for a pollution event, relies heavily on state regulatory authority. Traditionally, environmental legislation which uses this approach delegates a great deal of authority to the state government, and does not preempt states from adopting environmental policies which are more stringent than federal standards.

The problem with oil spill legislation is that while the impacts of oil spills are localized, prevention of oil pollution requires regulation of potential sources of pollution. These potential sources are primarily vessels involved in interstate and often international commerce.

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358 Eubank, 149.


360 Cameron, 3.

361 Ibid.
pollution prevention, coupled with the fact that the state government is commonly the source of the most aggressive pollution prevention statutes, suggests that states should adopt policies which target those industries which pose the greatest threat of spilling oil local waters. However, the need for consistency in maritime law suggests that the federal government is the proper arena for promulgating regulations governing vessels involved in interstate commerce.\textsuperscript{362}

In the words of Jean Cameron, Executive Director of the BC/States Oil Spill Task Force and national authority on oil spill prevention, \textquote{The authority of our national government derives from [the] states, and that federal relationship is made even more salient by current political trends. Not only is increased authority for regulation and policy implementation being returned to the states by this Congress, but the sitting Supreme Court is considered to be strongly supportive of states' rights and conservative in its interpretation of this Constitutional relationship...If Congress reduces federal authority under the Clean Water Act and the Endangered Species Act, and reduces the budgets available to the programs that remain, state ocean management authority, both within and beyond three nautical miles...assumes greater prominence as the governing legal authority.} \textsuperscript{363}

With this discussion of blurred jurisdictional boundaries and dueling state and federal interests in mind, this thesis will now examine the contents of various pollution prevention statutes which have been enacted in several states. Many of the regulations and policies contained in these statutes are subject to two forms of interpretation. They may be interpreted as intruding upon federal admiralty jurisdiction and threatening the uniformity of maritime law. Alternately, such provisions may be considered as a reasonable extension

\textsuperscript{362} Eubank, 163.

of state regulatory authority for the purpose of preventing vessel-source oil pollution.
In the nearly six years since the Oil Pollution Act of 1990 was enacted as U.S. law, numerous coastal states, as well as several states adjacent to inland waterways, have introduced, and in many cases passed, oil spill prevention and response legislation. To adequately present and analyze the contents of each state's strategy is beyond the scope of this project. However, it is appropriate to this discussion to provide an overview of the policies in place in several states, focusing on those provisions within the state laws which supplant or surpass federal standards or regulations for oil spill prevention and response. Upon consideration of the oil spill legislation currently in place in selected U.S. States, it will be possible to identify commonalities among pollution prevention approaches taken in various states. Likewise, this description of the most aggressive pollution prevention policies in place in various states will be useful to later discussions regarding whether the Rhode Island oil spill legislation may be considered as a continuation of a trend begun in other states.

Washington

Washington State has established one of the most progressive and comprehensive strategies for state-level prevention of oil pollution. Historically, Washington has been a frequent leader in the promulgation of proactive state regulations, as evidenced by Supreme Court decisions such as
Ray v. Arco and Kelly v. Washington. 364 In response to four significant oil spills which occurred in this state’s waters during 1993, 365 Washington developed a “Best Achievable Protection” program, 366 which is administered through the state’s Office of Marine Safety. 367 The Office of Marine Safety (OMS) was designated by the state legislature in 1991, in response to the Exxon Valdez oil spill. 368 The Best Achievable Protection (BAP) program, which was developed by the OMS in cooperation with the state’s Department of Ecology, requires that vessel operators submit detailed oil spill prevention plans outlining specific uses of procedures and technologies which a vessel must employ before it is allowed to operate in Washington waters. Although other states require submission of oil spill response plans, 369 Washington is the only state thus far to require that vessel plans also include preventative standards and policies. 370

364 Each of these cases involve lawsuits challenging pollution prevention laws in Washington State based on their perceived severity by the oil transportation industry. See summary of court cases presented in Chapter IX.

365 During 1993, four spills occurred in Washington waters. Three were bunker spills: the NOASC Forest spill in Tacoma, the Excellence in Seattle, and the Central in Longview. A fourth spill resulted when the tank barge Tidewater leaked oil into the Snake River.


367 Unfortunately, the Office of Marine Safety may have a short future in the State of Wisconsin. The OMS is currently running without funding, and the Washington legislature recently voted to eliminate the OMS altogether by 1998. There has as yet been no published information to indicate whether the recent victory of this office and the State of Washington in the Intertanko lawsuit will have any bearing upon the fate of the OMS.


369 For example, California, Alaska, Oregon and Florida, all of which are cited in subsequent sections of this text.

370 Doughton, A-1.
The BAP standards, which were recently upheld by a Federal District Court in Washington after being challenged by the industry group Intertanko,\textsuperscript{371} target four areas of vessel operations: operating procedures, personnel policies, management practices, and technology requirements. The BAP program outlines various requirements in these four categories, all of which must be satisfied by vessels operating in state waters. Vessel operators must include in their vessel plans various forms of records which document compliance with the BAP standards.\textsuperscript{372} The State may take administrative action against vessels not in compliance with the BAP programs, or against vessels whose contingency plans do not satisfy the BAP specifications.\textsuperscript{373}

There are several requirements included in the Best Achievable Protection standards which exceed federal standards, and these requirements were among the targets of the Intertanko lawsuit. There are at least two instances where crew requirements specified in the BAP standards exceed U.S. Coast Guard rules. For example, three licensed officers must be on deck of all vessels engaged in coastal tow in Washington waters outside of pilotage areas.\textsuperscript{374} The Coast Guard requires that only two such officers be present. Likewise, in Washington State, two crewmen must be onboard the tank barge

\textsuperscript{371} Intertanko, or the International Association of Independent Tanker Owners, is a Norway-based trade group which represents approximately 300 shipping company owners. Intertanko's membership represents approximately 80 percent of the world's independently owned tanker fleet.

\textsuperscript{372}WAC 317-21-140.

\textsuperscript{373}WAC 317-21-500.

\textsuperscript{374}WAC 317-32-315 (2).
during topping-off procedures, while the Coast Guard mandates that only one crew member be onboard the barge at this time. The former requirement, for the extra deck officer, was one of the targets of the Intertanko suit. Industry representatives charged that such a requirement will only lead to quicker fatigue of those officers, and will actually serve to increase the danger of unsafe coastal navigation.

Other provisions of the Washington program which exceed federal standards are bar crossing procedures, which require crew numbers and positioning in excess of Coast Guard standards. Likewise, BAP standards require more frequent shipboard drills, and equipment requirements which specify navigational and towing equipment, all of which are more stringent than federal standards. One of the most controversial requirements of the BAP program is mandatory drug and alcohol testing of all crew members on all vessels, foreign and domestic, who enter state waters. The Coast Guard only tests offices on U.S.-registered vessels.

375 Topping off is part of the process whereby oil is transferred between the barge and another storage facility.

376 Doughton, A-1. The court in the Intertanko suit did not rule on the effectiveness of this or other provisions of the Best Achievable Protection Standards. Rather, the focus of the court's analysis was on whether the oil prevention statutes and regulations included in the BAPS represented a legitimate exercise of state regulatory authority. The court upheld the laws in their entirety as an appropriate expression of the state's police power to protect against environmental degradation. See pages 93-94 of this thesis.

377 WAC 317-21-305 (2).

378 WAC 317-21-230 (5).

379 WAC 317-21-265.

Washington is one of four U.S. states and one Canadian province which participates in the British Columbia/States Task Force, which is a consortium of west coast states dedicated to developing effective oil pollution prevention standards. The Task Force exists primarily as an information-sharing forum among the pollution prevention agencies of each of these five political bodies, and it has allowed the four U.S. states which participate to develop similar approaches toward oil spill prevention legislation and policies. This agreement among state agencies has been largely successful in promoting the development of laws and policies which are consistent among west coast states. 381

California

Although Washington is often heralded as the west coast leader for progressive oil spill prevention legislation, California was actually the first west coast state to introduce comprehensive oil spill prevention legislation in the post-OPA 90 era. This legislation, the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act of 1990, 382 was actually the model which was used by Washington State in developing their own legislation. 383 This Act accomplished a number of objectives, many of them resulting from the establishment of the State Interagency Oil Spill Committee (SIOSC). This body is responsible for the development and review of all guidelines related to oil

381 Jean Cameron, Executive Director BC/States Task Force, composite information from phone conversation with the author, February-March, 1996.

382 Cal. Govt. Code, Title 2, Sec. 8670.

spill contingency planning and response.\textsuperscript{384} This act also created an Administrator position within the Department of Fish and Game.\textsuperscript{385} This individual acts at the direction of the Governor to implement state activities related to oil spill issues.\textsuperscript{386}

California has developed oil spill contingency plan requirements, vessel operating standards, and financial responsibility requirements which are all on par with the requirements in Washington State.\textsuperscript{387} Although the California statute does not venture as far beyond federal standards as the BAP program in Washington, the California law does assert that the state may require tug escorts for any tankers operating in state waters, at the discretion of the Administrator.\textsuperscript{388} The California contingency planning requirements\textsuperscript{389} also mention "best achievable protection," a phrase which originates in the California statute but was later adopted by the State of Washington.

The California law confers upon the Administrator the authority to "inspect or cause to be inspected" any vessel transiting state waters. The Administrator is required to evaluate Coast Guard inspection programs, and report to the state legislature any shortcomings. If shortcomings are found to exist, the Administrator is required to implement state regulations for vessel

\textsuperscript{384}Cal. Govt. Code, 8670.5, 8674.10 (a).

\textsuperscript{385} Cal. Govt. Code, 8670.4.

\textsuperscript{386} Ibid, 8670.5.

\textsuperscript{387} Beaver et al., 804.

\textsuperscript{388} Cal. Govt. Code, 8670.17.

\textsuperscript{389} Contingency plans involve vessel-specific procedures which are to be followed in the event of an oil spill. Contingency plans may specify that a vessel carry certain types of oil removal or safety equipment, and may provide for the periodic conducting of drills.
inspection, which are not to duplicate any aspect of the Coast Guard program.\textsuperscript{390} The Administrator is also required to develop a Vessel Traffic Service System, in consultation with the Coast Guard.\textsuperscript{391}

Additionally, the California statute provides for financial responsibility requirements,\textsuperscript{392} criminal and civil liability penalties,\textsuperscript{393} and provisions for recovery of claims against the responsible party.\textsuperscript{394} While none of these provisions of the California law could face reasonable challenge based on federal preemption, the expansive and comprehensive nature of California’s oil pollution statute certainly provides evidence to the theory that the body of state law which governs oil pollution issues concurrently with OPA 90 is at least as comprehensive and arguably more effective than the federal statute.

\textbf{Alaska}

It is the Alaska Department of Environmental Conservation (ADEC) which has been charged with protecting the state’s vast natural resources from the threat of oil pollution.\textsuperscript{395} However, in the aftermath of the \textit{Exxon Valdez} spill, this agency received a great deal of criticism which led to significant revision of Alaska’s pollution prevention laws.\textsuperscript{396} ADEC is now

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{390} Cal. Govt. Code, 8670.16-24.
  \item \textsuperscript{391} Ibid, 8670.21.
  \item \textsuperscript{392} Ibid, 8679.37.
  \item \textsuperscript{393} Ibid, 8670.65
  \item \textsuperscript{394} Ibid, 8670.56.5, 8670.67.5.
  \item \textsuperscript{395} Alaska Stat. 46.03.010(a).
  \item \textsuperscript{396} Beaver et al., 794.
\end{enumerate}
\end{footnotesize}
responsible for preparing and annually reviewing a statewide master oil spill plan.\textsuperscript{397} The master plan requirements include review of new technologies available for oil spill prevention and cleanup,\textsuperscript{398} the scheduling of unannounced oil spill response drills,\textsuperscript{399} and annual review and approval of the plan by the Alaska State Emergency Response Commission.\textsuperscript{400}

The State of Alaska also has discharge prevention and contingency plan requirements, oil spill response requirements, and financial responsibility requirements.\textsuperscript{401} Once again, these response, contingency, and financial responsibility requirements are extensive, and in the case of Alaska many of these requirements are directly related to the size of the vessel and amount of cargo on board.\textsuperscript{402} Lastly, Alaska’s statute contains provisions for containment and cleanup of spills,\textsuperscript{403} claims procedures,\textsuperscript{404} and civil penalties for responsible parties.\textsuperscript{405}

\textsuperscript{397} Alaska Stat. 46.04.200 (a).

\textsuperscript{398} Ibid, 46.04.200(c)(1).

\textsuperscript{399} Ibid, 46.04.200 (c)(4).

\textsuperscript{400} Ibid, 46.04.200(c)(5).

\textsuperscript{401} Ibid, 46.04.030(a)-(h).

\textsuperscript{402} For example, response capability requirement and financial responsibility increase as vessel size and cargo capacity increase. See Alaska Stat. 46.04.040 (c),(e).

\textsuperscript{403} Alaska Stat. 46.04.020 (b).

\textsuperscript{404} Ibid, 46.03.760, 46.03.780, 46.03.822.

\textsuperscript{405} Ibid 46.03.760.
Wisconsin

"...In limited areas of the law, Midwestern states are now preparing to move forward with legislation designed to supplement section of the Oil Pollution Act of 1990... [by] preparing legislation to require tank vessels operating on the Mississippi River in State waters to be of double hull construction under state law." 406

In the 1995 legislative session, an important bill was introduced into the Wisconsin House of Representatives. 407 Although Wisconsin is not a coastal state, the Upper Mississippi River provides this state with several extremely active ports, and thus with the perpetual threat of oil pollution from the frequent tank barge traffic in that area. Wisconsin's legislation was not preceded by any catastrophic spill; it was introduced as a truly preventative measure in response to serious concern that Wisconsin might experience a tank barge grounding or spill akin to those which have occurred in other U.S. ports.

The Wisconsin bill has a double hull requirement for tank barges which mandates that all vessels under 5,000 gross tons which enter state waters must be of double hull construction. The two exceptions to this provision are vessels in danger seeking refuge, or single-hulled vessels accompanied by an escort tug. The bill also prohibits the open burning of refuse on commercial vessels. This activity has posed a significant water and air pollution problem in and along the Upper Mississippi River, and this provision, which allows for the assessment of penalties against violators, was designed to limit this


undesirable practice.

On April 25, 1996, AB495 passed the Wisconsin General Assembly and was signed into law by that state's governor, making Wisconsin the first state to enact a double hull provision for vessels under 5,000 gross tons. Although there have been no lawsuits filed against Wisconsin on the basis of this requirement, it is likely that the double hull provision will withstand legal challenge due to the fact that the Oil Pollution Act of 1990 does not include vessels under 5,000 gross tons in its double hull phase-in requirements. Likewise, an examination of the line of case law presented in Chapter VIII suggests that Wisconsin's double hull provision could withstand preemptive challenge.

Relationship Between Oil Pollution Prevention Statutes enacted by West Coast States and Wisconsin and the Legislative Response to the North Cape Spill in the Northeast

The admittedly brief summary of pollution prevention statutes which are currently in place in selected U.S. states is presented in this text to demonstrate several points. Most importantly, these summaries are intended to provide a better understanding of the extent to which state pollution prevention statutes are truly comprehensive legislative strategies, addressing virtually all of the aspects of oil spill prevention, liability, and response which are contained in OPA 90 and even, as in the case of Washington state, legislating in areas where OPA has not. Many other states have developed oil pollution statutes, the contents of which are beyond the scope of this analysis. However, an examination of the laws currently in place in Texas, Oregon, New
York, Maine, Virginia, and Florida, among others, would yield summaries similar in nature in content to the four states’ law summarized above.

Of the four states outlined above, Washington is generally considered to have the most comprehensive program for prevention of vessel-source oil pollution. The Best Achievable Protection Standards in place in that state force vessel owners to comply with a variety of operating requirements which are much more specific than any federal regulations. Several components of the BAP Standards are closely mirrored in the contents of the Rhode Island oil spill law. These include reporting requirements, drug and alcohol testing requirements, and watchstanding practices. Both Washington and Rhode Island require that towing vessels have an extra licensed mate onboard, and this exceeds the federal requirement. The BAP Program was, in fact, used as a model during the drafting of the Rhode Island law. The Rhode Island bill, however, focuses specifically on specific aspects of the coastal tug and tank barge industry, whereas the Washington Best Achievable Protection Standards are more broadly focused. Nonetheless, the outcome of the recent Intertanko lawsuit suggests that Rhode Island’s newly enacted oil pollution statute stands an excellent chance of surviving preemptive challenge should the new law result in future litigation. However, although the new Rhode Island law borrows many of its provisions and approaches from the Best Achievable Protection Standards which were recently upheld by a Federal District Court, there are several components of the Rhode Island legislation, such as the double hull and tug escort requirements, which are even more aggressive than the components of the Washington oil spill prevention statute.

The legislation which was enacted in Wisconsin and Rhode Island during the past year directly impacts upon the industries involved in the coastwise and inland transport of oil in this nation. More so than even the Washington Best Achievable Protection Standards, the Rhode Island and Wisconsin laws target specific structural improvements on vessels which transport oil. In a sense, then, these strategies may be considered as representing the next step in a trend toward state oil spill prevention strategies which take far stronger regulatory action than the Oil Pollution Act of 1990. The next chapter reexamines the provisions of the Rhode Island Oil Pollution Prevention and Control Act to determine the extent to which that law, as well as the recently enacted oil barge law in Wisconsin and the legislative proposals in Connecticut and Massachusetts, may be considered as a continuation of a trend begun in states such as California and Washington.
XI. ANALYSIS OF RHODE ISLAND’S OIL SPILL LAW: UNCONSTITUTIONAL INTRUSION OR CONTINUATION OF A TREND?

Can the R.I. law withstand a legal challenge?409

Any discussion of the legal stature of legislation such as the Rhode Island Oil Spill Act necessarily leads back to the non-preemption language contained in the Oil Pollution Act of 1990. The following statement is contained in a summary and analysis of the Oil Pollution Act prepared by a Washington, D.C. law firm shortly after the law was enacted.

“The non-preemption provision may open the door to state regulation of vessel pollution equipment, or, arguably, open it even wider to state regulation of design, construction, equipment and manning standards. For instance, the state of California has recently enacted legislation that includes provisions for state enforcement of the federal Act’s requirement for double hulls and imposing navigation equipment and other technical requirements for tankers operating in state waters.”410

The author of this statement was speculating that one of the implications of the non-preemption language in OPA 90 would be the broadening of state regulatory authority over vessels equipment standards and operating

409 The text contained in this section was drafted several weeks previous to the Intertanko decision. This analysis has not been substantively changed since the rendering of this decision, however it should be noted that not only does the Intertanko decision provide support for the conclusions drawn based on the analysis in this section, but the reasoning process presented in the text of the Intertanko decision is strikingly similar to the analysis of preemption presented herein.

procedures. This forecast has indeed proved accurate, as evidenced by legislation such as the Rhode Island Oil Spill Act, the double hull barge bill in Wisconsin, and the legislative proposals for double hull requirements in Massachusetts and Connecticut during the 1996 legislative session.

The possibility still remains that the Rhode Island oil spill law, like the Washington Best Achievable Protection Standards, will face a court challenge from the tug and barge industry as the implementation date for the manning and double hull requirements approaches. The analyses presented in this thesis, regarding the non-preemption language in OPA 90 and the line of federal court decisions supporting states' rights to implement pollution prevention laws, suggest that the Rhode Island law will likely withstand a preemptive challenge. However, further consideration of this question is relevant to the broader question of how, and to what extent, state regulatory authority over the oil transportation industry has expanded in the wake of OPA 90.

**Implications of non-preemption language in OPA**

When the inclusion of non-preemption language in the Oil Pollution Act of 1990 was debated in Congress, the Exxon Valdez spill was fresh in the minds of most Americans, and Congressional leaders were committed to developing a bill which would provide for the highest degree of oil spill prevention at both the state and national level.\(^{411}\) Non-preemption was widely embraced as a mechanism for ensuring that this level of protection was attained, and representatives of the coastal states, the administration, and environmental

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groups joined with Congressional Leaders such as Senator Mitchell and Representative Studds in opposing preemption of state oil spill laws by the federal Oil Pollution Act. The primary supporters of preemption of state laws by OPA were, not surprisingly, representatives of the oil industry. The primary concerns of these proponents of preemption were ensuring that a uniform code exist for oil spill prevention and response, in order to avoid overlapping jurisdiction, extensive litigation, and potential confusion during the response to a spill.

Referring back to the discussion of preemption presented earlier in this thesis, there are essentially three mechanisms for federal preemption of a state law or regulation: field or implied preemption, explicit preemption, and conflict preemption. The non-preemption language in OPA 90 effectively eliminates the possibility for two of these three scenarios. The inclusion of the non-preemption clause precludes the likelihood that OPA can be viewed as preempts state oil pollution legislation on the basis of either implied or explicit preemption. For example, it is reasonable to assume that the Oil Pollution Act of 1990, which was intended by Congress to provide a comprehensive, national framework for oil pollution prevention, liability, and response, could be interpreted by the courts as providing for field preemption of all state oil spill laws. Field preemption occurs when a federal law or laws in a given area are so comprehensive as to not allow for the imposition of additional


414 See Chapter IX.
laws at the state level. However, because OPA 90 explicitly provides for non-preemption of state law, it is impossible to interpret OPA as providing for field, or implied preemption. Likewise, the Oil Pollution Act contains no language which would assert explicit preemption; on the contrary, the Act provides for explicit non-preemption. Therefore the possibility for explicit preemption of state laws by OPA is nonexistent.

There is one final test for establishing preemption of state laws, and that is the test for conflict preemption, whereby a state law or regulation is necessarily preempted by federal law if that state law conflicts with or contravenes a federal statute or regulation. When considering a hypothetical court challenge of a state oil spill statute such as the Rhode Island Oil Spill Pollution Prevention and Control Act, the court would likely test for conflict preemption, and attempt to determine whether there are any elements of the Rhode Island law which directly conflict with provisions of the Oil Pollution Act. Consideration of conflict preemption would involve a two-tiered approach. First, the provisions of the Rhode Island oil spill law must be compared to existing federal oil spill regulations in order to determine areas of overlap and potential conflict. Once these areas of potential conflict have been identified, the court would likely consider past federal court decisions regarding state laws which venture into the traditionally federal realm of vessel-source pollution prevention. This analysis of case law is important because court holdings play an important role in establishing and interpreting principles of maritime law.415

415 Refer to discussion in Chapter IX. See also Eubank, 156.
Analysis of Case Law and Relevance to the Fate of the Rhode Island Oil Spill Pollution Prevention and Control Act

There are several important distinctions which are established by the line of cases presented earlier in this thesis, all of which are relevant to the interpretation of existing and proposed state oil pollution statutes. This case law helps to resolve many of the preemption issues which arise in the context of state pollution prevention, and it also presents a set of "guidelines" which enumerate the types of state regulations the courts have generally upheld. These distinctions are extremely important to states as they attempt to draft and implement oil spill prevention legislation.

As the case law presented in Chapter IX clearly demonstrates, Congressional intent is central to determining whether state legislation is preempted in a particular area. All of the cases cited in this paper occurred before the enactment of the Oil Pollution Act of 1990. This Act, which is extremely broad and addresses issues ranging from vessel design and construction standards to contingency planning for oil spills and natural resource damage assessment protocol, might easily be interpreted by the courts as implying preemption of state laws. However, as the previous discussion of the non-preemption language illustrates, OPA explicitly provides for the maintenance of concurrent state jurisdiction.

416 See discussion of federal court decisions, Chapter IX.

417 For example, when the state of Wisconsin developed and introduced an oil prevention statute into the Wisconsin House of Representatives (AB 495), the Bureau of Legal Services in that state developed a legal analysis, which contained requirements such as double hulls and tug escorts. This analysis relied heavily on the decisions in Ray v. Arco and Chevron v. Hammond, both of which address situations where state regulations effect commercial vessels. See Michael A. Lutz, "Legality of Legislation Requiring Double Hulls," unpublished memorandum, Wisconsin: Feb. 8, 1995, 8 pp.
The Oil Pollution Act, in many ways, follows suit with other pieces of federal environmental legislation, such as the Superfund Act and the Clean Water Act, both of which have set federal standards as minimum levels for environmental quality, and have allowed individual states to enact stricter standards as they see fit.\textsuperscript{418} However, this characteristic of many federal environmental statutes has led to a situation where federal preemption of state laws (or the threat of preemption) has begun to occur more and more frequently in this country. In the history of our nation, less than 500 total state laws have actually been preempted by the federal government. However, nearly half of these preemptions have occurred within the past two decades, and many of these have involved environmental issues where state regulations have moved considerably beyond federal standards.\textsuperscript{419}

With respect to oil pollution prevention, OPA 90 explicitly allows for states to develop their own liability schemes, which may allow for unlimited liability at the state level, as well as for the state to separately determine civil or criminal negligence in the instance of spills in state waters. The Oil Pollution Act also protects a state’s right to participate in response and cleanup efforts when an oil spill effects that state’s waters or shorelines. However, the language of OPA does not establish to what extent state laws may move beyond OPA standards with respect to preventative measures such as safety and operational standards aboard vessels involved in the interstate transport of oil. In such an instance, where Congress has not legislated with respect to this issue of state-federal jurisdiction, the federal courts become an important

\textsuperscript{418} E. Perlman, "The gorilla that swallows state laws; federal preemption sounds like a technical term," \textit{Governing Magazine} Aug (1994) 82.

\textsuperscript{419} Ibid.
source of insight.\textsuperscript{420} Again, any interpretation of the legal status of state oil pollution legislation leads back to a consideration of the Supreme and Federal Court decisions cited herein.

The line of case law which was presented in Chapter IX provides insight as to where, according to the federal court system, the line between federal supremacy and state police power should be drawn. These delineations, as determined by the courts, should be considered as the foundations for determining the legal stature of the Rhode Island Oil Spill Act and other, similar, state legislative actions. In Chapter VII of this text, three provisions of the Rhode Island Act were identified as most likely to lead to an industry challenge of the law: the double hull provisions, the manned barge requirement, and the safety and navigational equipment requirements.

In order to make some assessment of the likelihood that the Rhode Island oil spill law would withstand preemptive challenge, these three provisions will be examined. The double hull provision in this bill requires that by January 1, 2001, all tank vessels entering state waters either be of double hull construction or be escorted by an additional tugboat. However, in situations of "limited visibility," all single-hulled vessels operating in state waters after June 1, 1997, must be accompanied by a tug escort. The Rhode Island bill also requires that all tank barges operating in state waters carry at least two crew members onboard at all times, unless such manning is determined by the captain to endanger the lives of the crew. All tank barges operating in Rhode Island waters must also satisfy several equipment requirements which, at the time the bill was drafted, exceeded Coast Guard

\textsuperscript{420} Eubank, 156.
standards. For example, working GPS (global positioning system) receivers, both a magnetic and a gyrocompass, and two working VHF radios must be onboard all towing vessels. Although a Coast Guard final rule issued July 3, 1996 imposes federal requirements for navigational equipment such as a magnetic compass, an echo depth-sounding device, an electronic position-fixing device, and various charts and maps to be carried onboard, there are still elements of the Rhode Island navigational equipment requirements, such as the redundant VHF radio requirement or the requirement for two types of compass, which exceed even these new federal standards.

Another controversial component of the Rhode Island legislation is the requirement that all tank barges operating in state waters must have an operable anchor system which may be manually deployed by a crew member in case of an emergency. Again, at the time the bill was drafted, the Coast Guard had developed no such requirement for tank vessels operating in U.S. waters. However, the Chafee Amendments to the Oil Pollution Act of 1990 do contain an anchoring provision. This new federal requirement, however, specifies that tank barges must carry onboard either a crew and an operable anchor, or a retrieval system or other “comparable measure”, whereas Rhode

421 On July 3, 1996 a final rule was issued by the Coast Guard regarding navigational equipment aboard towing vessels. This rulemaking renders several of the Rhode Island navigational equipment requirements redundant with federal law.

422 Fed. Reg., vol. 61, no. 129.

423 33 CFR part 164.72(a)(4).

424 33 CFR part 164.72(a)(5).

425 33 CFR part 164.72(a)(6).

426 33 CFR part 164.72(b)(1).
Island specifically requires an anchor and crew or, in certain circumstances, a retrieval device. The adoption of this provision at the national level, however, will probably work to the benefit of the State of Rhode Island, because the manning and anchor requirement in that state may be viewed as simply “choosing” which federally mandated barge anchoring/retrieving system must be employed by vessel operators in Rhode Island. There is nothing in the Rhode Island manning and anchoring requirement which may be viewed as directly conflicting with the new federal standard.

An analysis of the double hull requirements in Rhode Island suggests that this provision is also very likely to withstand legal challenge. The justification for the double hull provision is as follows. In the Rhode Island legislation, the double hull provision is clearly intended as an environmental protection measure, rather than a design or construction standard.\textsuperscript{427} Referring back to the courts’ rulings in cases such as \textit{Askew v. American Waterways Operators}, \textit{Ray v. Arco}, and \textit{Chevron v. Hammond}, the courts have held that the federal interest in environmental protection is not so dominant as to preclude the enforcement of state pollution prevention laws. In fact, more recent decisions, such as \textit{Chevron}, indicate that the courts expect that states will develop pollution prevention standards more stringent than federal laws in order to protect coastal waters.\textsuperscript{428}

The Rhode Island double hull provision is further strengthened by the fact that the state will still allow single-hulled vessels to operate in state waters if they are accompanied by an escort tug. The holding in \textit{Ray v. Arco}

\textsuperscript{427} The section in the Rhode Island law which contains the double hull requirement is actually entitled “environmental protection measures aboard tank vessels.” R.I.G.L. ch. 46-12.5-24(a).

\textsuperscript{428} See discussion in Chapter IX .
supports the tug escort provisions in the Rhode Island law, and suggests that such a requirement would be upheld if challenged in the courts. This fact would make it even more difficult to assert that the Rhode Island double hull provision is a design or construction standard. In determining whether conflict preemption might allow for the Rhode Island double hull provision to be overturned, the tug escort alternative to the Rhode Island double hull requirement will likely play an important role in determining whether the state requirement for and earlier phase-in of double hulls than required by OPA 90 is preempted by the federal law. Federal requirements for double hulls set the absolute deadline for phase-in of double hulls in most vessel classes as 2015. The Rhode Island requirement that after January 1, 2001, single-hulled vessels operating in state waters be accompanied by an escort tug does not directly contravene the intent or effectiveness of this federal standard. Based on an analysis of federal case law as well as the doctrine of preemption as it has been interpreted in the U.S. legal system, it would appear that the double hull requirement in the Rhode Island Oil Spill Act should survive a challenge of conflict preemption.

The manned barge provision in Rhode Island Act and the provision for an extra officer onboard towing vessels in both Rhode Island and Washington State have not been directly challenged in the federal court system to date, however the extra officer provision is one of the causes for the Intertanko suit against Washington. Intertanko claims that this provision is disruptive to interstate commerce and also would likely lead to hastened fatigue and therefore make towing vessel operations less safe. In determining whether either of these crew requirements, for the towing vessel or the barge, are preempted by federal law, an analysis of Coast Guard crew requirements for such vessels will be necessary. The Coast Guard clearly regulates crew size

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and qualifications aboard both towing vessels and tank barges. In fact, a Notice of Proposed Rulemaking issued recently by the Coast Guard\footnote{A final rule on licensing and training requirements for towing vessel crew members is due out in December, 1996. The contents of the proposed rule concentrate more on licensing and training than on actual watch procedures onboard vessels. This may be interpreted as allowing room for state legislation in that area.} will impose more stringent licensing requirements for masters and mates aboard uninspected towing vessels. However, in considering whether these Coast Guard regulations preempt state action, the Courts must determine whether crew issues are so pervasively regulated by the federal government as to indicate field preemption and thus allow no room for state requirements.

The non-preemption language in OPA 90 suggests that Congressional intent was to allow for concurrent jurisdiction of state and federal governments over all aspects of pollution prevention. The promulgation of crew requirements by state governments, then, must be demonstrated as primarily environmental regulations. Also, the previous discussion of the anchoring requirement in the Rhode Island law and its relationship to the Chafee Amendments demonstrated that the manning requirements in the Rhode Island law, when analyzed in the context of these recent changes in federal law, may be considered as a mere expression of state preference regarding certain pollution prevention standards which are sanctioned by the federal government.

This discussion regarding the legal stature of various provisions in the Rhode Island Oil Spill Act is purely speculative, although it is quite similar to the discussion and analysis provided by the court in the \textit{Intertanko} decision.\footnote{Again, it should be noted that the analysis presented in this thesis was drafted before the \textit{Intertanko} decision was rendered, and that it is pure coincidence that the reasoning process utilized by the court in that decision includes many of the same conclusions drawn in this thesis. See \textit{supra} note 409, page 115 of this chapter.}
Based on the analysis presented above, it seems as if there is no specific provision in the Rhode Island Oil Spill Prevention and Control Act which directly contradicts or conflicts with existing federal law. This fact, more than any other, should be taken to indicate that a preemptive challenge of any aspect of the Rhode Island law would very likely prove unsuccessful. The courts have held that a state law may affect maritime commerce and still survive preemptive challenge providing that law satisfies three conditions. It must not conflict with the purpose of a Congressional enactment. A state law must not directly conflict with or undermine characteristic features of maritime law, and it must not interfere with the “harmony and uniformity” of the federal jurisdictional scheme.\textsuperscript{431} The court in the \textit{Intertanko} suit has determined that although the provisions of the Washington State oil pollution statute do tangibly impact upon industries involved in interstate and international commerce, the potential threat to the uniformity of maritime law is, in that case, not sufficient to overrule the police power of the state to protect against environmental degradation. Should the Rhode Island oil spill law ever face a legal challenge contesting the statute’s constitutionality, the court will be forced to examine many of the same issues as confronted by the \textit{Intertanko} court to delineate where the state’s authority to protect against vessel-source pollution must yield to the need for federal consistency in laws governing maritime commerce. This is a distinction which involves far more than the provision-by-provision analysis of preemption and constitutionality presented above. However, because the Rhode Island law contains double hull and tug escort provisions which were not considered in the \textit{Intertanko} decision, a court ruling on the new Rhode Island oil spill law would further refine the

\textsuperscript{431} “State’s oil spill remedy scheme isn’t preempted by federal maritime law,” \textit{The United States Law Week} 63 no. 1030 (1994):2124.
continually evolving standard for state regulatory authority over tank vessels transporting petroleum.

One author has described this need to strike a balance between environmental protection and uniformity in maritime law as such:

"Protecting the environment is an area where the federal government and state governments should both be able to legislate. Other environmental laws follow this concept and include provisions that there should be no preemption [of state environmental protection laws] unless there is an overriding public need." 432

In considering the legal stature of the Rhode Island Oil Spill Act or the Washington Best Achievable Protection Standards, it will be left to the courts to decide whether the public need for environmental protection overrides the need for supremacy of federal law in areas effecting interstate commerce.

The Rhode Island Oil Spill Law as a Continuation of a Trend begun on the West Coast

"This bill makes Rhode Island tougher on the barge industry than are the federal government and other East Coast states, and puts it in league with Wisconsin and Washington, which have also passed comprehensive oil-barge regulations." 433

The local newspaper article which reported the signing of the new Rhode Island oil spill law contained the quote printed above, made by Rhode Island

432 Brown, 10.

Governor Lincoln Almond. This statement indicates that there is a feeling within Rhode Island government that the new law is following in the footsteps of other states with proactive pollution prevention policies, such as Wisconsin and Washington. That same newspaper article also noted that Rhode Island officials had already been contacted by representatives of other New England States requesting copies of the law, in the interest of adopting similar standards in other states. Connecticut and Massachusetts, in particular, reported to Rhode Island officials that their states were interested in implementing regulations which were as stringent as those now in place in Rhode Island.434

The Rhode Island Oil Spill Act, and the Wisconsin double hull law may be considered as a continuation of a trend which began on the west coast shortly after the Exxon Valdez spill. Even as the Oil Pollution Act of 1990 was being debated in U.S. Congress, states such as California, Washington, and Alaska had already begun to draft their own comprehensive legislative response to the Valdez spill. Summaries of various state laws addressing oil pollution prevention were included in the text of this thesis to illustrate the extent to which many states have enacted oil spill statutes which are at least as comprehensive and effective as OPA 90. This proliferation of state laws continues today, and the example of the Rhode Island legislation described in Chapter VII may be taken to indicate that the characteristics of state oil

434 Oil pollution prevention bills were introduced into the General Assemblies of both Massachusetts and Connecticut during the 1996 legislative session, however neither bill passed. According to staff members from each states' legislature, part of the reason that no spill bills were pushed through these two states was the feeling that they would wait to see what the fate of the Rhode Island bill would be. The fate of the Rhode Island bill was considered important not only in terms of its value as a precedent, but also so the Massachusetts and Connecticut could design legislation which would be consistent with the final provisions of the Rhode Island law. Martin Suuberg, General Counsel for Mass. Executive Office of Environmental Affairs, personal communication, May, 1996.
pollution statutes are becoming more targeted and aggressive. Although the Rhode Island Oil Spill Act is not as broad in scope or as comprehensive in nature as oil spill statutes in place in California and Washington, the Rhode Island Act, as well as the Wisconsin legislation, build upon many of the most aggressive components of west coast pollution prevention laws, and then move a step beyond in attempting to require double hulls on tank barges.

Attempts to Block Implementation of the Rhode Island Oil Spill Pollution Prevention and Control Act: the Regional Risk Assessment Team

The formation of a Regional Risk Assessment Quality Action Team, at the initiative of the tug and barge industry, provides perhaps the most convincing evidence that the Rhode Island Oil Spill Act is considered likely to withstand legal challenge and, more importantly, is likely to encourage other New England states to legislate in kind. The American Waterways Operators, together with the U.S. Coast Guard First District Office and the Massachusetts Maritime Academy, sponsored a towing vessel and tank barge safety workshop in early June, 1996. The purpose of this conference was to identify effective safety improvements which could be made within the tug and barge industry, and to “educate” state legislators from the New England states and New York about the “flaws” in legislative proposals such as the Rhode Island Oil Spill Act.435

435 See Proceedings of Tank Barge/Towing Vessel Safety Workshop, Massachusetts Maritime Academy, June 5-6, 1979, sponsored by United States Coast Guard, Massachusetts Maritime Academy, American Waterways Operators, and the Northeast States, Tab 2.
The workshop was held before the Rhode Island legislation had been enacted. Although representatives of the Rhode Island Senate Fiscal and Policy Office were invited to attend the conference, the event was orchestrated by the AWO and Coast Guard, and panel members represented primarily industry interests. The topics of discussion at the workshop did not directly address the contents of the Rhode Island bill as such, however discussion topics mimicked the contents of the Rhode Island law very closely, including issues such as manning of tank barges, anchoring systems, and double hulls.436 Representatives of state governments from Massachusetts, Connecticut, New York, and Maine were all in attendance at the meeting.437

Approximately 85% of those in attendance at the workshop represented either the oil industry, the tug and barge industry, or the United States Coast Guard. The recommendations developed by the group, then, called primarily for additional study and discussion of all issues identified.438 The outcome of the workshop was the creation of a Regional Risk Assessment Quality Action Team, composed of representatives of the Coast Guard, AWO, the environmental community, and state governments.439 The Risk Assessment Team (RRAT) is headed by a Steering Committee of four individuals: CAPT Eric Williams, from the First Coast Guard District Office in Boston, MA; Linda

436 Ibid, Tab 4.
437 Ibid, Tab 20.
438 Ibid, Tab 18. A generally accepted stall tactic, with many industry groups who are fighting increased regulation, is the call for additional research or study on an issue before regulations are adopted. Although research should certainly play a large role in all policy decision-making, environmentalists generally cite the fact that, with respect to such structural improvements as double hulls or anchoring requirements, industry representatives have historically called for more and more study. This argument, as it pertains to double hulls, has continued for 25 years. See Alcock, 125-140.
O'Leary, Vice President of the American Waterways Operators; John Torgan, Narragansett Baykeeper for Save the Bay in Providence, R.I.; and Stephen Morin, head of the emergency response team for the Rhode Island Department of Environmental Management. The purpose of the RRAT is to:

"identify the risks of petroleum transportation in the New England/New York area and institute mechanisms and derive measures to reduce those risks with a holistic approach that meets the needs of the industry, state governments, environmental concerns and the public."\(^{440}\)

Although there is nothing in the charter for the Regional Risk Assessment Team which specifically addresses the Rhode Island Oil Spill Act, it is the opinion of several participants at the Tank Barge/Towing Vessel Safety Workshop as well as of members of the Steering Committee, that the primary purpose of the RRAT is to develop recommendations for regional towing vessel/tank barge safety standards which may be implemented in lieu of the Rhode Island oil spill legislation, and which will preclude the development of similar statutes in other New England states or New York.\(^{441}\) A newspaper report which described the formation of the RRAT noted that, "it appeared clear that the Coast Guard and industry experts are finally acting on safety issues both because of the recent oil spills and their fears about the slew of new legislation that they feel may impose expensive and unnecessary rules."\(^{442}\)

The Regional Risk Assessment Team was formed at the June workshop, however the Steering Committee did not commence with meetings until September 12, 1996, a few weeks after the Rhode Island legislation was signed

\(^{440}\) Ibid, Tab 20.

\(^{441}\) John Torgan, Save the Bay, personal communication with author, 20 October, 1996.

into law. According to at least one member of the Steering Committee for the RRAT, this time delay was due to the fact that the contents of the Rhode Island legislation, as passed, were central to the agenda developed for the RRAT meetings.443 The Steering Committee as well as the full Risk Assessment Team has been meeting periodically since September 12, and the final meeting of the Steering Committee was held on October 28, 1996. At this time, a draft outline was developed for the final report which is to be issued by the Committee on December 2, 1996.444 This report is to contain recommendations for safety standards to be implemented within the framework of a specially regulated navigation area (RNA), which would allow for regional standards to be implemented by the Coast Guard and apply throughout the New England/New York area.445

It is the intention of the Steering Committee for the RRAT to submit a final draft of their recommendations to state legislatures throughout New England in order to discourage state governments from hastily implementing oil spill laws such as the Rhode Island Act. The Steering Committee also intends to offer the report to the Rhode Island legislature in hopes that, once assured that a regional initiative for tug and barge safety has been undertaken, Rhode Island will repeal its recently enacted legislation.446 As unusual as this proposal may appear, Stephen Morin of the Rhode Island DEM has assured members of the Steering Committee that such a scenario will

443 John Torgan, personal communication, 20 October, 1996.
444 Ibid, 30 October, 1996.
445 Ibid.
446 Ibid.
likely occur. However, the recommendations which have been developed by the RRAT are viewed by the environmental stake holders in New England as deficient, and certainly the provisions in the RRAT recommendations are weaker than the double hull and manning standards currently in place in Rhode Island.

The outcome of the RRAT process remains to be seen. However, the mere formation of the group suggests that the towing vessel and tank barge industry view the Rhode Island Oil Spill Act as a threat, and realize that similar legislative action will likely occur in adjacent states unless action is taken to improve regional or national standards. If a regulated navigation area is indeed implemented in the Northeast for the purpose of pollution prevention, it will be the first time that such an area has been proposed on such a large scale. Again, this fact speaks to the significant impact which the Rhode Island oil spill legislation has had on the oil transportation industry. More importantly, the formation of the RRAT suggests that the Coast Guard and industry alike are beginning to recognize that the trend toward proactive pollution prevention legislation at the state level will likely continue until significant efforts are made to improve the current regulatory framework on the regional or national level.

447 Ibid.

448 Ibid. For example, the RRAT recommendations advocate following the OPA 90 double-hull phase-in schedule. They also recommend that tug escorts not be required, and that manning standards be weakened such they only apply to certain tank barges which are being towed astern during calm weather.

449 Implementation of an RNA would require a federal rulemaking, a process which generally requires at least one year from the time a proposed rule is issued to the time a final rule is developed. Although RNA's exist throughout U.S. waters, they are generally very small and specific in nature. The implementation of an RNA throughout the first district for as broad a purpose as oil spill prevention would be a first, and members of the environmental community have expressed concern regarding enforceability and likelihood of timely implementation.
XII. CONCLUSIONS AND DISCUSSION

Analysis of the Oil Pollution Act of 1990: Successes, Failures, and Suggested Improvements

The proliferation of state oil pollution prevention statutes which have been proposed or enacted in the wake of the Oil Pollution Act of 1990 may be interpreted in several ways. This abundance of comprehensive state laws may indicate a fundamental shortcoming in OPA, and may indicate that this law needs serious revision or strengthening. Alternately, this trend toward stricter state policies governing oil pollution may indicate that the state government is the more appropriate arena for promulgation of pollution prevention laws. If this second scenario holds true, perhaps the federal government should assume a less prominent role in oil pollution prevention, as they have traditionally done in areas of environmental law, developing standards which serve as minimum levels for state governments to satisfy, and allowing states to implement more stringent requirements. Of course, the federal government must play a special role in monitoring state level oil spill laws, in order to provide for some level of consistency in laws governing interstate commerce. One possible mechanism for developing a more effective national pollution prevention scheme might be narrowing the role of the federal government so that the state becomes the primary arena for development of pollution prevention standards while the federal government acts only to ensure that some level of conformity exists so

439 States which have enacted pollution prevention statutes or amended existing statutes in the years since OPA 90 was enacted include California, Washington, Oregon, Alaska, Wisconsin, Texas, Maine, Rhode Island, and Virginia. States which have introduced pollution prevention legislation which has yet to be enacted include Massachusetts, Connecticut, and Michigan.
as not to impede the flow of maritime commerce.

Redesigning the jurisdictional paradigm governing oil spill prevention might be considered as an overly ambitious or unrealistic goal, however if the Oil Pollution Act of 1990 is to remain the primary statute governing prevention and clean up of oil spills in this country, then the law must be amended to more adequately address the concerns of coastal states. One of the most important issues which has been raised in this thesis is that of where federal jurisdiction should yield to state regulatory authority. The situation which currently exists, and the trend which has been documented herein, suggest that in the years since OPA 90 was enacted, individual states have continued to develop and enforce pollution prevention statutes which exceed the standards established in OPA 90 and which, some argue, undermine the Congressional intent to develop a national law which provides for a comprehensive, unified approach to oil spill prevention and response. In order for OPA 90 to satisfy this goal, it must address the pollution prevention concerns of coastal states such that the these states are not compelled to enact increasingly comprehensive and aggressive pollution prevention statutes.

In the months following the North Cape oil spill, U.S. Senator John Chafee held a series of oversight hearings which were focused on identifying mechanisms for improving OPA 90. One of the goals of these hearings was to strengthen the federal law so that it would more directly address the concerns recently voiced within the New England states. The State of Rhode Island, in the weeks following the North Cape spill, identified the lack of federal regulations governing the coastal tug and barge industry as a major contributing factor to the causes of the spill. Clearly, then, this was one area

\[\text{440See discussion, Chapter VIII.}\]
where the federal law could be improved and in the process remove the need for Rhode Island and other states to legislate concurrently with the federal government.

The Chafee amendments to the Oil Pollution Act and the Rhode Island Oil Spill Act moved through the U.S. Congress and R.I. General Assembly simultaneously. As the Rhode Island Oil Spill Act moved through the General Assembly, members of the Rhode Island legislature closely monitored the contents and progress of the Chafee amendments, realizing that the fate of the federal bill would have a significant impact on the need for enactment of the Rhode Island law.441 The Rhode Island Oil Spill Act was enacted several weeks before the Chafee amendments to OPA were signed into law by President Clinton. Although the possibility existed that amendments to OPA might have rendered several of the provisions of the Rhode Island Oil Spill Act redundant of federal law, the improvements to OPA which were ultimately signed into law did little to improve the federal regulatory structure governing spill prevention within the tug and barge industry. The following section of this thesis compares the contents of the OPA 90 amendments which were enacted as law in October, 1996, to the contents of the Rhode Island Oil Spill Act, as well as selected components of oil spill laws in place in other states, in order to identify areas in which the federal law must still be improved to adequately address the pollution prevention concerns of U.S. states.442

441 Bromley, personal communication.

442 See also Appendix C: “Legislative Comparison Between Selected Provisions of Rhode Island Oil Spill Act and Current Federal regulations for Tank Barges/Towing Vessels Operating in the Northeast”
The Chafee Amendments to OPA 90 and Recent Coast Guard Rulemakings: Do they Adequately Address the Issues of Concern to Rhode Island and Other Coastal States?

Chapter VII of this thesis discussed the Coast Guard Authorization Act of 1996, which absorbed the OPA 90 Improvement Act introduced by Senator Chafee. Likewise, both the Towing Vessel and Tank Barge Safety legislation introduced by Representatives Kennedy and Reed were partially incorporated into the Coast Guard Authorization Act. However, the pollution prevention provisions which survived, from all three pieces of legislation, and were enacted as U.S. law, are considerably less aggressive than the original contents of all three oil spill prevention bills introduced into the second session of the 104th Congress.

The Coast Guard Authorization Act contains two oil spill prevention measures: an anti-grounding provision which requires either a crew member and operable anchor or a retrieval device on board tank vessels, and a fire suppression system on board towing vessels. Although the Rhode Island law also contains provisions for manning of tank barges, anchor requirements on tank barges, and fire suppression equipment onboard towing vessels, the OPA improvement provisions do not render the Rhode Island law completely

443 S.1004.


445 S. 1004, Sec. 901(a)(1).

446 Ibid, Sec. 901(a)(2).

447 Ibid, Sec. 902(f)(1).
duplicative or unnecessary. Although the fire suppression system requirement now contained in the federal effectively removes the need for a similar provision at the state level, the manning and anchor requirements in the Coast Guard Authorization still fall short of the requirements in the Rhode Island law. Specifically, in Rhode Island waters all tank barges must now be manned with operable anchor systems, which the federal government still allows for the operation of unmanned barges with no anchoring system, as long as they carry a retrieval device or “comparable measure.” Likewise, the OPA amendments contain no incentives for implementation of double-hulls, which is perhaps the most effective prevention measure, and clearly a concern of coastal states such as Rhode Island.

The recent Coast Guard final rule for navigational equipment on board towing vessels also overlaps, to some degree with the Rhode Island Oil Spill Act. Again, however, the Rhode Island law is stricter in several respects, such as the requirement for redundant compasses and VHF radios, and the requirement for both working radar and GPS. There are other examples of where the Rhode Island law, and others like it on the West Coast exceed federal standards, even with the recent amendments to OPA 90 and the long overdue issuance of Coast Guard rules for towing vessels and single-hulled tank barges. It is reasonable to assume that within other New England states, and perhaps nationwide, this trend toward more aggressive state oil spill laws will continue either through enactment of individual laws on a state-by-state level, or

448 Such incentives were included in the original version of S.1730. See discussion Chapter VIII.


450 See Appendix C.
through some regional initiatives. However, even without any speculation regarding future legislative initiatives within state legislatures, it is reasonable to assume that all of the pollution prevention concerns of coastal states are not addressed within the existing body of federal oil spill laws. A comparison between the provisions contained in the Rhode Island Oil Spill Act and the recent improvements to the federal law governing oil pollution indicates that the federal government still lags behind Rhode Island, as it does behind Wisconsin and Washington, in the promulgation of aggressive oil pollution prevention regulations.

Mechanisms for Improving the Regulatory Framework Governing Oil Pollution Prevention in the United States

There are essentially two mechanisms which may be used to improve the current regulatory framework governing oil pollution prevention such that the jurisdictional boundaries between state and federal regulatory authority are more clearly delineated. Federal regulations governing oil pollution prevention must be strengthened such that they accommodate more directly the concerns of the states, or increased regulatory authority must be explicitly provided to the states.

The discussion in the previous section suggests that, even after recent improvements and rulemakings, there are areas in which the federal regulatory structure governing oil pollution prevention is still less aggressive than existing state laws. There is no reason to believe that states will not continue to enact oil spill prevention laws which exceed federal standards, unless the federal standards continue to be raised. In considering mechanisms
for strengthening existing federal regulations, the discussion must turn to a consideration of whether the body of federal oil spill prevention law can ever be comprehensive and aggressive enough to address all of the regionally-specific concerns of various states. Wisconsin's recently enacted double-hull barge law is directly related to specific navigational considerations on the Upper Mississippi River. Tug escort provisions which have been enacted in West Coast States such as California and Washington are a response to the threats posed by the large oil tankers which transit those waters. A federal law which took into account such regional concerns would be exceedingly comprehensive and likely extremely complex.

Many would assert, however, that it is not at all the role of the federal government to legislate in this regard. This assertion leads back to the distinction between maritime and environmental law, which is essential to this discussion. Environmental laws have traditionally set the minimum standard for protection, and state governments have created additional layers of protection above that minimum standard. Such state standards may account for regionally specific concerns, and afford a more effective level of environmental protection than one comprehensive national standard. Oil pollution prevention laws, however, exist in a gray area between maritime and environmental law, and as such must satisfy the often contradictory goals of protecting against pollution locally and regionally, while ensuring a conformity of maritime law nationally.
Conclusions

Rhode Island's legislative response to the North Cape oil spill represents a continuation of a trend begun in California, Alaska, and Washington State even as the non-preemption language in the Oil Pollution Act of 1990 was being debated in Congress. The ultimate inclusion of non-preemption language into the Oil Pollution Act is critical to the fate of the Rhode Island law, and should this legislation be challenged in federal court, an analysis of OPA 90 and relevant court rulings suggest that the Rhode Island oil spill law will be upheld. However, the existence of state level oil spill laws such as that recently enacted in Rhode Island lead to the larger question of whether, by allowing for concurrent state and federal jurisdiction, OPA has failed to satisfy its purpose of streamlining the regulatory framework governing oil pollution in this country. Indeed, the non-preemption clause may have created an impossible situation whereby OPA cannot at once provide a comprehensive, unified, federal code for pollution prevention while still allowing for concurrent state jurisdiction. This thesis has examined only a portion of the state level oil spill prevention legislation enacted since OPA 90, and this examination indicates that many state laws rival the Oil Pollution Act with respect to comprehensiveness, and as such certainly detract from the status of the federal Act as a unified, national standard.

The presence of Rhode Island as a regulatory authority within the tug and barge industry has been greatly expanded as a result of the legislative action in that state. More importantly, the passage of Rhode Island Oil Spill Act has allowed the issue of towing vessel and tank barge safety to assume a more prominent role on the agendas of the United States Coast Guard and the
tug and barge industry. It seems likely, then, that the impact of this new Rhode Island law will reach far beyond the waters of the smallest state. Whether the Rhode Island law encourages other New England states to legislate in kind, or whether it leads to the establishment of a regional safety initiative targeting the oil transportation industry, the Oil Spill Pollution Prevention and Control Act has effectively expanded the role of state governments as promulgator and enforcer of oil pollution prevention standards.

One author writes that “the establishment of preemption was animated by similar concerns about the need for effective national regulatory powers.” It is difficult to argue against the need for national consistency, particularly in an area which involves interstate commerce. However, the State of Rhode Island and many other coastal states have determined that, in the field of oil pollution prevention, national regulatory powers have not provided effective, preventative legislation. Therefore, perhaps the question here becomes one of providing for a shift in jurisdictional boundaries such that the priority of national consistency is balanced with the need to effectively protect the ocean commons from the continued threat of oil pollution. The decision as to where this boundary shall be drawn is in the hands of U.S. Congress and the federal courts, however the outcome of this decision is of paramount importance to residents of coastal communities throughout the United States who fear the effects of future catastrophic oil spills.

451 Gardbaum, 809.
APPENDIX A: LIST OF ACRONYMS

ABS: American Bureau of Shipping
ADEC: Alaska Department of Environmental Conservation
AWO: American Waterways Operators
BAPS: Best Achievable Protection Standards
CLF: Conservation Law Foundation
DEM: Department of Environmental Management (Rhode Island)
EDC: Economic Development Corporation (Rhode Island)
EOEA: Executive Office of Environmental Affairs (Massachusetts)
FWPCA: Federal Water Pollution Control Act (Clean Water Act)
MSD: Marine Safety Detachment (Coast Guard)
NOAA: National Oceanic and Atmospheric Association
NRDA: Natural Resource Damage Assessment
NRDC: Natural Resources Defense Council
OCSLA: Outer Continental Shelf Lands Act
OMS: Office of Marine Safety (Washington State)
OPA: The Oil Pollution Act of 1990
OPA 90: The Oil Pollution Act of 1990
PWSA: Ports and Waterways Safety Act
QAT: Quality Action Team
RRAT: Regional Risk Assessment Team
SLLA: Shipowners’ Limitation of Liability Act
TAPAA: Trans-Alaska Pipeline Authorization Act
TSAC: Towing Safety Advisory Committee
TVSA: Towing Vessel Safety Act
USCG: United States Coast Guard
XIV. APPENDIX B: LEGISLATIVE COMPARISON BETWEEN SELECTED PROVISIONS OF RHODE ISLAND OIL SPILL PREVENTION ACT AND CURRENT FEDERAL REGULATIONS FOR TANK BARGES/TOWING VESSELS OPERATING IN THE NORTHEAST

<table>
<thead>
<tr>
<th>Statutory requirement</th>
<th>R.I. Law</th>
<th>Federal Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. MANNING TANK BARGES</td>
<td>YES&lt;br&gt;2 crew members except in life-threatening situations</td>
<td>OPA AMENDMENTS&lt;br&gt;crew aboard OR retrieval device</td>
</tr>
<tr>
<td>2. NAVIGATION EQUIPMENT</td>
<td>YES&lt;br&gt;A. working radar&lt;br&gt;B. GPS&lt;br&gt;C. 2 VHF radios&lt;br&gt;D. magnetic and gyro compasses</td>
<td>COAST GUARD FINAL RULE&lt;br&gt;(7/3/96)&lt;br&gt;A. working radar OR GPS OR loran&lt;br&gt;B. 1 VHF radio&lt;br&gt;C. magnetic compasses only</td>
</tr>
<tr>
<td>3. FIRE SUPPRESSION SYSTEMS</td>
<td>YES&lt;br&gt;operable under “reasonably foreseeable circumstances”</td>
<td>OPA AMENDMENTS&lt;br&gt;similar wording to R.I.</td>
</tr>
<tr>
<td>4. TANK BARGE ANCHOR</td>
<td>YES&lt;br&gt;working anchors on ALL TANK BARGES</td>
<td>OPA AMENDMENTS&lt;br&gt;working anchor and crew OR retrieval device</td>
</tr>
<tr>
<td>5. DOUBLE HULLS</td>
<td>YES&lt;br&gt;by January 1, 2001, ALL TANK BARGES in RI must have double hulls or be accompanied by a tug escort</td>
<td>OPA 90 UNCHANGED&lt;br&gt;by January 1, 2015, ALL TANK VESSELS in U.S. waters must have double hulls (with a few exceptions)</td>
</tr>
</tbody>
</table>
XV. BIBLIOGRAPHY


Abbott, E. and C. Rowland. 1996. North Cape spill; tugs, barges face few regulations; Congress, Coast Guard slow to push for reforms. The Providence Journal-Bulletin. 28 January: 1A.


Healey, M. 1994. Exxon Valdez stays as symbol of tanker risks; little has been done to implement landmark 1990 protection law. Los Angeles Times. 29 March: A5.


MacLeod, H.R. 1996. Oil cleanup faces sticky problems: Spill bill is estimated at minimum of $10 million. Journal of Commerce. 25 January: 1A, 8A.


Panel proposes stiffer barge rules; In the wake of the North Cape spill, a state Senate commission is drafting a bill to require a crew and a working anchor before oil barges can enter Rhode Island waters. *The Providence Journal-Bulletin.* 17 February: A1.


O'Leary, L. 1996. Statement before the Massachusetts General Assembly Joint Committee on Natural Resources and Agriculture. Boston, MA, 7 May. Photocopied.


Poon, C. 1996. Up and down the coast, volunteers improvise to combat the

Randle, V.R. 1991. The Oil Pollution Act of 1990: Its provisions, intent, and

Rhode Island General Assembly. Senate. 1996. Oil Spill Pollution Prevention
and Control Act. 96-S 3304.

Rhode Island General Assembly. Senate. 1996. Rhode Island Senate Fiscal
and Policy Office. Final Report of State of Rhode Island Special Senate
Commission Investigating the Implications of the North Cape Oil Spill.
Providence, R.I. Photocopied.

Rhode Island General Assembly. Senate. 1996. Rhode Island Senate Fiscal
and Policy Office. Legislative Response to the North Cape Oil Spill.
Rhode Island Senate Briefing Paper. Providence, R.I.: Rhode Island

Rhode Island General Assembly. 1996. General Assembly Press Release. 2
May.


——. 1996. USCG Publishes Final Rule on Navigation Safety Equipment

——. 1996. Coast Guard Proposes Licensing and Manning Changes for

——. 1996. Advance Notice of Proposed Rulemaking (ANPRM) on Tank
Vessel and Facility Response Plans and Response Equipment for

Maritime Lawyer. 15: 1-32.

Rowland, C. 1996. Oceanographers trade advice with lawmakers. The

——. 1996. Senate bill requires double hulls on barges. The Providence

——. 1996. House approves petroleum barge safety regulations. The


Torgan, J. 1996. Testimony of Save the Bay on 96-S 3304: The Oil Spill Pollution Prevention and Control Act before the Rhode Island Senate Committee on Judiciary. Providence, R.I., 28 May. Photocopied.


1995. One of the biggest privately held U.S. oil companies could face $54 million in fines related to numerous oil spills in the waters of six states since 1990. *Oil and Gas Journal*. 93(17): 3.


