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Oil Spills/ Oil Tanker Operations

Report 5:

The Development of Petroleum Resources from the Outer Continental Shelf: Legal Management Problems and Capabilities in Oregon

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OIL SPILLS/OIL TANKER OPERATIONS

*Report to the
Oregon Outer Continental Shelf
Oil and Gas Development Task Force*

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from the Outer Continental Shelf: Legal
Management Problems and Capabilities
in Oregon

Prepared by Kenneth Johansen
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OREGON OUTER CONTINENTAL SHELF OIL & GAS DEVELOPMENT TASK FORCE REPORTS

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PREFACE

This report was prepared by Kenneth Johansen (Oil Spills) and Richard Parrish (Oil Tanker Operations) of the University of Oregon Ocean Resources Law Program. It is one of a series of reports to the Governor's Outer Continental Shelf Oil and Gas Development Task Force on legal issues associated with the development of petroleum resources and associated facilities. It is intended for the use of the members of the Task Force and other interested persons. Specific views and recommendations are those of the authors and not necessarily the views of the Task Force, the Department of Land Conservation and Development, or other persons who provided assistance or information.

OIL SPILLS

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OIL SPILLS

Section 1

INTRODUCTION

Torrey Canyon, Santa Barbara, Argo Merchant, and Amoco Cadiz are headline markers of the history of oil spill pollution. Each are well-known examples of how oil spill catastrophes can affect the marine and coastal environments and the lives of those who depend on these environments for their living. Each of these incidents, and others in turn, sparked public outcry, scientific studies, and legislative proposals to deal with the problem.

The energy crisis, Alaska pipeline oil, deepwater ports, and increased OCS activity are indicators of the present and future scope of the problem. They too have sparked public discussion and legislative proposals.

The scope of this paper is an outline and discussion of the various federal and state regulatory programs which have been formulated to deal with the oil spill pollution problem in three contexts: cleanup of spills, liability of spillers, and compensation for damages. The purpose of this analysis is to provide examples of how a state through its laws can deal with the problem of oil spill pollution. The text and footnotes are also designed to serve as a source of background material for legislative, regulatory, or managerial proposals.

It should be noted that prevention of spills should be the primary goal of any program directed at the oil pollution problem. This aspect is discussed throughout the report in terms of pipelines, tankers, facility siting, and in this section where applicable.

Section II

THE OIL SPILL

POLLUTION PROBLEM

SOURCES AND EFFECTS

Nobody knows exactly how much oil is entering the marine environment every year. Official estimates may be conservative but they are disturbing enough. A 1977 report from the Council on Environmental Quality¹ cited studies² which estimated the annual oil pollution of the world's waters at over six million metric tons.

The bulk of this pollution comes from the routine operations of producing and transporting oil, but a significant amount is attributable to accidental oil spillage. Future OCS oil production off Oregon's coast and increasing tanker traffic carrying Alaskan oil in Oregon's waters are serious potential sources of oil spill pollution.

The overall effects of oil pollution are presently unknown. Short term effects such as oil-covered beaches and dead marine birds are highly obvious but the long term effects on our oceans and coastal zones have not been authoritatively documented.³

No one can claim, however, that oil spills are in any way beneficial. Completely ignoring their effect on the environment, they can prevent or hamper traditional maritime activities such as fishing, navigation, and recreation. Spills may create a fire hazard or simply float and coat whatever they come into contact with.

Damages may occur to vessels, piers, or buildings. Those who are in the bus-

iness of catering to tourists may suffer, whether one is a resort owner whose befouled beaches repel tourists or a gas station or restaurant owner a few blocks away.

When large quantities of oil are discharged into a body of water it can asphyxiate or debilitate marine life. Reproduction may be reduced or migratory behavior interrupted. The destruction of a fishery or other marine industry in addition to causing havoc within that industry may affect the public in general through unemployment and a diminished food or resource supply.⁴

Several factors can influence the effect that an oil spill will have on the particular environment it strikes. Local conditions such as type of vegetation, amount of wildlife, ownership of property, and availability of cleanup equipment all play a factor in the ecological and economic toll of damages. Time of year, weather conditions, and coastal configurations also have an effect. Finally, the quantity and type of oil spilled is important in terms of area coated and toxicity.⁵

AMOCO CADIZ

With the wreck of the Amoco Cadiz on March 17, 1978, the world witnessed the worst oil spill disaster so far: the full loss of cargo by a Very Large Crude Carrier. Breaking in half in high winds and seas the supertanker spilled 216,000 metric tons of crude oil plus 4,000 tons of its own fuel onto the waters and beaches of the French coastline. Direct loss was \$23 million in cargo and a ship valued at \$70 million. The American Oil Company's liability for damage to French tourist, fishing, and seaweed industries will be a subject of extensive litigation.

The Arco Caliz spilled three times the amount of oil that was released by the grounding of the Torrey Canyon off the coast of England in March, 1967. Scientists who visited the scene called it "the worst marine environmental disaster" and "utter devastation." A U.S. Environmental Protection Agency official noted the similarity between the Brittany coast and stretches of New England, the Pacific Northwest, and Alaska. "I'd hate to think of anything like this happening in quieter areas like Puget Sound, Chesapeake Bay, or the mangrove swamps of Florida," he warned.⁶

Section III

OIL SPILLS AND THE LAW:

CLEANUP, LIABILITY, AND COMPENSATION

INTRODUCTION

The imposition of liability and compensation for oil spill cleanup and damages has been an active area in terms of litigation and legislation. Although it may seem that laws aimed directly at minimizing and preventing the potentials for oil spills are more important from an environmental perspective, liability and compensation laws also serve to control the pollution problem.

First, such laws provide an incentive to prevent spills. When producers or transporters of oil know that they will be held liable for the high cost of a spill, they are encouraged to invest in better equipment, proper training of personnel, and to guard more vigilantly against spills during their operations.

Second, they encourage rapid clean-up of spills when they do occur. If spillers are liable for the cost of removal, no matter who actually cleans up, then they will be motivated to contain and remove the pollution before more costly operations are required.

Finally, liability and compensation laws "internalize" the costs of oil spill pollution including them in the overall costs of the oil industry. The incidence of those costs are shifted from the circumstantial victims, such as fishermen and shorefront property owners, to those who benefit from the production and consumption of oil.

Compensation funds, state or federal, serve an important function in carrying out these goals. They provide a ready source of funds for cleanup costs and economic relief for those who have been injured by a spill. Funds can be of particular importance when a spill cannot be attributed to any specific source, is attributable to persons beyond the jurisdiction of the court, or when a shipowner's liability has been limited by federal or international law.

TRADITIONAL LEGAL REMEDIES

COMMON LAW

Although the common law principles of trespass, nuisance, and negligence are available as causes of action for victims of oil pollution damage, they have not proven to be a viable means of imposing liability. They pose several procedural difficulties which often preclude their use. One writer charges, "In the pollution context...the use of traditional proof burdens involves an unequivocal social decision to favor the one who pollutes and to frustrate expectations of those claiming that a higher right lies in the protection of the environment."⁷

An example is the requirement of proof of negligence or intent in an action based on trespass. To recover compensation, the claimants must prove that the discharge of oil which resulted in their damages was intentionally or negligently caused.⁸ Due to the complex nature of the maritime and oil industries the claimant is often unable to obtain the relevant facts about the operations which caused the spill.⁹

The trespass theory also requires actual entry or intrusion of property. This precludes its use by those who show no actual oil invasion of their property such as non-beachfront businesses which suffer economically due

to loss in tourism. In Burgess v. M/V Tamano,¹⁰ The court said fishermen and clamdiggers could maintain suit, but businessmen who claimed loss of customers, indirectly, could not.

Negligence, while one of the principle means for recovering damages for the tort of oil pollution, poses a great burden to claimants in that they must prove the existence of a legal or proximate cause of their damage.¹¹ This may be particularly onerous for the fishing industry attempting to prove that a reduction in the fish harvest was the result of a particular oil spill.

Union Oil Co. v. Oppen¹² is a very important precedent in this regard. In an action arising out of the Santa Barbara oil spill, the 9th Circuit Court of Appeals held the oil companies were under a duty to commercial fishermen to conduct their offshore drilling and production in a "reasonably prudent manner" so as to avoid "negative diminution" of aquatic life.

A nuisance theory may also be used as a basis for an oil spill damage action. The difficulty here is that oil pollution is generally considered a public nuisance and private claimants must establish injuries different in kind from the public at large in order to recover.¹³ At least one court has held that an oil spill cannot be classified a "nuisance" because it is not an "event of continuing nature."¹⁴ In the 9th Circuit case of Oppen v. Aetna Insurance Co.,¹⁵ however, the court indicated that physical damage to plaintiff's private pleasure boats from the Santa Barbara spill probably constituted a sufficiently different injury to support a recovery for private nuisance.¹⁶

Another relevant case is U.S. v. Ira S. Busney & Sons, Inc. There the gov-

ernment sought to force the oil barge transportation company to cease pollution on a public nuisance theory after five large spills over a three-year period.¹⁷ Injunctive relief was obtained on the basis of unreasonable interference with the public's rights in navigable waters.¹⁸

In Maine v. M/V Tamano,¹⁹ the state of Maine brought suit in its capacity as 'parens patriae'.²⁰ It sought damages for injury to its coastal waters and marine life caused by an oil spill from a Norwegian tanker. The Federal District Court held that Maine had met the two-step test for 'parens patriae' capacity as set out in Hawaii v. Standard Oil Co.²¹ by showing: 1) it had an interest apart from that of its citizens, and 2) a substantial portion of its citizens were adversely affected.²²

ADMIRALTY

Federal judicial power over "all Cases of admiralty and maritime" comes from Article III, section 2 of the United States Constitution. The district courts have original jurisdiction.²³ To bring an admiralty action in state court the "savings to suitors clause"²⁴ must be invoked and the action must be in personam and not in rem.²⁵ Whichever courts are used, federal law applies.²⁶

For a state or private party to bring a suit in admiralty there are two threshold jurisdictional tests which must be met. The first is the "locality" test which requires that the actionable incident occur on the high seas or on navigable waters.²⁷ These two "locales" still apply in most cases, but the Admiralty Extension Act of 1948 expanded admiralty jurisdiction to include "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."²⁸ This means, for example, that landowners may bring suit in admiralty for oil pollution damage to their property caused by a tanker

spill. But may not be able to do so for a spill caused by an offshore drilling rig.

The second threshold test is the requirement that the wrongful act bear a significant relationship to a "traditional maritime activity."²⁹ In addition, the maritime "activity" must be that of the injured party and not that of the person who committed the wrongful act. Under this test, commercial fishermen and clamdiggers have recovered for economic losses sustained as a result of an oil spill while private landowners, whose livelihood de-³⁰ pended upon tourism, were held not to have an admiralty cause of action.

The most significant obstacle to recovery in an admiralty action may be the Limitation of Liability Act.³¹ Section 183 of this Act allows the owners of vessels involved in accidents to limit their liability to the value of the vessel as determined at the termination of the voyage during which the damaging incident occurred.³² Claimants in an oil spill mishap may be left with no hope for compensation if a discharging tanker sinks or is destroyed and rendered worthless. After the Torrey Canyon disaster the Liberian owners had their liability limited to \$50, the value of the one remaining lifeboat.³³

The vessel owner's right to limit liability, however, is conditioned upon a lack of "privity or knowledge" of the cause of the accident.³⁴ In cases involving navigational error and similar mistakes of the crew it is extremely difficult to prove fault on part of the owners, but the courts have generally agreed that in cases of unseaworthiness and failure to properly crew a vessel there is a strong presumption against the owner.³⁵ For example, In Re Marine Sulphur Queen refused to limit the liability of a ship which was found in violation of numerous Coast Guard regulations.³⁶

Section 183 of the Limitation of Liability Act has received diverse treatment in cases involving state oil spill statutes. In Askew v. American Waterways Operators, Inc.³⁷ the U.S. Supreme Court declined to rule on whether either the Liability Act or the Federal Water Pollution Control Act imposed limits on the amount a state may recover in the way of clean-up costs and other damages from oil spill pollution (Askew and the FWPCA are discussed below). The Supreme Court of Maine cited Askew, however, and upheld that state's statutory scheme which imposed unlimited liability.³⁸ More recently, the federal district court in Virginia said: "At least as to federal oil spill cleanup costs, the language 'notwithstanding any other provision of law' in §1321 of the FWPCA certainly appears to preclude application of the Liability Act."³⁹

On the other hand, in addition to the cases which have approved petitions for limitation of liability,⁴⁰ there are at least two district courts which have expressly held that liability for oil spill damage imposed by state statutes could not preclude limitation under section 183.⁴¹

FEDERAL PROGRAMS

FEDERAL WATER POLLUTION CONTROL ACT

Spill prevention, spill cleanup, and assessment of liability for cleanup costs are the three objectives of the Federal Water Pollution Control Act.⁴² As amended by the Clean Water Act of 1977,⁴³ it is the primary federal law governing the discharge of oil and other hazardous substances into navigable waters. The FWPCA prohibits discharges in any quantity which present "an imminent and substantial danger to the public health and welfare."⁴⁴

Authority for administration of the FWPCA has been divided between the Coast

Guard and the Environmental Protection Agency (EPA).⁴⁵ These agencies have responded to this responsibility by promulgating their own oil pollution regulations.⁴⁶ The Coast Guard has primary authority over transportation and related facilities in coastal waters and rivers while authority over inland waters and non-transportation facilities is given to EPA.⁴⁷ In Oregon, an oil spiller is subject to concurrent regulation by State (DEQ) and federal agencies (USCG or EPA).

PREVENTION

The Administrator of the Environmental Protection Agency has the task of determining what discharges of oil or hazardous substances are "harmful" and formulating comprehensive programs to eliminate them.⁴⁸

Harmful quantities of oil have been defined as those which: (A) Violate applicable water quality standards, or (B) Cause a film or sheen upon or discoloration of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.⁴⁹ The "sheen test" was upheld by the 9th Circuit Court of Appeals in U.S. v. Boyd,⁵⁰ which also approved the exception that "discharges of oil from a properly functioning vessel engine are deemed not to be harmful."⁵¹

Discharges which violate these standards are subject to a \$5,000 civil penalty for each offense. The penalty is levied by the Coast Guard or EPA against any spill source "owner, operator, or person in charge."⁵² U.S. v. LeBoeuf Towing Corp.⁵³ upheld the constitutionality of the civil penalty and said it could be imposed even though the party responsible promptly reports the spill. In U.S. v. Atlantic Richfield Co.⁵⁴ the court went further and said the penalty could be imposed despite the fact that the spiller had cleaned up the oil since

"any remedial action is irrelevant to a determination of harmfulness." The court held the penalty was reasonably calculated to deter spills and did not deny due process. A \$2,000 fine for a discharge of 10-15 gallons of oil into the Ohio River was upheld in U.S. v. Beatty, Inc.⁵⁵

CLEANUP

The FWPCA requires the party responsible for a spill to report it immediately to the appropriate federal agency. Failure to do so results in a fine up to \$10,000 or imprisonment up to one year.⁵⁶ A corporation is subject to the fine when its employee does not properly report a spill.⁵⁷

Federal agencies are authorized to clean up spills if the party responsible is not going to do so or cannot be identified.⁵⁸ To encourage rapid mobilization of cleanup efforts, the FWPCA establishes a \$35 million revolving fund which is available for financing state and federal cleanup costs.⁵⁹

Another important provision of the FWPCA is the National Contingency Plan "to minimize damage from oil and hazardous substances discharges."⁶⁰ The purpose of this plan, prepared by the Council on Environmental Quality, is to provide for a "coordinated and integrated response by departments and agencies of the federal government and between federal and state response systems."⁶¹

The Coast Guard has primary authority for planning and implementing oil spill removal operations in coastal waters and the Great Lakes while EPA is responsible for inland waters.⁶² Operational cleanup responsibility is vested in an On-Scene-Coordinator (OSC), who is normally an employee of one of these agencies. The OSC may be advised and assisted by a Regional Response Team (RRT) depending on the severity of the spill.

The Coast Guard had three National "Strike Forces", located in California, North Carolina, and the Gulf Coast, to deliver equipment and trained personnel in the case of a major spill.

A recent report from the General Accounting Office should be noted. It indicates that the Coast Guard does not have enough money or trained personnel to handle the oil spill problem effectively. The GAO studied the response of the Coast Guard to 137 spills during 1975-76. The report rated the Coast Guard about 60% for effectiveness and noted that because of inadequate staff they often fail to investigate some spills.⁶³

Non-transportation related onshore and offshore facilities under the jurisdiction of the Environmental Protection Agency and required to prepare and implement Spill Prevention Control and Counter-measure Plans. (SPCC Plans). These plans must be certified by a professional engineer. If a facility suffers a spill of 1,000 gallons or more, or any two reportable spill within a twelve-month period, or if the SPCC plan is clearly not in conformance with regulations, EPA will evaluate the plan for violations and possible amendment.⁶⁴

LIABILITY

The liability provisions of the FWPCA cover cleanup costs, but do not provide compensation for damages caused by oil and hazardous substance discharges. Cleanup costs include those of the federal government, states, or private parties. The decision of U.S. v. Beatty⁶⁵ held the Coast Guard could recover its

cleanup expenses even though unreasonable, as long as they were the actual expenses.

Owners or operators of vessels from which oil is discharged in violation of the Act are liable for: (a) the greater of \$125 per gross ton or \$125,000 for inland barges; (b) the greater of \$150 per gross ton or \$150,000 for other tank vessels; and (c) \$150 per gross ton for all other vessels. Owners and operators of both onshore and offshore facilities are liable for the cost of removal up to \$50 million.⁶⁶

To ensure that potential spillers will be able to meet these liability limits, the Act requires oil tankers and barges over 300 gross tons utilizing U.S. waters or ports to show proof of financial responsibility.⁶⁷

Liability can be avoided only where the discharge is proven to be the result of "(A) an act of God, (B) an act of war, (C) negligence on the part of the United States government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent." Where it can be proven, however, that the discharge was the result of "willful negligence or willful misconduct within the (party's) privity and knowledge," the amount of liability is unlimited.⁶⁸

In the case of Burgess v. M/V Tamano⁶⁹ the tanker owners charged the U.S. government with responsibility for the tanker striking a submerged shelf by mislocating a marker buoy. The Court of Appeals ruled to the contrary, finding the evidence showed the pilot was negligent. The court held the owners liable for the government's cleanup expenses. The court also held the third party defense was not available even though the spill was caused by the negligence of a compulsory pilot. (Compulsory pilot requirements are discussed further in the section of this report dealing with tanker

safety.)

OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978

Another major federal law concerning oil spills is the Outer Continental Shelf Lands Act with its recently passed 1978 amendments.⁷⁰ This law applies to spills from any offshore facility or vessel operating in conjunction with an OCS lease.

Title III of the 1978 amendments establishes a \$200 million Offshore Oil Pollution Compensation Fund. It is supported by a 3¢ per barrel fee on oil produced on the outer continental shelf. Persons who suffer losses due to oil spills can make claims directly to the fund and the fund then acquires the claimant's rights to sue the spiller. State agencies are also authorized to process claims against the fund. Besides cleanup costs, claims for damages may include injury to, or loss of, property and natural resources, and loss of earnings or tax revenue.⁷¹

The amendments also establish a Fishermen's Contingency Fund of up to \$1 million with area accounts up to \$100,000. This fund is aimed primarily at aiding commercial fishermen whose livelihood is jeopardized because of OCS activity. It provides compensation for damaged equipment such as nets torn on underwater pipelines or boats coated with oil. The fishermen's fund is supported by requiring each OCS lessee to pay up to \$5,000 per year per lease, permit easement, or right of way.⁷²

When compensation is received from either of these funds, the claimant is precluded from any other state or federal law and vice versa. States are not preempted from imposing additional liability, however, or any other requirements.⁷³

Under the OCS amendments, owners and operators of offshore facilities and vessels have unlimited liability for the costs of cleaning up oil spills. Liability for other damages is up to \$35 million for offshore facilities and \$300 per gross ton or \$25,000 for vessels. There is no liability in cases where the spill is caused by an act of war or an unavoidable natural disaster, or if the spill is caused by a third party. Liability is unlimited when an oil spill is caused by willful misconduct or gross negligence. ⁷⁴

Owners and operators of vessels and offshore facilities are also required to submit evidence of financial responsibility up to the maximum amount of liability to which they could be subject. Proof of financial responsibility in accordance with this statute exempts them from having to meet separate state requirements. The Secretary of the Interior is authorized to deny entry to any port in the United States or to U.S. waters and may detain at any port any vessel that cannot furnish certification of financial responsibility. ⁷⁵

The Secretary of the Interior has similar authority over offshore operations to prevent spills. He is authorized to suspend or cancel an OCS lease if the lessee fails to comply with the terms of the lease or the Act. If the particular operations "would probably cause serious harm or damage to life (including fish and other aquatic life), to property...or to the marine, coastal or human environment," the secretary is directed to suspend or cancel the offending lease. The "advantages of cancellation", however, must "outweigh the advantages of continuing such lease...in force." ⁷⁶

The amendments also set civil penalties of up to \$10,000 per day for failure to comply with the Act or lease terms. Criminal penalties are available against any person who deliberately violates the Act or regulations under

it, including those "designed to protect health, safety, or the environment."⁷⁷

Finally, the amendments permit "any person having an interest which is or may be adversely affected" to file suit against any person including a government agency, for alleged violation of the Act or lease, or against the secretary for failure to perform a non-discretionary act or duty.⁷⁸

TRANS-ALASKA PIPELINE ACT

The Trans-Alaska Pipeline Act (TAP Act)⁷⁹ also provides a fund for oil spill compensation. Funds are available to persons injured by spills from vessels carrying "TAP" oil. This fund is important to Oregon since many of the tankers leaving Valdez will be traveling near or in Oregon coastal waters while on their way to Long Beach and other ports, and some may unload at Columbia River ports.

Compensation from the fund is limited to spills of "TAP" oil transported between ports under the jurisdiction of the United States. Once the oil is off-loaded, fund liability ceases.

The TAP fund makes \$100 million available for cleanup costs and damages sustained by any person, public or private, including residents of Canada.⁸⁰

Damages are not expressly defined, but the statute's legislative history indicates property, natural resources, and fisheries are included.⁸¹

The fund and the owners and operators of the discharging vessel are jointly liable for the first \$14 million in damages, while the fund is liable for the balance up to \$100 million. This fund is supported by a five-cent barrel fee imposed on "TAP" oil loaded on vessels for shipment to U.S. ports.⁸²

The only defenses available require proof that the disputed pollution dam-

age was caused by an act of war, the negligence of the United States or other governmental agencies, or the negligence of the party claiming damages.

DEEPWATER PORT ACT

The Deepwater Port Act of 1974⁸³ applies to facilities which are not yet in existence in the United States, but it can serve as a model for similar legislation.

First, it places strict liability for cleanup costs and damages on both the owners and operators of vessels which discharge oil or natural gas into the "safety zone" around a U.S. deepwater port. They are liable without regard to fault up to \$150 per gross ton or \$20 million, whichever is less, for each discharge. Liability is unlimited if the discharge was caused by gross negligence or willful misconduct. Deepwater port licensees are also liable to a limit of \$50 million for any oil spill emanating from their port or from a vessel moored at their port.⁸⁴

Second, the act includes significant definitions of cleanup costs and damages for which civil liability is imposed. "Cleanup costs" are:

"all actual costs, including but not limited to costs of the Federal Government or of any State or local government, of other nations or of their contractors or subcontractors incurred in the...removing or attempting to remove or...taking other measures to reduce or mitigate damages from, any oil discharged into the marine environment..."⁸⁵

The term "damages" is defined as:

"all damages (except cleanup costs) suffered by any person, or involving real or personal property, the natural resources of the marine environment, or the coastal environment of any nation, including damages without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or natural resources..."⁸⁶

Like the FWPCA the Act provides that the federal government shall remove or arrange for removal of spilled oil if it determines that the party res-

possible will not do so promptly and properly.

The Act establishes a \$100 million fund to pay all damages in excess of the liability limits of the vessel owner or operator or the deepwater port licensee. The fund is supported by a levy of two cents on each barrel of oil (or equivalent volume of liquified natural gas) which passes through a deepwater port.⁸⁷

Defenses available under the act permit the vessel or licensee to avoid liability by proving an oil discharge was caused by an act of war, by negligence on the part of the federal government in establishing and maintaining aids to navigation, or if caused solely by the negligence of the damaged claimant.⁸⁸

THE SUPERFUND PROPOSALS

Because of problems caused by overlapping federal and state oil spill laws, Congress has considered passage of a "Comprehensive Oil Spill Liability and Compensation Law."⁸⁹ The Senate and House have each proposed several bills over the past three years, but so far none of them has passed both houses.

The most successful bill to date has been HR 6803 which was approved by a 5-1 margin in the House of Representatives. It died with the adjournment of Congress this past October, however, along with the Senate version S 2900.⁹⁰

In many ways, these proposed bills would have been similar to the federal programs described above. Both bills would have set up a \$200 million compensation fund supported by a tax on transported oil. Both would have imposed strict, though not unlimited, liability for cleanup costs and other damages.

The two bills differed on some major issues however. First, S 2900 would

have extended the liability provisions to cover pollution by 271 materials identified as hazardous by the Environmental Protection Agency and would require the fund to cover spills of those substances. The problem was that the Senate Environmental Pollution Subcommittee did not come up with a way for chemical companies to contribute to the fund. The tax on oil would then pay for spills of other hazardous substances.⁹¹

Officials of the oil industry protested that it would not be fair to make oil companies pay for spills by chemical manufacturers and transporters. The chemical companies opposed the Senate bill because they did not want to be covered by liability legislation.⁹²

The second major issue was preemption. HR 6803 would preempt state liability statutes and their cleanup and compensation funds. S 2900 would allow states to have their own liability limits and funds. The oil industry is opposed to the Senate version on this issue also because they do not want to pay into several different funds. They also pointed out the potential for abuse since claimants might file with more than one fund.

Reintroduction of superfund proposals in the next Congress, which convenes in January, is an uncertainty. The same problems and opposition are bound to surface again. One publication quotes a House staffer as saying that next year the House may urge states to pass their own statutes.⁹³

THE ROLE OF THE STATES

Seeking to protect substantial tourist, recreation, and fishing industries, several coastal states have enacted pollution liability statutes similar to, or more stringent than, the Federal Water Pollution Control Act. Most state's water pollution laws can be interpreted as prohibiting oil pollu-

tion, and more than a dozen states address oil pollution in specialized legislation.

In general, the specialized statutes prohibit oil discharges and impose civil and/or criminal penalties upon violators. Most of the laws require spillers to report spills and to clean them up. Usually a particular state agency or comparable authority is designated to coordinate state clean-up efforts and work with federal officials.

States, however, do not have a free reign in controlling the problem of pollution. State authority is limited to actions which do not conflict with federal regulation. By using the authority of the state's "police power", however, a state can act to protect the health and safety of its residents.

Three of the most stringent state statutory schemes aimed at controlling the oil pollution problem are analyzed in the next few pages along with the treatment they have received in court. The major provisions of thirteen state statutes are compared in a chart at the end.

FLORIDA

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In 1970, the state of Florida passed its first Oil Spill Law. It held owner/operators of oil terminals and vessels to a standard of absolute liability and imposed unlimited liability for cleanup costs and damages from oil pollution. Its validity was challenged before it was fully implemented.

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In Askew v. American Waterways Operators, Inc., the owner/operators of oil tankers, barges, and terminals contended that the Florida law conflicted with the Federal Water Pollution Control Act, intruded into federal mari-

time jurisdiction, and unconstitutionally regulated foreign commerce.

In a unanimous decision, the United States Supreme Court ruled that the statute was fully constitutional. Justice Douglas, writing for the Court, said that the Water Quality Improvement Act of 1970, as amended in 1972, not only did not preclude, but in fact allowed, state regulation of the shipping industry's liability for oil spills. He quoted from §1161(o) (now §1321(o)) of the Act:

"(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil/ into any waters within such state. (3) Nothing in this section shall be construed...to affect any State or local law not in conflict with this section."⁹⁶

Askew made it clear that a state statute is constitutionally permissible so long as it is not in conflict with the terms of federal law. For example, the Court pointed out that the provision of the Florida law which allowed claims for damages (other than cleanup costs) did not conflict with the FWPCA since "Congress had dealt only with 'cleanup' costs" which, therefore, "left the states free to impose 'liability' in damages for losses suffered both by the states and by private interests."⁹⁷

The Court refused to decide whether the amount of costs Florida could recover was limited to those amounts specified in the FWPCA and whether the FWPCA in turn was limited by the Liability Act of 1851. Douglas wrote that these "are questions we need not reach here," and "there is room for state action in cleaning up the waters of a State."⁹⁸

The final issue was whether the Florida law conflicted with federal admiralty jurisdiction. The Court said a state could constitutionally exercise its police powers respecting maritime activities concurrently with

the federal government so long as the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law nor interfere with its proper harmony and uniformity in its international and interstate relations."⁹⁹

One year after the Askew decision, the Florida legislature yielded to a vigorous lobbying campaign and replaced the 1970 act with one modeled upon the milder FWPCA.¹⁰⁰

The current Florida Pollutant Spill Prevention and Control Act¹⁰¹ mirrors the FWPCA in its liability limits, defenses, and financial responsibility requirements. It contains additional provisions, however, which make it a model for other states considering legislation to supplement the FWPCA.

First, the Florida Act covers both oil and other hazardous substances, "Pollutants" are defined as "oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and derivatives thereof."¹⁰²

Second, terminal facilities are required to obtain registration certificates annually. In order to qualify for the certificate, a facility must implement "state and federal plans and regulations for prevention, control and abatement of pollution." The terminals are also required to provide information on all of the oil spill prevention, containment, and removal equipment which they have access to.¹⁰³

Third, money from such sources as damages recovered by the state for clean-up operations is placed in the Florida Coastal Protection Trust Fund. This \$35 million Fund is fed by a tax of \$.02 per barrel on the transfer of oil. Replenishment of the fund is secured by requiring vessels and terminal facilities to maintain evidence of financial security.¹⁰⁴

Persons seeking compensation from the fund file claims with the Florida Department of Natural Resources. The statute guarantees "prompt" recovery and provides for a board of arbitration to settle disputed claims.¹⁰⁵ A settlement through the fund precludes all other actions, but the statute allows claimants to file suit directly against the alleged spiller. The only issues in such a suit are whether there was a "prohibited discharge" and "damages." The claimant does not have to prove negligence since the statute makes the transfer of oil a hazardous undertaking.¹⁰⁶

MAINE

The most striking feature of Maine's Oil Discharge Prevention and Control Act¹⁰⁷ is that oil terminal facilities, in addition to being subject to strict liability for their own spills, are also vicariously liable for any spills caused by vessels using their facilities. Liability attaches to any tanker going to or from the terminal and remains in effect during the time it is within Maine's coastal zone.¹⁰⁸

This type of vicarious liability serves two purposes. Any jurisdictional problems that may arise when dealing with vessel owners are avoided, and terminal operators, unlike vessel owners, cannot use the Limitation of Liability Act (discussed supra, at p. 9).

The Maine Act also requires licenses for the operation of terminal facilities. It provides for regulations which set operation and inspection requirements for facilities, vessels, and personnel. Like the Florida statute, a precondition to licensing is the implementation of state and federal pollution control plans and regulations.¹⁰⁹

Under the Act, Maine levies a tax of 1/2 cent on each barrel of oil that

terminals receive from tankers. The money is then put into a fund which is available to pay the administrative expenses of the fund and any cleanup costs resulting from oil spills. ¹¹⁰ Third party damages recoverable from the fund may not be recovered directly from the spiller. If the claimant, the spiller, and the Board of Environmental Protection cannot agree to a damage settlement, a three-member arbitration board is convened. ¹¹¹ If the terminal facility promptly reports a spill, it is not held liable for the first \$15,000 of spill costs.

¹¹²
In Portland Pipeline Corp. v. Environmental Improvement Commission the Supreme Court of Maine was faced with a laundry list of constitutional challenges to this statute. The plaintiffs alleged inter alia, violations of the due process clause, the equal protection clause, the import-export clause, the commerce clause, and the admiralty clause. The court, in a lengthy opinion, upheld the law against each challenge. The U.S. Supreme Court, on appeal, dismissed the case for lack of a federal question. ¹¹³

In Portland Pipe, the plaintiffs claimed that the imposition of vicarious liability on terminal operators, where there was no control relationship between the operators and the vessels at fault, was an impermissible denial of due process. The court held, however, there was no constitutional barrier as long as imposing vicarious liability serves a valid state purpose and there is an "adequate opportunity to locate, among the business associates, the primary liability." ¹¹⁴

The imposition of strict liability on major terminal facilities and on vessels merely passing through Maine's waters was attacked on the basis

of denial of equal protection. The court reasoned that the legislature could rationally conclude that terminal facilities posed a greater risk than other oil storage facilities and that vessels not engaged in transferring oil posed less serious risks than those engaged in vessel-to-vessel transfers or vessel-to-shore transfers. 115

The commerce clause was invoked to challenge the tax on oil and the entire regulatory scheme. The court said the tax was not an unreasonable burden on interstate commerce because it was non-discriminatory, reflected a fair approximation of the conduct which gave rise to the danger, and was not excessive compared to the risk of environmental damage. 116

The final issue addressed in Portland Pipe was the Askew-type argument that the Maine scheme was inconsistent with the constitutional grant of federal admiralty jurisdiction. The court, relying on the Askew holding, said a statute violates the admiralty clause only if it contravenes a specific act of Congress, prejudices the characteristic features of maritime law, or interferes with the uniformity required for interstate and international relations. 117

ALASKA

The state of Alaska has set up one of the most intensive programs for controlling oil pollution. 118 Alaska's statute prohibits the discharge of oil or tanker ballast water in the "waters of the state" which includes the marginal sea adjacent to Alaska along with the coastal and inland navigable waters. 119

Civil penalties are imposed upon the spiller of oil and vicariously upon the person who owns the oil. These penalties are: \$10 a gallon for an oil spill in fresh water with an anadromous fish population or other aquatic

resources, \$2.50 a gallon for spills in estuaries or confined saltwater environments, and \$1 a gallon for spills in other areas. Penalties may be multiplied by a factor of five if the spill was intentional, grossly negligent, or if the spiller fails to help clean up the spill. The penalties may be reduced if there are mitigating factors. ¹²⁰

Criminal penalties are also provided for. Violations of statutes or orders are punishable by a misdemeanor fine of not more than \$25 thousand and willful violations can bring up to a year in jail. ¹²¹

All facilities used to transfer petroleum products, and all vessels engaged in the transportation of petroleum products are required to establish proof of financial responsibility. The tanker requirement is set at \$20 million, facilities with a capacity of over 200 thousand barrels at \$1 million, and smaller facilities at \$100 thousand. ¹²²

Certificates of Risk Avoidance from the State Department of Environmental Conservation (DEC) are also required. It is unlawful to unload any tanker without proof of financial responsibility and a certificate. The Certificates of Risk Avoidance are issued yearly. To obtain one, the vessel or facility must exhibit proof that federal and state pollution control regulations are being implemented and it must demonstrate ability to remove potential spills. ¹²³

Part of this risk avoidance scheme is payment of a risk charge by oil handlers and carriers. The amount of the risk charge varies according to the threat posed by the particular operator. Taken into account in assessing the charge are safety features, the experience of the operator, and other data which DEC may require in a particular instance.

The aggregate amount of the risk charges assessed each year is calculated to equal DEC's costs in enforcing its oil pollution regulations, cleaning up oil spills, research and state purchased insurance. All risk charges are paid into the Coastal Protection Fund along with damages recovered and penalties assessed.¹²⁴

Alaska's Coastal Protection Fund and Risk Avoidance scheme are currently in limbo, however, because of the recent decision of Chevron v. Hammond.¹²⁵ The federal district court for Alaska held that the risk charge and the safety requirements which the state imposed were contrary to the constitution of Alaska and preempted by federal law.

Citing Ray v. ARCO¹²⁶ the court said "the state's risk charge scheme is a design requirement" and "is thus contrary to the purpose of Title II of the Ports and Waterways Safety Act (PWSA) to achieve uniform national and international standards." (ARCO and the PWSA are discussed in the section of this report on tankers.) The court noted that there was room for state requirements as long as they didn't conflict with federal law.¹²⁷

One of the primary criticisms the court had of the statute was the inadequacies of the research report which it was based on. "[T]he fundamental flaws in the report infect the statute and implementing regulations." The court also charged that "the risk charge schedule is neither fair, equitable or rational" and is "regulatory and not actuarial."¹²⁸

In support of the Coastal Protection Fund, however, the court noted at the very beginning of its opinion that the only issue in Chevron was "[w]hether the means chosen by the state" were constitutional. Citing Portland Pipeline Corp. v. Environmental Improvement Commission,¹²⁹ the

court said "Alaska has vital interests at stake which deserve protection" and therefore, Alaska could have "a Coastal Protection Fund providing a ready source of money to clean up spills and abate pollution."¹³⁰

STATE LIABILITY LAW

L I M I T S	<u>FWPCA Limits</u>	<u>No Specified Limits</u>
	Alaska* Florida** North Carolina	Connecticut Georgia Maine Maryland Massachusetts
	New Jersey: Unlimited clean-up; \$150/ton up to \$50 million damages for vessels; \$50 million damages for facilities	
	*State limit for onshore and offshore facilities is \$100 per \$500 valuation or \$14,000,000	
	**In addition, unlimited damages liability for terminals	

D E F E N S E S	<u>Negligence Standard</u>	<u>FWPCA Defenses</u>	<u>Stranger Standard</u>
	Georgia Maryland	Alaska Florida North Carolina Oregon Texas	Conn--no defenses Maine--God; Government Mary--no defenses Mich--no defenses NJ--war; God; Govt; sabotage; 3d party Va--war; God; 3d party Wash--war; Government

C O S T S	State	Cleanup	Property Damage	Natural Resources	Ecolog. Loss
	Alaska	x	x	x	x
	Conn	x			
	Florida	x	x	x	x
	Maine	x	x	x	x
	Maryland	x	x	x	
	Mass	x	x	x	
	Michigan	x			
	New Jersey	x	x	x	x
	No Carolina	x	x	x	
	Oregon	x	x	x	
	Texas	x			
	Virginia	x	x	x	
	Washington	x	x	x	

	State	Size	Collection
	Alaska	\$30 million	"risk charges" on tankers and facilities
	Florida	35 million	2¢/barrel fee on licensees
	Maine	4 million	1/2¢/barrel fee on licensees
	Maryland	1 million	license fees of \$250-\$5,000
	New Jersey	50 million	1¢/barrel fee
	North Carolina	no set size	appropriations
	Oregon	"	penalties
	Texas	5 million	appropriations
	Washington	no set size	penalties, fees, other charges

<u>LICENSING OF TERMINAL FACILITIES</u>	
Alaska	Maryland
Connecticut	Massachusetts
Florida	North Carolina
Maine	

<u>PROOF OF FINANCIAL RESPONSIBILITY</u>	
<u>FWPCA Certificate</u>	Conn
Alaska	Connecticut--\$50,000 for vessels
Florida	Maryland--\$100/ton for vessels
	Massachusetts--\$25,000 for "

Section IV

OIL SPILLS AND OREGON

OREGON'S OIL SPILL PROBLEM

Although Oregon does not currently have any major oil refineries or production facilities, the states waters are nevertheless subject to oil spill pollution. Transportation of oil on the Columbia River alone amounts to 6 million tons annually.¹³¹ The river sees over 600 tanker trips each year with tankers averaging at 30,000 dwt.¹³² These tankers and barges carry crude oil from Alaska and petroleum products from refineries in the Puget Sound area to distribution terminals in Portland.

The Port of Portland is not the only harbor receiving oil. The port of St. Helens is currently being used by Portland General Electric for delivery of fuel oil for their electric generating plant near Clatskanie. Coos Bay has five berths serving oil tankers. Refined products are offloaded to small tank farms owned by Texaco and Standard which truck the oil inland. Astoria,¹³³ Newport, and Umpqua also receive fuel oils and petroleum products.

Primarily because of this activity in the transportation of oil, the Columbia River Basin suffered approximately 889 oil spills during the period 1973-77.¹³⁴ These spills resulted in over 189,000 gallons of oil entering the states waters.¹³⁵ Vessels, such as the Toyota Maru which spilled 26,000 gallons of fuel oil into the Willamette and Columbia Rivers in June, 1978, were the largest source of spills both in terms of number of spills and volume spilled.

OREGON'S OIL SPILL LAWS

Oregon's "Oil Spill Statute"¹³⁷ declares: "It shall be unlawful for oil to enter the waters of the state."¹³⁸ A person responsible for oil spillage is strictly liable for damages to public or private property.¹³⁹ The statute applies to "any ship or any fixed or mobile facility or installation located offshore or onshore."¹⁴⁰ To avoid any problems with preemption, the statute notes that it does not "require or prohibit any act if such requirement or prohibition is in conflict with any federal law or regulation."¹⁴¹

Any person who intentionally or negligently causes or permits the discharge of oil into the waters of the state is subject to a civil penalty not to exceed \$20,000 for each violation.¹⁴² All penalties and damages recovered by the state go into the General Fund.¹⁴³

Oregon used to have an Oil Spillage Control Fund but this was taken away by the 1977 legislature.

Although liability is imposed for oil spills regardless of cause or fault, several defenses are available to the person responsible. These defenses are: acts of war, sabotage, or God; negligence on the part of the U.S. government or the State of Oregon; and an act or omission of a third party.¹⁴⁴

If the person responsible for an oil spill fails to contain and remove it, the Oregon Department of Environmental Quality is authorized to do so.¹⁴⁵ The cleanup expenses incurred by the state are then billed to the spiller along with other damages. If the spiller fails to pay, the State Attorney General's Office is authorized to file suit.¹⁴⁶

The cost of restocking and replacing fish and wildlife in the affected areas may also be recovered.¹⁴⁷

The Department of Environmental Quality (DEQ) has considerable control over methods used to clean up oil spills. DEQ approval is required to dispose of oily debris (solid waste) in a landfill, to use chemicals or other dispersants, or to employ septic tank pumpers in emergency cleanup operations.¹⁴⁸

The Director of DEQ is also authorized to enter any public or private property to clean up a spill when it threatens to enter state waters.¹⁴⁹

When an oil spill occurs, the persons responsible are required to notify DEQ immediately. They must provide a written spill report within seven days of the spill and obtain written notice from DEQ that the spill cleanup is satisfactory.¹⁵⁰ Both the Environmental Protection Agency and the U.S.

Coast Guard operate an oil spill notification system and exercise separate enforcement actions against spillers which parallel DEQ's program. In Oregon's coastal zone, DEQ relies upon the Coast Guard to coordinate oil spill cleanup activities, while in inland waters, the EPA relies upon DEQ.

To help carry out cleanup operations efficiently, DEQ has set up an Oil Spill Contingency Plan. This plan outlines procedures for reporting and responding to oil spills and for the recycling and disposal of spilled oil. The plan includes lists of DEQ offices to be contacted and private contractors available for cleanup operations.¹⁵¹ Recognizing a need to improve Oregon's Oil Spill Contingency Plan DEQ plans to reorganize its current plan during 1979.

Section V

RECOMMENDATIONS FOR OREGON

Despite the fact that an oil handler has complied with federal and state regulations aimed at prevention, oil spills will happen. Accidental tanker collisions or faulty transfer procedures are bound to occur. In Noel Mostert's book, Supership, he reported that in a Shell Oil study of 40 serious tanker accidents involving pollution they found that the common link between them was that "people made silly mistakes."

For this reason, it is important that effective contingency plans and equipment are available to remove spilled oil and other hazardous substances. Also important is a source of revenue to pay for cleanup operations and to restore damaged natural resources.

This report makes the following recommendations for Oregon:

1) Hazardous substances besides oil should be addressed.

Since oil is not the only pollutant that enters the marine environment and poses a threat, laws and programs should be broadly construed to address pollution from all hazardous substances.

2) Interstate cooperation should be a primary goal.

Pollution does not respect political boundaries. An unregulated problem in this state will affect neighboring states and vice versa. Oregon needs to work together with California and Washington when developing regulations and preparing spill control and removal plans, especially with respect to the Columbia River.

3) An Oil and Hazardous Substances Pollution Control Fund should be established.

An effective cleanup program requires readily available funds. Private companies and government agencies should not have to worry about whether or not they are going to be compensated for their efforts.

4) The fund should be available to provide compensation for spill pollution damage.

The fund should be readily accessible to legitimate claimants and allow recovery for property damage, loss of natural resources, loss of income, loss of tax revenue, and cost of cleanup.

5) Land use planning tools should be used to locate potential sources of pollution in areas of least vulnerability.

Since spills will cause greater damage in areas such as salt marshes or tourist areas, oil terminals and similar facilities should be located elsewhere.

6) Sensitive environments should be identified.

Such studies may be fundable through grants from the Coastal Zone Management Act, including the Coastal Energy Impact Program (CEIP), or the Federal Water Pollution Control Act. These studies could collect wind, wave, and current data and inventory fish, wildlife, and vegetation.

7) Oil Spill Contingency Plans should receive greater emphasis.

Points to be considered in any OSCP include: a) establishment of a center for coordination and direction of operations; b) establishment of local plans and task forces; c) assignment of duties and responsibilities; d) identifi-

cation of equipment and supplies to be utilized; and e) establishment of procedures for containing, dispersing, and removing spills. It should be remembered that any written plan is not a substitute for experienced personnel and sufficient equipment. Training exercises should be held periodically at the local level to spot problems before a major spill occurs. The plans themselves should be updated annually.

8) Oil production, transportation, and storage facilities should be required to have adequate cleanup equipment available.

Pollution damages will obviously be decreased when a spill is rapidly contained. If the EPA and Coast Guard fail to enforce the requirements which they have set for these facilities then the state Department of Environmental Quality must do so. The equipment required should be based on the potential threat which the particular facility poses and personnel should be properly trained in how to use the equipment.

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- 8 See Post, A Solution to the Problem of Private Compensation in Oil Discharge Situations, 28 U. Miami L.Rev. 524 (1974).
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- 10 370 F.Supp. 247 (S.D. Me. 1973).
- 11 Post, note 3 supra.
- 12 501 F.2d 558 (9th Cir. 1974).
- 13 Id. at 530-31, and Burgess v. M/V Tamano, note 6 supra.
- 14 Maryland v. Amereda Hess Corp., 350 F.Supp. 1060 (D.Md. 1972).
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- 16 Damages were recoverable, however, under a negligence theory, Id.
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- 18 363 F.Supp. 110 (D.Vt. 1973), aff'd mem., 487 F.2d 1393 (2d.Cir. 1973).
- 19 357 F.Supp. 1097 (D.Me. 1973).
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- 22 Note 14 supra, at 1099-1101.
- 23 "The district courts shall have original jurisdiction, exclusive of
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time jurisdiction, saving to suitors in all cases all other remedies
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- 24 Id.
- 25 G. Gilmore & C. Black, The Law of Admiralty, 37-40 (2nd ed. 1975).
- 26 Southern Pacific Co. v. Jensen, 244 U.S. 205, 214-15 (1917).
- 27 See e.g., Maryland v. Amereda Hess Corp., 350 F.Supp. 1060 (D.Md. 1972),
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- 31 46 U.S.C. §§181-189 (1976).
- 32 Place v. Norwich & New York Trans. Co., 118 U.S. 468 (1886).
- 33 In Re Barracuda Tanker Corp., 281 F.Supp. 228 (S.D.N.Y. 1968).
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- 35 Glaeser, Federal Common Law and Ocean Pollution, 8 Env'l Law 1, at
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Regs. are at 40 C.F.R. §§112.1 - .7 (1977).

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tions, see 33 C.F.R. §153 (1977).

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93 Note 89 supra, at 4.

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- 121 Id. §46.03.790.
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- 123 Id. §30.25.220-280.
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- 137 O.R.S. §468.780-.815 (1977).
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- 143 O.R.S. §468.810 (1977).
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- 145 Id. §468.800.

- 146 Id. §468.805.
- 147 Id. §468.745.
- 148 O.A.R. §§340-47-005 to 025 (1977).
- 149 O.R.S. §468.802(1) (1977).
- 150 O.A.R. §340-47-015 (1977).
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(1977).

OIL TANKER OPERATIONS

Section I

INTRODUCTION

Oil Tankers as a source of pollution have been the subject of much recent debate. New and stricter standards for the regulation of tanker design and operations have been adopted in 1978 on both the international and national levels. To the extent that these programs inadequately protect the environment, the State of Oregon does possess limited authority to supplement them. This report will briefly analyze current regulatory systems and present those options which remain to the State.

Oil Tankers are considered to be one of the primary sources of oil pollution in the seas and coastal waters.¹ Intentional discharges of oil during normal operations and in preparation for drydocking are said to account for about 85% of tanker source oil pollution.² Accidental discharges, including more spectacular instances such as the grounding of the "Argo Merchant," account for approximatley 13%.³

Oil pollution on the Columbia River does not follow the ocean pollution trends. In fact, tankers are but a minor source of oil on the Columbia, both in terms of number of occurrences and quantity of oil spilled.⁴ One factor which helps to explain this difference is that tankers generally perform the bulk of pollution producing operations at sea. However, the possibility of increasing tanker traffic would support state efforts to maintain the tanker safety record. Also, some safeguards adopted for tanker traffic, such as vessel traffic control systems, could apply equally to non-tanker traffic in

hopes of reducing all sources of oil pollution.

Tank washings and ballast water discharges are the largest components of tanker operational discharges. Cargo tanks must be cleaned after unloading. This is normally accomplished by spraying water over the tanks' interiors. Also, after unloading, tankers must take on ballast water to maintain an adequate draft for navigational stability and safety. Ballast water is customarily taken into empty cargo tanks, expelling residual hydrocarbon vapors. Mixtures of oil and water produced in these processes have historically been discharged overboard.

Techniques are being developed and adopted which greatly reduce these operational discharges. Crude oil washing (COW) systems utilize high pressure application of cargo oil, rather than the customary water, to clean the cargo tanks. COW systems are not applicable to refined product tankers, which require a more thorough cleansing after unloading. Load on top procedures which minimize the oil discharged in ballast water can be utilized by crude oil carriers.⁵ More thorough tank washing is necessary to prepare a tanker for drydocking. This contributes significantly to operational discharges. Techniques and equipment to separate oil and water can be used to minimize oil discharges from tanker washing and ballasting. Port facilities for the reception of such oil-water residues are being developed and can greatly reduce the temptation to discharge at sea.

Design improvements are also being developed to reduce operational and accidental discharges. Segregated ballast tanks, now required on some new vessels, will eliminate the need to mix oil and water in ballasting operations. Double

bottoms or hulls are being incorporated into some new vessels, serving both as structural protection against accidents and as segregated ballast compartments. Double bottoms or hulls are not required by any law, though such a requirement has been considered. Improved steering and navigation equipment is also being developed and implemented.

Such design changes can be very expensive, especially when retrofitted onto existing tankers. The costs associated with oil pollution damages, in many respects unquantifiable, would seem to justify taking many of these precautionary measures. Oil pollution damages range from reduced biological productivity, fouled fishing gear, and obvious property damages, to the diminished pleasure and usefulness of spoiled beaches and estuaries.

It is estimated that up to 80% of marine accidents involve human error as opposed to purely structural failures. ⁶ Improved training and licensing requirements are being adopted in hopes of reducing such accidents. Similarly, better methods of reporting and recording navigational safety information are being adopted.

Efforts to limit oil tanker pollution have historically focused on cleaning up and assigning liability for oil spills after they have occurred. Pollution due to normal operating procedures is not addressed by these efforts. This section of the report reflects a shift in approach to include preventative regulations.

The purpose behind tanker design and operational regulations is to prevent oil from entering the marine environment. The ultimate solution to the hazards presented by oil pollution must be applied on an international scale

to be truly effective. It would be short sighted indeed to satisfy ourselves with local protective measures which shifted the dangers and burdens of oil pollution elsewhere in the nation or world. This is not to say, however, that Oregon should passively accept national and international standards which are decidedly inadequate. ⁷ While encouraging improvements at all levels of regulation, Oregon must do what it can as a state to protect its valuable and vulnerable marine resources.

Air pollution is another significant problem associated with tanker operations. ⁸ Engine exhausts and cargo vapors are the two major components of vessel source air pollution. Hydrocarbon vapors are expelled from cargo tanks during loading, ballasting, washing, venting, and inerting processes. Inerting is the procedure whereby the hydrocarbon vapor concentration in empty tanks is reduced below explosive levels by introducing "inert" gases, typically cooled exhaust, into the tanks. National and international programs have so far failed to address the issue of tanker air emissions, except to require inerting systems on some tankers for safety. There appears to be much state interest in filling this void. ⁹ Fortunately, the legal basis with which to protect local air quality does exist, if somewhat limited by concerns for safety and commerce.

Section II

INTERNATIONAL EFFORTS

International regulation of oil tanker design and operations has resulted largely from the efforts of the Inter-Governmental Maritime Consultive Organization (IMCO). IMCO was organized by international convention in 1948 and came into being in 1958.¹⁰ It operates under the auspices of the U.N. for the purpose of encouraging international cooperation and communication concerning various aspects of maritime affairs. Criticism of IMCO focuses on the often conflicting organizational goals of encouraging maritime commerce and protecting the marine environment.¹¹ As explained below, the effectiveness of current IMCO standards is questionable when applied to tanker operations in Oregon waters.

Presently applicable international regulations are the result of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil,¹² the first comprehensive international attempt to protect the marine environment from the hazards of oil pollution. The 1954 Convention, as amended in 1962,¹³ restricts intentional discharges by quantity and geographic location. It is in force internationally and has been accepted by the U.S.¹⁴ IMCO Amendments adopted in 1969,¹⁵ strengthening the discharge limitations, have also entered into international force and been accepted by the U.S. However, legislative implementation of the 1969 Amendments was conditioned upon delaying their application until additional amendments produced by IMCO in 1971 were also accepted by the U.S.¹⁶ The 1971 Amendments have not yet been accepted, nor have they entered into international

force. The 1971 Amendments include the first construction standards established to minimize oil pollution from normal operations and from accidents. Though not yet in force, these standards for defensively placed segregated ballast tanks have served as a practical model and have been implemented in much new construction.

Presently valid international regulations, stemming from the 1954 Convention and 1962 Amendments, are considered to be ineffective in controlling oil pollution.¹⁷ Only those ships whose flag nations have accepted the Convention are covered. Enforcement remains at the discretion of the flag nation and has been less than vigorous. Also, the lack of port facilities to receive oily residues has provided tankers with an excuse for discharging at sea.

The 1973 International Convention for the Prevention of Pollution from Ships¹⁸ will replace the 1954 Convention, as amended, when it enters into International force, anticipated sometime in 1981.¹⁹ The 1973 Convention, not yet accepted by the U.S., will impose more stringent discharge standards on tankers, require slop tank capacity sufficient to retain on board all oily residues (tank washings, oily ballast, and wastes) previously discharged at sea, and call for parties to the Convention to provide adequate port reception facilities for the disposition of such oil residues. Nations which ratify the Convention must apply its standards to all tankers, including those whose flag states have not accepted the Convention.²⁰ A significant improvement in enforcement practices provides for port-state enforcement against vessels for violations of the Convention occurring within that state's jurisdiction.²¹

A February, 1978, IMCO conference adopted amendments to the 1973 Convention

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which make significant improvements in tanker design standards. Segregated

ballast tanks will be required on all new crude oil tankers of greater than

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20,000 DWT and new refined product tankers of greater than 30,000 DWT.

Similar requirements, or equivalent measures, apply to all existing tankers

over 40,000 DWT. Dual radar systems, each capable of operating independently

of the other, and improved steering equipment will be required for all tankers

larger than 10,000 tons. Inert gas systems will be required on most tankers

larger than 20,000 DWT for safety purposes. Additionally, the inspection

and certification requirements were strengthened.

Though the 1973 Convention as amended in 1978 presents the strongest inter-

national regulations yet seen, the overall scheme appears inadequate in

several respects. Of utmost concern to the State of Oregon, the Convention

does not apply its most stringent standards, those requiring segregated

ballast tanks, to existing tankers below 40,000 DWT. It is reported that the

Columbia River is unable to accommodate loaded tankers larger than 40,000

tons. Larger vessels could enter the river only if partially laden. Other

Oregon ports are similarly limited as to size of vessels able to use them.

Thus, oil discharges for existing tankers of less than 40,000 DWT would be

limited only by standards similar to those of the 1954 Convention as amended.

The fact that most oil shipped into Oregon ports will be from domestic sources

and therefore in American ships reduces the importance of international regu-

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lations to the State of Oregon. Still, foreign tankers could be traversing

the waters along the Oregon coast.

Various other international agreements have addressed certain aspects of tanker traffic, safety, crew training, and pollution prevention in cases of accidents. ²⁵ A June, 1978, IMCO conference adopted the first international standards for crew training. ²⁶ This will be a tremendous improvement over the current situation, where countries such as Liberia, with large tanker fleets, have absolutely no training standards. Though it will be some time before the training Convention enters into force internationally, many ²⁷ maritime nations intend to implement the standards before that time.

There are undeniable problems with the current system of international regulation. Reliance on flag state enforcement which is sometimes less than vigorous, incomplete application of Convention standards to the world tanker fleet, delays in adopting technological advancements and delays in applying conventions once agreed upon are but several of the numerous problems facing effective IMCO control of tanker pollution. Nonetheless, the international approach offers the only viable ultimate solution. Oregon should encourage persistence in these efforts.

Section III

FEDERAL REGULATIONS

Federal efforts to impose effective regulations on tanker design and operations have been hampered by the desire to maintain international cooperation and uniformity in the field. Generally, however, the federal government has exceeded international standards deemed inadequate to protect the marine environment. President Carter has recognized that the critical importance of preserving the marine environment warrants exceeding international standards in light of the hesitancy of IMCO to adopt sufficiently stringent regulations.²⁸

The federal approach to tanker regulation is primarily contained in the Ports and Waterways Safety Act of 1972 (PWSA),²⁹ as amended in October by the Port and Tanker Safety Act of 1978,³⁰ authorizing the U.S. Coast Guard to establish and enforce regulations to ensure maritime safety and to protect the marine environment.³¹ Training of tanker crews, tanker inspections, vessel traffic systems, and tanker design for purposes of vessel safety and protection of the marine environment have all been effectively preempted by the PWSA.³²

Title I of PWSA, 33 U.S.C. 1221 et seq., authorizes the Coast Guard to regulate the movement of any tanker in navigable waters of the U.S. The Coast Guard has implemented this authority through regulations establishing general rules for tanker traffic³³ and specific rules for congested areas such as the Puget Sound.³⁴ As yet, no rules have been developed for specific application to the Columbia River or the Oregon Coast. There are, of course, standard

maritime "rules of the road" which apply to all vessels in Oregon waters.

The Coast Guard is presently under a statutory directive to study tanker

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traffic on the Columbia. The "Interim Final Technical Report" on Columbia River oil pollution has now been produced for the Coast Guard. Specifically,

it recommends that a vessel traffic system be considered for the Lower

Columbia River and that the pollution information reporting system be

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improved by being compiled and distributed on regional and local levels.

Both of these recommended actions are within the statutory authority of the Coast Guard. Vessel traffic systems can include standards regulating vessel size, draft, speed, time of entry, movement, departure, and general vessel traffic patterns. The pollution information system should include local and regional compilations of spill cause, source, size, location, etc. Such information could assist local authorities in preventing and minimizing harm caused by future spills. Oregon should encourage Coast Guard implementation of these recommendations.

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The October 1978 amendments to the PWSA provide for the Coast Guard to deny entry into any port to vessels which have proven unreliable, or are in violation of standards for tanker design and operations. Improved record keeping requirements should aid the Coast Guard in this respect. The state should encourage strict monitoring of tanker operations.

Vessel traffic is also a matter of concern regarding future Outer Continental Shelf (OCS) development. There is a very real danger that fixed structures, such as oil drilling platforms, could interfere with normal vessel traffic patterns, resulting in accidents with severe consequences. In the October 1978 amendments to the PWSA, the Coast Guard is specifically authorized to

adopt and enforce "safe access routes" through OCS waters. The state should encourage adoption of traffic plans which would prevent placement of fixed OCS structures within some safe distance, 500 meters, for example, of established traffic lanes. The State should also encourage the Coast Guard to establish regulations for uniform application of such standards along the entire west coast of the U.S. Regardless of the likelihood of future OCS development off of the Coast of Oregon, it would be wise to reserve safe traffic lanes before development pressures arise.

Oregon has already addressed the OCS traffic issue through the Ocean Resources Statewide Planning Goal 19 of the Oregon Coastal Management Program.⁴⁰ The Ocean Resources Goal requires that OCS development be managed so as to give 'clear priority' to renewable resources and uses of the ocean, including navigation. Federal permits for OCS activities which would affect this goal must be ruled consistent with navigational safety.⁴¹ It appears, then, that Oregon could deny the consistency determination if proposed activities interfered with the goal of maintaining navigational safety. The establishment of navigational safety lanes through OCS waters by the Coast Guard would be an important step toward achieving this goal.

Title II of the PWSA, as amended, 46 U.S.C. 391 (a), authorizes the Coast Guard to establish standards for the design and construction of tankers for the purpose of general safety and oil pollution prevention. These standards are to apply to both domestic and foreign vessels in U.S. waters.⁴² Rules regarding crew training, vessel operations and inspections, and development of a marine safety information system are also to be adopted.

Present Coast Guard regulations promulgated under Title II of the PWSA are

contained in 33 CFR 157. The Coast Guard is currently in the process of adopting more stringent standards reflecting the February, 1978, IMCO amendments. Proposed standards include a requirement for defensively placed segregated ballast tanks on all new crude oil tankers over 20,000 DWT and new product tankers over 30,000 DWT; design and/or operational standards to reduce oil discharges from existing tankers of greater than 40,000 DWT; inert gas systems for all new tankers over 20,000 DWT and for old tankers, where reasonable; improved steering gear and radar requirements; and improved inspection procedures. ⁴³ These standards will be adopted with a schedule which provides for complete application by 1985. Immediate action has been taken on the requirement for dual radar system, this becoming ⁴⁴ effective in June, 1979, for tankers over 10,000 tons.

The October amendments to the PWSA direct the Coast Guard to adopt standards which equal, and in some respects improve upon, the 1978 IMCO standards. Though the majority of proposed regulations reflecting the 1978 IMCO standards will probably be adopted in present form, the PWSA amendments do contain significant improvements for the protection of Oregon's waters. Of greatest significance, segregated ballast tanks or crude oil washing systems will eventually be required for existing tankers between 20,000 and 40,000 DWT, ⁴⁵ vessels left unaffected by the 1978 IMCO standards. Tankers are allowed until January 1, 1986, or the date on which they reach 15 years of age, ⁴⁶ whichever is later, to comply with this requirement.

Personnel and training standards are to be improved under the amendments, as are inspection programs and informational systems. New authority is provided for regulating the process of lightering, ⁴⁷ the offshore transfer of oil from

large tankers to smaller tankers able to enter restricted waters such as the Columbia River. Stricter training standards alone could have profound results in diminishing oil pollution, as the majority of pollution producing tanker accidents are said to involve human error.⁴⁸ If facilities for refining or trans-shipping Alaskan crude oil are developed along the Columbia, the practice of lightering could become common off of the coast as shipping crude oil in larger tankers is more economical for industry. If not strictly regulated, the transferring operation presents the danger of oil escaping into the seas.

It must be emphasized that in setting forth standards for Coast Guard implementation, the October 1978 amendments to the PWSA are offered as minimum guidelines only. The Coast Guard is given explicit authority to exceed the standards listed in the amendment if it appears necessary.⁴⁹ There is considerable support in the federal government for even stricter standards. The State of Oregon should encourage Coast Guard initiative where present regulations are found inadequate.

There is no current uniform federal approach to the regulation of tanker air emissions. Such a program seems to have been left to the states to develop on a local or regional level under the authority of the Clean Air Act of 1970.⁵⁰

Section IV

OREGON OPTIONS

The State of Oregon retains some limited control over oil tanker operations. A recent Supreme Court decision, Ray v. Arco, 435 U.S. 151 (1978), clearly delineates what a state may and may not do with respect to regulating tankers for the protection of its own environment. The October 1978 PWSA amendments do not appear to affect this decision in any manner.

Ray v. Arco involved a challenge to a Washington State Law which was designed⁵¹ to regulate oil tankers on the Puget Sound. The Washington Tanker Law would have banned tankers over 125,000 DWT from the Puget Sound, required state-licensed pilots for all tankers over 50,000 DWT, and either tug assistance or strict safety features on tankers between 40,000 and 125,000 DWT.

The Supreme Court ruled that the PWSA pre-empted the field of tanker design⁵² and operations except as to tug requirements,⁵³ pilot requirements on vessels engaged in foreign trade (registered vessels),⁵⁴ safety standards for "structures" in the waterways,⁵⁴ and valid state regulations designed for purposes other than those of the federal program (general safety and protection⁵⁵ of the marine environment).

Tug requirements are within the statutory vessel traffic management authority⁵⁶ of the Coast Guard under the PWSA. However, until a federal decision is reached as to whether or not to impose tug requirements, such regulations are⁵⁷ within the scope of state authority. Since the tug requirement itself is

valid, the Supreme Court found nothing wrong with the State of Washington
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waiving the rule for vessels with certain design characteristics.

Presently, there is no Oregon state law requiring the use of tugs. ORS
777.120 and .125 do appear to authorize separate port districts to adopt
such a requirement. With increasing tanker traffic a likelihood in
Oregon waters, additional regulations for tug requirements would
appear worth serious consideration. There is, however, some question as to
how a mandatory tug requirement would affect liability in case of an acci-
dent. (See the following discussion on mandatory pilot requirements
and liability.)

The State of Oregon may also require pilots on tankers engaged in foreign
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trade as they enter Oregon bays, rivers, or ports. Generally, separate
port districts have been delegated concurrent authority over maritime
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affairs. Thus, any regulations which the state could impose, such as
pilot rules, could also be required by ports. The practical effect of such
a law is questionable as most tankers expected in Oregon waters would be
domestic tankers carrying crude oil from Alaska or refined products from
Washington or California. However, every increment of additional protection
is worth considering.

Current Oregon laws are designed only to regulate licensing of pilots for
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registered vessels. Pilots for vessels engaged in domestic trade (coast-
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wise or enrolled vessels) are licensed by the Coast Guard and required by
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statute. However, it is not clear whether a compulsory pilot rule would
conflict with ORS 776.435 which allows vessels to refuse pilot services
without liability for such services. The State should, at least, revise

legislation and develop rules whereby the discretion as to whether to use a pilot rests with the ports rather than ship captains.

An interesting question concerning liability for accidents arises when a state or port assigns compulsory pilot requirements. The question involves release of a ship owner's liability for accident damages and cleanup costs when the accident was caused by the negligence of a compulsory pilot. The Federal Water Pollution Control Act (FWPCA) releases ship owners from such liability when third party negligence causes the accident.⁶⁴ However, a 1977 First Circuit Court of Appeals decision, Burgess v. M/V Tamano, 564 F.2d 1964 (1st Cir. 1977), stated that a compulsory pilot's negligence does not release the ship owner from liability.⁶⁵ Here, the accident resulted in oil pollution damages and the decision was based directly on the court's interpretation of the FWPCA. However, the Ninth Circuit (of which Oregon is a part) recently ruled that the negligence of a compulsory pilot does release the ship owner from liability under general maritime tort law.⁶⁶ Neither oil pollution nor specific federal statutes were involved. The First Circuit decision is more recent, is based on the letter and policy of the FWPCA, and is a very well-reasoned opinion. However, the Ninth Circuit decision is a legal precedent which Oregon must consider in determining whether to require pilots on registered vessels.

If a separate pollution fund were established to compensate for damages and costs to the state and private claimants under the situation described, there would then be no reason to refrain from adopting uniform pilot requirements for registered vessels. For instance, a program could be developed whereby paying in and drawing out of the fund did not depend upon fault or liability, but rather the activity engaged in (shipping or receiving petroleum products)

or the damages incurred as a result of a tanker accident. Similarly, a fund could be maintained with adequate reserves to pay for cleaning up spills and compensating those injured by spills without the necessity of collecting penalties from ship and cargo owners in cases where a compulsory pilot was a substantial cause of the accident. Such a program could function irrespective of fault or negligence.

Special conditions attach to pilot requirements for tankers on the Columbia River. The Columbia's status as a boundary water (between states) brings it under federal regulations which allow for pilots from either bordering state to pilot vessels to any port or destination on that portion of the river which serves as a boundary, regardless of the state in which the destination is located.⁶⁷ Registered tankers heading to the proposed GATX oil trans-shipment terminal and the proposed Cascade Energy Refinery, for examples, could carry a pilot licensed by Washington or Oregon. Upon entry into the Willamette River, an Oregon licensed pilot could be required to the exclusion of Washington licensed pilots.⁶⁸

It is clear that Oregon may prescribe more stringent safety standards for "structures" on or in Oregon waters than those set by the Coast Guard.⁶⁹ This would seem to include bridges, pilings, breakwaters, wharves and similar structures in the waterways. The Corps of Engineers generally has the responsibility to supervise installation of such structures under the Rivers and Harbors Act of 1899, 33 U.S.C. 401 et seq. To the extent that the state is dissatisfied with the Coast Guard safety provisions regarding such structures, it is at liberty to improve upon them.

Regulation of other aspects of tanker design and operation for general safety and the protection of the marine environment would appear to be pre-empted

by the federal government. Training requirements, inspection programs, and traffic systems would all be within the exclusive authority of the Coast Guard. As such, the state's only recourse in seeking to protect its environment would be to encourage the Coast Guard to adopt more stringent protective standards and practices. It also bears repeating that state oil spill liability and compensation programs (discussed elsewhere) can have a salutary effect on tanker operations.

In addition to the more spectacular problems of oil pollution, tanker operations also produce a significant amount of air pollution.⁷⁰ Tanker emissions can be categorized into those which are common to all shipping, especially SO₂ in engine combustion emissions, and those unique to oil tankers, such as the hydrocarbon component of cargo vapors. The danger to public health presented by such air pollution is well recognized.⁷¹ Fortunately, there is substantial legal support for state authority to regulate those aspects of tanker operations which contribute to air pollution problems.

Though the regulation of tanker design and operation for safety and protection of the marine environment has been largely pre-empted by the federal government, there has been no similar federal program directed at limiting vessel source air pollution. However, state discretion in establishing such regulations is not unlimited.

Generally, the regulation of interstate commerce, such as tanker traffic, is within the authority of the federal government pursuant to power derived from the U.S. constitution. ⁷² However, state and local govern-

ments are allowed to regulate certain aspects of interstate commerce for valid local purposes, such as the protection of public health, even to the extent of completely prohibiting certain interstate activities. ⁷³ State programs cannot be in conflict with or pre-empted by federal laws.

Especially strict state regulations will be subject to close judicial scrutiny to determine whether the resulting burden imposed on interstate commerce is legitimate. Courts are particularly suspect when state law is imposed in such a way as to have a discriminatory economic effect on out-of-state interests. Also, state regulations must have some reasonable basis in fact. Regulations adopted in an arbitrary and capricious manner may not survive a court challenge.

In 1960, the Supreme Court ruled that local governments could impose regulations directed toward the control of air pollution emissions on vessels engaged in interstate commerce. Huron Portland Cement v. Detroit, 362 U.S. 440 (1960). This decision was specifically upheld in Ray v. Arco, supra.

"We do not question in the slightest the prior cases holding that enrolled and registered vessels must conform to 'reasonable, non-discriminatory conservation and environmental protection measures . . . ' imposed by a state . . . Similarly, the mere fact that a vessel has been inspected and found to comply with the Secretary's vessel safety regulations does not prevent a State or city from enforcing local laws having other purposes, such as a local smoke abatement law."⁷⁴

Thus, state regulations for smoke opacity limits, fuel sulfur content, and hydrocarbon emissions for tankers are within the range of state authority.

States have been granted a powerful tool with which to protect air quality in
the Clean Air Act of 1970, as amended in 1977.⁷⁵ Under the Clean Air Act, the
federal government has delegated to the states primary authority for protecting
and improving air quality. Oregon has developed a State Implementation Plan
(SIP) with which to pursue this goal.⁷⁶ National ambient air quality
standards have been set by the Environmental Protection Agency (EPA) for,
among others, sulfur dioxide and hydrocarbons.⁷⁷ States are specifically autho-
rized to adopt stricter standards than those set out by the EPA.⁷⁸ A policy
of Prevention of Significant Deterioration has also been adopted to protect
those regions with relatively clean air, such as the Oregon coast.⁷⁹

The Environmental Quality Commission has recently been considering adoption
of regulations restricting tanker air emissions.⁸⁰ This would appear to be
clearly within the State's authority under the Clean Air Act. SO₂ emissions in
engine exhaust could be limited by requiring the use of either low-sulfur fuels
or emission control technology. Hydrocarbon emissions could be restricted
by preventing non-essential activities, such as tank washing, which emit
hydrocarbons, and by requiring collection or destruction of vapors emitted
during essential safety operations such as inerting or ballasting.

The imposition of hydrocarbon emissions regulations on tankers and barges
was attempted by EPA, challenged in court, and upheld as valid under the
Clean Air Act. In State of Texas v. EPA, 499 F.2d 289 (5th Cir. 1974), where
Texas was challenging several aspects of an EPA-developed state plan, the
imposition of such restrictions was ruled within EPA authority.⁸¹ In general,
states have even greater authority than the EPA in this area.⁸²

There is some question as to whether fuel oil sulfur content limitations or

emission control devices can be required for crude oil tankers without applying similar standards to other vessels. Unless the distinction between tanker and non-tanker emissions control would be justified, a court could find discrimination in the effect of such regulations. Justifications for distinguishing between types of vessels could be technical (do tanker engines emit more SO₂ than non-tankers, even due to greater hours of operation) or practical (are tankers better able to obtain low-sulfur fuel). A court could also determine that equal results (cleaner air) could be achieved with a 'less restrictive alternative' by requiring all vessels to burn a low-sulfur fuel of somewhat higher sulfur content which would theoretically be easier to obtain and therefore less burdensome.

Finally, courts resist imposition of inconsistent state regulations on interstate commerce. Thus, to the maximum extent possible, Oregon should attempt to coordinate establishment of any vessel emission regulations with other west coast states.

The Supreme Court has recognized unique features of the Clean Air Act which allow states to go to extreme measures to protect public health from air pollution. In Union Electric Co. v. EPA, 427 U.S. 246 (1976), the Court recognized that

"[T]he State has virtually absolute power in allocating emissions limitations so long as the national standards are met . . ."

and

"[C]ongress intended claims of economic and technological infeasibility to be wholly foreign to . . . consideration of a state implementation plan."

This recognizes the "technology forcing" concept of the Clean Air Act whereby

states have the discretion to set standards for emission controls, for instance, which do not appear readily available or economic.⁸⁸ The only requirement appears to be that such standards are based on fact and are not arbitrary or capricious.

Oregon also has some authority to control air pollution produced by OCS development. EPA has determined that SIP's promulgated under the Clean Air Act can be extended to OCS activities which actually affect the air quality of an adjacent state.⁸⁹ Congress affirmed EPA's interpretation of Sections 1333 (a) (1) and (2) of the OCS Lands Act, extending state and federal law, including the Clean Air Act and Oregon SIP, to the OCS, when the Act was amended in September, 1978.⁹⁰ Specifically, the Secretary of Interior, guided by the Clean Air Act and EPA, is authorized to establish regulations for compliance with clean air standards.⁹¹ However, the amendment specifically exempts ships and vessels operating on the OCS from application of air quality standards.⁹² Thus, Oregon will have to wait until tankers enter state jurisdiction, 3 miles off of the coast,⁹³ to apply any air standards finally adopted.

Section V

RECOMMENDATIONS

Oregon should consider adopting certain regulations to protect its environment from the dangers presented by oil tanker traffic.

1. It is within state authority to require pilots on registered vessels and the use of tugs by all tankers. At least the choice should rest with a state agency rather than remain at the vessel captain's discretion. To clarify and facilitate state control over pilot service discretion, ORS 776.435 should be amended or repealed.
2. The State may set additional safety standards for structures in or on the waters of Oregon. A determination should be made of the adequacy of the Coast Guard efforts in this direction.
3. Tanker air emissions can and should be adopted to protect air quality and public health. These efforts should be undertaken cooperatively with neighboring states. EQC should adopt regulations limiting engine and hydrocarbon vapor emissions within the Portland air quality control region.
4. Finally, the State should continually monitor and evaluate Coast Guard regulations applicable to oil tankers, and encourage adoption of stronger standards where necessary. The designation of safe passage lanes over the outer continental shelf, the establishment of a vessel traffic system for the Columbia River, and improvements in record-keeping and information dissemination should be urged by the State. Also, the Coast Guard should be encouraged to exercise its authority to deny entry into Oregon ports to those vessels not meeting federal standards for safety and design.

NOTES

- 1 Though estimates vary, land based sources (including discarded lubricants and industrial and municipal wastes) and atmospheric fallout from incomplete combustion of fossil fuels together contribute more than tankers to oil pollution of the seas. Congress of the United States, Office of Technology Assessment, Oil Transportation by Tankers: An Analysis of Marine Pollution and Safety Measures, July 1975, p. 26.
- 2 National Academy of Science, "Petroleum in the Marine Environment," cited supra n. 1, p. 27.
- 3 Id.
- 4 Oceanographic Institute of Washington, "Evaluation of Oil Clean Up Capabilities on the Columbia River Basin System, Interim Final Report," p. V-5 (November 8, 1978).
- 5 Supra n. 1 at 28. For a critical evaluation of the benefits of Load on Top procedures, see generally, Pritchard, S.Z., "Load on Top - From the Sublime to the Absurd," 9 *Journal of Maritime Law and Commerce* 185 (1978).
- 6 National Academy of Science, "Human Error in Merchant Marine Safety," 1976, cited in S. Rep. No. 95-176, 95th Congress, 1st Sess. 11 (1977).
- 7 See, Comments of Sen. Magnuson regarding the adequacy of even the most stringent nationally adopted standards. 124 Cong. Rec. S. 16762 (daily ed. Sept. 30, 1978).
- 8 See, U.S. Environmental Protection Agency, "The Alaskan Oil Disposition Study: Potential Air Quality Impact of a Major Off-Loading Terminal in the Pacific Northwest", 1977.
- 9 The Oregon Environmental Quality Commission is considering adoption of rules regulating emissions from tankers calling on Oregon ports. Proposed Adoption of Rules Controlling Emissions from Crude Oil Tankers Calling on Oregon Ports, Memo. to Environmental Quality Commission from Director (Mar. 31, 1978). E.Q.C. materials are available at E.Q.C., Portland, Oregon.
- 10 See, Convention on the Intergovernmental Maritime Consultative Organization, in force March 17, 1958 [1948], 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48.
- 11 Juda, L., "IMCO and the Regulation of Ocean Pollution from Ships," 26 *Int'l & Comp. Law Q.* 558 (1977); Greenberg, Eldon, "IMCO: An Environmentalist's Perspective," 8 *Case Western Reserve J. of Int'l Law* 131 (1976).

- 12 Opened for signature, May 12, 1954, [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3.
- 13 Adopted April 11, 1962, [1962] 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.
- 14 Oil Pollution Act of 1961, Pub. L. No. 87-167, 75 Stat. 402 (codified at 33 U.S.C.A. § 1001 et seq. (Supp. 1977)).
- 15 See 9 Int'l Legal Materials 1 (1970) for a composite of 1954, 1962, and 1969 texts.
- 16 33 U.S.C.A. § 1016 (Supp. 1977).
- 17 See supra n. 11.
- 18 Opened for signature, Jan. 15, 1974, 12 Int'l Legal Materials 1319 (1973). See U.S. Congress, supra n. 1, at 76-80.
- 19 The 1973 convention will enter into force one year after being accepted by at least 15 nations representing 50% of the world's merchant fleet.
- 20 Supra n. 18, Art. V.
- 21 Supra n. 18, Art. IV.
- 22 See 43 Fed Reg. 16, 886 (1978).
- 23 DWT (deadweight ton) refers to a tanker's carrying capacity. It includes the weight of all cargo oil plus the weight of fuel, stores, water, and crew. In most tankers the deadweight capacity is within 5 percent of the actual cargo capacity.
- 24 46 U.S.C.A. § 883 (1975). The Jones Act, § 27 of the Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, requires that goods shipped between American ports be carried in American vessels.
- 25 See, generally, Juda, supra n. 12.
- 26 43 Fed. Reg. 33, 357 (1978).
- 27 Id.
- 28 See, 13 Weekly Comp. of Pres. Doc. 408 (1977).
- 29 33 U.S.C.A. § 1221 et seq. (Supp. 1977) and 46 U.S.C.A. § 391 (a) (Supp. 1978).
- 30 Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (Approved Oct. 17, 1978).

31 The actual delegation is to the Secretary of the Department in which the
Coast Guard is located, presently the Department of Transportation.

32 See discussion of Ray v. Arco, 435 U.S. 151 (1978), at p. 14.

33 33 C.F.R. §§ 160-164 (1977).

34 33 C.F.R. § 161 (1977).

35 See, 33 U.S.C.A. § 1601 et seq. (Supp. 1977).

36 Act of May 19, 1978, Pub. L. No. 95-308, 92 Stat. 359 (to be codified at
33 U.S.C. § 1254).

37 Supra, n. 4 at p. XIV - 10.

38 Supra, n. 30.

39 Supra, n. 30, 92 Stat. 1473.

40 Oregon Land Conservation and Development Commission, "Oregon Coastal
Management Program," 207 (1976). Oregon Administrative Rules 660-15-010
(App. C).

41 16 U.S.C.A. § 1456 (c) (3) (1974).

42 Prior to the October, 1978, amendments to the PWSA, foreign vessels could
satisfy Coast Guard regulations by showing a certificate of compliance
issued by a foreign nation under certain international agreements.
See 46 U.S.C.A. § 391 (a) (7) (D) (Supp. 1978).

43 43 Fed. Reg. 16,886-90 (1978).

44 43 Fed. Reg. 32,112 (1978).

45 Supra, n. 30, 92 Stat. 1484.

46 Id.

47 Supra, n. 30, 92 Stat. 1491.

48 Supra, n. 6.

49 Supra, n. 46.

50 42 U.S.C.A. § 7401 et seq. (Supp. 1977).

51 Wash. Rev. Code Ann. §§ 88.16.170-.190 (Supp. 1976).

52 435 U.S. 151, 172 (1978).

53 Id. at 159.

54 Id. at 170.

55 Id. at 164.

56 33 U.S.C.A. § 1221 (Supp. 1977).

57 The Coast Guard is still considering whether to adopt regulations govern-
ing the use of tugs. See 41 Fed. Reg. 18,770 (1976).

58 435 U.S. 151, 173 (1978).

59 46 U.S.C.A. §§ 211, 215 (1958).

60 ORS 777.120 and .125.

61 ORS 776.405 et seq.

62 46 U.S.C.A. § 214 (1958).

63 46 U.S.C.A. § 364 (1958).

64 33 U.S.C.A. § 1321(f) (Supp. 1977).

65 564 F.2d 964, 982 (1977).

66 People of State of California v. Italian Motorship Ilice, 534 F.2d 836
(9th Cir. 1976).

67 46 U.S.C.A. § 212 (1958).

68 The Glenearne, 7 F. 604 (D.C. Oregon, 1881).

69 Supra, n. 54.

70 Supra, n. 8.

71 See H.R. REP. NO. 95-294, 95th Cong. 1st Sess. 105 (1977).

72 U.S. Const. art. I, § 8.

73 See, Exxon Corp. v. Governor of Maryland, 98 S.Ct. 2207 (1978).

74 435 U.S. 151, 164 (1978).

75 42 U.S.C.A. 7401 et seq. (Supp. 1977).

76 See Oregon Administrative Rules, ch. 340.

77 40 C.F.R. Part 50 (1977).

78 42 U.S.C.A. 7416 (Supp. 1977).

79 42 U.S.C.A. 7470 et seq. (Supp. 1977).

80 Supra, n. 9.

- 81 499 F.2d 289, 317 (5th Cir. 1974).
- 82 Supra, n. 78.
- 83 See Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977).
- 84 See Dean Milk Co. v. Madison, 340 U.S. 349 (1951).
- 85 See supra n. 83, and Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).
- 86 427 U.S. 246, 267 (1976).
- 87 Id. at 256.
- 88 For an analysis of the development of legislative support for the "technology forcing" concept, see Bonine, The Evolution of "Technology-Forcing" in the Clean Air Act, Environment Reporter, Vol. 6, No. 13 (Monograph No. 21, July 25, 1975).
- 89 43 Fed. Reg. 16,397 (1978).
- 90 Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 86 (1978).
- 91 Id.
- 92 Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 203 (a), 92 Stat. 635 (1978).
- 93 The states were granted jurisdiction over the sea bed for three miles off their coast in the Submerged Land Act, 43 U.S.C.A. § 1301 et seq. (1964).