

Recommendations for an Improved Oil Spill Prevention Regulatory System: LEGAL RESEARCH REPORT



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"RECOMMENDATIONS FOR AN IMPROVED
OIL SPILL PREVENTION REGULATORY SYSTEM"

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EXECUTIVE SUMMARY

Five states, Florida, North Carolina, California, Oregon, and Washington, have been unusually effective in developing laws and institutions for controlling oil spills, influencing outer continental shelf oil exploration and development, and managing their coastal zones. The purpose of this study is to examine the laws and institutions in these five states to determine the basis of their success, and whether their experiences might prove useful for Alaska.

In each state we examine federal and state laws, institutions and policies dealing with offshore oil and gas development, including outer continental shelf (OCS) activities, and oil transport in state water. We then analyze the origins, development, and current state of each state's coastal zone management program.

Florida has been particularly successful in influencing federal OCS decisions by keeping in the Governor's office the authority to deal with federal agencies on this question. Oregon has enhanced its ability to manage its coastal zone and influence OCS decisions by adopting 19 carefully drafted and widely debated goals to provide clear guidance to state and federal officials. Oregon has also created a system of statewide land use planning. Oregon and Washington have enhanced their ability to deal with oil spills and OCS development by mandating a series of key studies. Washington has created the Puget Sound Water Quality Authority to study and develop a management plan for water quality control in the Sound, coordinating among the 400 or more governmental entities that have some jurisdiction there. California has had significant success with its "Joint Review Panels" which have brought state and federal authorities together in efforts to protect environmental quality on a project by project basis. All of these states have emphasized active citizen participation in their management programs. Each one of these concepts is explored in some depth in this study.

From this background study we have selected several of the most successful ideas and have made recommendations to the Commission based on these ideas.

RECOMMENDATIONS

The following recommendations are distilled from the 5 state study and other materials examined by the authors. They are designed to present to the Alaska Oil Spill Commission a number of options for institutional and legal changes that might improve Alaska's ability to manage oil exploration, development, transportation, storage, and spill risks, on land as well as on the sea.

The focus of this study is on long term institutional improvements, ones that should give Alaska better direct control over oil and gas activities, as well as enhancing the state's capability of influencing federal actions in this arena.

An idea that has worked in one state may not work exactly the same in another, because of different geography, demography, history, legal structure, etc. Certainly this is true with Alaska, which surely is one of most unique of the United States. Recognizing this we have endeavored to glean some of the "better" ideas for institutional changes from the 5 comparative states and mold and shape these recommendations to the special conditions of Alaska. We have made references back into the main text to some of the key places where the ideas were generated.

In each case we have made rather specific recommendations in order to focus attention on a particular issue and a proposed solution. However it is quite impossible to anticipate the ebb and flow of politics in Alaska which would affect, and be affected by these proposals. Thus Alaskans may, while finding the concepts useful, wish to modify them to comport to the real-politics of the state.

RECOMMENDATION NO. 1. PERMANENT OIL OVERSIGHT COMMISSION

(or Oil Transport Commission)

Oil is a dominant factor in the economy of Alaska, providing as much as 80% of the state budget in recent years. In no other state is the production of a single resource so vital to

economic and social welfare. While oil production brings great economic and social benefits, at the same time it poses great hazards, both on the land and on the sea, to the human social fabric and environmental quality of the state. It is difficult to imagine a topic that deserves higher priority by the Alaska state government. For this reason we recommend that a **Permanent Oil Commission** be created.

Precedent for such action is suggested by the actions of three other states. In Florida the development of outer continental shelf oil and gas development poses potentially devastating hazards. Clean, sandy beaches are Florida's greatest recreational and tourist asset and one of the prized aesthetic assets for the nation. A major oil spill that washed onto those beaches, or onto the fragile ecology of the Florida Everglades or Keys would be a major catastrophe for the state and the nation. While the risk of such a spill occurring may be small, the Exxon/Valdez spill teaches that it is nonetheless possible. The amount of devastation such an accident could cause in Florida is enormous, so great in fact that the issue has remained under the direct control of the Governor, in spite of the fact that other coastal zone management and environmental issues have been delegated to the regular line agency that handles environmental matters, the Department of Environmental Regulation.

Development of the outer continental shelf oil and gas resources is almost entirely a federal matter, where the state has little control and only consulting rights. A state's political influence is far more important than its legal power, as numerous failed lawsuits by unhappy states have proven. A state Governor ordinarily is the focal point for the state's political power and is most likely to have the greatest impact on the design, location, and timing of federal programs. Recognizing this Florida has kept in the Governor's office the responsibility for participating and exercising influence over the federal OCS process.

The Governor of Florida is advised on these matters by the Coastal Resources Citizens Advisory Committee, composed of representatives of interest groups as well as representatives from several levels of government in the state. The Citizens Advisory Committee performs general oversight functions, and advises the Interagency Management Committee, the Governor,

and the legislature.

In Oregon the Governor created an "executive order" ocean resources task force in 1978. Its report was rendered in 1979 containing numerous recommendations for the state's participation in OCS planning and development. This led, in 1987, to the creation of a legislatively mandated Task Force, reporting to the Governor, the Legislature, and to the people. Membership is broadly based, including state agency directors, ocean users (fishermen), local government representatives, and citizens. It is backed up by a 30 member Scientific and Technical Advisory Committee. The goal of the Task Force is to assure that the state is an effective and influential partner with federal agencies. The Interim Report of the Task Force, published in July, 1988, concludes that the state should develop clearer, more coordinated state laws about OCS activities, that it obtain better information, and improve the network linking state and local agencies together on issues relevant to OCS development. Of special relevance to Alaska is the recommendation that a coastal oil spill response plan be prepared, and that a compensation fund be created through assessments on the oil industry in order to create a fishermen's contingency fund.

The Washington legislature, in 1987, initiated a program to prepare the state for federal oil and gas development on the outer continental shelf. Washington Sea Grant received a legislative appropriation of \$400,000 to conduct the required studies. Sea Grant created a special entity, the Ocean Resources Assessment Program (ORAP) to carry out the required studies. The legislation also created an Advisory Committee composed of 32 members from different disciplines and backgrounds, including state legislators, state agencies, oil companies, Indian tribes, commercial and sports fishing organizations, federal officials, local officials, and environmental organizations. The Final Report of the Advisory Committee was an excellent statement of information priorities for Washington's participation in the OCS process.

Oil production and transportation is vastly more important to Alaska, both in terms of economic benefit and environmental hazards, than OCS activity is to Oregon or Washington. And, indeed, it is more important to Alaska than OCS activity is to Florida. It justifies the highest

priority in governmental organization.

The **Permanent Oil Commission** should be created by legislative action, rather than by Executive Order, because legislative creation gives the Commission more political clout, and because appropriations from the legislature will be essential for Commission to carry out its work.

Composition of the Commission.

The Commission would have 7 members; four would be appointed by the Governor from among "citizens," representing commercial and sports fishing, environmental interests, local governments, and native communities. One would be from the oil industry. A federal member of the Commission should be appointed by the President. This would be a voting member, but this person would receive advice from other federal, nonvoting members representing different federal agency views. Putting people from these different backgrounds together, at this high level, will assist both the commission and the Governor to benefit by solid, informed discussion and recommendations on oil exploration, transportation, and oil spill problems.¹ This Commission should be kept small because it's members would be expected to devote much time to Commission duties. The Commission report directly to the Governor and the legislature.

Although the Commission would be a policy making body, it would nonetheless be expected to commit sufficient time to Commission work to make on-site visits, and to provide close oversight attention to both state and federal activities in the oil area.

The Commission would have sufficient budget to contract for appropriate studies to be performed. These studies might be done by federal or state agency experts who would be assigned to special investigative teams working for the Commission and reporting to it.

¹ Compare the 1987 Washington Advisory Committee, p. 9, and the BCDC p. 42.

Duties of the Commission.

1. The first duty of the Commission would be oversight of state, federal, and private oil and gas activity within or near the state. An important function would be to assure that state and federal agencies are carrying out their duties with regard to spill hazards, either from the pipeline, from terminal facilities, or from tanker operation. The Commission would exercise oversight functions over tanker traffic, the pipeline, North Slope exploration and production, oil storage, and outer continental shelf leasing, exploration and development.

2. The Commission would contract for appropriate studies to be completed.

3. The Commission would have responsibility to assist the state and specifically the Governor on recommendations that should be made to the Coast Guard, and to Congress, on federally preempted issues such as vessel design and construction (e.g. double hulls), qualifications of mariners, vessel traffic control systems and their operation, safe routes for oil tankers, etc.

4. The Task Force should advise the Governor on needed state legislation, where not preempted by federal legislation, covering such matters as creation and implementation of contingency plans, optimum areas where tankers should pick up pilots, and routes where tug escorts must be used.

RECOMMENDATION NO. 2. CITIZEN PARTICIPATION

All the states reviewed rely heavily on citizen participation, the advantages of which are now widely perceived and understood. We recommend that Alaska adopt a strong citizen participation program.

A NEW CONCEPT FOR CITIZEN PARTICIPATION.

Lack of vigilance by the Coast Guard in enforcing federal safety laws and regulations is alleged to be one reason for the Exxon-Valdez oil spill. Complacency was encouraged by several factors, including the lack of serious spills for several years, statements by the oil

industry about the lack of danger of spills, Coast Guard budget limitations, and, to some extent, the close social, professional, and peer group relationships between Coast Guard personnel and ALYESKA and Exxon employees. This sense of complacency also seemed to affect the relevant state agencies, probably for similar reasons. The problems associated with regulator/regulatee relationships are not unique to the Coast Guard and oil companies. Is it, in fact, a typical "regulated industry" phenomena.

One of the most commended approaches for handling the "industry influence" problem is through more active citizen participation. One of the best ways to assure continued vigilance by regulators is to integrate into the regulatory process a constituency whose interests are different, if not opposite, from that of the regulated industry. In Alaska there are two groups whose long and short term interests are most often at odds with those of the oil companies, and of the Coast Guard. These are the commercial fishermen, and the environmentalists. If their vigilance, powered by their own self interest, could be integrated into the decision process then the chances of creeping complacency would be reduced. At the same time, their participation in the process should not be so great as to thwart the economic goals sought by the regulated industry. We would like to suggest one way that this might occur, although other methods can also be devised.

A citizen participation committee could be formed, comprised, for example of 15 members. One might represent the oil industry, one the state, one the federal government. This would leave twelve members representing local government, commercial fishermen, and environmental groups. Such a Committee would serve several functions, serving as a forum for public debate, putting federal, state, and local personnel in direct, face to face contact, and allowing the Committee to insist on public answers to perceived problems.

Such a Committee would provide a valuable forum for public debate and discussion of important oil transportation and spill risk issues. It would put federal and industry officials into direct and personal contact with local citizens, fishermen, and environmentalists, groups vitally interested in these issues. A continuous education process would be generated, educating the

participants as well as the public, with important information about costs, risks, economics, and human values affected by oil transportation and spill risks.

One problem with citizen committees generally is that, while they initially are effective, over time they often lose their impetus. Because they have no real legal power they tend to be less and less heeded and sometimes ignored, unless they are woven into in the actual decision process. One way to accomplish this in Alaska would be to assure that local citizens, fisheries and environmental groups have a clear majority of the votes on the Committee (although it would be hoped that decision-making by the Committee would be by "consensus" rather than by technical vote counting).

The key element that would distinguish this entity from the ordinary citizens advisory committee is that the committee would have specific, limited "legal" powers to participate in the process. This could be accomplished as follows:

- a) The Committee should have subpoena powers, both for persons and for documents. These subpoena powers would extend to relevant Coast Guard personnel and files. Alternatively the congressional bill creating and empowering the Committee could instruct the Coast Guard to cooperate with the Committee in all Committee investigations.
- b) The meetings, deliberations, files, and entire process of the Committee should be "public," available to the press, appropriate state and federal officials and to Congress. The experience of the San Francisco Bay Conservation and Development Commission is instructive. Widely divergent views were expressed at the outset of the BCDC, but with public debate among all interested parties, they eventually reached accommodation.
- c) The Committee could be authorized to conduct investigations and make findings and recommendations. Its recommendations would normally carry only political weight, that is they would not have to be adopted by the federal or state agency, or by the industry, with one key exception. If the Committee recommendation was

not adopted then the agency would have to explain why it was not adopted, in writing, and with fully developed reasons, all of which would be available to the public, the press, the state legislature, and the Congress. The agency answer would have to be published within 120 days or else the recommendations would automatically become binding on the agency.

This would focus agency, industry, and public attention on problems before they got out of hand. The obligation on the agency is not overburdensome; if it chooses not to implement a recommendation, it must show it was considered by stating publicly and in writing, its reasons for not so doing.

The citizens Committee would have statewide authority. It would report to the Oil Commission, and to the Governor.

RECOMMENDATION NO. 3. JOINT REVIEW PANELS.

In California the most important component of the state government's formal OCS response system is the Joint Review Panel. In 1970 the California legislature enacted the California Environmental Quality Act, tailored after NEPA, requiring environmental impact reports for all projects expected to have important adverse environmental effects. In cases of proposed offshore oil development projects, several state and federal agencies often prepared reports covering different aspects of the same project. To reduce costs, and encourage federal/state cooperation, Joint Review Panels were formed. Each is a temporary association of permitting agencies which directs preparation of a report on the environmental effects of a single project. The panel oversees report preparation and conducts public hearings.

Eleven such panels have been formed in California since 1983. All have included a federal agency, most often either the Minerals Management Service, US Army Corps of Engineers, or Bureau of Land Management. Representatives from county and state agencies and from the Governor's office are included on the panels. Applicant oil and gas companies prepare detailed project descriptions and assist in the review of environmental issues; after this,

they are permitted to testify at public hearings, but have no further role in the review process.

In California the Office of Permit Assistance, in the Governor's office, and the Office of the Secretary of Environmental Affairs assist panels. In the case of Alaska, this could be done by the **Permanent Oil Commission**.

The California process has also resulted in area studies: evaluations of expected effects and necessary mitigation measures for later oil and gas development likely to take place in the general area where a permit application has been filed. Potential cumulative effects can then be evaluated, and the study format allows the panels to obtain access to data not normally made public by the Minerals Management Service.

CREATION OF JOINT REVIEW PANELS IN ALASKA.

Alaska does not have any law similar to California's in requiring a state environmental impact statement. Joint panels to prepare environmental impact assessments should nonetheless be created for all major oil and gas exploration, development, transportation or storage projects. This could be done under the general environmental authority of the Department of Environmental Conservation. This would cover pipeline related projects as well as those concerned with production, terminal facilities, and transportation by tanker. Such a program would enhance federal/state cooperation, keep the state better informed on federal plans and programs, and enhance the state input to the process.

Such **Joint Panels** would also be useful for ongoing inspection and monitoring of the Alyeska pipeline. A joint federal/state **Panel** could work as a team inspecting and investigating problems with the pipeline.

RECOMMENDATION NO. 4. DEVELOPMENT OF SPECIFIC GOALS.

One reason the state of Oregon has earned a reputation for effective participation in coastal zone and OCS federal activities is that Oregon has developed and articulated its goals and policies more fully than most states. Both the public process of creating these goals, and

the articulated goals themselves, provide direction for state and federal officials on the use of land, water, and other resources. Time and again, in the 5 states study as well as the study of other states, it was apparent that effective state participation depends first on having a clearly defined set of state goals and policies.

Recommendation. Alaska should initiate a public process of clarifying and articulating its goals and policies with regard to the exploration, development, production, storage and transportation of oil and gas, and management of the hazards posed by these activities. At no place in Alaska laws has this been done in the depth or with the completeness of the state of Oregon. See Appendix A for the Oregon goals, No.s 16, Estuarine Resources, and 19, Ocean Resources.

RECOMMENDATION 5. COMPLETION OF IMPORTANT STUDIES

Oregon, Washington, California, and Florida, have all enhanced their ability to influence federal action on the coastal zone and the outer continental shelf by conducting their own studies and creating their own body of experts and expert knowledge. The old adage "knowledge is power" fits precisely here. A state with little knowledge of its resources, federal plans, environmental impacts, legal and institutional options, etc., will understandably have little to say about how its resources are developed, and what hazards will result from that development. Therefore we recommend that the state of Alaska, either through the new **Permanent Task Force**, through Alaska Sea Grant, or through some other agency, arrange for appropriate studies to be made. It is important that money for such studies be spent wisely and thus that a knowledgeable group design and oversee the studies. Again, this could be the **Permanent Task Force**, Alaska Sea Grant, or another entity created for this special purpose.

It is not possible here to actually design the studies that should receive priority in Alaska, however the following is a list of studies recently completed, or recommended in the 5 comparator states along with a few others that we believe might be especially appropriate for Alaska.

1. Is the state taking advantage of all federal laws that provide for state participation in oil and gas activity?
2. Should the state engage in monitoring of "incidents" and "close calls" (as the FAA does with airplane near-misses) from spills, in order better to understand the risks involved?
3. Are Alaska laws rationalized and coordinated to achieve state goals, or are they conflicting and inconsistent?
4. Are the routes used by oil tankers safe enough to protect Alaska's interests?
5. What state action should be considered for protecting coastal native and nonnative communities from the threat of spills? What local planning or other action should be encouraged? How can native views best be integrated into the decision process?
6. How much storage capacity is there at Valdez? How much should there be?

RECOMMENDATION NO. 6. NATIVE PARTICIPATION

Design a system (see the report on the Sivunniug, of the NANA region) to bring the native population into meaningful participation on the oil spill/coastal zone management process. The widely held perception among Native peoples is that their voices are not heeded in the normal "hearings" process. Natives in the NANA region devised the Sivunniug process, incorporating a traditional decision-making approach into coastal management. Similar processes should be developed for other Native villages and regions.

RECOMMENDATION NO. 7. PRINCE WILLIAM SOUND AUTHORITY

Consider creation of a Water Quality Authority for Prince William Sound, and another for Bristol Bay. The Puget Sound Water Quality Authority has proven to be effective in explaining and rationalizing the multiple jurisdictional problems on Puget Sound, and in devising a comprehensive plan for improving water quality. While the number of jurisdictions involved in Prince William Sound is far fewer than on Puget Sound, and the management problems not so complex, nonetheless a single "Authority," concerned with gathering data, performing studies,

developing water quality management plans, and oversight of federal and state operations in Prince William Sound would provide a focus for protecting this body of water, and enhance state influence with the federal agencies.

This authority would be composed of representatives of the local, state, and federal agencies having jurisdiction in the area. It would have an Executive Director and staff. Its initial duty, for the first two years would be to study the water and environmental problems of the water body, and to recommend a structure for a permanent management authority.

RECOMMENDATION NO. 8. CONTINGENCY RESPONSE PLAN

Create a comprehensive oil spill contingency response plan for each major bay, sound, or region of the Alaska shoreline. Alaska statutes, AS 46.04.030 and 46.04.200-210 provide for contingency response planning, both by oil tankers and by DEC. DEC was directed in legislation enacted in 1989 to annually prepare statewide and regional master response plans, identifying the responsibilities of governmental agencies and private parties in the event of a catastrophic oil spill. These plans should be fully implemented. We have included, in the Appendices, the contingency response plan for California, for Coos Bay, Oregon, and the table of contents of a privately developed plan for the San Juan Islands, Washington.

Test drills should be conducted to assure the effectiveness of the contingency response plans. Funding should be provided to assist private efforts to develop contingency response plans.

INTRODUCTION

Alaska is reevaluating its options on how to participate effectively in oil and gas transportation/spill/development decisions. This study is designed to aid in that reevaluation.

One way to approach such an evaluation is by examining the experience of other states in related areas. We have selected five states for comparison, Florida, North Carolina, California, Oregon, and Washington, and have reviewed their experiences in marine resource and coastal zone management, outer continental shelf oil and gas development, and spill risk management. These five coastal states have earned special reputations for effective coastal zone and marine resource management, and especially for their ability to work with, and influence federal agency decisions. Could components of these states' management programs be useful to resource policy makers in Alaska? This paper describes the marine resource and coastal zone management programs of these states and attempts to identify such components.

Special emphasis is devoted to recent efforts of these five states to prepare for participation in outer continental shelf oil and gas development. The institutional, legal, and policy changes initiated by these efforts are particularly relevant to Alaska because they stem from similar state/federal clashes that are apparent in Alaska. The goal of each state is effective resource management. To accomplish this it is essential to be able to influence federal offshore oil and gas activities that impact the state and its citizens.

Development of oil spill contingency plans is a critical part of preparation for handling oil spills. This study reviews the contingency plans, and process, in California, Oregon, and Washington, and includes in the Appendices contingency plans for Coos Bay, Oregon, for the state of California, and the table of contents of an extensive contingency plan developed by a concerned citizens group in the San Juan Islands of the state of Washington.

A variety of legislation delineates federal jurisdiction over marine resources. The Outer

Continental Shelf Lands Act² (OCSLA), for example, establishes federal jurisdiction over marine resources in the Exclusive Economic Zone. The Ports and Waterways Safety Act³ (1972) gives the U.S. Coast Guard responsibility over marine navigation, including oil tanker traffic, and port safety. The Federal Water Quality Improvement Act of 1970⁴ and Water Pollution Control Act of 1972⁵ together delineate plans for federal response to oil spills and for spill prevention. They are also intended to promote federal-state coordination of spill response. The U.S. Coast Guard and U.S. Environmental Protection Agency have primary responsibility to minimize effects of oil spills. The Federal Trans-Alaska Pipeline Authorization Act⁶ holds the owner of the Trans-Alaska Pipeline oil, through the Trans-Alaska Pipeline Liability Fund, vicariously liable for damages (above the \$14 million in the Fund) caused by oil spills from vessels which service the terminal.

Coastal states share authority with federal agencies in the state-owned territorial sea, but have no direct jurisdiction over activities in the Exclusive Economic Zone (EEZ) beyond, although these activities often affect the interests of coastal residents. Existing federal legislation leaves states with little authority to regulate marine commerce, including oil tanker traffic.

States are able to protect their offshore interests primarily by making alterations in federal management programs. Options available to states include: use of CZMA consistency provisions⁷ to alter federal actions in accordance with state policies, lobbying or consultation with Congress and federal agencies, use of OCSLA state consultation provisions⁸ to negotiate with the Department of Interior, "filling in" around federal legislation with state laws, development of

² 43 USC §1331 et seq., 1953, and amendments, USC §1801 et seq., 1978.

³ 33 USC §1221 et seq.

⁴ 33 USC §1151.

⁵ 33 USC §1251, §1321.

⁶ 43 USC §§1651-1655.

⁷ §16 USC §1456.

⁸ 43 USC §§1351, 1352.

joint federal-state management programs, and litigation. In some cases, especially use of consistency provisions, the nature and extent of a state's options are ambiguous; there have been few court tests.

During the past few years, in response to the Federal government's policy of extensive leasing on the OCS, these same five states have initiated a variety of programs designed to give them greater control over oil and gas development on the OCS. This poses special challenges because the OCS is owned by the federal government. Conflicts are also generated because all the benefits of OCS oil and gas activity accrue to the federal government, whereas the risks of environmental degradation accrue to the states. The states do not feel their environmental and social concerns are adequately addressed by the OCS leasing/development process, partly because the Minerals Management Service of the Department of Interior has two conflicting missions. The first mission, and the dominant one, is to develop oil and gas on the OCS. The second, and much less powerful mission is to protect the environment. The states also feel that their conflicts with MMS are exacerbated by the lack of any clear national energy policy.

The commitment of a state to protection of its coastal zone and marine resources, and the effectiveness with which it is able to manage its coastal region and regulate development, can best be assessed by examining the last several decades of its history. The history of active state coastal zone and marine resource management can conveniently be divided into two phases.

The first phase includes the 10 to 15 years before the Coastal Zone Management Act⁹ was passed by the U.S. Congress in 1972. Coastal states varied in the time at which they first began serious study and development of coastal zone management programs, in the number of pieces of marine resource management legislation which they passed, in the cohesiveness and completeness of that legislation, and in the adequacy of appropriated funds.

By 1972, about half of the coastal states had begun major studies of coastal zone

⁹ 16 USC §1451 et seq.

resources and management options.¹⁰ Several, notably Washington and Rhode Island, had already established broad coastal zone management programs. In Oregon, North Carolina, and Florida, the studies were specifically designed to be the first steps in creating coastal zone management plans.¹¹

Many states made their first attempts to regulate industry activity in their coastal zones in the late 1960s and early 1970s. On the Atlantic seaboard, where extensive estuary systems exist, and where development pressures built up early, several coastal states passed legislation to protect wetlands against dredging and filling. Many states also passed legislation in the early 1970s to regulate siting of thermal power plants in coastal areas. In both of these cases, the incentive for legislation passage was the need to control increasingly heavy pressure from industry to develop coastal areas. In perhaps all states, pressure from conservation organizations and growth of concern for environmental protection among the general public also impelled passage of legislation.

After passage of the federal Coastal Zone Management Act of 1972 (CZMA), nearly all states prepared formal coastal zone management programs, and many states reorganized existing agencies or created new ones in order to meet goals of management programs. During this second phase of increasing state coastal management activity, the dominance of federal over state authority in coastal resource use decision-making had become increasingly evident. The expanding scope of federal regulation, intended originally to be primarily restricted to foreign affairs, treaties, and interstate commerce, is well-illustrated in the case of its increasing authority to regulate activities in navigable waters.¹² The desires of federal agencies have often differed from those of coastal state governments, especially in the case of offshore energy development.

¹⁰ Bradley and Armstrong.

¹¹ Ibid.

¹² Bish, p. 15.

State Marine Policy and Coastal Zone Management: A Review of Five States

Commentators differ in their identifications of the coastal states which have most successfully developed marine resource and coastal zone management programs. Five states are commonly mentioned by researchers: Washington, Oregon, California, North Carolina, and Florida.

Washington

Puget Sound

Many levels and types of local, state, and federal government agencies are involved in management of the state's coastal and near shore areas. The coastal area in Washington state (arguably) most difficult to manage, because it lies adjacent to a rapidly growing human population center, and because it is subject to many human uses, is Puget Sound. It has been designated an "estuary of national significance" under the federal Water Quality Act of 1987.¹³ The Puget Sound Water Quality Authority estimates that "more than 450 public bodies have responsibility for some aspect of the Sound's water quality."¹⁴

The Authority was created by state legislation in 1985, and was given responsibility to develop a Puget Sound Water Quality Management Plan.¹⁵ Because of the existing complex system of overlapping jurisdictions, the state legislature identified the need for coordinated state and local management as a priority for plan design. The current Plan calls for partnerships among state agencies and between state and local governments. It also contains provisions for joint state and federal management of certain programs. An example is the Puget Sound Estuary Program, established in 1986 and jointly run by the U.S. Environmental Protection Agency, the Puget Sound Water Quality Authority, and the Washington Department of Ecology.¹⁶

¹³ 33 USC §1330(j).

¹⁴ PSWQA, 1988.

¹⁵ 90.70 RCW.

¹⁶ 33 USC §1330, Wash. Laws 1988, Ch. 220 amending RCW 90.48.260.

EPA is responsible for conducting studies of estuary resources, and for developing management protocols.¹⁷ The Authority is responsible for plan oversight, additional research, and public education programs. The Department of Ecology implements point source discharge, wetlands protection, stormwater control, contaminated sediment, and pollution reduction provisions of the plan.¹⁸

Offshore oil and gas development and oil transport in state waters.

In September, 1989 the Puget Sound Water Quality Authority issued a draft paper on "SPILL PREVENTION" of oil and other hazardous substances, this was a topic that was not covered in the first or second Puget Sound Water Quality Management Plans. This study was initiated in October, 1988. Since that time the barge Nestucca spilled over 230,000 gallons of oil off the coast of Washington, and the tanker Exxon Valdez spilled 11 million gallons of oil into Prince William Sound, Alaska. As a result of those spills, Alaska, British Columbia, Washington, and Oregon have formed a Task Force to examine oil spill prevention, response, financial recovery and information transfer. The PSWQA is participating in the efforts of the Task Force.

The spill prevention draft study makes recommendations in eight different areas: prevention and contingency planning, operator training, public education, vessel traffic safety, federal design standards, hydrographic surveys, liability for costs and damages, and penalties. Of special interest is the breakdown of these recommendations, some of which can be implemented by state action and some of which are merely the subject of state recommendations to federal agencies. A few of the more important recommendations are:

Develop state statutes and regulations requiring prevention and contingency plans for specific facilities and operations.

Develop a hazardous waste handlers card program, similar to the food handlers card program, to assure minimum training requirements for hazardous material handlers.

¹⁷ 33 USC §1330(j).

¹⁸ PSWQA, 1988.

Recommend strengthened qualifications for mariners.

Recommend strengthened qualifications and training for personnel piloting and operating vessels subject to Vessel Traffic Safety (VTS) requirements.

Recommend implementation of selected traffic control as part of the VTS system.

Recommend imposition of selective speed limits for vessels in the VTS system.

Require that pilots be picked up prior to entering the Straits of Juan de Fuca.

Recommend requiring improvements in vessel design.

Require additional tug escorts.

If changes are made in federal vessel regulation, revise Washington law, specifically the Tanker Act, to accommodate those changes.

Inventory vessel groundings in Puget Sound caused by inadequate navigation or hydrographic information.

Support passage of a Comprehensive Domestic Oil Pollution and Compensation Act (by Congress) that does not preempt state unlimited liability provisions.

Support amendment of the Federal Limitation of Liability Act, to allow for state recovery of all expenses and costs.

The final version of this issue paper will be produced by January 1, 1990. That study should be watched carefully because it promises to be especially thoughtful, and might have much relevance to Alaska.

State preparations for outer continental shelf oil and gas development.

Washington is not quite so far along as Oregon in its preparations for participating in federal OCS development. The Oregon legislature created a Task Force in 1987 to develop a "Management Plan." The Washington legislature in 1987 created a study and information gathering program. Its next step will be to study the management and policy issues. One significant difference between Oregon and Washington is that Oregon has a statewide land use planning program, under the Land Conservation and Development Commission. Washington, along with nearly all of the other states has only municipal and county planning with the

exception of the coastal zone. In this limited zone Washington has a statewide plan under the Shoreline Management Act.¹⁹

In 1987 the Washington legislature enacted the Ocean Resources Assessment Act²⁰ to prepare the state for the potential development being planned on the outer continental shelf by the federal government. Washington Sea Grant received an appropriation of \$400,000 to conduct studies mandated by the law.²¹

Sea Grant created its Ocean Resources Assessment Program (ORAP) to implement the legislative mandate. Demonstrating active interest in the Sea Grant program, the Legislature's Joint Select Committee On Marine and Ocean Resources acts as an oversight committee for ORAP.

ORAP developed a program for several studies to be completed. Of special interest are three studies. The committee study was a product of a legislatively mandated Advisory Committee, consisting of 32 members from different disciplines and backgrounds, including state legislators, state agencies, oil companies, Indian tribes, commercial and sports fishing organizations, federal officials, local officials, and environmental organizations. In 1988 the Advisory Committee produced a book, "Washington State Information Priorities; Final Report of the Advisory Committee, ORAP."

The study "State and Local Influence Over Offshore Oil Decisions" was prepared, as a paperback book, by Hershman, Fluharty, and Powell, and was published in 1988. This excellent study describes the OCS decision making process in some depth from release through exploration. It then discusses the problems associated with bringing oil ashore by using, and analyzing three case studies: ARCO's Coal Oil Point Project, Exxon's Santa Ynez Unit, and Chevron's Point Arguello Project. At each point the authors are careful to note where state and

¹⁹ 90.58 RCW.

²⁰ Wash. Laws, 1987, Ch. 408.

²¹ Wash. Laws, 1987, Ch. 7, §603(3).

local governments might have an input to industrial development, or federal management.

The third study was produced as a workshop report, and is entitled "Toward a Conceptual Framework for Guiding Future OCS Research." The workshop, and the report, placed great emphasis on "risk analysis" in determining policy for OCS exploration and development. The report reflects the viewpoint that the "state of knowledge" should have a more prominent and explicit role in the identification, prioritization, and selection of environmental research concerning offshore oil and gas funded by the Minerals Management Service (MMS) of the U.S. Department of the Interior. Since about 1978, MMS has applied study selection criteria²² that are quite mission-oriented within the legal framework of federal laws and court decisions applicable to the agency. Consideration of the state of knowledge within the field of environmental and socioeconomic studies has been largely a matter of internal, subjective evaluation by the staff and advisory committees of MMS. Nevertheless, it has functioned as an informal, unwritten criterion and is a continuing source of frustration and dissension within the leasing process.

Workshop participants identified critical problems facing the state of Washington in connection with oil development/transportation/spill risks. Several of these are relevant to the problems posed in Alaska:

The need exists to distinguish clearly the intensity and frequency of risks [of spills, etc.]. The priorities of risk should be used to determine where the state invests its efforts and worries to reduce specific risks. Small risks should not unduly occupy state or county efforts.

Oil spills from shipping far outweigh any other type of risk. Yet the OCS process managed by MMS is the weakest in addressing this problem.

Prevention of oil spills should be emphasized over mitigation and compensation, even though prevention is more expensive. We cannot completely avoid damage, so greater attention to prevention is needed (e.g., transportation farther offshore, double hulls, state of the art navigation, no movement in severe storm). Greater control by the Coast Guard and changes in state and federal laws are needed.

How is it possible to get MMS to respond to concerns about damages that occur at the state and local level but where no revenues from OCS activity are allocated to these levels of government? One means may be to allocate a share of the revenues of OCS development to state and local governments so that these entities can balance the revenue benefits against the costs borne at this level.

There is a need to develop a state capability to help coastal counties respond to near-shore and onshore aspects of the OCS process. The counties do not have the capability to protect themselves, or the state, under the CZM process or to significantly affect the process.

It should be recognized that the process of lease-production-decommissioning and the various associated impacts consist of a complex system of interconnected governmental jurisdictions. A simple EIS check list by MMS does not reflect the true nature of the system.

The MMS decision-making process results in a fundamental process inequity. That inequity is characterized by the absence of a meaningful role for those who bear most of the burdens and impacts in the lease decision. The process inequity generates significant conflict and undermines cooperation at later points in the process.

ORAP is still working on several other studies under the 1987 legislative mandate, reflecting the high priority given to these issues by the Washington legislature.

Washington Oil Spill Contingency Planning:

The Washington state oil spill contingency plan is prepared and administered by the state Department of Ecology (DOE). The plan focuses on coordination among and procedures to be followed by the various agencies and volunteers that respond during an oil spill. The plan was revised in 1988 and is currently undergoing review following analysis of the response to the Nestucca incident, a major spill off the coast of Washington in 1988.²³

As with the Exxon Valdez, the response to the Nestucca spill incident illustrated the vulnerability of state and federal plans under emergency conditions. Certain plan procedures were ignored, and communications and coordination difficulties abounded. Nevertheless, the cleanup was fairly successful largely because the responsible party worked actively to undo the damage.

In 1987, the state legislature enacted a bill requiring the state Department of Community Development to prepare a model contingency plan for Washington localities. The plan must include recommendations concerning equipment and facilities, personnel training, cooperative public-private training exercises, and establish the relationship of local plans to state and federal plans.²⁴ The model plan has not yet been published.

The 1987 bill also directed DOE to promulgate rules requiring all petroleum transfer operations to keep containment and recovery equipment readily available with personnel trained to use it.²⁵ Beyond general notice and removal obligations, this statute is the only direct state regulation of the petroleum industry's spill response capability.

²³ Washington DOE, 1989.

²⁴ RCW 38.52.420.

²⁵ RCW 90.48.510.

Finally, a private organization in the San Juan Islands, funded by a state water quality education grant, prepared its own oil spill contingency plan to address emergency response in that region. The Islands' Oil Spill Association, frustrated by the lack of attention and equipment available in the San Juan Islands area, and concerned about the risks posed by major oil tanker traffic using the sealanes surrounding the islands, has prepared a thorough plan outlining how volunteers can initiate local, state and federal response. (See Attachment B.)

Pre-Federal Coastal Zone Management Act

While most coastal states were still conducting studies of coastal resources and management alternatives, Washington and Rhode Island became the first two states to establish coastal zone management programs.

The Washington state legislature passed the Shoreline Management Act²⁶ in 1971. There were two main reasons for the early passage of this legislation.²⁷ First, strong pressure for a program was exerted by the state's conservation organizations, especially the Washington Environmental Council (WEC), a coalition of conservation groups. The WEC had first pressured the state legislature for several years for an environmentally oriented shoreline management bill, and eventually developed its own initiative bill, I-43, a more preservation-oriented bill. Second, the state Supreme Court, in *Wilbour vs. Gallagher*,²⁸ called into question the state's right to permit construction and filling in state shore areas until planning legislation had been enacted.²⁹ Hence, an incentive existed for development interests to support passage of a bill they would otherwise likely have opposed. Washington voters passed the Shoreline Act as drawn up by the legislature in 1972; Bish notes that both WEC pressure and the uncertainty produced by the

²⁶ 90.58 RCW.

²⁷ Bradley and Armstrong.

²⁸ 77 Wn. 2d 306, 462 P.2d 232, 40 ALR 3d 760 (1969).

²⁹ Bish, p. 86; Mack.

court decision were probably essential to the Act's passage.³⁰

The basis of the Shoreline Management Act is a set of guidelines and standards drawn up by the state Department of Ecology in 1972.³¹ The Act directed local governments to develop shoreline master plans for future shoreline development, including shoreline resource inventories.³² The Department of Ecology was given authority to approve local master plans.³³ Plans for all Puget Sound counties and all but one city were approved by early 1980.³⁴ Local plans form the basis for permit systems,³⁵ developed and administered by local governments. Each permit application must be publicized and citizen comments accepted for at least 30 days before approval or rejection.³⁶

Both the Department of Ecology, permit applicants, and affected parties retain the right to appeal to a Shoreline Hearings Board;³⁷ permit violators can be given fines and/or jail sentences. The state Attorney General and local attorneys general have been given authority to enforce the Shorelines Act.³⁸ Because of these clear enforcement and appeals provisions, Washington's Shoreline Act is considered to be better-designed and more enforceable than similar legislation produced elsewhere.³⁹

Lack of local funds and staff to compile resource inventories has slowed implementation

³⁰ Bish, p. 88.

³¹ Washington Administrative Code Title 173, Chapters 16, 18, 19, 20, 22.

³² RCW 90.58.080.

³³ RCW 90.58.090.

³⁴ Bish, p. 91.

³⁵ RCW 90.58.100.

³⁶ RCW 90.58.140.

³⁷ RCW 90.58.180.

³⁸ RCW 90.58.210.

³⁹ Bradley and Armstrong.

of the Act, but that it has been used by local governments in notable cases. San Juan County, for example, used its authority under the Act to reject state-proposed recreation facilities.⁴⁰ State and local officials have successfully used the Shoreline Act to minimize environmental damage, generally by modifying projects rather than prohibiting them.⁴¹

The Washington state legislature had already produced other legislation regulating development and use of the state's coastal areas by the time of CZMA passage. The Thermal Plant Sighting Act of 1970⁴² established a Thermal Power Plant Site Evaluation Council,⁴³ composed of representatives of major state agencies as well as county representatives. The Act mandated that environmental and ecological guidelines⁴⁴ were to be given priority in development of a site evaluation program. It required that power companies pay a fee of \$25,000⁴⁵ to fund environmental impact study of a proposed site by an independent consultant, and it required that at least two public hearings be held whenever a site was evaluated.⁴⁶ Violation of permit terms was to be punishable by revocation of the permit⁴⁷ and criminal prosecution.⁴⁸

The Washington power plant sighting act is considered to be one of the most complete and effective statutes passed during the late 1960's and early 1970's, because it includes

⁴⁰ Bish.

⁴¹ McCrea and Feldman.

⁴² 80.50 RCW.

⁴³ RCW 80.50.030.

⁴⁴ RCW 80.50.040.

⁴⁵ RCW 80.50.071.

⁴⁶ RCW 80.50.090.

⁴⁷ RCW 80.50.130.

⁴⁸ RCW 80.50.150.

provisions for enforcement, funding of environmental studies, and public input.⁴⁹

Post-CZMA

Before CZMA passage, the Washington state legislature had already passed the Shoreline Management Act and power plant sighting act, as well as a State Environmental Policy Act,⁵⁰ and had established the Department of Ecology.⁵¹ To create a state coastal zone management plan, the legislature largely adapted these and other existing programs to CZMA guidelines.⁵² There were several advantages to basing the Washington program on existing components: federal agencies are able to coordinate most coastal programs with one state agency, the Department of Ecology; the power plant sighting act served as a good prototype for new provisions regulating coastal energy development; and likewise, the Shoreline Act provided a good basic plan and guidelines for state/local cooperation in planning and permitting.⁵³

Bish notes that the state government made one major strategic error when it developed its coastal zone management plan, approved by NOAA in 1976. The state--perhaps because it had developed its plan largely from existing components--had solicited almost no input from federal agencies during development of its plan, and the initial version, submitted in 1975, was rejected. The effect of this omission on the state's ability to influence federal decision-making is still unclear.⁵⁴

Washington state has a history of relatively strong funding for coastal management programs, beginning with the legislature's appropriation of \$500,000 in 1971 for implementation

⁴⁹ Bradley and Armstrong.

⁵⁰ 43.21C RCW.

⁵¹ RCW 43.17.010, 43.21A.040.

⁵² Bish, p. 94.

⁵³ Ibid.

⁵⁴ Ibid, p. 99.

of the Shoreline Management Act.⁵⁵ In 1986, it established the Centennial Clean Water Fund,⁵⁶ financed by an 8¢ per carton tax on cigarettes. The Fund is expected to provide about \$40 million annually for four years, and \$45 million annually in subsequent years for water quality management throughout the state⁵⁷. The state legislature has allocated \$9 million⁵⁸ for implementation of a Puget Sound Water Quality Management Plans from 1987 to 1991. Finally, the 1987 legislature set higher permit fees for point source discharges;⁵⁹ these fees are expected to provide up to \$3.6 million annually to state programs to control toxins in discharges and improve permit enforcement.⁶⁰

North Carolina

Offshore oil and gas development and oil transport in state waters. The Office of Marine Affairs within the Department of Administration was formed in 1972;⁶¹ it was given responsibility to coordinate state and federal coastal and marine management programs, and to generally provide leadership in coastal planning. The Office oversees three state visitor centers, the Marine Resources Centers and an Outer Continental Shelf Task Force (formed in 1979), as well as the Marine Science Council.⁶²

The state's Coastal Area Management Act⁶³ was passed by the state legislature in 1974.

⁵⁵ Wash. Laws, 1971, Ch. 286, Sec 39.

⁵⁶ RCW 82.24.027.

⁵⁷ Puget Sound Water Quality Authority (PSWQA).

⁵⁸ Wash. Laws, 1987 2st Ex. Sess., Ch. 7, Sec. 309.

⁵⁹ RCW 90.48.601 and 610.

⁶⁰ PSWQA, 1988.

⁶¹ NCS § 143B-390.1.

⁶² North Carolina Ocean Policy Council.

⁶³ NCS § 113A-100 et seq.

It is intended to serve as a comprehensive plan for cooperative state and local management of the 20-county coastal zone.⁶⁴ The Coastal Resources Commission (CRC) is responsible for implementing the Act, primarily by developing a set of guidelines⁶⁵ describing the state's objectives, policies, and standards for coastal zone activities, and by designating Areas of Environmental Concern⁶⁶ within the coastal zone. All state policies, permits, and land use plans are to be consistent with this set of guidelines.⁶⁷

The CRC is a 15-member citizen panel.⁶⁸ Members are nominated by local governments and appointed by the Governor. All but three must be experts in some aspect of coastal affairs.⁶⁹ The CRC is assisted by the Coastal Resources Advisory Council (CRAC),⁷⁰ composed of representatives of coastal cities and local governments, state agencies, and planning groups.

Several state agencies currently share administrative authority over the coastal zone, including the Department of Natural Resources and Community Development, which includes the Office of Coastal Management and Divisions of Environmental Management and of Marine Fisheries, and the Departments of Commerce and of Administration, with the Office of Marine Affairs, OCS Task Force, and Marine Science Council. Several administrative bodies are interagency in composition: the OCS Task Force, for example, includes representatives of several other state agencies and the League of Municipalities. Several governor-appointed boards and commissions, including the CRC, each with some ocean policy-making authority, also exist. These boards and commissions oversee marine fisheries, mining, and issues of

⁶⁴ NCS § 113A-102.

⁶⁵ NCS § 113A-107.

⁶⁶ NCS § 113A-113.

⁶⁷ NCS § 113A-108.

⁶⁸ NCS § 113A-104.

⁶⁹ *Ibid.*

⁷⁰ NCS § 113A-105.

environmental protection. These, as well as the CRAC, provide opportunities for concerned citizens as well as experts in marine-related issues to become formally involved in the setting of ocean policy.⁷¹

Hershman (1986) notes that the North Carolina coastal management network includes both a major pre-CZMA component, the Marine Science Council, and a second major component which evolved directly out of the state's CZM plan. He recommends instead developing state ocean management systems directly from a CZM plan without incorporating older components, to avoid repeating at the state level the "fragmentation at the federal level." However, incorporating older components, redesigning them if necessary, may in fact be more feasible; eliminating agencies is not an easy task at either state or federal levels.

North Carolina began work towards the development of a state ocean policy which would take into account the existing complex set of federal jurisdictions and authorities when a special ocean policy committee of the Marine Science Council evaluated and reported on 16 ocean policy issues important to the state, ranging from ocean dumping to OCS leasing. In 1985, Governor Jim Martin directed state agencies to take action on nine of the Council's 16 recommendations.⁷² Like other coastal states, North Carolina finds it difficult to promote environmental protection within its coastal zone and comply with the development mandate of OCSLA. The state has reviewed federal offshore oil and gas lease sales for consistency, but officially supports the OCS oil and gas leasing program. The Marine Science Council noted in 1984 that the state had not yet established policy or a regulatory process for leasing of submerged lands under its territorial sea; it recommended that the state develop such a policy and process.⁷³

The state negotiated a Memorandum of Understanding with the U.S. Minerals

⁷¹ North Carolina Ocean Policy Council.

⁷² Hershman, 1986.

⁷³ Ibid.

Management Service in 1983, before South Atlantic Sale 78. The state's intention was to protect nearshore resources and to ensure that spill trajectories were adequately predicted by the current MMS model. By signing the memorandum, the state agreed not to file suit against the lease sale. After deficiencies in the model had been identified by state contractors, the MMS responded slowly, requiring more than a year more than expected to convene a technical panel to consider the model's problems. The North Carolina government is generally unhappy with the way the terms of the memorandum were met; the case illustrates the difficulty in setting up a mechanism for resolving federal-state conflict.⁷⁴

North Carolina is an example of a state which has produced legislation for comprehensive coastal zone management,⁷⁵ rather than rearranging existing agencies and legislation to meet CZMA criteria. Commentators suggest that the set of coastal zone legislation, policies, and institutions created by the North Carolina state government since the early 1970s may be the best in the U.S.⁷⁶

North Carolina Contingency Planning:

North Carolina does not currently employ a state oil spill contingency plan. However, the legislature this summer directed the State Emergency Response Commission to prepare one.⁷⁷ The state has developed a statewide multi-hazards response plan, which plan does not explicitly address oil spills, but outlines procedures to be following in the event of a spill of any hazardous substance.⁷⁸

The state coordinates oil spill response and contingency planning with both the U.S.

⁷⁴ Hershman et al., 1988.

⁷⁵ Hildreth and Johnson, 1984.

⁷⁶ King and Olson.

⁷⁷ NCS §143-215.940.

⁷⁸ Wiggins, 1989.

Coast Guard and U.S. Environmental Planning Agency through its Divisions of Emergency Management and Environmental Management (Department of Natural Resources and Community Development).⁷⁹

Agencies are authorized to acquire and deploy response equipment in the event of a spill, and are required to engage in some pre-planning effort.⁸⁰ Petroleum terminal facilities must furnish information to regulatory authorities concerning facility operations, site schematics, and spill response procedures.⁸¹ However, these requirements have not been strictly enforced.⁸²

A successful element of the state multi-hazards response plan is the coordination between the Division of Emergency Management, which has offices and contact personnel throughout the state, and the Division of Environmental Management, which is able to provide necessary technical expertise. A clear delineation of duties allows the two offices to work together well under emergency conditions.⁸³

No major oil spill has yet occurred in North Carolina. The Ocean Policy Council (1984) notes that both state and federal laws provide for minimal liability for spill damage, concentrating largely on prohibitions, penalties, and cleanup mechanisms. The state's pollution protection fund⁸⁴ is generally underfunded.⁸⁵

North Carolina's earliest coastal management legislation was the Sand Dune Protection Act,⁸⁶ passed in 1965. This act authorized boards of county commissioners to appoint shoreline

⁷⁹ Hershman, 1986.

⁸⁰ NCS §143-215.84-.86.

⁸¹ NCS §143-215.96.

⁸² Wiggins, 1989.

⁸³ Wiggins, 1989.

⁸⁴ NCS § 143-215.87.

⁸⁵ Hershman, 1986.

⁸⁶ NCS §§ 104B-3 to 104B-16 repealed by Session Laws, 1979, C. 141, s. 1.

protection officers responsible for administering, by a permit system, human activities in dune areas.

Like other Atlantic seaboard states, a more important coastal development issue faced by the North Carolina state government was the loss of estuarine wetlands by dredging and filling for construction. The first action taken by the legislature was passage of Act 1164 (Estuarine Zone Study) in 1969. This Act authorized the Division of Commercial and Sport Fisheries of the Department of Conservation and Development to conduct studies of the state's estuaries in order to prepare an "enforceable plan" for managing the areas.⁸⁷

The state legislature also passed Act 791 in 1969, outlining state regulations to control dredging and filling in and near estuaries and other state lands, later consolidated with a related bill, Act 1159, the Dredge and Fill Law,⁸⁸ passed in 1971. Together, these acts require applicants to obtain permits from the state Department of Conservation and Development for dredging and filling projects. If an applicant or other state agency wishes to appeal a decision, a review board must be formed, composed of representatives of several state agencies. Permit violations are misdemeanors, punishable by up to 90 days in jail and/or a fine of up to \$500; each day of continued infraction is considered a separate violation.⁸⁹

A weakness of the two acts is that they require no public hearings unless the applicant or a state agency objects to a permitting decision; appeals to the state Supreme Court can be made only by an agency or affected property owner⁹⁰. It is ironic that concerned citizens are excluded from participating in the formal review or appeals processes; Bradley and Armstrong note that the legislation passed "only after the growth of environmental concern was able to offset pressures from development interests." Later coastal zone management programs

⁸⁷ Bradley & Armstrong.

⁸⁸ NCS § 113-229 et. seq.

⁸⁹ Bradley & Armstrong.

⁹⁰ NCS § 113-229(f).

developed by North Carolina, however, include extensive provisions for citizen participation.

The state legislature established the North Carolina Marine Science Council in 1967.⁹¹ The Council serves to assist the state government in planning for participation in both Sea Grant programs and projects initiated by the Coastal Plains Regional Commission (of representatives of the North and South Carolina and Georgia state governments).

The Council was given a set of specific duties: to encourage use and study of marine environments; to develop education and training programs; to act as liaison with other states; to advise the state on development of an ocean resources inventory; to coordinate implementation of federal, state, and local legislation concerning marine resources; and to advise on the coordination of resource development, remaining mindful of the need for conservation.

Florida

Offshore oil and gas development and oil transport in state waters

Florida is vulnerable to oil spills from tankers now and may in the future be at risk from spills from offshore oil production. All 42 wells drilled on federal OCS off the Florida coast have been nonproductive. About 1.3 million acres are under current lease in the Gulf of Mexico off of Florida. Most of the oil transported along the United States coast passes Florida.⁹² The Department of Natural Resources has developed a state oil spill contingency plan and a spill response team, the Hazardous Materials Task Force, to be activated only in the event of a major spill. According to the plan, the Coast Guard and the Department are to coordinate spill response, with federal responders taking the lead. By Florida policy, no state money is to be spent on spill cleanup until available federal funds have been exhausted.⁹³ However, Florida has established a fund for emergency response; this money may also be used for resource

⁹¹ NCS § 143B-389.

⁹² Christie, 1989.

⁹³ Ibid.

rehabilitation and to compensate local governments or private parties for damages or costs.⁹⁴

Because of concerns raised by Florida Governor Martinez, Interior Secretary Hodel agreed in 1988 to delay further leasing off southwest Florida until 1989; leases near the sensitive Florida Keys have been canceled. The Governor and Secretary agreed to form two study teams to examine oil spill risks and other potential environmental effects of offshore drilling. D.R. Christie suggests that the state conduct research and mapping programs to identify sensitive areas which should be excluded from further lease sales, then work for federal legislation to protect the identified areas.

Florida has no single, comprehensive plan for ocean resource use and conservation; D.R. Christie, under contract by the Environmental Policy Unit of the Governor's Office of Planning and Budgeting, compiled a report on the state's existing laws, policies, and agencies concerned with ocean resource issues. She intends the report to be a first step towards development of such a comprehensive plan.

Separation of OCS and CZM Authority

There are eight policy units within the Governor's Office of Planning and Budgeting (OPB), including the Environmental Policy Unit (EPU). Its legislated objectives include: protection of Florida's natural resources by policy planning, budgeting, and advising the legislature; and administration of state coordination of federal, state, and regional permitting and planning projects under NEPA, the OCS Lands Act, and the CZMA.⁹⁵

Hershman⁹⁶ contrasts the case of Florida, where OCS decision-making has been consolidated into the EPU while CZM authority remains with the Department of Environmental Regulation (DER), with those of Washington and Oregon, where OCS authority has remained

⁹⁴ FSA §376.11.

⁹⁵ Christie.

⁹⁶ Hershman, Fluharty & Powell (1988).

with the same agencies which also retain CZM management authority. In Florida, OCS planning remains in the governor's office apparently because it began there before CZM planning was initiated, and because of the enormous importance of this issue to the state's economic and social welfare.

Separating OCS and CZM planning may be a beneficial arrangement. OCS legislation specifies that the Secretary of the Interior must meet a number of times with the governor of a state to consider that state's views on OCS development.⁹⁷ Consolidating OCS planning into the governor's office may simplify information transfer between planners and the governor, and hence improve the governor's ability to clearly define and defend the state's position, when that position may be counter to Interior policy.

In fact, the Florida Governor's office has been effective in achieving its OCS objectives. OPB has required modeling of spill trajectories and biological bottom sampling before all exploratory drilling. Florida, in negotiations with the Minerals Management Service, also achieved cancellation of Lease Sale 140 in the Straits of Florida and deferment of two other proposed sales.⁹⁸

Coastal Zone Management

Florida is an example of a state which has "networked" existing development controls and resource management legislation to create a coastal zone management program.⁹⁹ Of all the coastal states, it has enacted the most coastal zone management legislation; the state government's management effectiveness has been hampered, however, by insufficient consensus and coordination among state and local agencies.¹⁰⁰

⁹⁷ Christie.

⁹⁸ Ibid.

⁹⁹ Hildreth and Johnson, 1983.

¹⁰⁰ Guy.

Development of the current Florida Coastal Management Program (FCMP)¹⁰¹ was authorized by the Florida Coastal Management Act¹⁰² in 1978. Under this Act, the Department of Environmental Regulation, also the lead agency in regulation of air and water quality and of dredging and filling projects, was charged with compiling existing statutes and rules into a coastal management program. The Act is often referred to as the "No Nothing New Act".¹⁰³ The current program includes 26 acts and implementing rules, and involves 16 state agencies, mainly the Departments of Environmental Regulation, Natural Resources, and Community Affairs. A particular difficulty of coastal zone management in Florida is that the Program defines the entire state to be within the coastal zone.¹⁰⁴

The Interagency Management Committee (IMC) was created by joint resolution of the Governor and Cabinet in 1980; it is responsible for coordinating this network of laws as a coherent program. The Committee is composed of the heads of 10 state agencies responsible for coastal management. It is responsible for integrating agency activities and policies, and for recommending new rules, legislation, and memoranda of understanding.¹⁰⁵

The state Advisory Council on Intergovernmental Relations (IAC),¹⁰⁶ originally designed in 1975, serves as a liaison among agencies to effect the FCMP, and prepares background papers for the IMC. The Governor's Coastal Resources Citizens Advisory Committee (CAC) includes concerned citizens. Members are appointed by the governor for 2-year terms; they include representatives of interest groups as well as representatives from several levels of government in the state. The CAC advises the IMC, Governor, and legislature on coastal zone

¹⁰¹ FSA §380.22.

¹⁰² FSA §§380.19-380.27 [1987].

¹⁰³ Christie.

¹⁰⁴ Guy.

¹⁰⁵ Christie.

¹⁰⁶ FSA §163.701 et seq.

*management issues.*¹⁰⁷

Observers question whether the Florida coastal management program is too fragmented to be effective. The NOAA Office of Coastal Resource Management (OCRM) periodically reviews state coastal zone management programs. OCRM issued its most recent evaluation of the Florida program in 1988, questioning whether DER functions effectively as the lead agency in program implementation, and whether the IMC and IAC are in fact able to coordinate agencies and resolve disputes, as required. Christie suggests redefining agency responsibilities in a series of memoranda of understanding, and codifying the responsibilities of the IMC, in particular. Guy notes that the Coastal Management Program does not sufficiently specify criteria for local governments to use in making permitting decisions, and suggests making the Office of Coastal Management, now only a small branch within the Department of Environmental Regulation, a larger, cabinet-level agency.

Pre-CZMA

The Florida state government's first act of coastal management was unique. The Florida Board of Trustees of the Internal Improvement Trust Fund¹⁰⁸ (composed of the governor, secretary of state and attorney general, and other state officials) passed a resolution in 1969 establishing a set of state aquatic preserves; 41 such preserves had been designated by 1988 and incorporated into the Florida Aquatic Preserve Act of 1984.¹⁰⁹

In 1970, the legislature passed Act 259, establishing the Florida Coastal Coordinating Council¹¹⁰ within the state Department of Natural Resources. The Council was intended to be the eventual coastal zone authority. Guidelines included in the legislation directed that the

¹⁰⁷ Christie.

¹⁰⁸ FSA § 253.02.

¹⁰⁹ FSA § 258.35 et seq.

¹¹⁰ FSA § 370.0211, subsequently abolished and duties transferred to the Department of Environmental Regulation.

principal consideration in all resource allocation decisions was to be maintenance or even improvement of environmental quality, and that all proposed uses were to be measured against the public interest. The legislature allocated \$200,000 to fund the council, which was to initiate resource studies and draft a coastal zone management plan. A weakness of the act is that no deadlines were set for completion of the plan and studies.¹¹¹

In 1971, the Florida legislature passed Act 280,¹¹² to regulate coastal construction and excavation. The act required that setback lines were to be drawn in coastal areas, with no construction allowed seaward of any line. The legislation included a provision for public hearings and for 5-year reviews.

Oregon

Offshore oil and gas development and oil transport in state waters

Good and Hildreth evaluated Oregon's institutional capability to manage its territorial sea. They concluded that "...the State of Oregon has excellent provisions in place for multi-use ocean management, better provisions, in fact, than the federal government or any other state". They identify the Oregon's 19th land use goal, Ocean Resources Goal (Appendix A), as the key provision. This goal gives renewable resources top priority in decision-makings, and imposes strict requirements for resource inventory, analysis of impacts of a proposed project, avoidance of pollution, and coordination among agencies). It serves as a useful framework both for coordination among agencies and for decision-making by a single agency.¹¹³

A weakness of current management practices is that, although Oregon land use law requires that agreements drawn up for coordination of state and local management activities be certified to be in compliance with the Ocean Resources Goal, no agreements reviewed fully

¹¹¹ Bradley & Armstrong.

¹¹² FSA § 61.053.

¹¹³ Dull.

incorporated the provisions of the goal. These agreements will be revised to meet recently updated regulations defining coordination.¹¹⁴

Recently the Secretary of Interior announced a proposed lease sale, no. 132, on the outer continental shelf off the Oregon coast. In response, in 1987 Oregon undertook an important new initiative concerning ocean planning. The legislature enacted the Oregon Ocean Resources Management Act,¹¹⁵ directing the state to develop the means to manage the use of its offshore resources. The overall management plan will describe resources and uses within the 200 mile U.S. Exclusive Economic Zone, including the Oregon territorial sea, and must be completed by June, 1990. This plan must be approved by the Land Conservation and Development Commission by December 1, 1990. A more detailed management plan for Oregon's territorial sea must be completed by July, 1991, and then adopted by the State Land Board, which is the manager of all state lands.¹¹⁶

Precursors to the Oregon Ocean Resources Management Task Force had performed preparatory work. In 1978 a book for interested laymen was published, "Oregon and Offshore Oil" which raised questions about Oregon's ability to manage development under existing state laws. An earlier Task Force, appointed by executive order, rendered its report in 1979, containing numerous recommendations for improving Oregon's participation in OCS planning and development. The 1987 Task Force was a direct product of the recommendations of the earlier Gubernatorial Task Force. In 1985 the Oregon Ocean Book was completed and published by the LCDC. It provided a comprehensive review of the resources and dynamic conditions of the ocean off Oregon. In 1987 the excellent study "Territorial Sea Management Study," was completed, prepared jointly by Oregon State University's Marine Resource Management Program and the Ocean and Coastal Law program of the University of Oregon Law

¹¹⁴ Ibid.

¹¹⁵ ORS 196.405 et. seq.

¹¹⁶ ORS 196.475.

School. This study is a basic reference for the Task Force's evaluation of Oregon's ocean management plan, and makes recommendations for program improvements. Finally, in 1987, the Oregon Department of Fish and Wildlife published its "Research Plan," identifying the information needed for sound management, and listing currently-identified research needs.

The 1987 Task Force is broadly based, with state agency directors, ocean users (fishermen), local government representatives and citizens.¹¹⁷ It is backed up by a 30 member Scientific and Technical Advisory Committee.¹¹⁸ Also important is the provision requiring that federal agencies be invited to participate in task force meetings and preparation of plans.¹¹⁹ The Interim Report of July 1, 1988 reflects active federal agency participation.

A major goal of the Oregon program is to ensure that the state is an effective and influential partner with federal agencies. This will require, says the Task Force, clear state standards, sound information, and technical expertise, to assure that existing fishery and renewable resources are protected if offshore oil, gas, and minerals are to be developed for the benefit of the state's citizens.

The Interim Report concludes that the state presently has only a "bare framework" for an effective management program. Numerous changes should be made. (1) State laws and policies should be made clearer, more consistent, and mutually reinforcing. (2) The state needs better information, and should create an ocean management information network to take advantage of the substantial existing information in state, federal, and university sources. Gaps need to be identified. (3) A coordination network linking state and local agencies could provide a more effective and flexible management structure. The Report concludes that no new agency is needed, but argues that offshore development presents entirely new demands for state and local agencies and thus additional resources i.e., dollars, will be needed to work with citizens,

¹¹⁷ ORS 196.445.

¹¹⁸ ORS 196.450.

¹¹⁹ ORS 196.455.

fishermen, and federal agencies to complete the Oregon Ocean Resource Management Plan.

A few of the many specific recommendations are worthy of special note. The Interim Report recommends that all of the affected state agencies should submit an integrated package of their budget needs to the Legislature to ensure that the state can effectively represent state interests in federal lease sale planning. The Report recommends that a coastal oil spill response plan be prepared; that for the 1991 legislative session a spill damage assessment and compensation fund be established, and that a fisherman's contingency fund be created (the report does not provide details on how this should be done); and that the Legislature should provide special grants to local governments for planning for onshore development resulting from offshore OCS development.

The Final Report of the Task Force is due in 1990 and should be studied carefully by Alaska because of the careful and extensive study and thinking it will represent.

One product of the Oregon state planning efforts was the establishment of a Placer Mining Task Force to study the possibility of placer mining off the southern Oregon coast. This is a federal/state task force, with representatives of all the affected federal and state agencies. An advisory group was formed, representing mining companies, environmental organizations, and a college of Oceanography. This Task Force is primarily concerned with economic, biological, and economic factors. Information will then be fed into the enhanced legal/institutional structure which is the responsibility of the Oregon Ocean Resources Management Task Force.¹²⁰

Oregon Oil Spill Contingency Planning:

Two types of contingency planning exist at the state level in Oregon, and a third has recently been authorized by the legislature.

The oil spill section of the statewide oil and hazardous material emergency response

¹²⁰ DOGAMI, 1989. ___

plan¹²¹ (see Appendix C) is administered by the Department of Environmental Quality. The plan is an organizational document that identifies and allocates agency responsibilities during the spill response process. While the hazardous materials section of the plan is administered by the State Fire Marshal, oil spill response is viewed as correctly belonging with the DEQ because the state's role and interest is in resource protection.¹²² The DEQ has promulgated a few guidelines regulating spill response, primarily establishing notice requirements and forbidding the use of all but inert chemical dispersants during an oil spill.¹²³

Over the last decade, in response to requests by the U.S. Coast Guard and funded by the CZMA Coastal Energy Impact Program, the DEQ also prepared three regional contingency plans focusing on environmental resource identification and protection. (The most recent plan, describing the Coos Bay region, is attached as Appendix D.) These plans describe biological and other resources at risk during a spill, analyze the impact of physical factors such as tidal action and weather, outline cleanup techniques, and provide maps and charts that indicate where booms and other equipment should be deployed.

During the 1989 session, the state legislature enacted a bill authorizing the DEQ to prepare oil spill contingency plans for the entire coast and the length of the Columbia River forming Oregon's northern boundary.¹²⁴ These plans will incorporate sophisticated resource mapping using computer generated geographic information systems (GIS). The plans will also expand on response resources and mechanisms available in each plan area.¹²⁵

Oregon does not currently impose contingency planning requirements on petroleum facilities within the state, and must rely therefore on the U.S. Environmental Protection Agency's

¹²¹ Authorized by ORS 466.620.

¹²² Sutherland, 1989.

¹²³ Oregon Admin. Rules Ch. 340, Div. 47.

¹²⁴ Oregon Laws, 1989, Ch. 1082.

¹²⁵ Sutherland, 1989.

enforcement of SPCC plans. This enforcement is viewed as lax, and state regulation of industry is contemplated.¹²⁶

Oregon is similar to Alaska in that there have historically been few pressures to develop its coastline relative to other coastal states, such as California. This is in large part because the state's population is concentrated in the Willamette River valley, away from the coast.¹²⁷ Perhaps because most residents live in a rapidly urbanizing area, there has historically been strong support in the state for careful management of its natural resources. By 1983, the state's unique, strict land use legislation had survived three initiative recall petitions; the margin of citizen support for the legislation has increased each election.¹²⁸

Pre-CZMA

The earliest coast management concern of the Oregon government manifested in legislation was provision of public access to beach areas. The Beach Bill, passed in 1967, establishes the rights of citizens to use beaches up to the vegetation line.¹²⁹ The Nuclear Sighting Task Force, a sub-unit of the existing Nuclear Development Committee, was established by Executive Order 01-069-25 in 1969. The task force, after considering environmental issues, was to advise the Governor and full Committee on proposed sites for nuclear power plants.

Bradley and Armstrong cite two weaknesses of this action. Primarily, the task force was not to consider sighting and construction of fossil fuel power plants, more common and hence potentially more damaging to the coastal zone. Second, a task force created by executive order can easily be abolished the same way. Compared with Washington's and Maryland's much stronger power plant sighting legislation, the executive order serves as a poor prototype for

¹²⁶ Ibid.

¹²⁷ Dull, 1983.

¹²⁸ Ibid.

¹²⁹ ORS 390.630.

further state actions to control coastal industry.

Act 608,¹³⁰ passed in 1971, established the Oregon Coastal Conservation and Development Committee (OCC & DC). Its 30 members included city, county, and port officials, representatives of Oregon's four coastal zone districts, and others appointed by the Governor. The Committee, which was given planning and advising functions only, was responsible for developing a "comprehensive plan for the conservation and development of the natural resources of the coastal zone...";¹³¹ this plan was due in 1975. The legislation mandated a conservation bias to the plan: conflicts among uses were to be resolved so that the coastal zone was not irreversibly damaged, and pollution was to be controlled.¹³² Governor Tom McCall issued an executive order placing a moratorium on coastal construction until plan completion.¹³³

Oregon has defined a broader coastal zone than most other states; it includes all areas west of the Coast Range, and areas further inland along major river drainages, within the zone.¹³⁴ In contrast, Washington state includes only the 200 feet of land inland from the tide line.

Post-CZMA

The OCC & DC was inadequately funded during its first 3 years of operation, and had difficulty in deciding on directions and methods; it finally was allocated federal CZMA funds in 1974. The Commission held a series of public workshops in all coastal counties; this workshop format, rather than public hearings, was chosen in order to provide an unthreatening forum for citizens to express their views.¹³⁵

¹³⁰ ORS Ch. 91, repealed OCLA, 1977, c. 664, §42..

¹³¹ Ibid.

¹³² Levinson and Hess, 1978.

¹³³ Bradley and Armstrong.

¹³⁴ Ibid.

¹³⁵ Ibid.

The OCC & DC presented its Natural Resources Management Program to the state legislature in 1975. When commission members were surveyed at that time, they identified several factors as having most influenced their selection of policies: (1) state agencies and resource specialists, and the results of land use inventories; (2) industry and the private sector; (3) environmental groups; and (4) citizen participation.¹³⁶

In 1975, OCC & DC was absorbed into the Land Conservation and Development Commission (LCDC), which had been established by the Land Use Planning Act of 1973.¹³⁷ The major responsibility of the LCDC is to coordinate land administration through comprehensive plans developed for all areas in the state. In order to prepare plans, the Commission was to develop a set of statewide resource management goals, prepare land use inventories and statewide planning guidelines, review local plans, and prepare example plans, acts, and ordinances.¹³⁸ There are especially strong provisions in this legislation for ensuring citizen participation as well as for coordinating state, federal, and local agencies.¹³⁹ The administrative arm of the Commission is the state Department of Land Conservation and Development.¹⁴⁰

The LCDC held hearings in four coastal cities to evaluate the planning recommendations made by OCC&DC, then established a technical advisory committee to further evaluate the recommendations; it published a revised set of policies, or 'goals' in 1976 for public review. After 20 hearings throughout the state in 1976, a revised draft was published, and more hearings and public meetings were held before statewide goals were formally adopted in 1976.¹⁴¹

Oregon is unique among the coastal states in requiring local governments to prepare

¹³⁶ Ibid.

¹³⁷ ORS 197.030.

¹³⁸ ORS 197.040.

¹³⁹ Dull, 1983.

¹⁴⁰ ORS 197.075.

¹⁴¹ Doubleday et al., 1977.

comprehensive plans according to state-imposed standards, its land use goals.¹⁴² The LCDDC established 19 statewide planning goals, each addressing a specific topic, and each specific with regard to the resources to protect, uses to accommodate, hazards to avoid, level of inventorying or documentation required, and geographic area of coverage.¹⁴³ Planning goals themselves have the force of law; each is accompanied by advisory guidelines. Most goals are stated generally, to allow flexibility in local planning. Local governments may choose to follow the established guidelines to develop a comprehensive plan, or may identify an alternative way to meet planning goals.¹⁴⁴ If a local government fails to create a plan which conforms to goals, authority to establish regulations passes to the LCDDC.¹⁴⁵ The citizen participation goal requires documented feedback showing that attention has been paid to citizen concerns; this goal is based on the premise that plans will be more successful when citizens have assisted in their preparation.¹⁴⁶ Two of the 19 goals are set out in Appendix A.

Oregon's statewide planning goals: topics (from Dull, 1983)

1. Citizen involvement
2. Land use planning
3. Agricultural lands
4. Forest lands
5. Open spaces, scenic and historical areas, and natural resources
6. Air, water, and land resources quality
7. Areas subject to natural disasters and hazards

¹⁴² Levinson and Hess, 1978.

¹⁴³ Dull, 1983.

¹⁴⁴ Ibid.

¹⁴⁵ ORS 197.251.

¹⁴⁶ Dull, 1983.

8. Recreational needs
9. Economy of the state
10. Housing
11. Public facilities and services
12. Transportation
13. Energy conservation
14. Urbanization
15. Willamette River greenway

The following four goals, added in 1976, address coastal topics:

16. Estuarine resources (See App. A for full statement)
17. Coastal shorelands
18. Beaches and dunes
19. Ocean resources (See App. A for full statement)

Another unusual feature of Oregon land-use law is that requests for changes in any approved comprehensive plan must be accompanied by evidence of a public need for the changes.¹⁴⁷ The laws also provide unusual opportunity for both citizens and agencies to appeal permitting or other resource allocation decisions, by arguing that a decision does not comply with a plan or goal.¹⁴⁸

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

California

California remains the only state outside the Gulf of Mexico with oil and gas development on the federal outer continental shelf; it is second only to Louisiana in offshore oil production.¹⁴⁹ Offshore oil and gas leasing began in the state in 1963, when the federal government offered for lease 57 tracts in six offshore basins. These tracts were all eventually abandoned,¹⁵⁰ but several additional state and federal lease sales had been held by the time of the Santa Barbara oil blowout in 1969. Both the state and federal governments imposed moratoria on further lease sales following the spill; both moratoria were lifted in 1973.¹⁵¹ Since 1965, more than 20 offshore drilling platforms have been built in Santa Barbara Channel alone. Perhaps because of the large extent of OCS oil development in California, and the opportunity to observe the effects of the 1969 blowout, great public support for strong coastal zone protection has developed in the state.¹⁵²

OCS oil and gas development: California's experience

During the late 1970s and early 1980s, California's attempts to strengthen the state's influence over oil and gas leasing decisions were marked by controversy.¹⁵³ The state filed several lawsuits in order to force the Department of Interior to place greater weight on state concerns. Suits were filed over Lease Sales 53 and 68, the first 5-year OCS leasing program, the revised 5-year leasing program, and air quality regulations imposed on OCS operators by the Department of Interior.

The state administration, because litigation proved to be a costly, time-consuming, and

¹⁴⁹ Kahoe, 1987.

¹⁵⁰ National Oceanic and Atmospheric Administration, 1980.

¹⁵¹ Hershman et al., 1988.

¹⁵² Ibid.

¹⁵³ Kahoe, 1987.

inefficient way to advance the state's concerns, has since concentrated on using existing legislation to strengthen the state's negotiating position. The most useful legislation includes Sections 18 and 19 of OCSLA, describing consultation opportunities for states;¹⁵⁴ the CZMA consistency provisions;¹⁵⁵ and a variety of statutes including NEPA,¹⁵⁶ the Endangered Species Act,¹⁵⁷ the Marine Mammal Protection Act,¹⁵⁸ the Fisheries Conservation and Management Act,¹⁵⁹ the Clean Air Act,¹⁶⁰ the Water Pollution Control Act,¹⁶¹ and other statutes, which provide environmental safeguards to protect state interests, and sometimes consultation requirements for states as well.¹⁶²

The Secretary of Environmental Affairs has been designated as the Governor's OCS Policy Coordinator, charged with mediating and ensuring coordination among agencies and representing the state administration's position. The Secretary is to meet regularly with advisory groups and representatives for local and city governments, conservation and community organizations, and OCS operators. He or she is to prepare a single state administration response to each OCS activity under provisions of Sections 18 and 19 of OCSLA.¹⁶³

It should be noted, however, that a distinction should be made between the initial leasing phase and preparation of development proposals. The leasing phase has become a highly

¹⁵⁴ 43 USC §§1351, 1352.

¹⁵⁵ 16 USC §1456(c).

¹⁵⁶ 42 USC §4321 et seq.

¹⁵⁷ 16 USC §1531 et seq.

¹⁵⁸ 16 USC §1361 et seq.

¹⁵⁹ 16 USC §1801 et seq.

¹⁶⁰ 42 USC §7401 et seq.

¹⁶¹ 33 USC §1151 et seq.

¹⁶² Kahoe.

¹⁶³ Ibid.

political process that centers on the federal and state agencies described above. The California Coastal Commission (the CZMA consistency review agency) participates minimally in the lease phase because consistency review has been eliminated for initial OCS leasing. However, after leases have been awarded, the oil companies must prepare Plans of Exploration (POE's) and Development and Production Plans (DPP's). At this point the governor's office becomes passive and the CCC steps in with consistency review.

In previous years, the consistency process was one of "hard bargaining" between the CCC and industry. However, because of the political climate, the process is now much more confrontational. More decisions of the CCC are appealed to the Sec'y of Commerce. Examples of recent problems include the question of who determines OCS air quality standards (COI or the state under the CAA program), and whether the state can require installation of seabed platforms to protect sub-seabed resources. Attempts at negotiated rulemaking have failed. Both the state and industry are looking for the right lawsuit to litigate state authority and powers.

California's Joint Review Panels

The most important component of the state government's formal OCS response system is the Joint Review Panel. These panels occur at a much later time than the Calif. Coastal Commission consistency review. In 1970, the state legislature passed the California Environmental Quality Act, tailored after NEPA, requiring environmental impact reports to be prepared for all projects expected to have important adverse environmental effects.¹⁶⁴ In cases of proposed offshore oil development projects, several state and federal agencies often prepared reports covering different aspects of the same project.¹⁶⁵ To reduce costs and time to evaluate a project, Joint Review Panels were formed. Each is a temporary association of permitting agencies which directs preparation of a report on the environmental effects of a project. The

¹⁶⁴ Calif. Public Resources Code §21000 et seq.

¹⁶⁵ Hershman et al., 1988.

panel identifies the most relevant issues to address, then interviews and selects an independent consultant to prepare the report. The panel oversees report preparation and conducts three public hearings: one before beginning the review of environmental issues, a second to evaluate the draft report, and a final hearing once the report has been determined to be complete.¹⁶⁶

Eleven such panels have been formed in California since 1983, all for projects related to offshore oil and gas development. All have included a federal agency; most often either the Minerals Management Service, US Army Corps of Engineers, or Bureau of Land Management. Representatives of county and state agencies and from the Governor's office are included on the panels. Local governments play a big part in the Joint Review Panel process because they will manage many of the onshore impacts of OCS development. The existence of SEQA is especially important here as it gives local governments a good bargaining chip. Applicant oil and gas companies prepare detailed project descriptions and assist in the review of environmental issues to address; after this, they are permitted to testify at public hearings, but have no further role in the review process; however, applicants pay consultant's costs, and sometimes agency staff time as well.¹⁶⁷

The Office of Permit Assistance, in the Governor's Office, and the office of the Secretary of Environmental Affairs assist panels. A representative from the Secretary's office normally serves as a non-voting panel member, to help resolve disputes and to assist with meeting deadlines.¹⁶⁸

Hershman et al. and Kahoe note that the review panel process promotes a coordinated approach which reduces disputes among agencies, allows agencies opportunity to share expertise and resources, and promotes clear identification of needed mitigation measures which can be drawn up as permit conditions.

¹⁶⁶ Calif. Public Resources Code §68735.

¹⁶⁷ Hershman et al., 1988.

¹⁶⁸ Ibid.

The process has also resulted in area studies: evaluations of expected effects and necessary mitigation measures for later oil and gas development likely to take place in the general area where a permit application has been filed. Potential cumulative effects can then be evaluated, and the study format allows the panels to obtain access to data not normally made public by the Minerals Management Service. These studies help local governments project and plan for future developments and growth in their areas of jurisdiction.¹⁶⁹

Hershman reports that agency members whom they contacted believed the review panel process to be generally effective and helpful, as well as flexible. One contact listed several problems remaining to be resolved: methods of determining panel composition and leadership, of resolving conflicts arising from different agency mandates and opinions, and of working with consultants to select research methods and criteria.¹⁷⁰

Successes

In several notable cases, the state has been able to successfully promote its OCS concerns. Using OCSLA Section 19 consultation provisions, Governor Deukmejian submitted recommendations for specific lease sale stipulations and tract deletions for protection of sensitive areas. These recommendations were used as a basis for beginning negotiations.¹⁷¹ In a Memorandum of Understanding achieved through such negotiations, the state obtained deletion of 22 tracts, added oil spill contingency measures and a set of mitigation measures to protect fisheries and marine mammals and to mandate consultation with local fishermen.¹⁷² Kahoe notes: "The use of negotiated stipulations cannot guarantee that all State interests will be successfully addressed through the lease sale process, but these negotiations have been

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Kahoe, 1987.

¹⁷² Ibid.

successfully used to reduce the number of issues that must be handled through other measures".

California Contingency Planning:

Oil spill contingency planning in California is conducted both at the state agency and industry facility level. The state plan (See Appendix D) is administered by the Department of Fish and Game.¹⁷³ Because of federal preemption rights, the state acts primarily to advise and monitor federal agencies during spills. Thus, the state plan is an organizational document identifying agencies that are involved in spill response. The plan outlines the hierarchy of authority in an emergency and the sequence of steps to be taken during the response process. Contact information is provided for agencies, cleanup contractors and coops, wildlife rehabilitation facilities, etc. The plan also provides information about funding sources available to repay costs of cleanup and copies of necessary forms.

The state does retain veto power over use of chemical agents, such as dispersants, in spill cleanup¹⁷⁴ and acceptable chemical agents are also listed in the plan.

In 1986 the legislature mandated a review of the state contingency plan¹⁷⁵ considering such factors as adequacy of manpower and equipment. The petroleum industry is required to contribute to the cost of this review.¹⁷⁶

Through CZMA consistency provisions¹⁷⁷ the California Coastal Commission has some jurisdiction over oil-development related activities. The state requires that all petroleum cargo vessels, refineries, terminals, and offshore production facilities prepare contingency plans and

¹⁷³ Public Resources Code §35050.

¹⁷⁴ Fish and Game Code §5650.

¹⁷⁵ Government Code §8574.6.

¹⁷⁶ Government Code §8574.6(d).

¹⁷⁷ 16 USC §1456.

provide emergency response training for their personnel.¹⁷⁸ The CCC oversees implementation of these requirements through its planning authority,¹⁷⁹ and is authorized to call practice drills and exercises in order to test the effectiveness of industry plans.¹⁸⁰

The State Lands Commission, an executive agency within the Governor's office, is also authorized to require drills and tests of industry contingency plans, and otherwise investigate methods of marine pollution control.¹⁸¹

The California plan and process has been praised for its clear delineation of authority during emergency response. In addition, the CCC program of on-site testing of industry plans has enhanced general preparedness by locating and correcting response problems before a spill occurs. However, the plan is criticized for including too many state agencies within its ambit without clearly defining responsibilities. In addition, the legislatively mandated review of the plan has been underfunded thus far. So far as possible, the plan review will take a systems approach to the problem, considering response from point of spill to the dumpsite. Following the Valdez spill, the state is also concerned with potential response to a massive spill incident.¹⁸²

Pre-CZMA

Formal coastal zone management began in California in the San Francisco Bay area. The San Francisco Bay Conservation and Development Commission (BCDC), which in 1965 became the nation's first regional coastal management agency, resulted from a decade of citizen efforts to protect the Bay.¹⁸³ The area of the Bay had diminished by diking and filling from an

¹⁷⁸ Government Code §8574.6(c).

¹⁷⁹ Public Resources Code §30232.

¹⁸⁰ Baird, 1989.

¹⁸¹ Government Code §11180, Public Resources Code §6226.

¹⁸² Baird, 1989.

¹⁸³ Bradley and Armstrong, 1972.

initial 680 to 437 square miles by 1958,¹⁸⁴ and concerned Bay area residents formed the Save San Francisco Bay Association in 1961 to counteract this loss of area. The group worked to focus public attention on Bay management, and by 1964 had been able to have legislation introduced and passed by the state legislature establishing a commission to study the Bay problem. The recommendations of the commission resulted in formation of the BCDC, by passage of the McActeer-Petris Act.¹⁸⁵

The BCDC, originally intended to be a temporary agency created to develop a comprehensive management plan for the Bay Area, submitted the San Francisco Bay Plan to the state legislature in 1969. The BCDC has been made a permanent regulatory agency, and is composed of 27 members: representatives of local, state, and federal agencies, as well as citizens.¹⁸⁶

Bradley and Armstrong note that the BCDC's decisions are rarely challenged, perhaps because its varied membership lends it credibility. They cite as other factors contributing to its success: public support for action to protect the Bay and control development; a clearly present danger to the environment; the initiative of private citizens; as well as the respect which the commission developed during the years it worked on the Bay Plan.

Post-CZMA

The basis of California's Coastal Management Program is the California Coastal Act of 1976.¹⁸⁷ The Act describes a set of state policies for protection of coastal zone resources and management of human activities and development within the zone. The Act defines the coastal zone to contain waters out to the 3-mile boundary of the territorial sea and inland usually 1,000

¹⁸⁴ Ibid.

¹⁸⁵ Government Code §66600 et seq.

¹⁸⁶ Government Code §66620.

¹⁸⁷ Public Resources Code §§30000 et seq.

yards (900 m). The zone boundary is extended inland to the first major ridgeline in estuarine or recreational areas and important habitat.¹⁸⁸

The Act established the California Coastal Commission, the main coastal zone management authority in the state, as well as several regional authorities, all charged with implementing the Act.¹⁸⁹ Regional commissions were given permit authority until coastal management plans submitted by local governments have been approved by the Coastal Commission. The Coastal Commission remains the permitting agency for ocean activities. The Commission also reviews federal activities for consistency under the CZMA. The State Lands Commission administers tidelands and submerged lands out to the 3-mile boundary. It also participates in local planning.¹⁹⁰

Marine Resource and Coastal Zone Management in Alaska

The history of Alaska state marine resource and coastal zone management differs from that of other coastal states in important respects.

First, until initiation of federal programs to encourage oil and gas leasing and development on the continental shelf, there had been little pressure for industrial development in Alaska's coastal areas. With the arrival of the oil industry, the state's government has in a short time been confronted with the need to regulate a single, politically powerful, large-scale industry promoted by the more powerful federal government. Conversely, other coastal states have been confronted over much longer periods of time by many, mostly small-scale, gradually evolving types of coastal development and resource use conflicts. In this sense, Alaska's state government has lacked the opportunities presented to governments of other coastal states to test, evaluate, and refine management programs over a period of years.

¹⁸⁸ National Oceanic and Atmospheric Administration, 1980.

¹⁸⁹ Public Resources Code §§30300-30305.

¹⁹⁰ Public Resources Code §30416.

Second, the state achieved statehood in 1959. Its government was still in a startup phase when other, older states had begun serious consideration of problems of coastal management and marine resource use. More than 90% of Alaska has until recently been owned by the federal government. Under the Alaska Statehood Act,¹⁹¹ Congress gave the state government the right to select more than 104 million acres of unreserved federal lands; the state was given a 25-year period to make these selections.¹⁹² (As in the cases of all coastal states, the Submerged Lands Act of 1953¹⁹³ gave the state title to tidelands and submerged lands under the territorial sea as well.) On achieving statehood, the new government began to conduct land inventories and prepare plans for land management. Fewer than 10 million acres had been transferred to state ownership by 1969, however, when the federal government instituted a "freeze" on all transfers of land ownership until Alaska Native claims to their historical lands had been resolved. The freeze remained in effect until passage of the Alaska Native Claims Settlement Act in 1971.¹⁹⁴ Section (d)(1) of the Act mandated a review of all unreserved federal lands in the state to ensure that the public interest was being met. Lands under such review remained in a withdrawal status until passage of the Alaska Lands Bill¹⁹⁵ in 1980. Thus it was not until the 1980s that the state finally received title to the bulk of its selected land. Because it has only recently obtained ownership of this land, the state's land management options have been limited, again limiting its accumulated resource management experience.

Third, perhaps because of the low population density in Alaska, and because residents have not felt the stresses of urbanization and observed the rapidly increasing development pressures which have been the common experience of residents of "The Lower 48", concern for

¹⁹¹ 48 USC, note prec. §21.

¹⁹² Arctic Environmental Information and Data Center, 1975.

¹⁹³ 43 USC §1301 et seq.

¹⁹⁴ 43 USC §1601 et seq.

¹⁹⁵ Alaska National Interest Land Conservation Act.

environmental protection has grown markedly more slowly in Alaska than in other coastal states. Both Congress and the Administration, in making decisions on allocation of Alaskan lands and resources under federal jurisdiction, have been extensively pressured by national conservation groups, which formed the Alaska Coalition in the mid-1970s to lobby Congress in favor of the Alaska Lands Bill. Relative to the other West Coast states, though, Alaska's indigenous conservation groups have been small in size and number and have found it correspondingly more difficult to affect state-level decision-making. Anti-environmentalist feelings, demonstrated in newspaper editorials and letters-to-the-editor, by the public speeches of political leaders, and by t-shirts and bumperstickers ("Let the Bastards Freeze in the Dark With-Out Alaskan Oil", and "Sierra, Go Home" were the commonest slogans in the state during the time of the pipeline hearings), have traditionally been much more visible in Alaska than elsewhere on the West Coast.

A fourth difference is the multicultural nature of Alaska. Many communities with the greatest stake in coastal resource decision-making are Alaska Native: Aleut, Eskimo, or coastal Indian. Decision-making traditions in these communities differ markedly from those of the white majority. Such traditions must be incorporated into planning programs in order for these citizens to have sufficient opportunity to assist in plan development and to express their concerns and priorities to agency representatives. Public hearings, for example, are a common mechanism for encouraging public participation in resource management in Alaska as well as other states. They are of limited use in rural Alaska, though, where many residents hesitate to express themselves in such an unfamiliar forum. Many of these same residents, however, possess a fund of knowledge about their region unavailable elsewhere.

Pre-CZMA

These several factors have acted to slow resource decision-making and coastal zone planning *per se* in Alaska. By the early 1970s, when most coastal states were actively conducting coastal studies and considering planning alternatives, no legislation specifically

addressing coastal zone planning had been passed by the Alaska legislature. Pertinent Alaska state law at that time included the Alaska Land Act of 1959¹⁹⁶ and provisions of the state Constitution related to resource use and development. Article VIII of the Alaska Constitution states that the policy of the state is to encourage settlement and maximum use of its resources; that all renewable resources are to be managed for maximum sustained yield; that the state may lease but not sell renewable resources, and may reserve areas of natural beauty or of scientific, cultural, or historical importance. The Land Act provided for classification of Alaskan lands, including tidal and submerged lands, according to their "highest and best uses", in area land use plans. The Act mandates public participation in all land use decisions and requires public hearings on all regulation-setting procedures and classification actions.¹⁹⁷

However, marine fisheries have always been one of the several most important components of the state's economy, and both residents and the state government place high priority on maintenance of important stocks and their habitat. A variety of marine research programs have been instituted by Alaska's management agencies and colleges.¹⁹⁸ The Institute of Marine Science was established at the University of Alaska-Fairbanks by the state legislature in 1960; the Alaska Sea Grant Program was established in 1970, and University of Alaska branches at Juneau and Kodiak run marine studies programs as well. Several state agencies with regulatory and research responsibilities for marine resources were established at statehood. These include: the Alaska Departments of Fish and Game, Natural Resources, Community and Regional Affairs, and Environmental Conservation.¹⁹⁹

Post-CZMA

¹⁹⁶ 38.05 AS.

¹⁹⁷ AS 38.05.945.

¹⁹⁸ Jarvela, 1986.

¹⁹⁹ Ibid.

The state legislature passed the Alaska Coastal Management Act,²⁰⁰ intended to provide for "coordinated planning for use and conservation of the state's coastal resources" in 1977.²⁰¹ The Act provides for a state management program based on sharing of management responsibilities between the state and local governments, by development of coastal management programs for local districts.²⁰² These district plans are developed by municipalities²⁰³ or, in rural regions, by popularly elected Coastal Resource Service Area Boards.²⁰⁴ District plans are reviewed by the public and by state and federal agencies, then must be approved by the local coastal board, state Coastal Policy Council, and NOAA.²⁰⁵ NOAA approved Alaska's state coastal management program in 1979. By 1987, NOAA and the state Coastal Policy Council had approved 21 plans submitted by local governments.²⁰⁶

Incorporating the Alaska Native perspective

The history of coastal zone planning by members of the NANA Native Corporation, in northwestern Alaska, illustrates the particular resource planning outlook and experiences of rural Native Alaskans (NANA members are Inupiat Eskimo). No municipal government exists in the NANA Region, so residents have no access to land use controls in common use elsewhere, such as permitting and zoning provisions. Likewise, residents had been dissatisfied with their experiences in the public participation processes of state and federal agencies. They found that public comments were not usually taken until late in the planning process, and they were

²⁰⁰ 46.40 AS.

²⁰¹ Hanley and Smith, 1987.

²⁰² AS 46.40.030.

²⁰³ AS 46.40.090.

²⁰⁴ AS 46.40.140.

²⁰⁵ Isaacs, et al. 1987.

²⁰⁶ Hanley and Smith, 1987,

concerned that their comments were not evaluated seriously by agency representatives.²⁰⁷ They decided to participate in the state coastal management program. Because participation provides residents with a formal, central role in planning, because any approved district management plan would be legally binding on state and federal agencies, and because they would obtain some of the same "consistency" benefits available to a state with an approved coastal zone program, they saw an opportunity to increase their control over development activities in their coastal zone.²⁰⁸

In 1978, NANA Region residents requested organization of a NANA Coastal Resource Service Area, and in 1979 elected members of a NANA Coastal Resource Service Area Board. The Board submitted a coastal management plan to the Alaska Coastal Policy Council in 1979.²⁰⁹

Once a plan is approved and development projects proposed, a Board is normally one of several reviewers which make consistency recommendations to a state agency with legal authority to make a consistency determination. To improve their control over plan implementation, NANA residents proposed an alternative method of implementation, Sivunniug, based on traditional decision-making approaches.²¹⁰

There are three important aspects to the Sivunniug method. First, well before a permit application has been filed, permit applicants are asked to present their project plans to the Board, which holds a pre-development conference of representatives of affected communities, local landowners, and the applicant. Additional discussions may be held as necessary to further clarify issues and conflicts. Second, once a permit has been filed, the Board may request the lead state agency to schedule a permit application conference. The conference is attended by

²⁰⁷ Isaacs et al., 1987.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

representatives of communities and state agencies, the Board, and landowners; its purpose is to discuss the coastal management implications of the proposed activity and to identify methods of resolving conflicts. Third, federal and state agencies are requested to include representatives of the Board, affected communities, and landowners in regional planning and study teams. This procedure is meant to ensure that state planning activities are consistent with the district management program.²¹¹ Isaacs et al. note that when the NANA Board presented the concept of Sivunniug to state agencies, it was "not well received", but that agency representatives and NANA members were eventually able to negotiate a solution which reasonably satisfied everyone.

Alaska statutes and regulations governing oil pollution

Legislation governing oil pollution and control in Alaska is found primarily in five chapters of the Alaska Statutes. AS 44.46 establishes the Department of Environmental Conservation (DEC) and delineates its duties. AS 46.03 prohibits the release of oil and establishes a penalty scheme and various legal remedies in the event of a spill. AS 46.04 addresses pollution control in terms of financial responsibility, contingency plans, containment procedures, and master response plans. AS 46.08 creates a spill response fund. AS 46.09 establishes containment and cleanup procedures to be followed by persons responsible for a spill. Each of these chapters is described in more detail below.

The DEC administers programs to prevent and abate pollution,²¹² and promulgates regulations to fulfill its mission.²¹³ An environmental advisory board, consisting of non-governmental personnel, is created to review DEC programs and policies, and make necessary

²¹¹ Ibid.

²¹² 44.46 AS.

²¹³ 18 AAC Ch. 75.

recommendations to it.²¹⁴

Alaska prohibits the discharge of oil into state waters except where permitted by regulation or international convention.²¹⁵ Oil discharge permits are issued only for research and scientific purposes.²¹⁶

Civil penalties for oil discharges are assessed per gallon spilled, based on the quality of the receiving environment, characteristics of the oil, and the intent of the discharger.²¹⁷ The DEC has established specific guidelines for penalty assessment.²¹⁸ A statute enacted this year, effective 8/10/89, assesses additional penalties on spills of crude oil in excess of 18,000 gallons.²¹⁹ Civil actions may be brought by the state attorney general to collect damages and penalties for discharges of less than 18,000 gallons.²²⁰ Oil dischargers are responsible for restoration of the environment.²²¹

Additional statutes provide for attorneys fees, injunctions, security detention of vessels, criminal penalties, nuisance actions, emergency powers of the DEC, strict liability (and defenses) of various parties, proof and requirements of financial responsibility, and actionable rights.²²² All remedies for spills greater than 18,000 gallons are cumulative.²²³

Oil discharged into state waters must be removed, and the DEC is directed to cooperate

²¹⁴ AS 44.46.030.

²¹⁵ AS 46.03.740.

²¹⁶ 18 AAC 75.190.

²¹⁷ AS 46.03.758.

²¹⁸ 18 AAC 75.500 - .600.

²¹⁹ AS 46.03.759.

²²⁰ AS 46.03.760.

²²¹ AS 46.03.780.

²²² AS 46.03.763 - .880.

²²³ AS 46.03.875.

with the U.S. Coast Guard and Environmental Protection Agency in cleanup operations.²²⁴ The DEC is required to seek reimbursement for its cleanup costs.²²⁵ All oil production and transport facilities, including vessel transfers, must prepare and have ready a contingency response plan for oil discharges, as approved by the DEC.²²⁶ The DEC has promulgated regulations addressing the requirements of contingency plans, including applications procedures, contents requirements, approval criteria, etc.²²⁷

Oil facilities and vessels must provide proof of financial responsibility to the state.²²⁸ The limits of financial responsibility for vessel transfers are established under federal statutes, i.e., the Trans-Alaska Pipeline Authorization Act²²⁹ and the Clean Water Act.²³⁰ The DEC is authorized to promulgate regulations governing spill response "which do not conflict with and are not preempted by federal law or regulations."²³¹

The legislature this year enacted new laws requiring the DEC to annually prepare state-wide and regional master response plans. These plans will identify the responsibilities of governmental agencies and private parties in the event of a catastrophic spill.²³²

The Alaska statutes provide for an oil spill response fund and a new law establishes an oil and hazardous substance response office within the DEC.²³³ The fund is financed by

²²⁴ 46.04 AS.

²²⁵ AS 46.04.010.

²²⁶ AS 46.04.030.

²²⁷ 18 AAC 75.305 - .395.

²²⁸ AS 46.04.040.

²²⁹ 43 USC 1653(c)(3).

²³⁰ 33 USC 1321(p)(1).

²³¹ AS 46.04.070.

²³² AS 46.04.200-.210.

²³³ 46.08 AS.

governmental appropriations and by damages and penalties recovered from parties responsible for spills.²³⁴ The fund may be used for cleanup activities, and is intended to finance the new response office and volunteer corps (noted below) and the master response plans.²³⁵ The DEC must report to the legislature on fund accounting and on the activities supported by the fund.²³⁶

The DEC and the attorney general must immediately seek reimbursement for spill cleanup costs.²³⁷ The fund may be used to reimburse municipalities. The statute authorizes liens against property of persons responsible for spills.²³⁸

The legislature this year created an emergency response office within the DEC.²³⁹ The office will establish and coordinate a volunteer cleanup corps, response depots throughout the state, and emergency procedures to be followed during spills.

Oil spills must be reported to the DEC, and responsible parties must make reasonable efforts to contain and clean up spills. Under certain circumstances the DEC may waive or intervene in private cleanup operations. Guidelines for cleanup must be consistent with federal statutes.²⁴⁰

The statutes and regulations described above comprise the major laws addressing oil pollution control and liability. There are, however, additional statutes that bear relation to the subject, including the Alaska Coastal Management Program²⁴¹ and a \$10 million appropriation

²³⁴ AS 46.08.020.

²³⁵ AS 46.08.040.

²³⁶ AS 46.08.060.

²³⁷ AS 46.08.070.

²³⁸ AS 46.08.075.

²³⁹ AS 46.08.100 - .190.

²⁴⁰ 46.09 AS.

²⁴¹ 46.40 AS.

made this year to the oil release response fund.²⁴²

Emergency response to an actual or threatened oil spill is governed by statutes scattered throughout the chapters described above. In addition, the Alaska Disaster Act²⁴³ and the Disaster and Emergency Relief Funds statute²⁴⁴ permit the governor to act independently in response to catastrophic oil spills.

²⁴² 1989 SLA, Ch. 13.

²⁴³ 26.23 AS.

²⁴⁴ 44.19 AS.

Analysis

Applying components of other states' management programs to Alaska

The March 1989 oil spill in Prince William Sound may have been North America's worst environmental catastrophe, yet the oil industry remains the most important component of the state's economy. Can the Alaska state government modify its marine resource management plans and policies to reduce the risk of further disasters? Would incorporating specific components of the marine management programs of other states help to improve Alaskan regulation of coastal and offshore oil industry?

Promotion of local participation

Many observers identify local participation as a critically important component of any coastal zone, marine resource management programs.²⁴⁵ One reason frequently cited is that coastal residents who have participated in preparation and implementation of management programs will more fully support them. There is another reason as well: in some cases, private citizens have shown great commitment to the objective of adequately protecting natural environments. A primary impetus for initiation of coastal planning in many states was growing concern for resource protection expressed by state residents, and often pressure from conservation groups as well.²⁴⁶

In the case of Prince William Sound, a particular group of local residents has proved itself to be especially committed to protection of local natural resources. Commercial fishermen, represented formally by the Cordova District Fisherman's United, have actively promoted strict regulation of oil industry activities for many years. "They fought the pipeline, they fought the terminal and the supertanker traffic, and they sued, time and again, to fight the practices that

²⁴⁵ Dull, 1983; Mack, 1977.

²⁴⁶ Bradley and Armstrong, 1972; Bish, 1982.

allowed 40 lesser spills and leakages into the sound over the past 12 years".²⁴⁷

Local residents may also in some cases be privy to important information not available to agency personnel. Residents of Valdez, for example, may have been more aware of the increasing problem of slack supervision of tanker crews, apparently an important immediate cause of the March spill, than were agencies charged with monitoring vessel traffic. A Valdez City Council member reported in a March National Public Radio interview that Valdez residents had been concerned about heavy drinking by tanker crew members for some months before the spill, and felt that complaints made to agency representatives had not been sufficiently followed-up.

Restricted opportunity for meaningful citizen participation in state resource management programs may in fact be a problem in Alaska. As noted above, NANA Region representatives reported that local residents found their comments accepted too late in state planning processes, after main policies and directions had been determined.²⁴⁸ Incorporating several public participation components of other states' management programs may improve Alaska's resource planning and management programs. California's Joint Review Panels and North Carolina's CRC and CRAC seem especially appropriate. Some of the components of the Sivunniug approach could be added to statewide management programs as well.

A new concept for Citizen Participation.

Lack of vigilance by the Coast Guard in enforcing federal safety laws and regulations is alleged to be one reason for the EXXON-Valdez oil spill. Such a "too-complacent" attitude was probably encouraged by several factors, including the lack of serious spills for several years, statements by the oil industry about their high degree of care, Coast Guard budget limitations, and, to some extent, the close social, professional, and peer group relationships between Coast

²⁴⁷ Sims, 1989.

²⁴⁸ Isaacs et al., 1987.

Guard personnel and ALYESKA and EXXON employees. This sense of complacency also seemed to affect the relevant state agencies, probably for similar reasons.

The problems associated with regulator/regulated relationships are not unique to the Coast Guard and oil companies. They are, in fact, a typical "regulated industry" phenomena. One of the most commended approaches to resolving these problems is through more active citizen participation. Let us explain. One of the best ways to assure continued vigilance by regulators is to integrate into the regulatory process a constituency whose interests are different, if not opposite, from that of the regulated industry. In the case of Alaska two groups come to mind whose long and short term interests are most often at odds with those of the oil companies, and of the Coast Guard. These are the commercial fishermen, and the environmentalists. If their vigilance, powered by their self interest, could be integrated into the decision process then the chances of creeping complacency would be reduced. At the same time, their participation in the process should not be so great as to thwart the economic goals sought by the regulated industry. We suggest one way that this might occur, although other methods can also be devised.

A citizen participation committee could be formed, comprised, for example of 15 members. Three might represent the oil industry, two the state, two the federal government. This would leave eight members representing local government, commercial fishermen, and environmental groups. Such a Committee would serve several functions, serving as a forum for public debate, putting federal, state, and local personnel in direct, face to face contact, and allowing the Committee to insist on public answers to perceived problems.

Such a Committee would provide a valuable forum for public debate and discussion of important oil transportation and spill risk issues. It would put federal and industry officials into direct and personal contact with local citizens, fishermen, and environmentalists, groups vitally interested in these issues. A continuous education process would be generated, educating the participants as well as the public, with important information about costs, risks, economics, and human values affected by oil transportation and spills.

One problem with citizen committees generally is that, while they initially are effective, over time they tend to lose their impetus. Because they have no real legal power they tend to be less and less heeded and sometimes ignored, unless they are somehow involved in the actual decision process. One way to accomplish this in Alaska would be to assure that local citizens, fisheries and environmental groups have a majority of the votes on the committee (although it would be hoped that decision-making by the Committee would be "consensus" rather than by technical vote counting).

The key element that would distinguish this entity from the ordinary citizens advisory committee is that the committee would have specific, limited "legal" powers to participate in the process. This could be accomplished as follows:

- a) The Committee would have subpoena powers, both for persons and for documents. These subpoena powers would extend to relevant Coast Guard personnel and files. The congressional bill creating and empowering the Committee could instruct the Coast Guard to cooperate with the Committee in all Committee investigations.
- b) The meetings, deliberations, files, and entire process of the Committee would be "public," available to the press, appropriate state and federal officials and to congress. The experience of the San Francisco Bay Conservation and Development Commission is instructive here. Widely divergent views were expressed at the outset of the BCDC, but with public debate among all interested parties, accommodation was finally achieved.
- c) The Committee could be authorized to conduct investigations and make findings and recommendations. Its recommendations would normally carry only political weight, that is, they would not have to be adopted by the federal or state agency, or by the industry, with one key exception. If the Committee recommendation was not adopted then the agency would have to explain why it was not adopted, in writing, and with fully developed reasons, all of which would be available to the

public, the press, the state legislature, and the congress. The agency answer would have to be published within 120 days or else the recommendations would automatically become binding on the agency.

This would focus agency, industry, and public attention, on problems before they got out of hand. The obligation on the agency is not overburdensome because all it need do, if it chooses not to implement the recommendation, is to state publicly and in writing, its reasons for not so doing.

Promoting state-federal working relationships

California state officials²⁴⁹ have noted that when state and federal agency representatives work together in planning programs, not only do they have a greater opportunity to share expertise, but such coordination allows resolution of disputes as well. Formal planning programs, such as California's Joint Review Panels, with roles for both state and federal representatives and specific planning goals and agenda, may afford state agency members an opportunity to promote state positions and describe state concerns to federal decision-makers.

Clarifying state planning and resource management objectives

The federal government, with far more resources and offshore jurisdictional authorities than any state government, often differs with coastal states over marine resource management issues. In some cases, state or local governments may not differ with formal federal positions, but may feel that federal policies are inadequately enforced. States are then at a negotiating disadvantage both because of this differential in resources and power, and also because state authority over marine affairs is "constitutionally vulnerable",²⁵⁰ ambiguous in nature and scope.

²⁴⁹ Kahoe, 1983.

²⁵⁰ Good and Hildreth, 1987.

State governments, then, which are clearly at a negotiating disadvantage whenever policy differences with federal agencies exist, can most effectively promote their concerns and recommendations when these have been most clearly defined. Two measures adopted by other states would most effectively help in this: (1) Oregon's mandatory coastal goals and (2) California's system of evaluating proposals for OCS activities, especially preparation of Area Studies by Joint Review Panels. Oregon's goals provide an unambiguous standard for state and local agencies and individual citizens to use in evaluating proposed marine activities and defining state positions. California's evaluation system, with its emphasis on broad, long-term regional planning, need not be limited to consideration of OCS leasing decisions; it seems more widely useful.

In spite of the negotiating disadvantage of the states, they still have significant areas which have not been preempted and where direct state legislation and regulation are possible. In *Ray vs. Atlantic Richfield Co.*²⁵¹ the court invalidated a state law that attempted to regulate design characteristics of oil tankers (double hulls, etc.) but upheld a state requirement for tug escorts. Similarly, in *Chevron vs. Hammond*,²⁵² a State of Alaska attempt to prohibit discharge of ballast oil by oil tankers into the territorial waters of Alaska was upheld. It did not conflict with coast guard regulations and was not therefore preempted.

The question of centralizing state authority

In the cases of California and Florida, states have attempted to improve their OCS bargaining positions, vis-a-vis the federal government, by consolidating decision-making authority in the governor's office. In this era of extremism in politics, this solution may be flawed if too much reliance is placed on an administration's commitment to wise resource management. Checks on state administration authority should be retained either by mandating extensive public

²⁵¹ 435 US 151, 1978.

²⁵² 726 F.2d 483 (1978).

participation as Oregon does, or by formally incorporating citizens and marine experts into policy making bodies such as North Carolina's CRC and CRAC or California's Joint Review Panels.

Knowledge is power

Oregon and Washington have been especially effective at producing studies that gather and analyze information about impacts that might come from oil transportation and development. The series of studies were started when the Governors Task Force in 1979 recommended heightened state participation in the OCS process. This recommendation was reinforced by the book "Oregon and Offshore Oil" published in 1978. In 1987 a Legislatively authorized Task Force was created and it soon produced "Territorial Sea Management Study" with basic recommendations for state program improvements. The goal of the 1987 Task Force is to assure that the state is an effective and influential partner with the federal agencies and to assure that development, when it occurs, will accrue to the benefit of the state's citizens. In 1987 the Oregon Department of Fish and Wildlife published its "Research Plan" identifying new research needs. The Interim Report of the 1987 Task Force provides a comprehensive blueprint of actions recommended for preparing Oregon for full participation in OCS oil and gas decisions. Oregonians believe the Final Report of the Task Force will be followed by legislative implementation.

Washington has similarly turned out an impressive array of studies in preparation for institutional and legal reorganization. The 1987 Washington Legislature was enacted to prepare the state for federal oil and gas development on the OCS. Implementation was delegated to Sea Grant, at the University of Washington. The Ocean Resources Assessment Program (ORAP) has moved efficiently to produce the required studies. First came the ORAP Advisory Committee Report. Then came: "Washington State Information Priorities," "State and Local Influence Over Offshore Oil Decisions," and "Toward a Conceptual Framework for Guiding Future OCS Research." Additional studies are now coming on line.

The Oregon/Washington approach is to study to problem carefully, then, through Task

Force reports, to implement recommendations by coordinated legislative and administrative actions. Both states have clearly enhanced their positions vis-a-vis the federal agencies by the execution of these studies identifying their own goals and policies, creating a group of "experts" at the state level, and raising the level of the public dialogue on these critical issues.

The Oregon and Washington Task Forces are quite distinguishable from the Alaska Oil Spill Commission. The Alaska Commission was created in response to a particular incident and lacks the resources and the time that were provided in Oregon and Washington. Very possibly a more permanent, more broadly mandated Task Force would be the next logical step in Alaska, to analyze on a broader scale changes in laws, policies, and institutions that would enhance the state's role in oil development/transportation/spill management.

Comprehensive Regional Planning: A Water Quality Authority

Water quality authorities have been established throughout the United States where important bodies of water are surrounded by multiple governmental jurisdictions. The Chesapeake Bay Program coordinates among several states, and multiple counties and cities that exert some authority over the Bay. The International Joint Commission plans for an enormously complex system of governments abutting the Great Lakes. The San Francisco Bay Conservation and Development Commission in California and the Puget Sound Water Quality Authority in Washington provide varying measures of planning and regulatory authority for the waters they are charged to protect.

In each of these regions, the sound, bay or lakes are a significant economic and aesthetic resource. Conflicts occur as development pressures and attendant pollution press on the resource. Often there are dozens, if not hundreds of state and local agencies, municipalities, ports and special use districts each regulating use of the waters. Even where agencies want to regulate comprehensively, jurisdictional restraints prevent it. The predictable result of this confusing array of laws and governments has been serious degradation of water quality and significant loss of habitat.

The function of a water quality authority is to develop goals and priorities for the waters it must protect, and rationally coordinate among competing agencies and uses. While state authorities typically do not have power over the federal agencies also governing in the region, a state-federal partnership may be formed, especially where the waters have been designated an "estuary of national significance."²⁵³

The Alaska legislature should consider establishing water quality authorities for both Prince William Sound and Bristol Bay, the two bodies of water in Alaska most seriously at risk from jurisdictional conflicts and development pressures. While Alaskan waters do not yet suffer the degree of environmental decline seen in the examples cited above, establishment of proactive authorities with the power to plan and regulate while growth is occurring will provide needed protection to state waters. This is especially so given the special risks posed by oil transport in Alaska, and the extraordinary value of the state's natural resources. Water quality authorities usually are established as a reactive measure, working to rectify damage already done; Alaska should consider taking the initiative to address the problem of jurisdictional conflict before it impacts state water quality.

Powers of water quality authorities vary depending on the extent of the jurisdiction they serve. Multi-state or international authorities must be elevated to the federal level, but an authority created to protect waters within a single state is committed to the discretion of that state's legislature. Typically a water quality authority conducts physical and institutional surveys of the region, and prepares a management plan that seeks solutions to problems using institutions already in place and by proposing new systems, when appropriate. If the study process is thorough, the authority may be able to predict and plan for future problems. Authority powers range from the purely advisory, to the power to coordinate and direct other state and local agencies, to independent regulatory powers allowing the authority to establish its own programs. Citizen, business, and governmental input to the planning process is vital.

²⁵³ 33 USC §1330.

Oil Spill Contingency Planning

Oil spills are inevitable, and experience teaches that contingency plans for response to spills are not infallible.²⁵⁴ The crux of the problem is in preparing plans that are workable and effective. There are several approaches to this problem.

Alaska has a solid foundation for effective contingency planning in two areas. First, petroleum facilities and transport vessels are required to maintain contingency plans for their operations.²⁵⁵ While this is a logical requirement, only California, of the five states surveyed, also requires specific contingency plans of industry.

Second, the Alaska legislature this summer enacted laws to create statewide and regional contingency plans, and establish an emergency response office to administer the plans.²⁵⁶ This type of contingency planning, which identifies and coordinates the institutional mechanisms for emergency response, is a more common practice found in all of the five survey states.

However, simply requiring plans is not enough; the plans must be responsive, action-oriented documents that will be useful during a spill emergency. The key is familiarity with plans before they are needed. To this end, the legislature should provide the Department of Environmental Conservation (DEC) with the authority to require practice drills of industry contingency plans.

In California, industry plans must be tested before approval. In addition, agencies have authority to require practice drills at any time. The California Coastal Commission regularly exercises that authority, and has learned that there are many flaws that are undiscoverable until a contingency plan is put to the test.²⁵⁷

At the statewide plan level, the U.S. Coast Guard has developed an emergency response

²⁵⁴ See Townsend & Burr, *The Exxon-Valdez Spill: A Management Analysis*, 1989, Center for Marine Conservation.

²⁵⁵ 46.04.030.

²⁵⁶ AS 46.04.200 - .210.

²⁵⁷ Baird, 1989.

drill that tests Regional Response Teams and contingency plans, incorporating state organizational response as well. This drill, called the Yorktown exercise, is cited as an excellent test of state and federal response capabilities.²⁵⁸ As the DEC develops the state and regional response master plans, it should ensure that they are tested under the Yorktown program.

A second area where the legislature can encourage development of effective contingency plans is through private citizen involvement. The Islands Oil Spill Association of the San Juan Islands in Washington is merely a group of individuals with a deep concern for their environment, a lot of initiative, and a government grant. Knowing that if and when an oil spill occurs, private citizens will probably be the first ones on hand to deal with it, their oil spill contingency plan is a resourceful effort to be prepared for that eventuality.

Alaska citizens are no less invested in their environment. The legislature should consider a program to involve citizens in its regional planning efforts. The DEC could provide resources ranging from a model plan, to money, to equipment and training. Given the complexity and remoteness of the Alaska coastline, citizen preparedness may be the key to limiting damage during a spill.

The fact of the complexity of Alaska waters is another important problem in contingency planning. Charting environmentally sensitive areas and developing site-specific containment procedures is a common element in response plans. But given the length and general sensitivity of the state coastline, such a task becomes Herculean. The state of Oregon has determined that effective contingency planning will require use of a computer generated geographic information system (GIS). GIS's are under development at many universities, and although initially expensive, provide remarkable flexibility for land use and other planning efforts. Early GIS's were developed for petroleum exploration purposes. The legislature should direct the DEC to coordinate its contingency planning efforts with any Alaska GIS work being conducted at state schools or elsewhere. Such computer-based information systems may be the only way to

²⁵⁸ Baird, Wiggins.

manageably plan for the Alaska coastline. In addition, well-documented coastal charts will assist in damage assessment, which turns in part on how sensitive a damaged area is.²⁵⁹

Finally, the legislature has the power to regulate the petroleum industry, and that includes the power to tax. Oil extraction is considered a partnership between the petroleum industry and the people of Alaska. Planning for the eventuality of an oil spill has become an increasingly sophisticated, expensive, and absolutely vital part of government services. Where appropriate, as with industry plan drills, or provision of equipment and training to remote areas of the state, the legislature can exercise its authority to require industry to pay its way, a price that is no more than the cost of the privilege of doing business in the state.

²⁵⁹ AS 46.03.758, 18 AAC 75.510 - .530.

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LEGAL RESEARCH REPORT

No. 3.2

"THE STATE OF ALASKA'S POWER TO PETITION
FOR FEDERAL RULEMAKING UNDER APA § 553(e)"

Submitted: December 1989

Principal Investigator: Zygmunt Plater

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

This deceptively simple provision is, on its face, rather limited in its grant of power to petitioners. It possesses, however, a very practical potential for seizing the initiative from inert federal agencies and catalyzing federal rulemaking action. It straightforwardly sets in motion a progression of administrative procedures for putting particular provisions into federal regulations, with distinct tactical and political advantages, backed up by the opportunity for direct oversight by a federal court.

Normal avenues for attempting to induce federal action (appeals to Members of Congress, political inquiries to the administration, less formal approaches to agencies, media campaigns, etc.) all have their place, but are relatively unwieldy, indirect, and unfocused. The 553(e) route is a direct line, and may offer Alaska more bang for its buck.

Procedure and Prospects:

Who can petition for a rulemaking?

Anyone who arguably has an interest in an area of regulation may petition under 553(e). The standing requirement that has to be fulfilled is not very restrictive. The phrase "interested person" has been interpreted to be far broader than the standing requirement in judicial actions. It appears that any person whose "interests are or will be effected by the issuance amendment or repeal of a rule" can use 553(e), and that is a very broad definition indeed.¹ The State of Alaska clearly has the required interest in any imaginable area of policy proposal.

Although any interested person may petition, it is realistic to note that the more substantial the petitioning party, the more likely the agency is to grant it fullest consideration. If a sovereign state makes a well-publicized petition to a federal agency, it is far more likely that the agency will immediately publish notice of the petition in the Federal Register and open a record for comments, and hold hearings, whether formal or informal. The political momentum of the petitioner adds to the seriousness with which 553(e) is considered by the agency, at the same time that 553(e) adds focus and power to the petitioner's request.

Who gets petitioned?

A 553(e) petition is directed to any agency which has statutory authority to promulgate the kind of regulation being proposed. As to oil spill issues, a variety of agencies might be petitioned: the U.S. Department of Interior on pipeline corridor and terminal land management, and the like; the Coast Guard on double-hulling, crew-size, navigation practices, required response equipment; the Department of Commerce on certain transport issues; etc. There is no set form in which petitions proposing rule-making must be made, although a number of agencies have set out

¹ Attorney-General's Manual on the Administrative Procedures Act, 38 (1947).

suggested formats in the Federal Register. See Administrative Conference of the United States Recommendations and Reports 493, (1986) 1 CFR 305.86-6 (1987).

The petition for rulemaking

A request under 553(e) can probably be made in oral as well as in written form; it might in fact be submitted as just a broad undefined request "that a rule on so-and-so be enacted."

Realistically, however, a 553(e) petition should not only be in writing; it should also set out an actual proposed text for regulatory adoption in the exact form in which it could be published in the Federal Register. The drafting of language clarifies issues, pins down a rule's structure and language, advances the review process, and mobilizes momentum in a way that general policy exhortations would not. Even if the proposed text gets amended and reworded in the agency process, its initial existence gets serious attention focussed and tends to shape the final product.

A proposal for rulemaking can be substantive or procedural, that is, it can request that an agency apply a new substantive standard to matters it regulates, or it may propose changes for the internal working of the agency or its external procedures for working with regulated parties.

Agency consideration

When a petition is directed to a regulatory agency that possesses statutory power in a field and 553(e) is cited, the specific proposal for rulemaking triggers a much more direct administrative process that substantially increases the chances of serious considerations of the proposal.

When an agency receives a petition, it may make a variety of responses: it may summarily deny the petition, it may publish notice to the public of the petition, request public comments, hold a hearing formally or informally, fold the proposal for rulemaking into ongoing rulemaking procedures, file a notice of proposed rulemaking (NPRM), or go right ahead to issue a final rule in cases where that is statutorily possible.

Once the agency receives a proposal for rulemaking under 553(e) it must consider it. It cannot just receive it pro forma and fail to react to it. (See APA legislative history, 79th Cong., 2d Session, Sen. Document 248, 359.)

The agency must act reasonably promptly: under the terms of APA section 555(b), an agency is required to "proceed to conclude a matter presented to it ... within a reasonable time". Agencies understandably are often not pleased to have to change their agendas or move on issues which they had previously been passive about. When they stall a petition, a court can step in an order them to make a prompt

decision denying or granting the petition proposal. In one case, administrative inaction of eight months produced a federal court injunction against the agency.²

Summary denial

An agency's "consideration" can be quite summary in nature, if circumstances permit, especially where the agency is inclined to resist the initiative. There is no statutory requirement that the agency investigate the matter beyond the particulars of whatever the petition presented; that is, an agency which believes that a petition is not supported by sufficient obvious evidence can summarily deny it. The point is, however, that if Alaska accompanies its proposal for rulemaking with extensive evidentiary support, then the agency cannot summarily dismiss it, and must investigate so much of the evidence as is presented. Obviously, even if an agency doesn't wish to do so, the ever-present availability of judicial review will make an agency go through all supporting documentation presented with a petition.

An Agency's need to support its decision.

The strategic leverage upon the agency comes from the APA's §555(e) legal requirements for an agency to justify its decisions:

"prompt notice shall be given of the denial in whole or in part of a written application [or] petition....Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

The case law under 555(e), incorporating the Supreme Court's decision in the Vermont Yankee case, 435 U.S. 519, 549(1978), establishes that a court will review with some particularity whether or not the agency's decision was reasonable, based on the evidence on the record of the petition. Where an agency decision appears to the court to be arbitrary and capricious, the court can annul the agency denial as unreasonable. See 653 Fed. Supp. 1229(DC 1985). In a very few cases courts have been so impressed with the merits of the proposal that instead of sending it back to the agency for reconsideration, they have directly required the agency to put the rule into effect. (Id.)

More commonly, the court that finds an agency's decision to be insufficiently supported by facts and reason can remand it to the agency demanding an "adequate" explanation for the petition's denial. See State Farm Mutual, 463 U.S. 29, 43, 45-46 (1983). To support its decision, whether denial or otherwise, an agency must be able to show a reasonable basis for the decision. This means that from the moment it receives a nonfrivolous petition under 553(e) an agency must be sure to "build a record," by at least opening a file on it. Where the petitioner has supplied supportive documentation, the file must contain analysis of its merits.

² Public Citizen v. Heckler 602 F. Supp. 611(DDC 1985).

Further agency procedure.

Faced with a serious petition that cannot be summarily denied, an agency must move to further procedures.

The agency may, of course, decide to proceed to enact the proposed rule. The procedure in this case follows two different avenues:

If the rule is purely procedural, without direct impact on regulated parties or the public (being merely "interpretative," a general "statement of policy," or setting out internal rules of agency organization, procedure or practice § 553(b)(3)(A)), or where practicality and public necessity require immediate action (§ 553(b)(3)(B)), then the agency can just go ahead and publish it by a notice of Final Rulemaking (NFRM), in the Federal Register, and that's the end of the process.

If the rule is substantive, as most petitioned rules will be, (and not an emergency rule under (b)(3)(B)), then the agency that wants to enact it must publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register setting out a timeline for comments to be received. The agency may also voluntarily schedule formal or informal public hearings. Formal hearings, whether voluntary or required by statutes (as they are in some areas,) involve an elaborate trial-type procedure, involving cross-examination by all parties, a full stenographic record, etc. (§§ 556, 557). After the comment period or formal hearing, the agency must prepare its responsive comments and then publish them along with the final rule in the Register. At that point the 553(e) petition has directly accomplished what it sought.³

If the agency doesn't want to enact the rule, or is not enthusiastic, receipt of a serious 553(e) petition still requires it to assign staff to analyze the merits. But once that step is taken, most agencies decide to give notice to other interested parties that the petition has been received, by publishing notice in the Federal Register or otherwise. Even in the case of reluctant agencies, a comment period or even a hearing process may be established.

Again it should be noted that where the 553(e) petitioner is a state government, (and even moreso if there has been a well-publicized media presence,) even hesitant agencies will tend to provide more process, which means that more of the merits are developed for review on the record. The more merits that are developed (if they are accurate and compelling,) the more constrained the agency will be to go along with those merits. Thus 553(e) initiates a process of rulemaking momentum.

³ It should be noted that some agencies have further procedural constraints imposed on them by their specific organic statutes, or by Executive Orders No. 12,291 and 12,498, by which the Reagan Administration tried to control rulemaking. (It is not clear to what degree subsequent administrations will try to enforce those orders).

The Catalyst: Judicial Review

Agencies will respond to petitions filed under 553(e) because the failure to respond has real consequences to the agency. The ready availability of judicial review is the tail that wags the agency dog in applying 553(e), (and 555(e)), especially when an agency inclines toward denying the petition.

Judicial review, of course, does require some initial steps. Anyone who will challenge the agency's denial must first of all show judicial "standing", an Article III case or controversy injury, although the very fact of having petitioned the agency and been denied may help elevate a person's interest to that level. Alaska's interest, backed by the public trust doctrine and "parens patriae" interests, is quite clearly sufficient for judicial review standing.

The agency decision must be "ripe for review," although a denial of a petition automatically satisfies this, and in some cases even where the agency has not issued a formal denial, courts are willing to say that when action has been substantially delayed it effectively becomes a denial.

The major potential judicial review problem lies with with "reviewability", in that courts have regularly said that the decision whether to take administrative action lies within the discretion of the agency, and there is a presumption against broad reviewability of such decisions. In cases involving Section 553(e) and Section 555(e), however, courts have seemed willing to enter into the review of agency action with the purpose of enforcing the policy goals of the Administrative Procedure Act.⁴ In a recent case, American Horse Protection Association, 812 Fed. 2d 1 (D.C. Circuit 1987), the Court undertook a particularized review to determined whether or not the agency had a taken a "hard look" at the proposal, reviewed the evidence presented by the petitioner in favor of the rule and the materials presented by the agency to explain why they had not promulgated the rule, and the Court decided that the agency's denial was "unreasonable" and "arbitrary and capricious," sending it back to the agency for reconsideration. The APA's Section 706 provides for courts' review of "abuses of discretion." The Horse Protection case indicates that judicial review is realistically available and potentially effective.

⁴See cases and materials analyzed in Luneburg, 88 Wisconsin Law Rev. 1, 53-58(1988).

Summary:

The APA's Section 553(e) holds real potential for Alaska, enabling the State to petition directly for federal rulemaking on particular regulatory recommendations. Where the State, as a substantial petitioner, is well-prepared, drafts a specific text for a rule, backs it up with documentation, and follows through, the 553(e) avenue shifts the tactical and procedural balance, enhancing the possibilities for putting a particular rule on the books, thereby mobilizing desired applications of federal regulatory power.

Appendix:

1 CFR 305.86-6

U.S. CODE OF FEDERAL REGULATIONS
1 CFR 305.86-6 Petitions for Rulemaking
Administrative Conference of the U.S.
Recommendation No. 86-6

The Administrative Procedure Act (APA) requires each Federal agency to give interested persons the right to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. § 553(e). The APA also requires that agencies conclude matters presented to them within a reasonable time, 5 U.S.C. § 555(b), and give prompt notice of the denial of actions requested by interested persons, 5 U.S.C. § 555(e). The APA does not specify the procedures agencies must follow in receiving, considering, or disposing of public petitions for rulemaking.¹ However, agencies are expected to establish and publish such procedures in accordance with the public information section of the APA. See Attorney General's Manual on the Administrative Procedure Act 38 (1947). An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.

This Recommendation sets forth the basic procedures that the Conference believes should be incorporated into agency procedural rules governing petitions for rulemaking. In addition, the Conference encourages agencies to adopt certain other procedures and policies where appropriate and feasible. The Conference feels that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons.

Agencies should review their rulemaking petition procedures and practices and, in accordance with this Recommendation, adopt measures that will ensure that the right to petition is a meaningful one. The existence of the right to petition reflects the value Congress has placed on public participation in the agency rulemaking process. The Administrative Conference has recognized, in past recommendations, the benefits flowing from public participation in agency rulemaking and from publication of the means for such participation.² The absence of pub-

¹ But other statutes expressly create the right to petition for rulemaking, and some of these statutes specify procedures to be followed in the petitioning process.

² See Recommendation 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 1 C.F.R. § 305.69-8; Recommendation 71-6, *Public Participation in Administrative Hearings*, 1 C.F.R. § 305.71-6; Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 C.F.R. § 305.73-5; Recommendation 78-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 1 C.F.R. § 305.76-5; and Rec-

lished petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking.

Some agencies currently have petition-for-rulemaking procedures that are more elaborate than those recommended in this Recommendation. This Recommendation is not intended to express a judgment that such procedures are inappropriate or that the statutes mandating particular procedures should be amended. Nor is the Recommendation intended to alter the prior position of the Conference recommending elimination of the categorical exemptions of certain types of rulemaking from the APA's rulemaking requirements. See Recommendations 69-8 and 73-5. To the extent Congress or agencies adopt those recommendations, they should also expressly apply the right to petition to those types of rulemaking.

RECOMMENDATION

1. Agencies should establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking. These basic procedures should include: (a) Specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended, or repealed; (b) maintenance of a publicly available petition file; and (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.

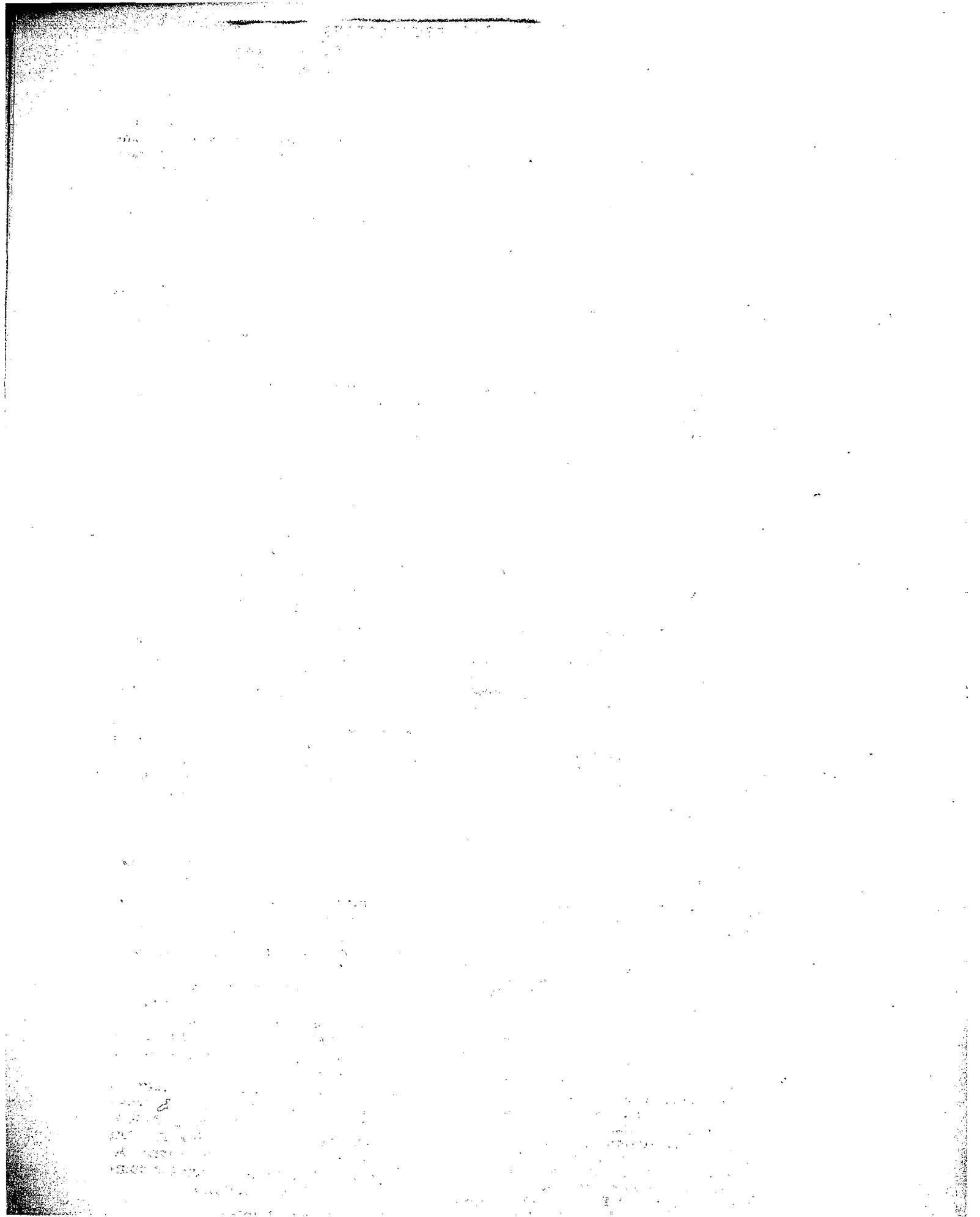
2. In addition, agencies should, where appropriate and feasible:

a. Make their petition procedures expressly applicable to all types of rules the agency has authority to adopt;

b. Provide guidance on the type of data, argumentation, or other information the agency needs to consider petitions;

c. Develop effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made; and,

d. Establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines.



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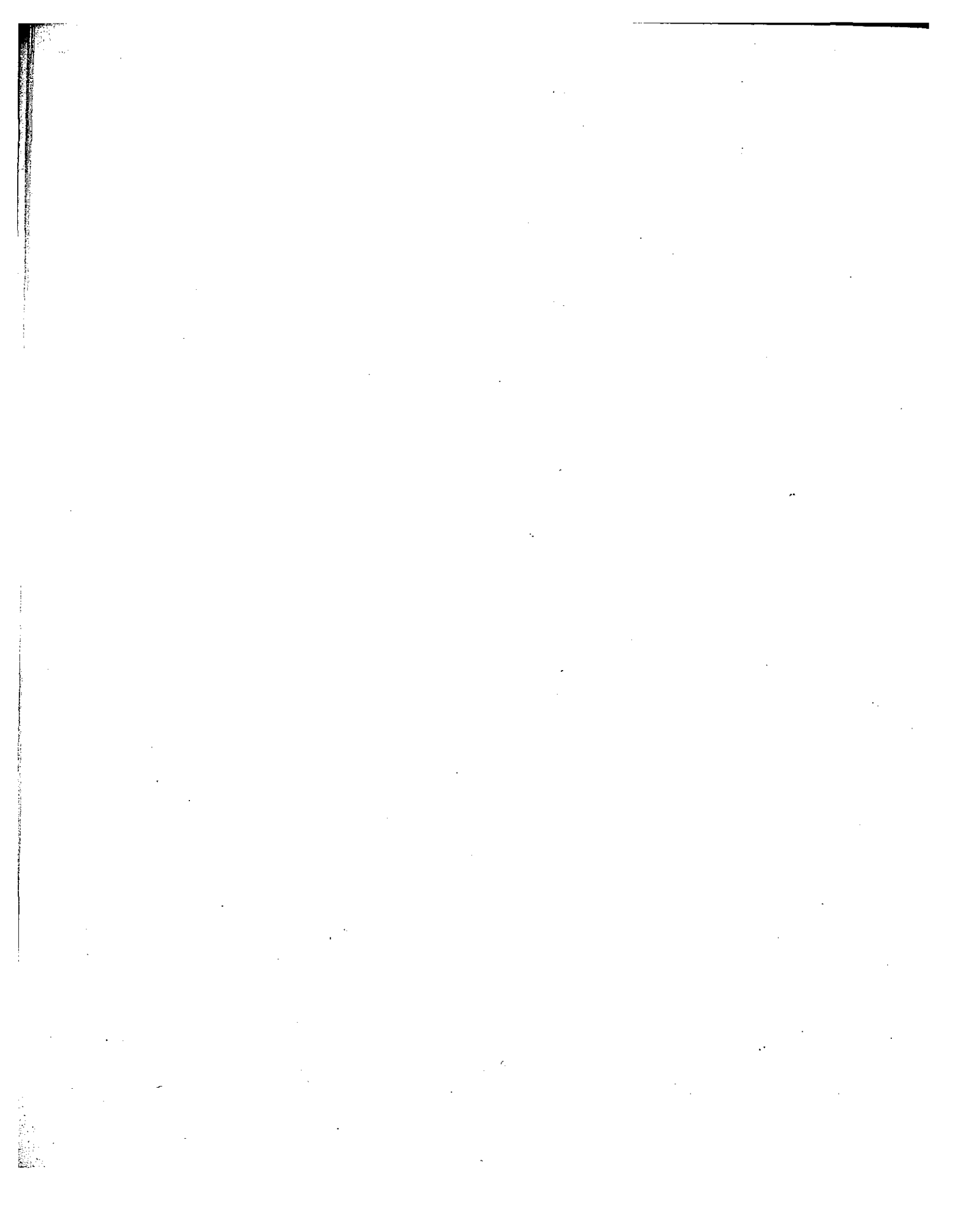
No. 4.2

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

Submitted: December 1989

Principal Investigator: Alison Rieser

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INTRODUCTION

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

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

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

SUMMARY OF FINDINGS

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

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

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

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

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

ANALYSIS AND DISCUSSION

A. Basic Principles

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

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

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

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

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

B. The Supreme Court Decisions of 1973 and 1978

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

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

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

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

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed ... to affect any State or local law not in conflict with this section (emphasis added).

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

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

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

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

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

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

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

The preemptive effect of the 1972 federal law varied with respect to the four major provisions of the Washington law: the requirement of a state-licensed pilot for all federally enrolled and licensed tankers over 50,000 DWT navigating in Puget Sound, the outright ban of supertankers (over 125,000 DWT) from transiting the Sound, the imposition of vessel design, construction, and navigational equipment standards on tankers between 40,000 and 125,000 DWT, and the provision of an alternative tug escort requirement for vessels not meeting these standards. Each was considered separately as they implicated different provisions of federal law and therefore raised individual questions of congressional intent.

The state-licensed pilot provision was dealt with easily, as the Court was able to find in the federal enrollment and licensing laws clear evidence of congressional intent with respect to state pilotage. While the federal law did not completely preclude state pilotage laws, it did expressly prohibit state pilotage laws for vessels enrolled in the coastwise trade (interstate shipping). 46 U.S.C. section 215. The Court held, however, that federal law left states free to impose pilotage requirements on foreign trade vessels that enter and leave their ports. Washington could therefore require "registered" tankers larger than 50,000 DWT to employ a state-licensed pilot while in Puget Sound.

The State's tanker safety standards presented a much more difficult questions of congressional intent. The relevant federal law, Title II of the Ports and Waterways Safety Act (PWSA), contains no express language regarding permissible state law. In Title II Congress required the Coast Guard to promulgate marine environmental protection regulations specifying standards for maneuverability and stopping that would reduce the risk of collisions, groundings, and other accidents that could lead to an oil spill. These regulations were also expected to reduce oil pollution resulting from normal operations, such as ballasting, deballasting, and cargo handling. 46 U.S.C. 391a(7)(A). Vessel inspections and certificates of compliance would indicate that a particular vessel complied with applicable design and construction standards and that its crew was qualified to handle oil as cargo. *Id.*, section 391a(9).

The Washington Tanker Law required tankers between 40,000 and 125,000 DWT navigating in Puget Sound to have certain "standard safety features," including a particular shaft horsepower to dead weight tonnage ratio (1 to 2.5), twin propeller screws, double bottoms beneath all oil cargo compartments, two operating radars (one being a collision avoidance system), and other navigational position location systems as required by the State board of pilotage commissioners. These standards were not required of vessels while in ballast or while escorted by a tug vessel or vessels with a combined shaft horsepower equivalent to five per cent of the tanker's dead weight tonnage. These design features were more stringent than those under federal regulations.

The Supreme Court ruled that these tanker design and equipment provisions were preempted. The Court found in Title II a statutory pattern that revealed a congressional intent to entrust to the Secretary of Transportation the duty to determine which design characteristics render oil tankers sufficiently safe to be allowed to proceed in the navigable waters of the United States. That the Secretary alone was to make the risk assessment judgment was evident to the Court, as it wrote:

Congress intended uniform national standards for [tanker] design and construction ... that would foreclose the imposition of different or more stringent state requirements.... Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.... The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate U.S. waters prevail over [any] contrary state judgment.

435 U.S. at 163-164, 165.

To square its holding under Title II with Court decisions made prior to enactment of the PWSA, the Court concluded that State and local governments may enforce local laws against federally licensed or inspected vessels only if they are aimed at objectives that differ from those embodied in the federal law. As Title II was aimed at tanker vessel safety and environmental

protection, states may not, at least directly, mandate different or higher tanker design requirements. Can they impose them indirectly by requiring tankers not meeting the standards to be escorted by tugs? This question made it necessary for the Court to examine the congressional intent behind Title I of the PWSA concerning vessel traffic controls and port safety.

The regulation of vessel traffic and port controls has been delegated less exclusively to the federal government than has tanker design and construction. The Court found the language and structure of Title I to evince a much less preemptive effect on state law. Title I gives the Secretary of Transportation the discretionary authority to adopt vessel traffic systems (VTS) for particular U.S. ports for preventing damage to vessels, structures (a term not defined in the Act but most likely meaning bridges, piers, roadsteads, and other harbor installations), and shore areas, as well as prevent pollution of navigable waters and marine resources. Under a VTS, the Coast Guard controls vessel traffic during periods of congestion and hazardous conditions by specifying vessel movement times, size and speed limitations, vessel operating conditions, navigational equipment, and minimum safety equipment.

The Supreme Court viewed Washington's tug escort provision not as a design requirement but one "more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures, and, as such, ... a safety measure clearly within the Secretary's [Title I] authority." 435 U.S. at 171. Unlike Title II, however, Title I contains explicit language allowing the state to exercise legal authority in the field of vessel traffic and port safety. Section 1222 (b) provides that Title I does not prevent a state from prescribing for structures higher safety equipment requirements or safety standards "than those which may be prescribed pursuant to Title I." 33 U.S.C. section 1222 (b). Higher state safety standards for the protection of structures are allowed even if the Coast Guard has enacted provisions to achieve the same objective in its regulations and applicable VTS. The implication is that state safety standards for vessels are also permissible but they may not impose higher standards than any that are adopted under the federal law. 435 U.S. at 174. (This is not entirely clear, however, as the Court's opinion later refers to legislative history that could be interpreted as precluding any state regulation of vessels. 435 U.S. at

174, citing House Report No. 92- 563, pt.2 (1971) at 15. But the Court's analysis regarding the supertanker ban, discussed below, indicates the Court's belief that state action respecting vessel safety and equipment is permissible as long as the Coast Guard has not considered and acted upon the particular measure.) Until the Secretary acts it is not possible to determine if the state standard imposes an impermissible higher safety standard.

Thus the federal PWSA allows states to regulate in the area of vessel safety and traffic controls as long as they do not conflict with federally-promulgated regulations. States may impose more protective standards with respect to structures even if they go beyond what the Coast Guard has deemed necessary in its regulations. Whether Washington's tug escort requirement, a provision concerning vessel traffic safety, was precluded by the authority of the Secretary of Transportation depended on whether the Coast Guard had either promulgated its own tug escort requirement for the Puget Sound VTS or had decided that such a requirement should not be imposed. Since the record revealed no evidence that either decision had been taken, the Washington tug escort provision was not preempted. The Court, however, left open the possibility that subsequent Coast Guard rulemaking (in 33 CFR Part 164, under Title D) setting minimum standards for tug escorts would oust the state provision. 435 U.S. at 172.

The members of the Court were divided on whether the tanker design standards were saved by the alternative tug escort provision that allowed tankers to avoid compliance with the design standards. The Court found the Puget Sound tug escort provision to be a requirement "with insignificant international consequences" as it did not coerce tanker owners into adopting the state's design standards. The provision was in effect just a tug escort requirement, a permissible local regulation that was not per se preempted as would be a direct state design standard. The tug escort provision could stand as long as it did not conflict with a federally promulgated tug rule. The 1972 Act authorized the Coast Guard to impose a tug escort rule but did not compel it, and no such requirement had yet been adopted for the Puget Sound vessel traffic system, nor had a policy decision been taken that such a requirement was unnecessary. Justice White's plurality opinion, joined in full only by three justices, Chief Justice Burger and Justices Stewart and Blackmun,

implied, however, that if the Coast Guard were to enact such regulation, the state tug provision would be preempted. 435 U.S. at 171-172. Because the state had the power to require all vessels to use a tug escort, it could also require only those vessels not meeting the specified design standards to use tugs. The Court also found that the tug escort provision did not violate the Constitution's commerce clause by imposing heavy costs on interstate shipping.

In a dissenting opinion, Justice Marshall, joined by Justices Rehnquist and Brennan, agreed that the tug escort provision was permissible. Because all affected tanker owners had opted to use tug escorts and thus had not felt forced to comply with the design requirements, it was unnecessary for the Court to address the question of whether the state design requirements were in conflict with the federal goal of national uniformity and thus not preempted.

The Court was also seriously divided on the question whether the federal law prevented the State from banning supertankers from Puget Sound. The majority found Washington's prohibition of tankers greater than 125,000 DWT to be preempted by the Coast Guard's authority under PWSA's Title I to establish "vessel size and speed limitations." Both the majority and the dissent agreed that Title I did not on its face preempt all state regulation of vessel size; preemption depended on whether the Coast Guard had addressed and acted upon the particular regulatory issue of size limitations. The justices disagreed, however, whether the Coast Guard had in fact considered the question and concluded that no size limitation was necessary. The majority concluded that the Coast Guard's local navigation rule controlling the number and size of vessel in Rosario Strait at any given time constituted federal action with respect to vessel size limit that precluded a higher state standard. The state could not have adopted the supertanker ban as a matter of state judgment that very large tank vessels unsafe generally. Such a blanket determination would be precluded under Title II as a judgment respecting tanker design. As a judgment reflecting consideration of local conditions and water depths, however, the ban would have been permissible had the Coast Guard not made its own judgment that the local conditions did not warrant such a prohibition. The Court was not concerned that the Rosario Strait rule was an unwritten policy and therefore did not clearly reflect an affirmative Coast Guard judgment that a supertanker ban was

unnecessary. The Secretary's failure to adopt a supertanker ban "takes on the character of a ruling that no such regulation is appropriate" because the Title I required him to give full consideration to numerous factors in setting vessel traffic controls. Because his responsibility to consider and balance factors was so broad, it was apparent that the the ban was determined to be unnecessary. This reasoning appears somewhat strained, however, as it seems to say that because the Act requires the Secretary to consider everything thoroughly he must have done so.

The dissent did not buy the majority's analysis either. It noted the Court's well-established principle in cases of supremacy clause analysis that state and federal statutory schemes should be read to the greatest extent possible as compatible and should only oust state law to the extent necessary to protect achievement of federal aims. The dissent took particular note that the Coast Guard's Puget Sound Vessel Traffic System, 33 CFR Part 161, Subpart B, contained no tanker size limitation. The Coast Guard comments on the System in the Federal Register during its promulgation indicated that no consideration of the need for a ban took place. To the dissenters the Coast Guard's unwritten rule prohibiting more than one tanker larger than 70,000 DWT from transiting Rosario Strait during clear weather reduced to 40,000 DWT during bad weather was insufficient to establish a federal policy that a supertanker prohibition was unwarranted. 435 U.S. at 183, n.3.

Contrary to the majority's conclusion that Title I preempted the supertanker ban, the dissent found support for the state ban in a provision authorizing local VTSs. Section 1222 (e) provides that "the existence of local vessel-traffic-control schemes must be weighed in the balance" [by the Coast Guard] in determining which federal regulations should be imposed. 435 U.S. at 184, n.4. Likewise, Title II of the Act, regarding tanker design and construction standards did not preempt the State's supertanker ban. The dissent rejected the suggestion to that effect made by the majority's statement that Title II preempted "a state judgment that, as a matter of safety and environmental protection generally, tankers should not exceed 125,000 DWT." 435 U.S. at 175. Justice Marshall wrote:

It is clear, however, that the Tanker Law was not merely a reaction to the problems arising out of tanker operations in general, but instead was a measure tailored to respond to unique local conditions -- in particular, the unusual susceptibility of Puget Sound to damage from large oil spills and the peculiar navigational problems associated with tanker operations in the Sound. Thus, there is no basis for preemption under Title II (emphasis added).

435 U.S. at 184-185.

The fact that the Court wrote three separate opinions weakens the force of the Ray decision. Moreover, the holding is not helped by the PWSA's lack of clear congressional intent with respect to state regulatory jurisdiction. Most important, however, is that the Court's most forceful argument for federal preemption of tanker design and construction standards was based upon the assumed need for uniformity in order to achieve international agreement on tanker safety standards. An argument could be made that vessels carrying North Slope crude oil from Valdez to ports on the West coast are engaged in interstate trade only. They are not competing with foreign tankers for international shipping. Many of these tankers, like the Exxon Valdez, were constructed specifically for the North Slope trade. Rather than frustrate the federal objective for uniform, international standards, the adoption of consistent state-imposed tanker standards by all States handling North Slope crude oil could help demonstrate the need for a higher, minimum international standard of tanker safety design. Consistent state tanker standards enacted by all the states receiving North Slope crude oil would eliminate the otherwise potent argument aired in Ray that national standards are needed to prevent the very costly impact on shipping of diverse state design requirements, for example, among Washington, Oregon, and California. See, e.g., Ray, 435 U.S. at 14-15.

The problem of costly, divergent state tanker standards was raised in the separate concurring opinion by Justice Stevens, joined by Justice Powell. They criticized the majority's decision not to preempt the tug escort alternative provision. They believed it to be of no consequence that the escort penalty imposed only a modest additional cost on tankers *not meeting the invalid design rules*. In their view, these additional costs would be magnified by the enactments of similar re-

quirements by other states attempting to impose more stringent standards. Evidence of this multiplier problem could be found in the fact that Alaska had just recently enacted an explicit system of economic incentives to try to get tankers to adopt safety and design standards similar to those required by the Washington Tanker Law. The decision in Ray despite its weakness was to have a serious impact on this newly enacted Alaskan law, although it is not entirely clear that it should have. It is to this story that we now turn.

C. Alaska's Experience with Federal Preemption: Chevron v. Hammond

To address the significant risks of oil spills posed by the imminent commencement of shipping operations from the terminus of the Trans-Alaska Pipeline in Valdez, the Alaska Legislature adopted SB 406 in 1976, enacted as Chapter 266, 1976 Alaska Laws. SB 406 was a comprehensive act covering all aspects of marine oil transportation and handling. Section 1, the Tank Vessel Traffic Regulation Act, required safety and maneuverability features on tankers and tug escorts for certain vessels, and the adoption of a state system of tanker traffic regulations. The Tank Vessel Act included a provision authorizing ADEC to adopt a comprehensive system of traffic regulations for tankers that did not conflict with regulations adopted by the Coast Guard and one authorizing the Governor to enter into interstate compacts to achieve the purposes of the Act. Section 2, the Oil Discharge Prevention and Pollution Control Act, prohibited the discharge of oil in state waters and required the payment of annual risk charges by terminal operators and vessel owners into a fund to pay for clean-up, research, and administration. The amount of the annual risk charges depended upon the presence or absence of the specified vessel features. Provisions of the new law also controlled the placement of ballast water in tankers and prohibited its discharge.

The new law took effect on July 1, 1977. On September 16, 1977, Chevron USA, Inc. and others filed suit in the federal district court for Alaska, claiming that key provisions of the law were unconstitutional. During the pretrial phase of the litigation in March, 1978, the Supreme Court announced its decision in Ray v. Atlantic Richfield Co. In response to the Ray ruling,

Chevron and the State stipulated that certain provisions of the 1976 Tank Vessel Traffic Regulation Act were preempted by the federal Ports and Waterways Safety Act and thus void. This agreement settled a significant part of the challenge to the state law.

Stipulated as preempted under the tanker design provisions (Title II) of the PWSA was the requirement that all tankers navigating Alaskan waters have on board what Alaska considered to be "standard safety and maneuverability features." *The safety features included two marine radars systems, collision avoidance radar systems, LORAN-C navigational receivers, and other position location systems as prescribed by regulations by the Alaska Department of Environmental Conservation (ADEC). Provisions requiring tug escorts for tankers greater than 40,000 DWT that lacked such maneuverability and stopping features as lateral thrusters, controllable pitch propellers, and backup propulsion equipment were deemed preempted in light of the Coast Guard's promulgation of the Prince William Sound Vessel Traffic System under Title I of the PWSA. The parties also agreed on the invalidity of provisions controlling the placement of ballast water in vessel cargo tanks. They were not invalidated under the PWSA, however; they were deemed to pose an unreasonable burden on interstate commerce and were thus invalid under the commerce clause of the U.S. Constitution.*

The parties did not agree with respect to the validity of the Oil Discharge Prevention and Pollution Control Act. They decided that a two-phase trial was necessary. The first phase of the trial would consider the validity of the annual risk charges and the Coastal Protection Fund. The second phase would try the validity of the ballast water discharge provision, loading and unloading requirements, the contingency plans and capability criteria, the certification provision, and the financial responsibility standards. This law authorized ADEC to take all necessary steps in cooperation with federal authorities to prevent oil spills, including the inspection and supervision of oil transfer activities, to arrange for the prompt and effective containment and removal of spilled oil, and to provide procedures to compensate victims. The key aim of the law was to provide economic incentives for oil terminal facilities and tanker owners to adopt the State-specified safety and maneuverability features by assessing annual risk charges and by requiring risk avoidance certifi-

cates and proof of financial responsibility. The certificates would be issued upon payment of an annual risk charge into the Coastal Protection Fund and upon proof of capability to carry out all required state and federal spill prevention and contingency plans. Oil terminal facility and marine carrier certificates would not be issued unless the owners could demonstrate their ability to provide all equipment, personnel and supplies to contain and clean-up any oil discharges. The statute provided for the establishment of differential risk charges based upon the presence of the risk-reducing equipment and design features.

The Act also authorized the State to undertake the immediate removal of discharged oil and to direct operations of all contractors and departmental personnel. The Coastal Protection Fund was created as a revolving fund consisting of all annual risk charges, payments for damages, penalties, and other fees established under the Act. The Fund's purpose was to finance ADEC's administrative, enforcement and clean-up expenses and to fund research on spill prevention and removal.

After a trial in the first phase, the U.S. District Judge, Judge James M. Fitzgerald, ruled in June, 1978, that the State's system of risk avoidance charges was preempted by the federal PWSA. The Coastal Protection Fund was invalid in light of Article IX, section 7 of the Alaska Constitution prohibiting the dedication of license fees for a special purpose. The State of Alaska filed an appeal of this ruling but later abandoned it. Details of Judge Fitzgerald's views on the risk charge system are presented below.

After this initial ruling, the remaining issues concerned the validity of the State's ballast water discharge regulations requiring onshore treatment, constitutionality of the warrantless ADEC searches and inspections of tankers, and the permissibility of State certification of tankers. Judge Fitzgerald ruled in September, 1979 that the ballast water provisions were preempted by the federal PWSA. Before he could rule on the other provisions, the Alaska Legislature repealed both the Tank Vessel Regulation Act and the Oil Discharge Prevention and Pollution Control Act. HB 205, Chapter 116, 1980 Alaska Laws, effective July 1, 1980.

The State ultimately appealed only one of the provisions that Judge Fitzgerald ruled unconstitutional, the ballast water discharge provision. Alaska eventually prevailed on this issue. The U.S. Circuit Court of Appeals for the Ninth Circuit Court reversed Judge Fitzgerald. It held that the federal Ports and Waterways Safety Act, as amended by the Ports and Tanker Safety Act of 1978, did not "occupy the field" of tanker discharge regulation in state waters, that the State's discharge prohibition did not pose an irreconcilable conflict with any regulations adopted by the Coast Guard pursuant to the PWSA nor prevented the achievement of that Act's objectives, and that the federal Clean Water Act reflected express congressional intent to achieve maximum state-federal cooperation in protecting the marine environment within three miles of the shoreline. Chevron v. Hammond, 726 F.2d 483 (9th Cir. 1984). The U.S. Supreme Court denied Chevron's petition for a writ of certiorari and the litigation was finally concluded.

It is difficult and probably unwise to speculate on what the Ninth Circuit would have held had the State decided to appeal Judge Fitzgerald's decision to invalidate the oil spill risk charge system. His preemption analysis was not particularly convincing nor detailed, however, and it seems clear from his opinion that his principal concern was for the adequacy of the statistical basis for the risk charge system. His reading of the Supreme Court's decisions overlooked the complexities of the Ray decision that could have limited its impact and it completely ignored the Court's strong endorsement of state authority in spill contingency measures in the Askew case. On these grounds it would have been more appropriate to appeal the decision to the Ninth Circuit for a more comprehensive reading of the applicable case law. It may be that the regulations' technical deficiencies revealed by Judge Fitzgerald's close scrutiny made the State reluctant to pursue their vindication in the Court of Appeals.

The judge seemed particularly bothered by the nature of the actuarial statistics and data on tanker accidents that were used as the basis for establishing the different risk charges by tanker size and construction. His discussion of the system and of the qualifications and methodology of the ADEC contractor who designed it, suggest that it was the program's execution rather than its legal basis that troubled him. That being the case, the more appropriate response would have been

to remand the risk charge regulations to the agency to correct the defects rather than invalidate the system entirely.

Judge Fitzgerald considered at length the ADEC methodology employed in setting the risk charges, emphasizing the Department's conscious decision, with the encouragement of the Attorney General, to develop the program as a system of insurance premiums rather than regulatory standards for tankers. This approach was taken in light of the potential for preemption under the federal regulatory statute, the PWSA. He was particularly persuaded by testimony of Chevron's expert witnesses that the ADEC contractor's report, which formed the basis for the risk charge regulations, was "statistically and actuarially unsound" and based upon inadequate and misapplied data. Memorandum of Decision, June 30, 1978, at 29. (These data concerned the casualty experience of the world-wide tanker fleet on the high seas, and did not take account of the performance of tankers in Alaskan coastal waters.)

The model employed in the report assumed a simplistic and unproven relationship between particular tanker design features and navigation equipment and their reduction of the risk of an oil spill. Judge Fitzgerald found the risk reduction estimates to be subjective, incomplete, and unsupported. He condemned the contractor's report as "devoid of merit" but faulted the ADEC decision to use an actuarial method for which the contractor was unqualified and for which he was given inadequate time (six weeks), resources, and staff assistance. Noting the complexity of the task of determining tanker standards to reduce oil spills, Judge Fitzgerald pointed out that the double bottom issue alone had consumed years of study and debate before it was ultimately rejected by the International Maritime Consultative Organization (IMCO) in February, 1978, just four months prior to his ruling. He was apparently influenced, at least in part, by the results of the IMCO deliberations, but he assumed, probably naively, that the IMCO decision was a technical rather than a political and economic one. See Silverstein, *Superships and Nation-States: The Transnational Policies of the Intergovernmental Maritime Consultative Organization* (1978) at 184-186 ("IMCO is an inherently sympathetic forum to maritime interests" which has not functioned effectively as a regulatory body because of its lack of an independent research capability).

Judge Fitzgerald gave significantly less attention to the legal question whether Alaska's risk charge regulations were preempted by the PWSA. Again he noted the international dimension of the problem of tanker oil spills, adding that President Carter's proposal for double bottoms on tankers had been rejected four months before at the International Conference on Tanker Safety and Pollution Prevention on safety grounds and in preference for further study of the selective placement of segregated ballast tanks. In his view the risk charge system was an attempt to influence the design characteristics of tankers, a subject that the Ray v. Atlantic Richfield decision of three months prior had indicated was completely preempted by Title II of the PWSA.

He rejected the argument that the risk charge system was similar to Washington's alternative design/tug escort requirement, and as an operating rule reflecting the peculiar conditions of local waters, it was not preempted under Title I until specific federal judgments to the contrary were made. Judge Fitzgerald merely concluded that because the risk charge system was designed to provide incentives for the incorporation of state-desired safety and maneuverability features it was contrary to the goal of Title II to achieve uniform national and international standards. In light of the divergence in opinion respecting the effectiveness of various design characteristics to prevent oil spills, he predicted that a widely varying array of conflicting state standards would result if states were allowed to enact their own tanker standards.

The actual impact the state regulations were having on tanker design was not considered, although this was an important part of the Supreme Court's consideration of the Washington's design/tug escort alternative in Ray. Judge Fitzgerald made no mention of the fact that tanker owners were paying the risk charges instead of incorporating the State's safety and design features. Moreover, he did not even discuss whether the risk charge system was effectively an oil spill contingency fund the contributions to which were assessed on the basis of the different risks posed by certain kinds of tankers. If he had undertaken this line of inquiry he may have upheld the risk charge system as a contingency fund provision authorized by the federal Clean Water Act as interpreted by the Supreme Court in Askew v. American Waterways Operators, as discussed above. A more thorough consideration of these issues could have been made by the Court of

Appeals, thus the State's failure to appeal the ruling is unfortunate. A ruling by the Ninth Circuit on all aspects of the Alaska law could have helped clarify the application of the Ray and Askew rulings and promoted the development of this uncertain area of the law.

D. California's Legislative Initiatives

The State of California is currently pursuing legislation to revise and strengthen the State's control over oil shipments through state waters. There is both a petition drive to get new legislation enacted by referendum and bills pending in the State Senate and Assembly. All of these proposals promise to enhance considerably the State's power to prevent an Exxon Valdez disaster in State waters. While these proposals may raise concerns regarding federal preemption, and are likely to be challenged by a litigious oil industry, they merit serious consideration by other States. They are likely to have a more positive reception in the federal courts, if the new federal oil spill legislation reflects a renewed spirit of cooperative state-federal responsibility for oil spill prevention and if the deficiencies of the federal regulatory performance since 1978 can be presented.

California's Environmental Initiative is currently being prepared for a citizens' petition drive and voter referendum in November, 1990. If adopted it would enact comprehensive environmental legislation to control pesticide use, reduce the production of greenhouse gases, protect old growth forests, prevent toxic water pollution, and reduce the risks of coastal oil spills. The oil spill provisions should be of interest to other states because they skillfully employ the strongest aspects of the State's legal authority to build a comprehensive oil spill prevention and response system.

Recognizing that most if not all oil development and transportation facilities are located on state tidelands (including offshore exploration and production facilities, pipelines, tanker terminals, and refineries), the new law would forbid the renewal of any state lands lease for such facilities until a State Oil Spill Prevention Plan is adopted. The Plan must be implemented by all agencies with authority over potential sources of oil pollution. It will include at a minimum tug escorts

for oil tankers, the establishment of emergency stations for disabled tankers, and periodic inspections for all oil-related facilities.

Permit approvals for facilities that pose the risk of oil spills will be withheld in the absence of an approved oil spill contingency plan that meets requirements specified by the California Coastal Commission, prepared in consultation with the State Lands Commission and the Department of Fish and Game. (Together the heads of these agencies will form a State Oil Spill Coordinating Committee to oversee implementation of the new law.) Local governmental and port contingency plans will be developed and incorporated into local coastal management programs, giving them the force of federal approval and consistency under the federal Coastal Zone Management Act.

In the event of a spill, the Act contemplates that state agencies will direct all containment and clean-up operations, including those of the responsible party, subject to the overriding authority of the U.S. Coast Guard. A new agency within the Department of Fish and Game, the Office of Oil Spill Response, would direct spill response, interagency coordination, and most importantly, oil spill contingency training and plan implementation. The Office would have available funds from an Oil Spill Prevention and Response Fund created by a variable fee on oil deliveries by tanker and offshore pipelines. The variable fee provision adopts a relative risk approach that is similar in philosophy to the 1976 Alaska legislation. The fee of up to twenty-five cents per barrel "shall be commensurate with the oil spill risk posed by the method of transportation and volume of oil transported." Initiative Measure, Section 24, adding Public Resources Code, section 6232 (a).

Bills pending in the California legislature should also be noted. They reflect a new boldness and a willingness to exercise the maximum state authority to prevent the occurrence of catastrophic oil spills. The pending Senate and Assembly bills use the State's regulatory authority over shoreside terminal facilities to impose risk-reducing standards on tankers. This approach, if tested in the courts, will bring into direct focus the somewhat conflicting policies on state authority that are reflected in the federal Clean Water Act and the Ports and Waterways Safety Act/Port and Tanker Safety Act.

Clearly the aim of the California law is to influence tanker design and construction but does so through the state's police power and public trust responsibilities as applied to marine terminal facilities. The impact of the Ray and Askew decisions on this approach is uncertain. A reviewing court is likely to be influenced by the ineffectiveness of existing federal and state controls as revealed by the Exxon Valdez disaster. Whether it concludes that there is greater scope for state control could depend on the language Congress adopts in enacting the 1989 Oil Spill Prevention Act. These developments should be followed closely.

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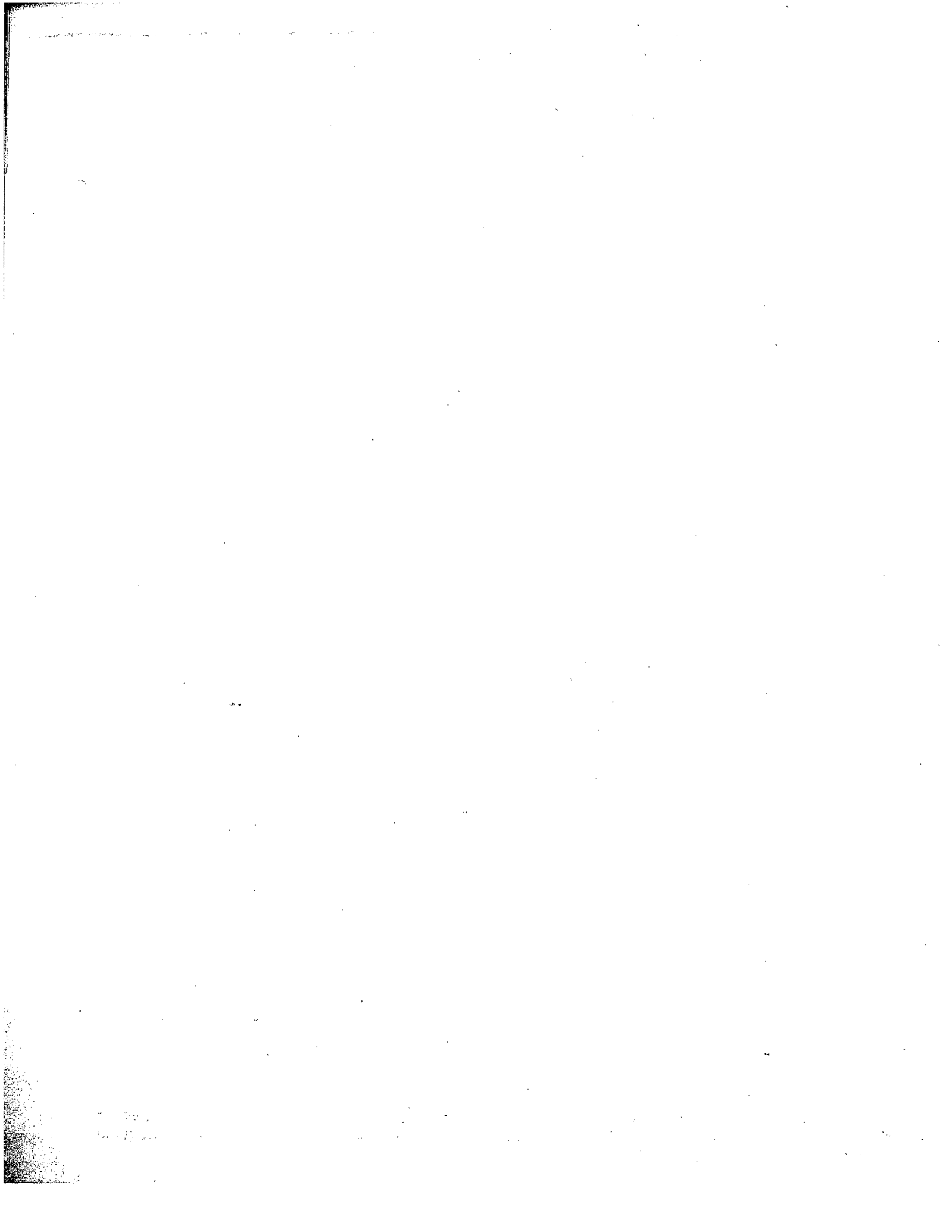
No. 5.2

"AN EMERGENCY RESOURCE REQUISITIONING SYSTEM
FOR RESPONSE TO FUTURE OIL SPILLS"

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"An Emergency Resource-Mobilization Requisitioning System for Future Oil Spill Emergencies"

I. Prospectus

This report analyzes one proposed component for the State of Alaska's future oil spill prevention and response program: a system for requesting and requisitioning a variety of necessary private resources and services in the event of a declared oil spill emergency. In such an event, on land or water, codification and application of existing and proposed Alaska law will provide for necessary quick access to resources by the state's emergency response command, and legal and economic protections to the persons and private property interests affected.

Proposals

- The State of Alaska should create a comprehensive emergency resource-requisitioning process for requisitioning corporate and private resources and services in the event of major declared public emergencies.
- The emergency resource-requisitioning process should make a basic distinction between requisitions made of responsible corporate parties and those made of private third-parties.
- The emergency resource-requisitioning process should provide for appropriate protections for requisitionees, to the fullest extent when applied to private third-parties, in terms of compensation, coverage against injuries, and tort law immunities.
- By statute, the emergency resource-requisitioning process should incorporate a shift in tort law duties, so that persons refusing to provide requisitioned resources and services can be sued by injured parties in subsequent civil litigation for injuries to persons and property that occur because of such refusals.

II. Introduction and Background

Privatization, dominating the process by which Alaska oil transport is administered and supervised, has been repeatedly identified as a significant contributing cause of the laxities that produced the Exxon Valdez oil spill and other oil spills.

The dominating presence of the oil industry was evident throughout the course of response to the Exxon Valdez oil spill, as well as prior to the spill in the ongoing management of the oil transport system – operation, maintenance, testing, oversight, "prevention," and spill-response preparation, including contingency planning.

A private lockup of virtually all necessary cleanup resources was one of the strategic causes, in the confusion and turmoil that followed the Exxon Valdez spill, that allowed the private corporation to dominate the oil-spill response and clean up. As soon as the tanker's grounding was known, many or most of the logistical requirements and equipment for oil spill response and clean-up were quickly locked up by private purchase, lease, or contract, so that only the private industry entities had the wherewithal to undertake response efforts.

The encumbered resources included aircraft and boats, other transport vehicles, radio and telephone systems, cleaning equipment, fuel supplies, and the like, as well as facilities for housing response workers and staff (in a community with severely-limited hotel and motel space available.) The short supply of some resources was made even tighter by the influx of media personnel, who often desired exactly the same kind of resources that were necessary to facilitate the cleanup itself. In circumstances where state and federal officials arriving on the scene could not even be sure of having a place themselves to spend the night, it becomes clear in retrospect that such industry lockups of resources can be a major logistical problem in the event of major oil spills. Beyond the short-term lockup problem, moreover, is the fact that in some urgent circumstances governments may have to request and requisition various other private resources from third parties, when government-owned equipment cannot be brought on site sufficiently quickly to respond to the emergency.

In these circumstances, if the State decides that future oil spill response must never again be so privatized as to relegate governmental participation to the backseat role it played in the Exxon Valdez incident, then state governmental officials must be able to request and requisition available resources for governmental clean-up efforts. The following system sets out a basis for temporary governmental acquisition of volunteered or requisitioned resources by the state's disaster response coordination center.

There are, of course, major consequences to private property rights when a governmental entity requests or requisitions private assets. Circumstances may vary according to whether the assets and resources requisitioned belong to parties

implicated in the cause of the spill, or are sought from third parties in the locality with no responsibility for the spill or its clean-up. Circumstances may also vary according to the type of use that is sought to be made, the length of time for which the requisition is sought, the necessity for private personnel to work with the government in deploying and using resources, and the differing needs for immediate short-term compensation therefor.

Current Alaska law already provides many of the powers and procedures to be applied in the event of a civil emergency, and these include the power of requisitioning private assets as necessary. AS 26.23.020(g)(4). In the following analysis of the requisitioning mechanism, existing authority is noted, and areas in which further statutory authority is necessary are likewise noted. Precedents and analogies have been drawn from other states that have considered the problem.

This proposal is based upon general assumptions about the State of Alaska's future emergency response system as set out in the attached report, "Some Suggested Elements for an Improved Oil Spill Response System".

III. Description of the Proposed Legal Mechanism

Under the authority of existing statutes, with the addition of certain further required statutory provisions as noted, the State of Alaska should define, by regulation, a comprehensive format for requisitioning required oil spill response resources.

The requisitioning system would be primarily directed toward "un-locking" resources that are critical to the State's response to a spill that have been "locked-up" in the immediate aftermath of a major spill by the industry itself. [If necessary it could also be applied to third-party resources; politically, as well as in terms of appropriateness, however, the industry is a far more practical object of the process and powers set out here.]

A declaration of oil spill emergency [or on-site "preliminary declaration" in urgent cases] is the threshold requirement for the requisitioning process. It triggers the existing powers of the State, and the proposed statutory powers of the State and the on-site command center, to respond to the emergency, including the proposed power to requisition.

Take as an example four possible emergency requisition requests:

- The State requests that the Village Inn in Valdez turn over 20 rooms for the use of the State's response team personnel, for a period of 20 days, even though the corporation responsible for the oil spill has already contracted with the Village Inn to reserve all the Inn's rooms for a 30 day period.
- The State requests that Alyeska provide two bulldozers, five trucks, and portable pumping equipment, present at a North Slope location [or at a pumping station near the Brooks Range], to be turned over to the State's on-

site command center, along with the personal services of those employees necessary to operate the equipment, in order to respond to a spill of oil in tundra along the pipeline corridor.

- The State requests that Alyeska make available the use of three large cargo helicopters rented by Alyeska from a Houston company and recently flown to the locality of the spill.
- The State requests the use of a fishing boat to transport urgently needed booms to protect the port of Homer.

The requisition system set out here operates in each case, by either voluntary or mandatory compliance. The written requisition is defined initially as a "request," and if the persons requested to provide resources/services in an emergency do acquiesce in the request, they will receive benefits of legal protection, qualified legal immunities, and rights to compensation for the value of resources/services provided, as applicable.

Note on oil industry, and third-party, applicability:

The primary motivating circumstance that requires a requisitioning system is the corporate lockup of resources already noted. In some cases, however, private third-party resources may be necessary. Past experience in the Exxon Valdez spill indicates that third-party private resources will usually be made readily and willingly available. In such circumstances the primary effect of the proposed requisition system is to provide legal and economic protections to the private third-party resources and services. Most requisition requests, in fact, can be expected to be honored, whether made of corporate parties or private third parties, especially if the system proposed here is in place and well known. Where, however, the industry parties responsible for the spill and its cleanup are the objects of requisition orders, some of the legal and economic protections may proposed here may be inappropriate. Reimbursement for use of corporate cleanup equipment, for example, would seem to miss the point of corporate responsibility for response preparedness and liability for spills. Oil and pipeline company requisitions might well be directed into a special arbitral tribunal to take account of their special nature. The legislation implementing this proposed requisitioning system should establish differing categories of protections, depending upon the role and responsibilities of the various second and third parties.

The full range of protections presented below are primarily directed toward private third-party requisitionees.

Enforcement authority

If persons requested to provide resources/services initially refuse to acquiesce, the order to provide resources and services operates as a mandatory requisition, and there are three consequences possible:

- immediate enforcement by law enforcement officials;
- prosecution [as a misdemeanor]; and

- (by a proposed statutory change), a new degree of responsibility and civil liability for any injury or loss of life to persons or property that is caused in whole or part by the unavailability of the resources/services requested.

If the requisition must be mandatorily enforced, it nevertheless carries with it, once transfer of dominion and control of the resources/services has occurred, the benefits of qualified legal protections and immunities previously noted, and the right to compensation for the value of resources/services provided.

The administrative and procedural components of the proposed requisitioning system are straightforward.

The liability, qualified immunity, and compensation provisions are slightly more complex, but not problematic.

The potential legal constraints upon the State's ability to requisition resources and services lie in:

- (a) the federal pre-emption problem, which may be quite serious in special cases (like a State attempt to requisition a nearby empty tanker for offloading a grounded tanker, in circumstances where the Coast Guard has declined to make such an order);
- (b) the federal constitutional due process and takings clause [not a major concern];
- (c) the federal constitutional contracts clause [likewise not a major concern]; and
- (d) the need to compensate for the value of resources/services taken [not, however, a major issue where the requested party is the corporation responsible for the discharge of the oil, which in any event will eventually have to reimburse Alaska for the State's expenditures, including any payments for use by the State of the corporation's own assets.];
- (e) the need to compensate for injuries to persons whose services are requisitioned.

IV. Legal Analysis

Requisitioning Authority

AS 26.23.020(g)4, and other authority

Property

Personal Services

Administrative and Procedural Requirements

Declaration of emergency

Master C-plan

Decisional officers

Notice of request and requisition

Filing in Registry
Enforcement, civil and penal

Liability and Compensation Provisions

Compensatory coverage for injury to property and persons requisitioned
Qualified immunity
Liability for damages caused by failure to provide
Compensation system, and quantifying compensation amounts

Constitutional Constraints

Pre-emption
Due process, takings
Contract clause
Compensation

Requisitioning Authority: AS 26.23.020(g)(4), and other

Requisitions of Property

A significant part of the powers necessary to operate a requisitioning system already exist within Alaska law. Under the Alaska Disaster Act, AS 26.23.020(g)(4), the governor, upon the proclamation of a civil emergency, specifically may "commandeer or utilize any private property [except for news media] if the governor considers this necessary to cope with the disaster emergency," following the required procedures for declaration of emergency, notice, [see Rep't No. 6.2], compensation, etc.

By citing this authority, and making the assertions noted below in §IV and in the Draft Requisitioning Request Form [see Appendix], it is clear that the Governor already possesses the necessary powers to take short-term dominion and control of needed private property so long as the emergency lasts. This power in turn can be delegated to an oil spill command center. AS 26.23.020(f).

Requisitions of Services

As noted in the second example above, of a requisitioning request made to Alyeska to provide equipment and equipment operators, the State's oil spill response command center will sometimes need to requisition personal services, in cases where personnel trained to run the equipment may be as necessary to the clean-up effort as the equipment itself.

The Alaska Disaster Act, however, does not specifically authorize commandeering the services of individuals. Other states have enacted statutory authority for the requisitioning of personal services in the event of an emergency. In Alaska, that power must be derived from other statutory and common law sources.

Several statutory sources of authority to requisition personal services lie within the more general provisions of the Disaster Act. If such services are determined to be critical to a spill response, the power to requisition them could be grounded initially in §26.23.020(a) and (b):

(a) The governor is responsible for meeting the dangers presented by disasters to the state and its people...

(b) [and] may issue orders, proclamations, and regulations necessary to carry out the purposes of this chapter....These orders, proclamations, and regulations have the force of law.

This general grant of necessary powers is supported by a specific reference to the governor's ability [in specifically non-military or paramilitary circumstances, 26.23.200(4)] to exercise the powers of a "commander-in-chief of the...unorganized militia." AS 26.23.020(e) and (f). The "unorganized militia" is specifically defined as including "all able-bodied persons between the ages of 17 and 59 years, inclusive, who reside in the state." AS 26.23.230(7). This particular authority thus clearly allows the requisitioning of services by the governor, at least if the requisitioned personnel are residents of the State. And the Act also affirms the governor's martial law powers. AS 26.23.200(4).

Beyond the statutory powers, the State of Alaska, along with other American state governments, possesses the inherent authority to mobilize emergency resources and services under the common law doctrines of posse comitatus. When law enforcement officers reasonably demand the assistance of private persons and property in responding to an ongoing violation of law, the citizens have a legal duty to respond. See *Kagel v. Brugger*, 119 NW2d 394, 397 (Wisc. 1963); *Babington v. Yellow Cab Co.*, 250 NY 14, 164 NE 726 (1928); *Application of U.S.*, 427 F2d 639 (1970). The comitatus powers apply to crimes "in exigent circumstances." To extend them to the oil spill response setting may require a showing that the discharge is punishable under penal laws, that each day of discharge be defined as a separate count, and that cleanup response actions be deemed law enforcement, but in the spill setting these elements are readily shown. The Alaska cases mentioning "emergency impressment" may support such an interpretation. The authority for requisition is likely to be carefully scrutinized by the Alaska Supreme Court. See *Seward v. Wisdom*, 413 P2d 931 (1966).

Delegation of Governor's Powers

The Disaster Act specifically says that the governor may delegate his/her emergency command authority by appropriate orders or regulations. AS 26.23.020(f). As suggested in Report No. 6.2, "Some Suggested Elements for an Improved Oil Spill Response System," the governor should provide for a delegation of the full range of emergency powers to ADEC's OHSR or whatever other on-site command authority the State creates to handle response and clean-up functions. To accommodate the sensitive political question of requisitioning resources and services from third parties, the governor might choose to delegate only certain portions of the

emergency powers, so that, for instance, the declaration of emergency in a particular spill might delegate only those requisition system powers needed for unlocking the resources of corporations involved in oil transport or responsible for the oil spill emergency.

Administrative and Procedural Requirements:

Declaration of Emergency

As noted in Report 6.2, "Some Suggested Elements for an Improved Oil Spill Response System," the declaration of emergency in the event of oil spills triggers an array of powers and duties under existing Alaska law. There is currently a multiple jurisdiction over oil spills, where the Department of Emergency Services ["DES"] has jurisdiction up to the amount of 100,000 barrels, concurrent with ADEC, which has the ability to exercise some emergency powers, but does not get full powers unless the spill reaches the full 100,000 barrel level. AS26.23.040; AS46.03.865; AS46.04.080.

As recommended in the "Suggested Elements" report, oil spill jurisdiction should be centered in one entity, and the 100,000 barrel trigger for full response powers should be eliminated. The 100,000 barrel standard was set up by the federal government to define those catastrophes in which the federal government would assert federalization. The levels of concern over an oil spill and the range of interests involved, differ markedly between the state and federal governments, and accordingly the 100,000 barrel defining line does not appear to serve a useful purpose in triggering full Alaska state response efforts. Moreover, because of the fact that future oil spills may well occur inland, where relative dangers differ proportionately from ocean spills, the 100,000 barrel trigger is doubly inappropriate, and deserves amendment.

Also as noted in the "Suggested Elements" report, there may be a need for on-site personnel to order an immediate civil emergency declaration to mobilize resources, in the form of a "preliminary declaration of oil spill emergency" which will require new legislation.

The Master Contingency Plan

The "Suggested Elements" report [6.2] discusses some of the requirements for improved contingency planning. A competently structured contingency plan, in place and clear enough to guide the immediate responses of state personnel, is a requirement of this requisition system because it will identify the kinds of efforts and kinds of resources necessary to the state's response, which likewise justifies the requisition requests to be made hereunder. See the recently enacted requirement of a statewide master plan, AS 46.04.200ff, discussed in Report 6.2.

Decisional Officers

Decisions about what particular equipment or personnel are needed are likely to be best made on-site, not back in the state capital. Accordingly, it is important that the power to requisition be delegated by the governor in each emergency, or via a prior-designated delegation under regulations issued in the recodified emergency response system, so that on-site officials can exercise an immediate response effort including necessary requisitioning powers. It is presumed that the person in command of the on-sight response command center would be the one who would have to authorize each particular requisition request.

Notice of Request of Requisition

The draft form appended at the end of this report (Appendix: "Draft Requisitioning Request Form,") identifies the requirements of a requisition order[and see AS 9.55.430]: multiple citations of authority, a request and requisition for particular identified resources/services, a statement of the particular purpose under the contingency for which the request is made, the duration of the request, and statement of rights and liabilities for voluntary or mandatory provision of resources/services.

Filing in Registry

It is a simple requirement of administrative process and private property rights that the requisitioning orders be filed in some appropriate registry, either at the relevant Registry of Deeds, or with the municipal clerk in the area where the requisition is made, as is required with the initial declaration of emergency. See AS 26.23.020(d). The requisitioning orders should also be filed in one central state office which will manage compensation requests thereafter, so a state filing is administratively as necessary as the local filing required by property rights.

Enforcement, Civil and Penal

Where a requested person does not respond affirmatively to a requisition request, the statutes should be amended to clarify that law enforcement officials have the ability to take dominion and control of private property for requisitioned uses without a prior hearing, if the requirements of the requisition order are otherwise in order. Under the Maine oil spill statutes the state officials' emergency orders and regulations are not to be stayed, even if appeals are filed. 38 MRS §557. There also is the possibility that in some cases an immediate possession of the resources is not necessary, and in that circumstance the statute may allow normal condemnation action to take place under the state's powers of eminent domain, although a "quick-take" procedure is advisable so that the matter would be put immediately at the front of the docket of whatever court has jurisdiction.

Violation of the order would appear to be a misdemeanor under existing statutes. Enforcement, of course, must follow all the requirements of procedural due process;

these requirements, however, allow for a balancing in emergency situations that takes account of urgent public exigencies. See the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Liability and Compensation Provisions

Compensatory Coverage for Injury to Requisitioned Property or Persons

Under principles of constitutional due process protections of private property rights and personal rights, the state government must not only compensate persons for the value of resources taken, but also must reimburse them for injuries or destruction which may occur during the requisitioned period. This proposition holds irrespective of language in AS 26.20.140(b) which purports to eliminate tort liability on the part of the State or those working for the State. Further, the protections of worker's compensation laws extend to persons providing requisitioned services because they are legally regarded as state employees. See *Gulbrandson v. Midland*, 36 NW2d 655 (SD 1949).*

Qualified Immunity

As noted above, it is appropriate and apparently normal practice for states which make emergency use of private resources or services to extend affirmative immunity in tort law to persons and property requisitioned. The exception is in cases of gross negligence or intentional misconduct. Alaska has adopted this approach for a part of its emergency response law, and should probably apply it generally to all emergency requisitions. See AS 26.20.140(b); 46.03.823; 46.08.160. See also Restatement of Torts 2d §265. The alternative approach of adjusting insurance coverages for requisitionees and volunteers is the subject of ongoing federal studies by the Department of Justice, but appears to be primarily directed at settings different from the emergency response situation.

In this case it is also advisable to extend statutory immunities as well. It is altogether foreseeable that clean-up and response equipment will itself have incidental discharges and other circumstances which could open the owner of the equipment to further statutory liability, and it appears advisable that, except in the case of gross negligence, or where the equipment is not being used according to the requirements of the state's response system, that qualified immunity from state statutory liability also be extended. See AS 46.08.160 [where immunity "from costs or damages" may cover some statutory liabilities.] The state, of course, has no ability to

* The opposite result is likely, however, in the case of "pure volunteers," persons who provide emergency services to the public on their own unfettered initiative, without having been requested to provide such services by an authorized emergency official. *City of Seward v. Wisdom*, 413 P2d 913 (1966); local political subdivisions can nevertheless include volunteer firefighters, police, and ambulance drivers under worker's comp. AS 23.20.092. Members of the newly authorized volunteer Response Corps would appear to be covered by worker's comp. AS 46.08.110.

extend such immunity for actions violating federal law, except insofar as the state has assumed federal authority, under the Clean Water and Clean Air Acts. (NPDES, 33 USCA §1342ff; SIP, 42 USCA § 7410ff).

Liability for Damages Caused by Failure to Provide

This is a provision that substantially increases the practical incentives upon private parties to acquiesce in a requisitioning order. If they do not, the proposal is that the oil spill act (AS.46. 04.010ff, and the Civil Disaster Act, AS26.23.010ff) be amended to reverse, in effect, the traditional tort law that does not hold a person to any "duty to rescue". If the statute is drafted to state that-- "failure to provide resources or services upon the proper requisition and request of a civil emergency official shall constitute a breach of duty to persons and properties injured by the failure of the person to so provide"-- major tort damages may follow. For a stubborn property owner, this may be a more persuasive incentive to cooperate with state efforts than the uncertain possibility of conviction for a misdemeanor. In the event that major injuries to persons or property occur, a person or corporation could lose the entire value of the requisitioned resources, or much more.

Analogues for this kind of statutory creation of a special tort duty can be found under the law of posse comitatus. See *Babington v. Yellow Cab Co.*, 250 NY 14, 164 NE 726 (1928); *Application of U.S.*, 427 F2d 639 (1970); *Blackman v. Cincinnati*, 35 NE2d 164,166 (Ohio 1941).

Compensation System

Under AS 26.23.020(g)(4), compensation is required under the terms of subsection 160 for any property that has been "commandeered." In that section, a person files claims for compensation with DES, although presumably if ADEC was exercising the same power by delegation under its oil spill authority, claims would be filed directly with ADEC.

Compensation claims should be directed to one single state office, to permit coordination and uniformity in the compensation process. An arbitration panel could be set up administratively to facilitate the process. See 38 Maine RSA §551(3). Ultimately, all claims may be taken to a court as with regular eminent domain condemnation.

The question of quantifying compensation amounts is treated in the next section.

Constitutional Constraints

Preemption

Under preemption, where the federal government has jurisdiction over an area and expressly preempts the area, the state has no power to regulate. There do not appear to be any areas of express exemption in the oil transport system, with the possible

exception of the Coast Guard standards. Implied preemption, however, is an ever present concern where a regulated industry can resist state efforts on the argument that the function being exercised is properly a federal function, and that congress impliedly intended to occupy the entire field, whether or not congress or a federal agency is acting in a particular area.

The requisition system discussed here largely does not run afoul of preemption concerns. The federal emergency management agency administration (FEMA) has indicated that it does not itself wish to exercise the requisitioning role, and fully expects that the State would requisition required resources and services, perhaps turning them over to the Federal On-site Coordinator in the event of federalization. Likewise, in a number of areas of response effort, the federal agencies may be expected to be relieved that the state is taking the initiative. The on-land response actions of the state, including requisitioning, do not appear to raise any substantial preemption issues. On the tanker route sector of the system, however, the Coast Guard exercises predominant control over the navigation and design and equipment standards of the tanker trade, so that short-term requisitioning of a vessel that is otherwise under Coast Guard jurisdiction might run afoul of the preemption doctrine. This issue is to be treated further in another report.

Due Process, takings

Under the principles of due process and takings, the requisition system proposed here does not raise major concerns. The authority for a taking will be clearly established, there is clearly a proper public purpose sounding in health, safety, and welfare; the requisition order, if it follows the terms of a rational contingency plan, is clearly rationally related to achieving the purposes of the state's oil spill response effort; and any burdens upon the private property are straightforwardly handled by the existence of the compensation remedy. The statutory change in tort liability, proposed to increase the incentives to cooperate with a requisition, does not raise takings issues because the courts have held that individuals and corporations do not have a right to the continuation of particular common law rules.

Contract Clause

In some cases, as the examples show, a requisition order may directly interfere with contracts made between a corporation that has locked up resources and the supplier of those resources. This clearly is a state action "impairing" a contract, which raises questions under the Contracts Clause of the U.S. Constitution, Art. I § 10. The Contracts Clause, however, has repeatedly been interpreted to permit a state to modify or abrogate contracts when the requirements of due process and valid regulatory actions have otherwise been fulfilled. The leading case in the area is *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1933): "...The State...continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect'....[T]he reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order....This

principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." 290 U.S. at 434-435. While the State's power is not unlimited, the effective result of Supreme Court holdings is that the same balance that supports an action against due process and takings challenges will concurrently satisfy the Contracts Clause.

Compensation

Under Alaska and federal law, it is clear that in many, if not all instances, compensation must be paid for property which is taken; the due process requirements of the eminent domain proceeding are statutorily codified in the condemnation provisions of Alaska Statutes, §§9.55.290-340 and 420-460.

Several special questions arise, however. If it occurs that the state orders, for instance, the destruction of a grounded tanker with all its remaining cargo by burn technology, there is some authority to indicate that the state does not have to compensate the owners of the vessel therefor. See* U.S. v Caltex, 344 US 149 (1952); *Srb v. Larimer*, 601 P2d 1082 (Colo. 1979); *Franco-Italian Packing Co. v. U.S.*, 128 F.Supp. 408 (Ct. Claims, 1955); *Miller v. Schoene*, 276 US 272 (1928), and cases involving the destruction of houses in the path of fire. In such cases, moreover, the corporation that owns the grounded tanker will often be responsible for the cost of clean-up, so that the action of destroying a ship and cargo, if necessary to effective response, in such circumstances would be part of the corporation's clean-up response obligation and hence not compensable.

There is also the question of assessing the amount of compensation. In the example of requisitioning hotel rooms, where the corporation has already reserved the same hotel rooms, it might be argued that it is not enough that the state itself pay the hotel for the rooms used by the State. The corporation that had reserved those rooms, of course, does not have to pay for rooms it did not use (and if it prepaid the rooms, the State would have to repay that amount). But the corporation may well argue that the value of the contract to the corporation in the emergency circumstances was greater than the actual cost of the rooms, in effect a "special benefit" of the bargain. In these circumstances, could the corporation that has been ousted from its reservations demand compensation for the loss of those reservations? This does not appear so much the loss of a property interest as a contract clause claim. The language of the Supreme Court of the United States in determining whether such contract losses would have to be compensated does not offer much support to the corporate position.

A further question arises with the amount to be paid where the existence of the oil spill emergency dramatically raises the on-site going market rate for available resources. If the corporation responsible for the spill is the target of the requisition request, it is hardly likely that it can demand inflated premium values from the State. Even were it to do so, the state is authorized to recoup clean-up expenses from responsible parties under AS 46.04.010, and, accordingly, whatever the State would

have to pay out to the corporation in compensation, it would probably demand as a reimbursement from the corporation under that statute and AS 46.03.760(e), and 46.08.070.

The more difficult question occurs in the case where the state will be taking third-party resources. In the event of a spill, one of the small compensations to a local community is that responsible corporations may pay greatly inflated prices for the rental or purchase of desired resources. In those circumstances, does the state government have to pay the same price? The Alaska statutes indicate that the measure of compensation will be the same as that in other condemnation cases. AS 26.23.160. This generally means that just compensation will be measured by fair market value at the time of the taking. There is some authority, however, that government need not pay inflated values for property that is taken by eminent domain, where the reason for the inflated value is attributable to governmental demand or governmental orders. See *U.S. v. Cors*, 337 U.S. 325 (1949). In that case, the federal government had requisitioned a steam tug for use in the war effort. Many steam tugs had been so taken, and the price for remaining unrequisitioned tugs was going ever higher on the private market. The statute involved, however, the Merchant Marine Act of 1936, section 902A, stated explicitly that "in no case shall the value of property taken or used be deemed enhanced by the causes necessitating the causes or use". This is a provision that might well be replicated in an Alaska Disaster Act amendment. The Supreme Court decided that there was no constitutional reason why the government had to pay a higher price for private assets when the price had been driven up by the government's own actions, in that case mobilizing resources for the war. In the oil spill situation, the inflated market prices for goods are both generally the result of the emergency situation, and specifically the result of the government's own requirements applied to the corporation that it undertake immediate response and clean-up efforts. To make the government pay the higher premium owing to its own order appears to be both inappropriate and constitutionally unnecessary.

V. Summary

For the foregoing reasons, it appears that a requisition system, both voluntary and mandatory, is both desirable and administratively, legally, and constitutionally feasible for implementation by the state of Alaska, with the regulatory and statutory changes noted as required.

[DRAFT]

REQUISITIONING REQUEST FORM

State of Alaska

[Oil Spill Emergency Command Center] [or whatever response entity is authorized]

Under the authority of the Declaration of Oil Spill Emergency issued by ___ on [date], and according to the regulations for emergency oil spill response set out in Alaska Administrative Code ___, as authorized by the Statutes of the State of Alaska ___, and pursuant to the terms of the Master Oil Spill Contingency Plan for [denoting sector of oil transport system] adopted by the State on ___, 1990,

You are hereby requested to provide the following resources/services to the responsible official signing this order or his/her appointed agent:

The resources/services requested under this order will be utilized for the following purposes, consistent with the terms of the Master Oil Spill Contingency Plan noted above:

This requisition will continue until _____
During this time the resources/services are to be used according to the terms of this order, the laws of the State of Alaska, the applicable state contingency plans, and directives of state officials authorized to direct oil spill cleanup and response efforts.

Your co-operation with the State of Alaska's oil spill emergency response efforts is important, and deeply appreciated by the State, as well as being required by Alaska law.

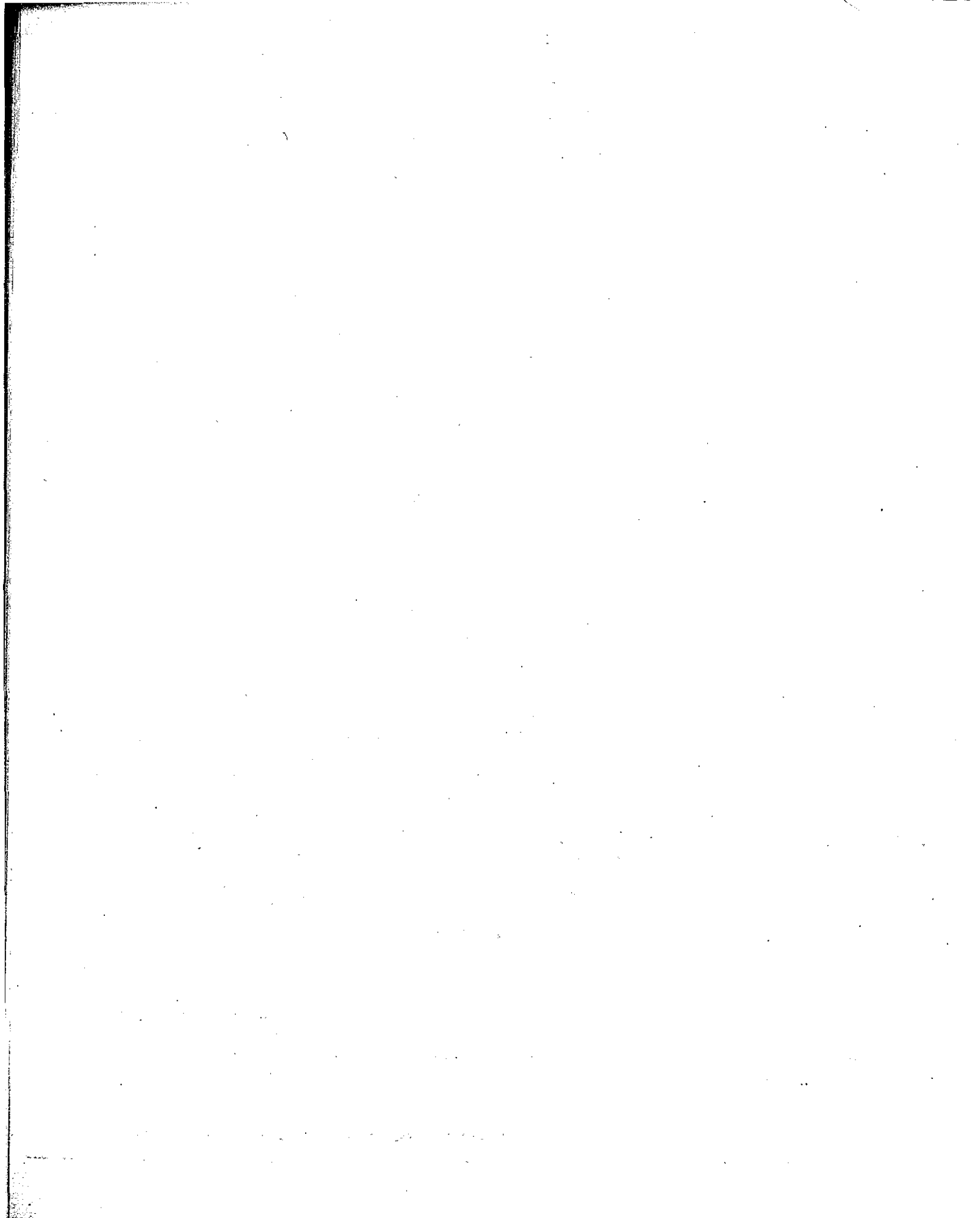
If this order is not complied with, you are on notice that law enforcement officers have the duty to enforce it, and violations are punishable as [misdemeanors] under the terms of Alaska law ___. Furthermore, if this order is not complied with, you and your property by statute will become civilly liable for any injury or loss of life to persons or property that is caused in whole or part by the unavailability of the resources/services here requested. AS 26.**.**.

FOR REQUISITIONS OF THIRD PARTY RESOURCES AND SERVICES:

You have a right to be compensated for the full, fair value of the resources/services provided to the oil spill emergency response efforts. Compensation claims may be filed at the following [time], [place], [manner].

Because the State assumes dominion and control of the resources/services during the time covered by this order, absent gross negligence you and your property will not be liable under state statutes or common law for actions taken according to the terms of this order. Damages to persons or property are likewise the responsibility of the State so long as actions with the requisitioned resources/services are being taken according to the terms of this order.

Authorized official, address, contact tel. no., Date



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LEGAL RESEARCH REPORT

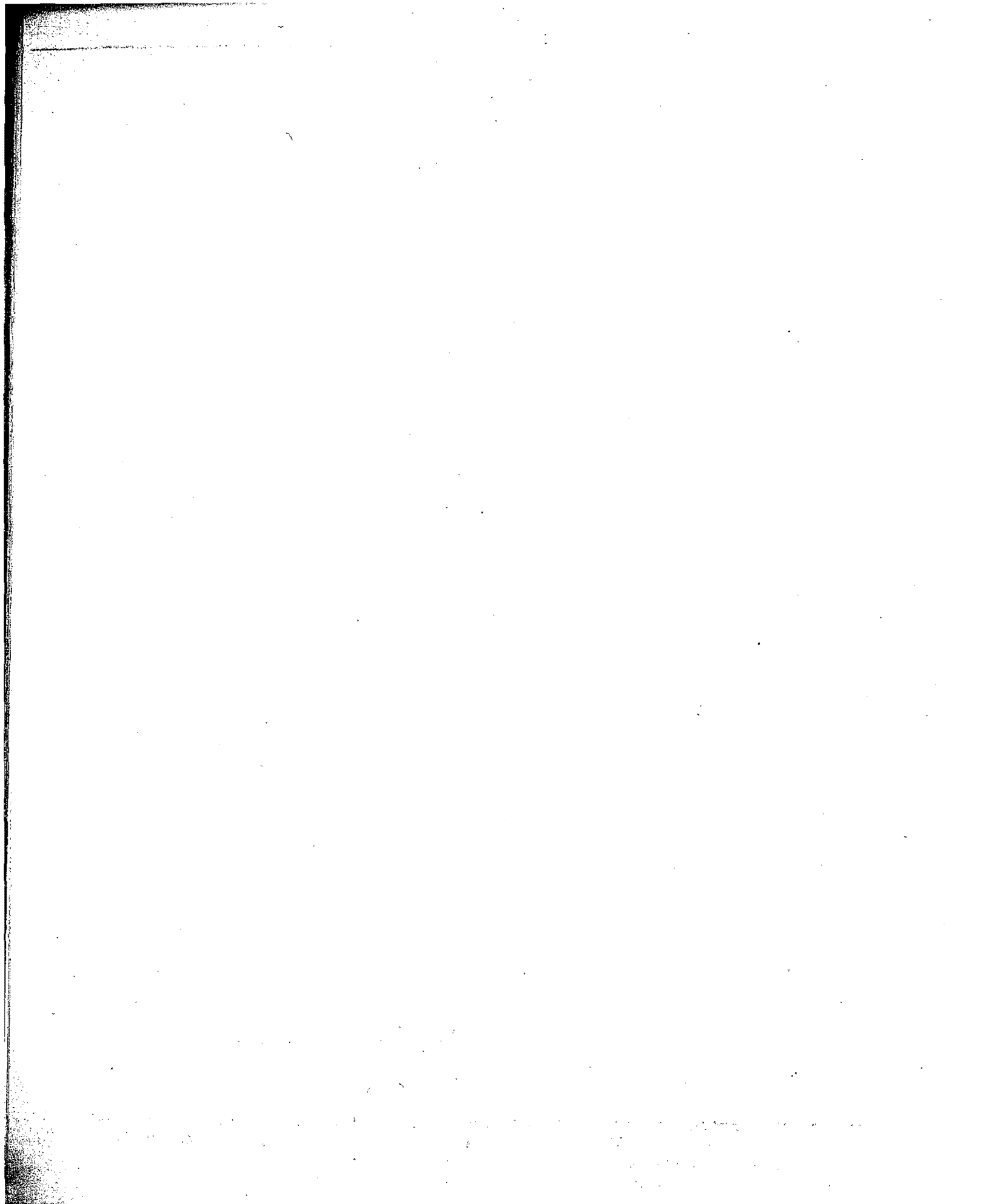
No. 6. 2

"SOME SUGGESTED ELEMENTS FOR
AN IMPROVED OIL SPILL RESPONSE SYSTEM"

Submitted: December 1989

Principal Investigator: Zygmunt Plater

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



I. Prospectus

The first SeaGrant Report [Rep't 1.2, by Prof. Johnson,] covers the various possible prevention mechanisms that the state of Alaska can promulgate in order to prevent, to the maximum extent possible, oil spills from occurring at any point in the oil transport system, over land or water. This present outline is a less ambitious and less comprehensive report, sketching out some generic response system options required when prevention systems fail, an eventuality that is unfortunately not unlikely.

The outline identifies some elements of a clarified structure for the state of Alaska's oil spill response system. It defines the initiation of oil spill response, the mechanisms by which the state's response should be centralized and coordinated, and the powers and functions of a state tactical command center that would operate as the central coordinator of all oil spill efforts, a base for state, local, and federal communications, managing and directing all aspects of oil spill response.

II. Introduction: In the Wake of the Exxon Valdez

The hours, days, and weeks that followed the Exxon Valdez oil spill demonstrated that, although the industry, state government, and federal government officials had considered and to some degree prepared for catastrophic oil spills, none of the systems in existence performed capably. The oil spill response system was fundamentally privatized; the Exxon Corporation took over from a disorganized Alyeska, and assumed overall responsibility for the clean-up. Given that the Exxon Corporation was the only actor on the scene with the resources (both technical and financial) to undertake the clean-up, it dominated the direction and day-to-day control of oil spill response efforts. That allocation of function presented advantages and disadvantages (not the least the disadvantage to the Exxon Corporation itself that it was forced to deal directly with an enraged public, which may well have prevented it from making rational triage decisions that would have been available to governmental authority directing the clean-up effort).

This outline presumes that the State of Alaska and federal government are likely to reject the privatization approach to oil spill prevention and response. The problem then is to design a governmental response system that can utilize the vast resources and expertise of the industry, while maintaining governmental directive authority for all phases of oil spill clean-up. In some cases the requirements of such an improved system are relatively clear, reorganizing existing Alaska authority, issuing new regulations under existing statutes, and in some situations refining new statutory authority. In other cases there remain fundamental policy choices which the state of Alaska must address. This sketch outline attempts to set out an array of those potentially useful options.

III. Legal Mechanisms of an Improved Alaska Oil Spill Response System

Summary Outline and Recommendations:

- Emergency response powers and duties are triggered by a declaration of emergency by the Governor, or in some cases by ADEC. [Existing: A.S. 26.23.020]
- There should be provision for urgent "preliminary" declarations of emergency by on-site officials to permit short term rapid response. [Requires statutory supplement] [note: the recent A.S. 46.08.130 gives the new Oil and Hazardous Substance Response Office (OHSR) some authority to respond, without a formal declaration, but not itself to declare an emergency.]
- Oil spill response powers and duties for all discharges from the Alaska oil transport system, on land and sea, should be vested in one agency, presumptively ADEC, instead of two or more. [Requires statutory or regulatory supplement]
- ADEC has been delegated full powers and duties, equivalent to the Governor's general powers in civil emergencies, in the event of "catastrophic" oil spills, defined according to the federal standard at 100,000 barrels, with lesser powers and duties in other spills. [Existing: A.S. 26.23.020, A.S. 46.03]
- ADEC should be able to declare an oil spill emergency, triggering its full scope of response powers and duties, in the event of any substantial spill, without limitation by the federal-inspired standard of 100,000 bbl., because the levels of concern differ between state and federal governments, and because of the fact that future oil spills may well occur inland where relative dangers differ proportionately from ocean spills. [Requires statutory or regulatory supplement]
- The State should set up an "oil spill tactical command center" system to coordinate all state-federal-local-corporate response efforts, at least prior to federalization, and thereafter to assist in assuring rational federalized efforts. (This goes beyond the recent creation of the OHSR office.) [Requires statutory or regulatory supplement; See Nestucca spill report]
- The State's response efforts should be guided by Master Contingency Plans – at minimum one for ocean spills, one for overland spills, one for inland river spills – which rationalize and are consistent with any other official oil spill contingency plans; the Master C-Plans should be shaped by the State itself rather than the industry, prepared by a comprehensive and incisive drafting process drawing upon the best scientific and technical advice available, in cooperation with federal agencies and local governments. [Requires regulatory supplement; statutory authority has recently been enhanced by the amended A.S. 46.04.200]

- The State should improve its ability to mobilize all required resources in the event of a major spill, by codifying and further authorizing, as necessary, an "emergency resource requisitioning system."
[Requires statutory supplement; see Legal Res. Rep't, No. 5.2]

1. Declaration of Oil Spill Emergency

A. Initiating the declaration; Authority

A legal declaration of an oil spill emergency is the fundamental trigger for the powers and operations of an oil spill emergency response.

The governor of the state is the primary official authorized and responsible for declaring emergencies under the Alaska Disaster Act (Alaska Statutes, Title 26, ch. 23 §010 and following sections; hereafter using the abbreviation form A.S. 26.23 §010). There is no specific requirement for a particular finding before a declaration can be made by the governor but it requires the support of the legislature. If the legislature rejects any declaration of emergency, it immediately terminates, A.S. 26.23.020 (c), and in any event it must be renewed every thirty days by legislative approval. The governor is given strong, specifically defined emergency powers, including the power to:

- act as commander-in-chief of the organized and unorganized militia, and other emergency forces,
- suspend regulatory statutes as necessary,
- direct state and local government resources,
- commandeer or utilize any private property [except property belonging to the news media]
- relocate populations in the emergency area,
- control movement within the area,
- allocate available emergency supplies

A.S. 26.23.020(f) and (g)

The Alaska Department of Environmental Conservation (ADEC) also has the power to declare civil emergencies on its own authority, A.S. 46.03.865; such ADEC declarations, however, have less specifically broad powers set out than a gubernatorial declaration, unless a "catastrophic" oil spill of more than 100,000 barrels is involved. In circumstances where oil spills potentially exceed 100,000 barrels, ADEC has a broader array of delegated emergency powers, taking over the functions and extensive powers of the Division of Emergency Services of the Department of Military Affairs and Veterans (DES). A.S. 46.04. 080. (Even where a spill does not potentially exceed 100,000 barrels, the Commissioner of ADEC may request the Governor to declare that a release of hazardous substances fulfills the requirements for disaster emergency, and to delegate his powers to ADEC, thereby adding the stronger powers of the gubernatorial declaration to ADEC's independent disaster authority. (A.S. 46.09.030.)) Given the fact that the next oil spill disaster may well occur on land rather than water, ADEC's full powers under A.S. 46.04.080

and A.S. 26.23.020 should be available for spills less than 100,000 barrels. The fact that ADEC can currently take full command of an emergency situation, overriding the authority of DES and other state agencies, only where a spill potentially exceeds 100,000 barrels of oil (a standard inspired by the federal government's standard for "catastrophic" spills requiring federal takeover) is a problem. This limitation should be amended to include full powers in the event of lesser major spills, because the state and federal governments have different levels of concern, and because of the fact that future oil spills may well occur inland where relative dangers differ proportionately from ocean spills. Under A.S. 26.23.020(c), and 46.04.120(2), the Governor's mobilization of full emergency powers is not limited by the 100,000 bbl requirement. A declaration may cover "any discharge which the governor determines presents a grave and substantial threat to the economy or environment of the state."

ADEC has recently been given additional authority under A.S. 46.08.100, by the creation of the Oil and Hazardous Substance Response Office (OHSR) within ADEC. OHSR is to be prepared to respond promptly to oil spills. A.S. 46.08.130. This response, however, can be activated in only three ways: an emergency declaration by the governor or ADEC under A.S. 26.23 or 46.03.865; a catastrophic spill declared by ADEC under A.S. 46.04.080; or by order of ADEC's Commissioner without a declaration where s/he "reasonably believes" that there is going to be a spill under the prior standards, or an "imminent and substantial" threat to public health or safety. The OHSR office's "emergency powers" are distinctly underwhelming; apparently the OHSR's primary "power" in such cases is the ability to enter private property and go to work cleaning up spills by itself, A.S. 46.08.140 (a), backed by an uncertain state fund, A.S. 46.08.020.

Under Alaska statutes, the mobilization of necessary governmental powers requires a declaration of emergency. If a declaration is to be the initiation of full emergency response efforts it must come quickly. Even in the catastrophic Exxon Valdez spill, however, the official state declaration did not come until Day Three. In some states the mere occurrence of a natural disaster creates legal authority in civil officials to take emergency measures; in other states, local governments have declaratory power. (Some states permit the legislature by itself to declare a state of emergency. See revised statutes MO 44.010(4)).

In Alaska's circumstances it is advisable to provide for a system of preliminary declaration of oil spill emergency, to be issued by either the Governor or ADEC officials on-site, upon the first verified reports of a significant oil spill. This would trigger all initial response duties and powers, but should be followed within three days by a formal declaration of oil spill emergency in order to continue those duties and powers.

B. The Content of Oil Spill Proclamation, Filings and Notice

The proclamation declaring or terminating a state of emergency "must indicate the nature of the disaster, the area or areas threatened or affected, and the conditions that have brought it about or which make possible the termination of the disaster emergency". A.S. 26.23.020 (c)

A declaration of emergency must be "disseminated promptly by means calculated to bring its contents to the attention of the general public, and unless prevented or impeded by circumstances attendant upon the disaster, properly filed with the Alaska Division of Emergency Services, the lieutenant governor and the municipal clerk in the area to which it applies." A.S. 26.23.020(d). These provisions do not require amendment.

C. Duration

A disaster emergency, once declared, remains in effect until the governor finds that the threat or danger has passed, or the disaster has been dealt with to the extent that emergency conditions no longer exist. If such conditions exist for more than thirty days, the legislature must vote to continue the proclamation. The emergency is ended by the proclamation of the governor so stating, by concurrent resolution of the legislature at any time, or by legislative failure to renew an existing emergency proclamation after a thirty day period. A.S. 26.23.020(c). These provisions do not require amendment.

2. The Governmental Entity in Command of Oil Spill Response

[If federal government agencies officially "federalize" the oil spill clean-up response function, as they may in certain circumstances for spills occurring both on land and on water, then the State of Alaska will not continue to exercise the command role, instead yielding it to the federal government under the terms of federal statutes and the supremacy clause of the U.S. Constitution. In a number of oil spill situations, however, federal officials may choose not to federalize the clean-up response efforts, or may delay federalization, deferring to state agencies for initial response efforts, choosing to assist and coordinate with state officials until a situation clearly requires federalization (if ever). In each event, the State of Alaska will substantially improve the overall governmental response machinery if it has created an effective centralized state command system for assuming all response efforts.]

What entity should be placed at the center of the State's future spill response system? There are two preliminary considerations required to answer that question:

First, what entity is the State's choice for overall direction of the oil transport system?

- Should the State choose to make an existing or new agency into a "super-agency" as far as oil transport goes, focussing all powers and duties therein? This would require a difficult discussion about which of several agencies can best be entrusted with such a mandate, not an easy process politically or logically.

- The alternative approach recommended in Prof. Johson's SeaGrant Rep't No. 1.2, is to avoid such major reorganization, instead setting up a small highlevel standing "Permanent Oil Transport Supervisory Taskforce," reporting directly to the Governor and legislature, to act as an overview watchdog with no active administrative "mission" duties, but rather assuring

constant oversight, coordination, quality control, management of spill prevention efforts, and response planning and readiness.

The choice on this issue may by its terms determine who commands the State's response efforts if indeed a "superagency" is given overall prevention and response powers. The Legal Research Team prefers the Taskforce approach; such a taskforce would focus on supervision and management prior to a spill, and response would be undertaken by an action agency.

Second, is the response action agency to be a cleanup service or a supervisory command entity? (Either way, as to funding, the oil industry will inevitably and necessarily be the ultimate source of funds for any major state clean-up response system.) There are two different basic models that might be followed:

- prior creation of a dedicated state response service, so that the state has all the resources and personnel necessary to take on the clean-up of an oil spill by itself, or
- state take-over and direction of the private industry's clean-up resources in the event of a major spill.

(a) In Maine, the Department of Environmental Protection itself is charged with the actual clean-up of oil discharges, including on-land spills involving pipelines; it establishes and maintains personnel and equipment where they may be deployed to handle oil spill emergencies, and apparently can take on the entire task of cleanup (though of course the size of potential spills in Maine is generally far more limited than in Alaska). 38 Maine Revised Statutes Annotated 544, 548. This approach, however, is most feasible where spills are likely to be small; in Alaska circumstances it would require an immense technical and economic undertaking on the part of the state.

The recent OHSR entity does not appear to take on full cleanup responsibility. It provides for a volunteer Response Corps, Response depots, and a response director within ADEC, who are backed by a severely limited OHSR fund. A.S. 46.08.020, 110, 120. This is not a sufficiently comprehensive framework to support the full required functions for cleaning up major spills on land or water.

Even if it were conceivable, a fully-adequate Alaska state clean-up service would be vastly expensive to maintain. In Maine there is a special transport license tax of [1 1/2¢] on every barrel of oil moved in the state, to finance the state's purchase and maintenance of adequate cleanup equipment and facilities, and Alaska might wish to replicate that fund, but the Alaska Constitution's prohibition against dedicated funds appears to prevent creation of the Maine approach. 38 MRSA §551; see Portland Pipe case, 307 A2d 1 (Me.1973; the Maine fund can be used to pay third party injuries Id.(2)). (In the event of a spill, of course, Alaska can obtain direct reimbursement for its costs. A.S. 46.04.010.) Theoretically interstate compacts might help bear some of the cost of clean-up response services, but the practicalities of distance and logistics indicate that interstate compacts would probably be of more use in the prevention sector of oil transport regulation.

(b) Given the scope of the Alaska subcontinent and the resources available to the State, it is clearly preferable that the State of Alaska follow, at least in part, the less elaborate approach: Instead of attempting to establish and maintain a service with complete cleanup capability, the State would still rely substantially upon the resources of the petroleum industry for response and cleanup actions, while setting up a strong directive body to assert a dominant, active, hour-by-hour command of the response and cleanup process (absent federalization.)

Lead agency and tactical direction of response efforts

Which should be the state entity in command of an oil spill emergency? The OHSR office appears to have been given a start on that role, according to the recent Oil and Hazardous Substance Response Act, A.S. 46.08.100ff, although as noted earlier its powers are not clear. Whatever entity is ultimately given primary authority, it is recommended that (preferably prior to, or in the event of a spill) the governor delegate his/her special emergency powers under the Alaska Disaster Act and otherwise [see discussion of authority, Rep't No. 5.2,] to some form of Oil Spill Tactical Command Center on-site. Such a command center proved its tactical effectiveness in the recent Nestucca oil spill in the waters of British Columbia and Washington. [See appendix -- Nestucca Oil Spill On-Scene Coordinator's Report, Seattle, August 1989.] In the Nestucca oil spill response, the command center organization successfully integrated state and federal clean-up efforts.

Under a Letter of Agreement between ADEC, EPA, and the BLM Alaska state office dated 8 April 1982, ADEC was designated the On Scene Coordinator (OSC) for all spills originating on state or private land, and spills incidental to operation and maintenance of the pipeline. (BLM is OSC only for spills from pipeline failures on federal lands.) The command center thus presumptively would be headed by a senior ADEC official who would be designated on-scene coordinator for the state. It would have liaison staff assigned to it by relevant state agencies, operating under its command, including state police, DES, community development, health, and the like as required, and serve as a common location for the Federal On-Scene Coordinator (FOSC) and the Responsible Parties' On Scene Coordinator (RPOSC), as well as liaison to Native corporations potentially affected, and to citizen groups. ADEC is already entrusted with the lead agency role as to environmental emergencies in general and oil spills in particular. There is a split of authority, however, under the terms of the Alaska Disaster Act. Under the terms of that statute, the governor has the ability to act personally or through a delegee, to take control of and direct the state's response to emergencies in general. The Division of Emergency Services has concurrent jurisdiction to prepare for and carry out emergency responses, and to develop "plans" to cover various potential civil emergencies. A.S. 26.23.040.

ADEC has two forms of emergency authority. Like the Governor, it has the full emergency response powers noted where spills exceed 100,000 barrels, and the §865 power in lesser spills to declare emergencies, and "issue orders directing persons to take action the department believes necessary to meet the emergency, and to protect the public health, welfare, or environment." A.S. 46.03.865. The department may order other state agencies to take particular actions, but the

operational chain of command and the degree of ADEC authority are not clear. A.S. 46.03.865(c). The nature and force of such §865 orders, moreover, is not made clear under that statute, and anyone who is given an 865 order may immediately request a hearing, which might effectively undercut the effectiveness of an emergency order. A.S. 46.03.865(b). (Pre-enforcement review of emergency orders, and of compliance orders generally, should not be provided except in extra-ordinary cases.)

ADEC now has authority under A.S. 46.04.200 to "prepare and annually review and revise" a statewide master spill response contingency plan, and regional plans [Id. §210], with annual open public review, and hold unannounced oil spill drills [no set frequency]. The statewide plan obviously can not have just a single set of standards and procedures; statewide oil spill threats differ as widely as Alaska's waters and terrain. Accordingly ADEC should be directed to incorporate several specifically-tailored sectoral contingency plans within the statewide master plan -- at minimum one sectoral plan for ocean spills, one for overland spills, one for inland river spills, adjusted for seasonal and climatic variables -- which rationalize and are consistent with any other official oil spill contingency plans. The master C-plan[s] should be shaped by Alaska itself rather than by the industry, prepared by a comprehensive and incisive drafting process drawing upon the best scientific and technical advice available, in cooperation with federal agencies and local governments.

As noted, only where a spill potentially exceeds 100,000 barrels of oil (inspired by the federal government's standard for "catastrophic" spills which require federal takeover) does ADEC take full command of an emergency situation. A.S. 46.04.080. For the reasons noted earlier, this is a limitation that should be amended to allow full response as required by ADEC in any substantial oil spill situation, weighing the spill in its environmental setting so as to determine the degree of seriousness and whether an oil spill emergency should be declared.

Also, to improve subsequent response efforts, the State should supervise the development of protocols for the deployment and use of recovery technologies (including innovative coagulant technologies, burn methods, and dispersants, as appropriate.) Major doubts about these technologies, including the question whether some might do more harm than good, prevented decisionmakers in the Exxon Valdez spill from knowing enough to make rapid reasoned decisions. After an appropriate course of investigations and hearings, there should be a sufficient technical and policy basis to improve the data base and in some cases to prepare protocols pre-authorizing the deployment and use of these technologies.

3. Functions of an Oil Spill Command Center

A. Contingency Plan

Alaska has recently taken an essential step toward strengthening its spill response capability in enacting legislation requiring ADEC to prepare a statewide master contingency plan for oil and hazardous substance discharges, and prevention. A.S. 46.04.200. In formulating the master contingency plan, ADEC is

directed to include "federal and state agencies, and private parties, in assessing, clarifying, and specifying response roles." [The DES is required to have contingency plans for various emergencies, but does not appear to have produced oil spill contingency plans, given the fact that ADEC has concurrent authority, and take-over authority if spills potentially exceed 100,000 barrels.] It is proposed that ADEC's mandate, under the statewide plan requirement of A.S. 46.04.200, be interpreted to require specifically-tailored component contingency plans for spills in each of the relevant five sectors of oil transport, and for particular spill scenarios in each:

(a) for off-shore oil drilling operations and surroundings [currently primarily Cook Inlet, but potentially elsewhere]

(b) for north Slope gathering areas for the pipeline, and analogous gathering areas for other fields [currently exempted from most direct regulation].

(c) for the Trans-Alaska Pipeline 800 miles overland from North Slope to Valdez terminal [requires three different types of C-Plan: over-(and under-) land spills; and spills into inland waters, i.e. at the Yukon crossing; and wetland spills].

(d) for Valdez Terminal, and adjacent harbor spills.

(e) for the tanker route from Valdez through the Sound and the Gulf to the Lower 48.

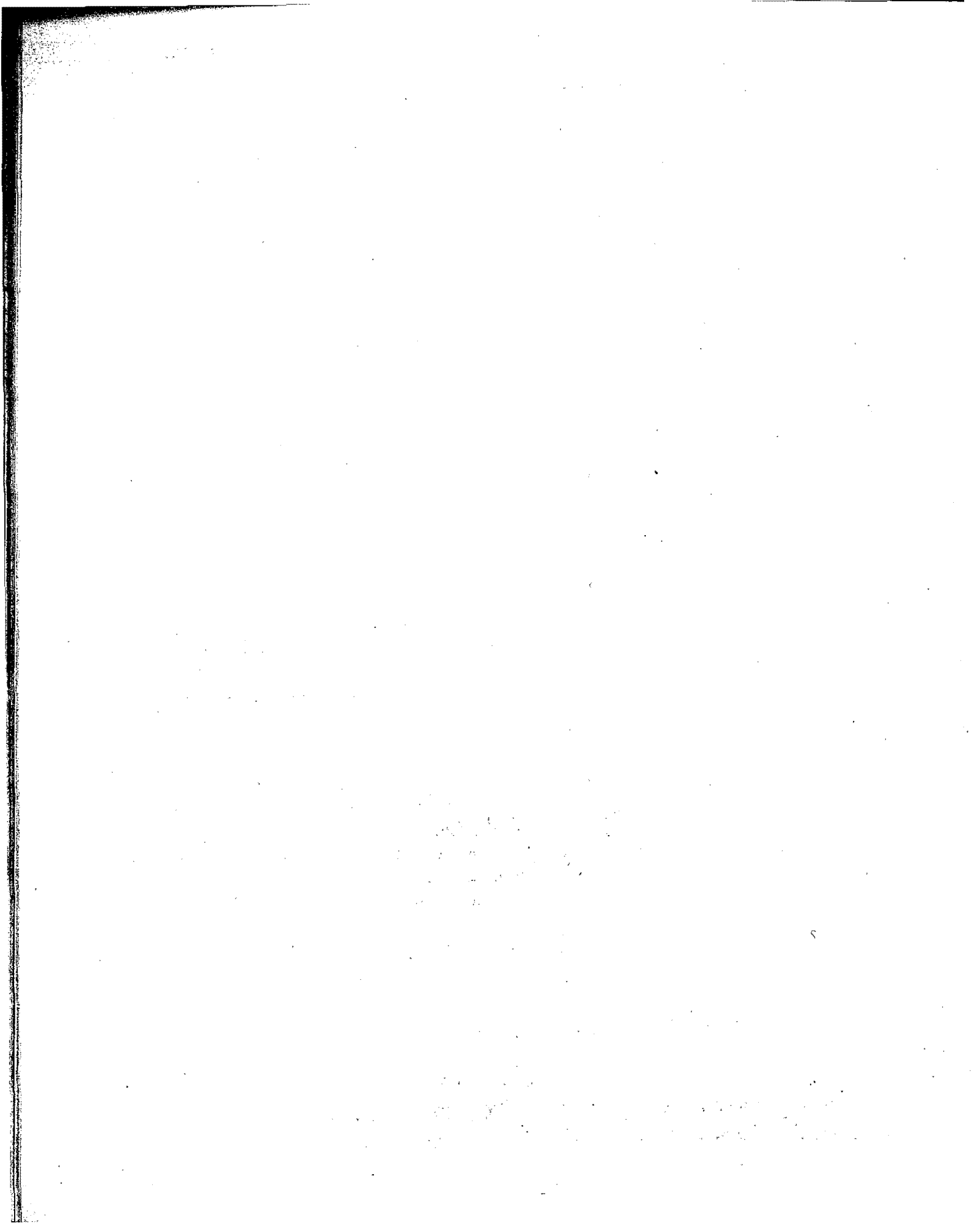
Having Alaska set up its own contingency plans for these sectors is necessary to ensure that the State is a dominant player, avoiding the privatization that has characterized management of operations, contingency planning and spill response.

B. Notification

Among the immediate functions of the ADEC oil spill command center would be to initiate the declaration of oil spill emergency, notifying all relevant parties of the occurrence of a significant spill. The initial notification sets in motion the mobilization of resources and procedures as designed in the revised contingency plans. The State's command center serves as the site of active coordination for pre-designated representatives of state agencies, federal agencies, local governments, native corporations, citizens groups, and other responsible parties. Rapid implementation of an effective communication system is one of the basic requirements of an effective response organization

C. Cleanup and Response Operations

Subsequent course of action follows according to the terms of the revised contingency plans....For an instructive analysis of how a response team can work in the confusion of a complex emergency, see Nestucca Oil Spill On-Scene Coordinator's Report, Seattle, August 1989.



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LEGAL RESEARCH REPORT

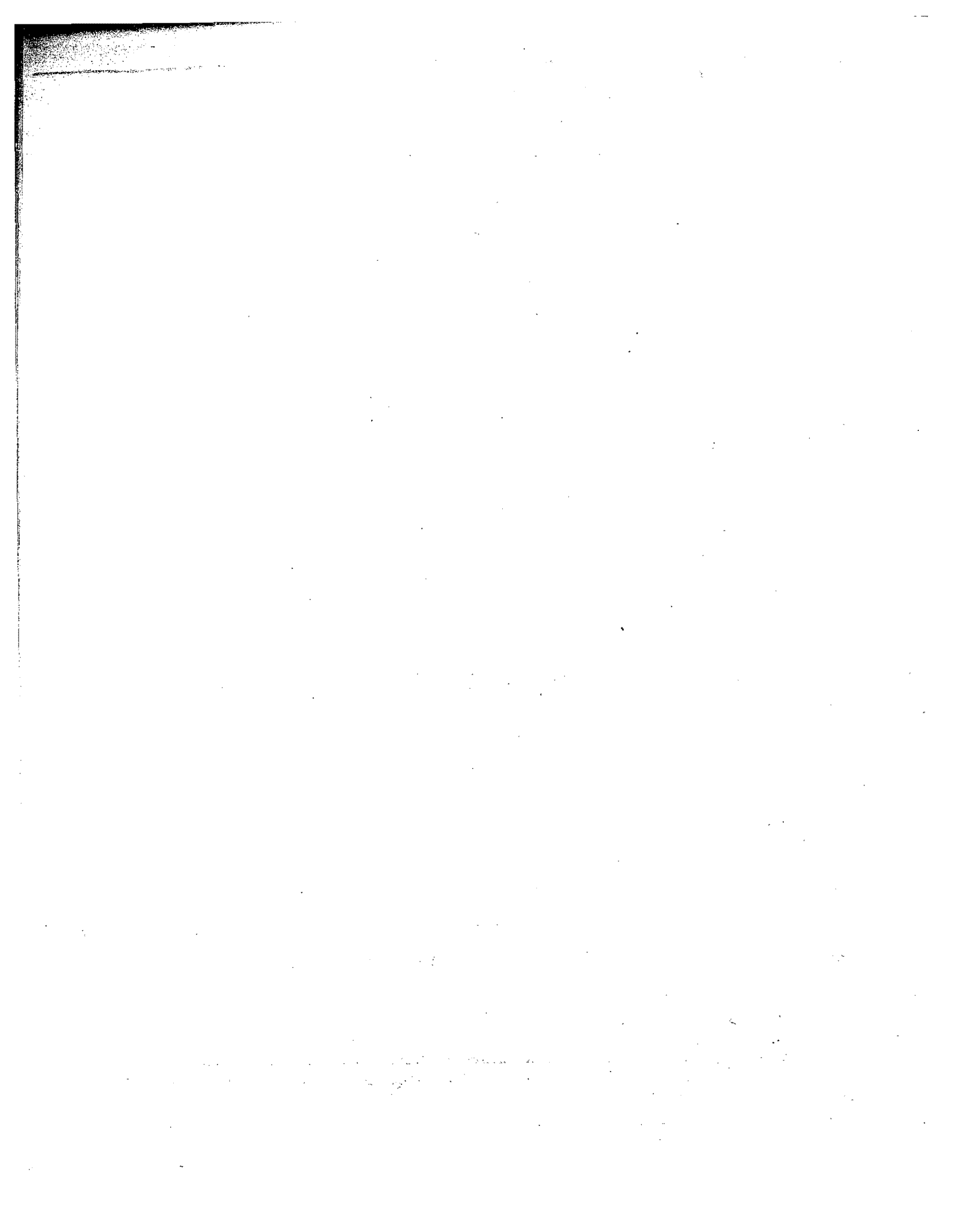
No. 7.2

"JUDICIAL REMEDIES FOR PREVENTION OF FUTURE OIL SPILLS"

Submitted: December 1989

Principal Investigator: Zygmunt Plater

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



Judicial Remedies for Prevention of Future Oil Spills

I Prospectus

This report surveys several judicial remedies which can be advantageously applied by courts reviewing the Exxon Valdez disaster, under general equitable powers; they can also be applied in other future public safety and resource protection litigation.

II Recommendations

PROSPECTIVE EQUITABLE REMEDIES

- The Oil Spill Commission, the Legislature, and the Governor should urge the Attorney General to include requests for a variety of prospective equitable remedies -- including injunctions and court-appointed monitoring -- to be included in any final judgments or consent agreements resulting from the State's Exxon Valdez litigation.

PROSPECTIVE INJUNCTIONS

- When the ongoing court proceedings produce major findings and determinations about particular wrongful past conduct contributing to the spill, these should each be encapsulated in injunction decrees. These should be decrees oriented toward prospective conduct (not merely remedial orders aimed at restoring past natural resource conditions.) Such prospective decrees should variously prescribe or proscribe relevant practices, conduct, and conditions, as required to assure maximum feasible avoidance of future oil spills, and maximum feasible response in the event such future spills do occur.

EQUITABLE MONITORS

- Where court orders deal with areas of the oil transport system that are particularly complex, information-sensitive, or problematic for compliance, the State should suggest to the court that it appoint one or more post-decree monitors to supervise the ongoing implementation of the court's orders, as well as maintaining continuing jurisdiction.



III. Introduction

This report outlines a variety of judicial remedies arising through the equitable jurisdiction of courts. The currently-ongoing lawsuits, seeking recovery for injuries to natural resources and property arising from the Exxon Valdez oil spill, provide an opportunity for the State of Alaska to ask the courts to issue forward-looking remedial orders in addition to money compensation, thereby "piggybacking" equitable remedies upon the civil damage litigation.

More than one hundred and forty lawsuits have been filed in the Exxon Valdez case. In the course of this litigation, whether consolidated or separate, the courts will develop extensive evidence about the conduct of the industry parties, the state, and the federal government.

Wherever it is determined that particular negligence or wrongful intentional acts contributed in whole or part to the Exxon Valdez disaster, a court may appropriately tailor forward-looking injunctive relief to its civil damage remedies, seeking to prevent those wrongful conditions from recurring in the future.

Likewise in other controversies through the 1990's, as natural resource problems continue to arise and be addressed in serious fashion, equitable remedies should be actively considered for judicial application. Especially where the State exercises its role as public trustee, reaffirmed in the recent Owsichek case (see SeaGrant Report 8.1), equitable orders will regularly be the preferred judicial remedies. It would be timely and fitting for the State's enforcement offices now to start developing special expertise and planning for informed, imaginative, expanded use of modern equitable remedy doctrines.

This memorandum surveys some of the particular areas in which various equitable remedies can be applied, and briefly analyzes their nature, supporting authority, and practical consequences.

IV. Some Examples of Prospective Equitable Remedies

By way of example, the following are a range of injunctions and other equitable remedies which could be applied to parties in the Exxon Valdez litigation, or more broadly in other litigation under the equitable powers of a court. (These examples, though drawn from allegations arising in the Exxon Valdez incident, are completely theoretical, and do not presume that there will in fact be specific findings of wrongful conduct in that controversy so as to support any one or more of the following particular hypothetical decrees):

1. The Court orders the Exxon corporation, Alyeska, and other industrial defendants to establish specialized fish hatcheries on the shores of Prince William Sound to re-stock aquatic resources lost in the oil spill.
2. The Court orders the Exxon corporation to refrain from paying any bonuses through any internal corporate procedures, direct or indirect, that reward shortcuts or speed in the safe handling and transport of oil through the Gulf of Alaska.
3. The Court orders Alyeska to maintain a permanent specialized tanker-loading crew at the Valdez terminal, as originally undertaken, so as to avoid the several dangers posed by inexperienced loading practices at that facility.
4. The Court orders Alyeska to provide it and the Alaska state government with all data obtained from through-the-pipeline monitoring "pigs", and undertake monitoring of corrosion, subsidence, and other damage to the pipeline at least twice a year.
5. The Court orders Alyeska to maintain in constant ready condition all booming, skimming, and oil retrieval storage equipment as specified in applicable state and federal oil spill contingency plans – with duplicate backup resources if there is any question of equipment uncertainty – and to run tri-monthly unannounced readiness drills to maintain a high state of preparedness. [This example illustrates the role of equity as a complement and reinforcement to other public law regulatory devices; see below, VII.]
6. The Court issues an injunction requiring double-hulling, minimum crew size, and use of ARPA (Automatic Radar Positioning Aid) in Alaska waters, against all liable defendants. [This example illustrates the conjectural role of equitable orders setting judicial requirements that would certainly face serious problems if applied by state statute; see pre-emption section below, in VII.]

7. The Court appoints an equitable monitor to observe and report, on a bi-monthly basis on the defendant's compliance with the injunction on oil spill contingency response readiness set out in Injunction Example 5, above.
8. The Court appoints an equitable monitor to observe and report to the Court, on a twice-yearly basis, from within the defendant corporation, at the defendant's expense, (1) on the defendant's compliance with the prohibition on speed bonuses set out in Injunction Example 2, above, and (2) with recommendations for modifications of the injunction whenever such appear necessary to assure its effectiveness in reducing internal corporate incentives for cutting corners on navigational and environmental safety.
9. If in the course of any future controversy over environmental hazards, a Court identifies a defendant corporate entity that is either so obstructive, recalcitrant, or managerially incompetent, that the Court deems it highly improbable that the defendant will be able to comply with statutory law and court orders, then in the interest of public safety the Court can find it necessary to put the defendant corporation into a managerial receivership, to be reviewed and renewed on an annual basis, so long as necessary.

and so on

V. Injunctions

A.

Injunctions were for a long time regarded as "extraordinary" remedies, to be issued only in those rare occasions that economic damage awards were inappropriate or insufficient. A certain hesitancy in applying injunctions continued through the mid-20th century, explained in part by New Deal judges' aversion to some conservative courts' exercise of injunction powers against labor unions. Over the past two decades, however, the injunction has become the remedy of choice in a wide range of public and private law areas, fueled by the growth of administrative law, civil rights, and environmental litigation. In these and many other areas of modern practice, money damages are often insufficient or inappropriate. Often only equitable orders can provide fully relevant relief.

The virtues and advantages of injunction-based remedies are obvious. They can be tailored quite precisely to the specific circumstances of each case, based upon a full court record and findings of past and prospective wrongful conduct. As necessary and expedient, a court can issue orders with great specificity as to time, place, personnel, conduct, equipment, organizational procedure, and required performance standards. These decrees are not generally subject to political lobbying, bureaucratic pressures, or procedural requirements like pre-enforcement review, as is normally the case with administrative agency orders. They are, moreover, backed by the constant presence of the court's contempt power, which makes criminal, not civil, sanctions available for any violation of the court's orders.

In the State's Exxon Valdez litigation to date, although the complaint does request equitable relief, the discussions of contemplated injunctive remedies appear to focus on retrospective restoration injunctions, like hypothetical injunction example number 1 above, seeking to return conditions in Prince William Sound and elsewhere as far as possible to their prior state. That initiative is worthwhile, but misses out on potentially far more useful prospective applications of injunction remedies: seeking to prevent as far as possible the occurrence of another such catastrophe in the Alaska oil transport system, and seeking to assure a high state of response readiness if another disaster does happen.

Under Alaska law, as in virtually all modern state caselaw, it is quite clear that an injunction can be affirmative as well as merely prohibitory in its effect. Injunctions are issued regularly requiring defendants who have been found to be involved in wrongful action to take positive affirmative steps to correct those actions and to mitigate their effects on plaintiffs. See *Weed v. Alm*, 516 P2d 137 (Alaska 1973).

In each case it is required that the court identify a wrongful act which has injured the rights or property of persons or the state. In the oil spill context, that kind of wrongful conduct is not likely to be difficult to demonstrate in most cases. An injunction is issued where the plaintiff argues that money damages are not sufficient. Given the ecosystemic injuries of oil spills, and the longterm difficulties of rehabilitating Prince William Sound and other potentially-polluted sectors of the

oil transport system effectively, an injunction is clearly available. Prospective injuries are clearly irreparable under normal economic damage remedies.

Although such injunctions are not frequent, insofar as injunctions specify particular internal corporate conduct of a defendant corporation, there is no a priori reason why such conduct is not as fully susceptible to injunctive remedy as individual conduct, if the corporation's conduct has been found to be wrongful. The question rather is how difficult it may be to define the terms of injunctions specifically enough to effect the subtleties of corporate conduct. In the example above of corporate bonuses for speed in transiting the rocky waters of the Sound and the often ice-clogged waters of the tanker channel, it may be difficult to craft injunctions that are specific enough to be enforceable by the equitable remedy of contempt of court. The only question, however, is the technical task of drafting the terms of the injunctions.

The application of prospective injunctive remedies to the Alaska oil transport situation thus is legally straightforward and feasible, and offers a variety of substantive and tactical advantages for achieving higher levels of prevention and response.

VI. Beyond Injunctions

In a number of cases, courts do not merely issue an injunction. They supplement it with an order creating a court-appointed post-decree "monitor", and can even go so far as appointing and creating mandatory "receiverships" over defendant corporations. Both of these named orders are post-judgment remedies, but they differ greatly in the scope and aggressiveness of the cure.

Remedies beyond injunctions appear to be ordered in at least four standard situations: where the defendant has demonstrated bad faith, where the defendant has shown general incompetence and mismanagement, where the defendant is lacking in sufficient resources to overcome economic, technical, or political obstacles in complying with law, or where the size and complexity of the undertaking are themselves daunting.

[RECEIVERSHIPS]

The most stringent remedy beyond simple issuance of injunctions is receivership. A court-appointed receiver moves into an organization or corporation and, backed by the judicial order and contempt powers within it, takes over the actual day-to-day formal administration and management of the entity. A receiver in effect becomes the chief executive officer and chairman of the board of a defendant corporation under receivership. Receivership is familiar and fairly uncontroversial in the area of bankruptcy, where court-appointed receivership is a familiar method of choice for resolving the complex financial difficulties of corporations with massive debt. The receiver manages the company until it can either be liquidated or brought back to solvency

Receiverships, however, have been extended beyond the bankruptcy setting, to include a variety of less frequent but nevertheless interesting applications, where

corporations are systematically incapable of following a particular set of regulatory requirements. See Morgan, 379 F. Supp 410; 509 Fed 2d 580 (1974), where the receivership extended over the entire Boston public school system owing to violations of statutory integration requirements; and see Johnson, "Equitable Remedies: an Analysis of Judicial Utilization of NeoReceiverships to Implement Large Scale Institutional Change", 1976 Wisconsin L. Rev. 1161; Receivership as Environmental Remedy, 10 ELR 10059 (1980); Vertac, 671 F. Supp 595 (ED Ark. 1987); Chem-Dyne, C.A. 80-03-0021 (Ohio App. 1981).

Receivership, however, is the big gun, a remedy of such force that when it leaves the accepted area of bankruptcy to enter into environmental enforcement, it can stimulate resistance and resentment from judges as well as defendants, and hence may not be a regularly available or advisable enforcement tool.

POST-DECREE MONITORS

But the special remedies beyond simple injunctions need not go so far as a court-appointed receiver actually taking over the management of a defendant corporation.

A useful and more measured remedy is the carefully-defined appointment of one or more post-decree monitors so as to provide for continuing equitable surveillance of the operation of the court's order. See hypothetical examples 7 and 8. Once an injunction is issued, there are always questions whether it was properly drafted to answer the problems for which it was requested, whether changing circumstances have made its terms less appropriate, or whether experience has shown that the order should be made more stringent, in addition to questions of ascertaining the defendant's good faith compliance, competence, and technical capabilities.

In each case a judge may appoint a "monitor" to be stationed on-site with the defendant so as to oversee and keep an eye on the defendant's compliance with the injunction, and on the sufficiency of the injunction.

Having such a court monitor placed within a defendant corporation, (paid by the corporation and yet separate from it, with a mandate to scrutinize the litigated circumstances and report from within to the observing court), accomplishes a number of practical advantages. Compliance with the order is removed from an adversarial setting, where plaintiffs must constantly override the counterpressure of defendants in order to have the court take account of their arguments, and defendants must continually mobilize the special resources needed to mount an active partisan defense. If the observing monitor is the court's own agent, that person is automatically removed from the adversarial mode, committed to nonpartisan objectivity, and court proceedings are accordingly potentially much more efficient.

Like all equitable orders, the order appointing a monitor is backed by the full authority of the equity court, including the contempt power. This means that failure to provide required information, or provision of willfully inaccurate information, immediately opens defendants to criminal sanctions.

The mere presence of a monitor within a defendant corporation, moreover, provides a constant visual manifestation of the court's authority, the seriousness of public concern in the matter, and the probationary nature of the defendant's ongoing conduct. The monitor can also serve to identify legitimate problems arising with the injunction, where it appears that the need for an injunction has ended, or that the terms of the injunction do not fit the particular goals and purposes for which it had been created, and can facilitate amendment or supplementation of its terms.

The authority for such a monitor lies both within specific Federal Rules of Civil Procedure, and within the general common law powers of courts. Under FRCP Rule 53, courts can appoint masters or monitors, paid by the defendant, to supervise and manage litigation issues. Usually a Rule 53 "master" is appointed to handle matters prior to the final decree in a case, but the same terms have been used to authorize post-decree masters as well. (Convention tends to use the word "monitor" for post-decree appointments, reserving the term "master" for pre-decree judicial appointees.) FRCP 66 codifies the equity jurisdiction, incorporating receiverships as well as the injunctive jurisdiction and everything in between, including the inherent power under equity to issue such orders. FRCP 70 provides courts with whatever powers are necessary to assure that their orders will be complied with. FRCP 70, in other words, is a free-floating grant of such powers "necessary and proper" to insure compliance.

The Supreme Court, furthermore, has held that courts have an "inherent power" in the circumstances of equity to tailor their remedies so as to achieve the goals and purposes of the judicial forum. In an opinion by Justice Brandeis, *In Re: Peterson*, 253 U.S. 300 (1920), the court asserted that remedies beyond injunctions could be designed when injunctions in themselves would not accomplish the goal, when expert assistance to the court in implementing its decree was necessary, or in general in other "extraordinary circumstances". In each case the court should look at the nature of the plaintiff, the nature of the violations of law, the difficulty of the circumstances, and the complexity of the violations or the relief that is sought, in determining whether equitable remedies beyond injunctions might issue.

In sum, the option of seeking court appointment of post-decree monitors, as an equitable remedy supplementary to injunctions, offers a number of very tangible benefits to legal enforcement efforts, and deserves serious attention in any attempt to improve Alaska's resource protection policies.

VII. Equitable Remedies as Supplements to Regulation

Equitable remedies, particularly prospective injunctions and equitable monitors discussed above, can obviously offer major benefits for environmental protection, spill prevention, and response, even if they are not integrated into a comprehensive policy of state administrative enforcement efforts. Equally obviously, they can strengthen and improve the State's programs if they are conceived and requested to operate alongside ongoing legislative and administrative efforts.

One of the equitable examples above (number 5), for instance, illustrated how a court's order can directly incorporate and parallel administrative remedies, thereby sharing roles with the administrative process.

Is it appropriate for judges in equity to enter into areas in which regulatory government plays a prominent role?

It is clear that in many cases judicial remedies may undertake the same kind of regulatory actions a state could otherwise accomplish through statute or rule, in advance of such state action. This does not appear to be unusual or inappropriate. Courts have often been able to respond to societal necessities at a pace faster than the administrative or legislative processes. As has often happened over the years, a court may be asked to enter into a situation involving specific plaintiffs and defendants, and issue an order that ultimately becomes a model and a catalyst for subsequent administrative or legislative action. That clearly is a possibility in litigation concerning the Alaska oil transport process, and ultimately an important reason why judicial remedies should be considered in the ongoing litigation, and in future cases superintending the resources of the state, both hydrocarbon resources and otherwise.

Further, there is no reason why equitable remedies in litigation should not be mobilized to supplement and reinforce ongoing governmental initiatives. They do offer advantages over administrative remedies in speed, precision, and the seriousness with which they are taken. The primary jurisdiction doctrine is not a bar; a self-imposed judicial restraint, it focusses on whether a court should take on the fundamental liability fact-finding process when an agency is authorized and ready to do so. Where courtroom litigation over liability issues is already underway, as here, the defense is not applicable. Moreover, when a court is dealing with issues of potentially catastrophic effect upon a state, its people and resources, its equity role is dominated by the compulsions of the public interest rather than deference. Where dangers are demonstrated to exist, and equitable orders are demonstrated to offer potentially important protections to the public interest, a court acts within its historically traditional equity role, as well as its modern mandate, in crafting protective remedies.

[POSSIBLE PRE-EMPTION ADVANTAGES]

There is a further point at which equitable remedies may offer advantages to a state's enforcement efforts, though it is quite conjectural. Under the supremacy clause of the United States Constitution, there are certain areas where state

governments cannot regulate because the area has been expressly or impliedly pre-empted by the federal government. In *Chevron v. Hammond*, 726 F.2d 483 (9th Cir. 1984), Alaska's attempt to regulate certain aspects of tanker transport was struck down by the district court and only partially resurrected by the circuit court of appeals. Pre-emption is discussed extensively in the oil transport setting in Professor Rieser's report (Number 4.2).

The question arises, however, whether the common law and its equitable remedies can issue judicial orders even where their substantive requirements would in all likelihood be pre-empted against statutory action by a state.

In the examples, for instance, of an injunction requiring double-hulling, minimum crew size, and use of ARPA (Automatic Radar Positioning Aid) in Alaska waters, state statutes would almost certainly be pre-empted, but there is at least a possibility that injunctive remedies might not be equally pre-empted. Injunctions and common law actions are designed to tailor restrictions on potentially harmful conduct to the needs of particular neighborhood and local conditions. Statutes are usually designed to provide overall generic regulation for general nationwide conditions. Accordingly it might be argued that common law remedies in the neighborhood of Prince William Sound, or elsewhere in the oil transport system, are localized decrees which do not contradict the generic regulatory role of the federal government, but supplement it. This argument's weakest ground is where a court holds that uniformity is a dominant federal goal; otherwise the argument holds some possibilities for state action.

There is some authority in the United States Supreme Court to support this argument. In the case of the *Estate of Karen Silkwood v. Kerr-McGee Corporation*, 464 US 238 (1984), the United States Supreme Court held that the question of radioactive safety was completely pre-empted by federal law against state statutory regulation. The Supreme Court held, however, that the state court could nevertheless go forward and sanction the nuclear manufacturer, by exercising its common law remedies. The manufacturer had to respond to the common law action's compensatory damage claims, and even more significantly to punitive damage claims, which are directly designed to punish and deter future action by the corporation.

The simplest answer probably would be that if a matter is clearly pre-empted against state regulation by a federal statute, then an injunction upon the defendant has precisely the same effect that a state regulation would have, and should be similarly pre-empted. *Silkwood*, however, does not take that simple approach. In *Silkwood* it is clear that the state, through its punitive damages, was seeking to effect the defendant's future radiation safety behavior, and yet the Supreme Court held such legal action to be non-pre-empted. In several other cases, the Supreme Court has indicated that common law remedies, specifically mentioning injunctions, may survive in circumstances where state regulation would be pre-empted. In the *Garmon* case, 79 S.Ct. 773, 778-779 (1959), the Supreme Court stated that where the federal concerns are "periphery" and "the regulated conduct touched interests deeply rooted in local feeling and responsibility," pre-emption would not operate. Cf. *Mallinkrodt*, 698 SW2d 854 (Mo. App. 1985).

In the final analysis, the results of pre-emption arguments can never be accurately determined before the fact. Courts have no consistent clear standards by which they find implied pre-emption. Where there appears to be a plausible opportunity to circumvent pre-emption, the state and other plaintiffs may well wish to request the injunctive remedy, allowing the arguments to prevail as they may in subsequent judicial hearings. As the judicial-political climate has shifted more toward state's rights, the scope of pre-emption is likely to continue to shrink.

Summary

Equitable remedies have a variety of uses in attempting to regulate conduct of the oil transport industry so as to avoid future oil spills and to assure effective response measures if spills do occur. The availability of prospective equitable remedies clearly enhances the ability of the State to add credible clout to its administrative enforcement efforts. In particular, prospective injunctions and equitable post-decree monitors recommend themselves to the serious attention of state officials and involved citizens seeking to improve Alaska's efforts for longterm resource protection.

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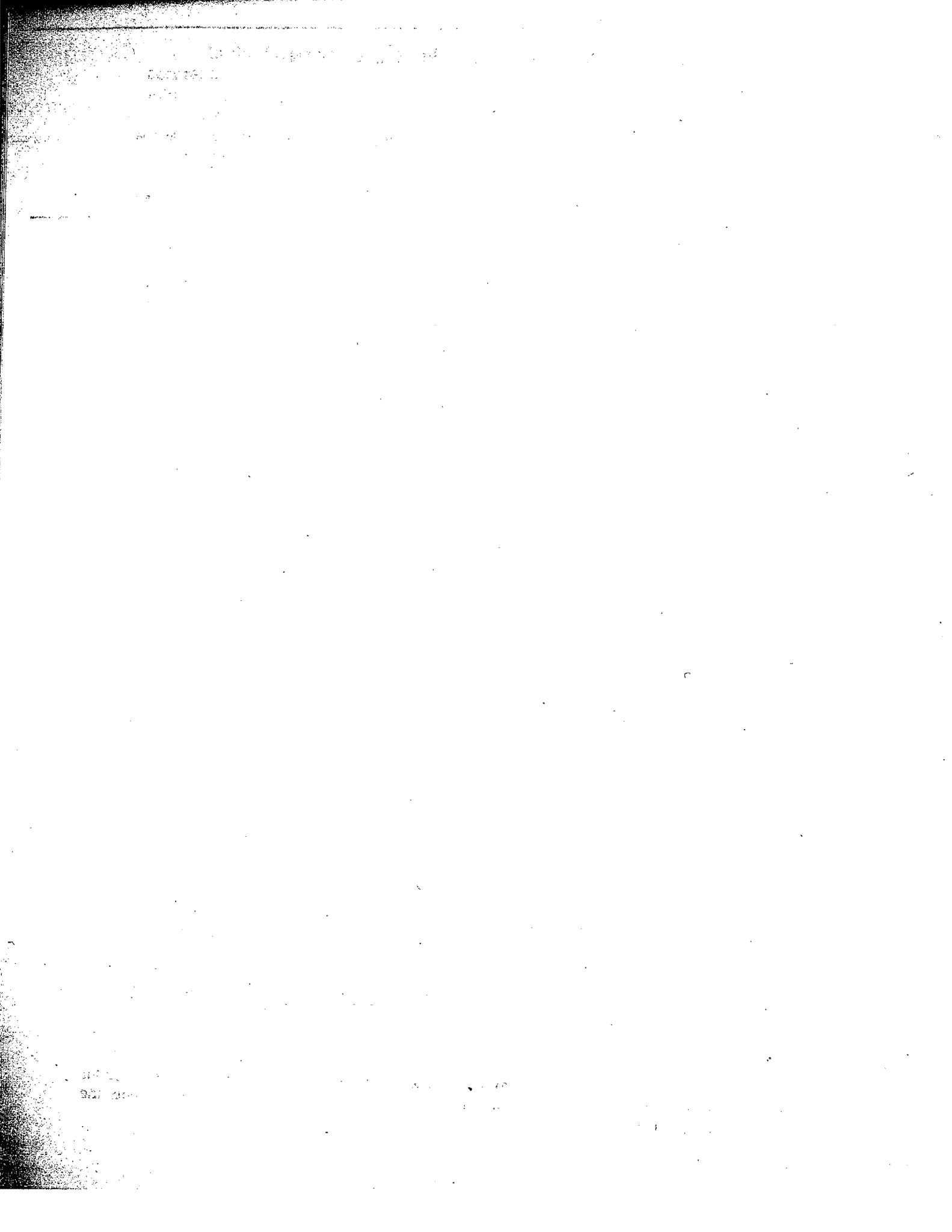
LEGAL RESEARCH REPORT

No. 8.2

"PUBLIC TRUST DOCTRINE APPLICATIONS
FOR ALASKAN OIL TRANSPORT"

Submitted: December 1989
Principal Investigator: Ralph Johnson

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



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THE PUBLIC TRUST DOCTRINE AND ALASKA OIL

by
Ralph W. Johnson
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INTRODUCTION

The purpose of this study is to analyze and explain the relationship of the public trust doctrine to the oil transportation and spill problems of Alaska.

Alaska Senate Bill No. 277, established the Exxon Valdez Oil Spill Commission, "to investigate the Exxon Valdez oil spill disaster and to recommend changes needed to minimize the possibility and effects of similar oil spills." The commission has a duty to "make findings and recommendations" on "governmental practices or laws that should be changed to minimize the potential for future similar events," and recommend "steps that should be taken by all levels of government to ensure proper management, handling, and transportation of crude oil and to improve the ability of industry and governmental agencies to respond to oil discharges."

With the support of Sea Grant Alaska, this study analyzes the potential application of the public trust doctrine to these mandates. The public trust doctrine,¹ put simply, is an ancient, but recently expanding, judicially created doctrine that says the public has an

¹ A select few of the articles on the public trust doctrine include: Dunning, The Public Trust Doctrine and Western Water Law: Discord or Harmony? 30 Rocky Mt. Min. L. Inst. 17-1 (1984); Johnson, Public Trust Protection for Stream Flows and Lake Levels, 14 U.C. Davis L. Rev. 233 (1980); Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. Davis L. Rev. 269 (1980); Ausness, Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses, 1986 U. Ill.L. Rev. 407; Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Question the Public Trust Doctrine, 71 Iowa L. Rev. 631 (1986).

interest akin to an easement, which predates all private ownership, for the protection of navigation, commerce, fishery, wildlife habitat and kindred interests.

This study will survey the origins of the public trust doctrine, its current application in other states, its current development in Alaska, and its potential application to oil transportation and oil spill issues. It is noteworthy that over the past 15 years, in half the states, over 100 reported cases involving the public trust doctrine have had a major impact on natural resources protection.²

The report concludes that the public trust doctrine could be used in Alaska as a basis for zoning or land use management. For example, tidelands could be zoned as "natural" areas, thus preventing fills in those areas or construction of oil facilities. Use of the public trust doctrine would eliminate the possibility of constitutional challenges to such zoning which could be raised if the normal "police power" authority of the State is the basis for zoning. The public trust doctrine might also be the basis of litigation enjoining sloppy oil tanker navigation practices, or crew management, although preemption issues need to be addressed here. Other possible uses of the public trust doctrine will be discussed at the end of this study.

² See Lazarus, *supra*.

EXECUTIVE SUMMARY

The public trust doctrine is an ancient doctrine, used to protect the public interest in navigation, commerce, and fisheries. Courts around the United States have expanded this doctrine in recent years to explicitly cover pollution and water quality questions. As thus developed the doctrine can provide a useful tool for the state of Alaska to control oil spills.

The Alaska Constitution, Article VIII, Section 3, adopts the public trust doctrine. Section 3 provides: "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use." While the term "public trust" is not explicitly used, the proceedings of the Constitutional Convention make it clear that the intent of the language was to express this doctrine. The Alaska Water Use Act (A.S. 46.15) directly incorporates the Section 3 language, thus providing that this basic water law should be interpreted consistent with the doctrine. In 1985 the Alaska legislature enacted (Ch. 82, Section 1, SLA 1985, Temporary and Special Acts) specifically codifying the public trust doctrine with regard to navigable or public waters of the state and their beds.

Two key cases decided in 1988 gave a major boost to the public trust doctrine in Alaska. In CWC Fisheries, Inc. v. Bunker (755 P. 2d 1115, 1988) the court held that privately owned tidelands were subject to the public trust doctrine so that the public could enter these lands for navigation, commerce and fisheries in spite of their private ownership. The court said that to convey tidelands free of this public trust would require the conveyance to be in furtherance of a specific public trust purpose and without substantial impairment of the public's interest in the land conveyed. The conveyance in question was not in furtherance of a public trust purpose, so the land is still subject to the trust. In Owsichek v. State Guide Licensing and Control Board (763 P. 2d 488 (1988)), the

Alaska court relied on the public trust doctrine to strike down legislation giving exclusive use permits to hunting guides for different areas.

Alaska is launched on a path of reliance on the public trust doctrine. The following recommendations are based on the assumption that this trend will continue.

The public trust doctrine as a basis for legislation.

Recommendation No. 1.

The public trust doctrine should be used as the basis for environmental protection legislation designed to prevent oil spills, on land, or water. When so used it removes the question of unconstitutionality of the legislation. If the public trust doctrine is applicable, then the burden it imposes antedates all private rights or claims and imposes a pre-existing public "easement" on private rights. It can, for example, be used to zone coastal areas, including privately owned coastal and tide lands, for "natural" uses so that oil transportation or storage facilities would have to be placed elsewhere. It can be used to control dredge and fill activities.

Recommendation No. 2.

The public trust doctrine, along with the state police power, should be used to regulate the number and size of oil storage tanks available for pipeline emergencies at Valdez. There is a significant risk of spill, into the Sound, if storage facilities are not adequate to handle a pipeline or tanker emergency. This problem could be addressed under the public trust doctrine.

Both accidental or intentional discharges of oil from ships can be controlled under the public trust doctrine, to the extent that these matters are not preempted by federal law. The discharge of oil at sea adversely affects fish and wildlife and is thus subject to control under the public trust doctrine.

Recommendation No. 3.

If Congress passes new oil spill legislation allowing states to have "more strict" state regulations than the federal government adopts, then Alaska should adopt such "more strict" regulations under authority of the public trust doctrine.

Recommendation No. 4.

The public trust doctrine as a basis for litigation.

The state attorney general can enforce the public trust by bringing suit against anyone violating, or threatening to damage or destroy public trust resources. For example, an injunction might be obtained against an oil facility that was a source of oil leaking into streams, or into salt water. Such a suit would be especially useful if there is no state statute covering the problem. In other words, the public trust doctrine establishes common law standards for protecting navigation, fisheries, environmental, and clean water values, especially where no legislation exists on the topic, or where the particular issue "falls between the cracks."

Recommendation No. 5.

Citizens should use the public trust doctrine. Ordinarily a citizen of the state, or group of citizens, or club, can bring suit to protect public trust resources. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). This is especially useful where the plaintiffs feel state officials are not enforcing environmental laws.

Recommendation No. 6.

The public trust doctrine in Alaska should be used to strike down state legislation that inappropriately allows destruction or damage to public trust resources. The Alaska

Supreme Court has said that a conveyance of public trust resources will be upheld only where the conveyance is made (1) in furtherance of a specific public trust purpose, and (2) where the conveyance can occur without substantial impairment of the public's interest in the trust resources conveyed. This sets a judicial standard against which to measure the constitutionality of legislation that affects public trust resources. It can be a high standard.

Recommendation No. 7.

Nonpoint pollution, including pollution from oil storage or transportation activities, is an exceptionally difficult problem to solve. The federal and state governments have defaulted to date on their obligation to regulate nonpoint pollution. However any action that causes or contributes to lowering water quality, and which damages fish or wildlife habitat, is subject to judicial control under the public trust doctrine, either by an attorney general's suit or a private citizen's suit. The doctrine should be used to require that companies transporting oil over land or sea, or storing oil, all oil transporters use the "best practicable," or the "best conventional," or the "best available," technology, to protect fishery and wildlife habitat. The choice among these standards, or others, is the responsibility of the courts applying the public trust doctrine. Alternatively, the doctrine can be used to require that oil companies develop new technologies where existing ones are inadequate.

Recommendation No. 8.

The Public Trust Doctrine should be used to protect the land as well as the coastal zone and the sea. These remedies would apply anywhere on land or sea in Alaska, not merely on navigable waters and their tributaries. Section 3, Article VIII of the Constitution

expands the public trust doctrine to cover fish and wildlife anywhere in Alaska, not merely on or near navigable waters. The doctrine should apply to activities in Prince William Sound, Bristol Bay, the Gulf of Alaska, in or near the pipeline terminal at Valdez, along the pipeline corridor, or on the North Slope.

Conceivably the public trust doctrine could be used to demand that oil tanker traffic remain a certain distance away from reef or shore hazards. This might be especially true where a pattern of tanker traffic poses unacceptable threats to public trust resources. Needless to say, the preemption issue is important here, however there is reason to believe that preemption will not so readily be found where the state or its citizens are protecting public trust resources.

The public trust doctrine is a state law doctrine.

In spite of the fact that the leading public trust case³ in the nation was decided by the United States Supreme Court, the doctrine is nonetheless a state law doctrine. It applies for the benefit of the citizens of the state. Although one leading author⁴ asserts that the doctrine should apply to federal agency management of federal lands, the cases supporting this argument outside of statutorily based duties, are not strong.

The state courts can apply the doctrine directly through litigation,⁵ or as the basis for legislation.⁶ When used as a basis for legislation it does not raise constitutional questions because the doctrine existed as an easement or burden on public lands and resources long before any private ownership interest might have arisen. The ancient origins of the doctrine are discussed in the following section.

I. HISTORICAL ORIGINS OF THE PUBLIC TRUST DOCTRINE.

The public trust doctrine originated from the widespread practice, from time immemorial, of using navigable waters as public highways and fishing grounds. The Institutes of Justinian of 533 A.D. recognized the doctrine saying that it applied to the air, running water, the sea, and the seashores.

³ Illinois Central RR v. Illinois, 146 U.S. 387 (1892).

⁴ See Wilkinson, "The Public Trust Doctrine in Public Land Law," 14 U.C. Davis Law Review 269 (1980).

⁵ See, for example, CWC Fisheries, Inc. v. Bunker, 755 P. 2d 1115 (Alaska, 1988), and Owsichek v. State, Guide Licensing and Control Board, 763 P.2d 488 (Alaska, 1988). Wilbour v. Gallagher, 77 Wn. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970).

⁶ See Orion Corporation v. State, 109 Wn. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996, (1988).

In England the doctrine was well established by the time of the Magna Charta. Leading English court decisions⁷ recognized that the Crown held the beds of navigable water in trust for the people. Even the Crown could not destroy this trust.

In the United States cases as early as Arnold v. Mundy,⁸ decided in 1921, recognized and upheld the doctrine. In Mundy the New Jersey court declared the trust as we know it now, or at least as it was known until recently expanded. The New Jersey court said that the States had succeeded to the English trust, which was held by the Crown, and that a grant purporting to divest the citizens of these common rights was void. The people, it was held,

may make such disposition of them and such regulation concerning them, as they may think fit; that this power...must be exercised by them in their sovereign capacity; that the legislature may lawfully erect ports, harbours, basins, docks, and wharves;...that they make bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvement and the ease of passage; that they may clear and improve fishing places....The sovereign power itself...cannot, consistently with principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.⁹

The leading case on the public trust doctrine in this country is Illinois Central Railway v. Illinois.¹⁰ In 1869 the Illinois legislature, in one of the more outrageous schemes of the times, deeded the bed of Lake Michigan along the entire Chicago waterfront to the Illinois Central RR. In 1873 the legislature suffered pangs of conscience and repealed this grant. The Railroad brought suit claiming the revocation was void, but the Court held that the revocation was valid and that the original conveyance was "if not

⁷ See, 2 H. Bracton, *On the Laws and Customs of England*, 16-17, 39-40 (S. Thorne, trans. 1968).

⁸ 6 N.J. L. 1 (1821).

⁹ *Id.* at 78.

¹⁰ 146 U.S. 387 (1892).

absolutely void on its face, . . . subject to revocation." The Court said the title of the state to the bed of navigable waters could not be sold except for *public purposes*. The "state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties,....than it can abdicate its police powers in the administration of government and the preservation of peace."

Until the past twenty years or so the public trust doctrine was not a major doctrine in terms of actual use by the courts. During this past 20 years, however, it has become increasingly attractive to the courts and has now been applied in nearly all of the states. Needless to say, its scope is different in various states, not so much because some states reject the doctrine, but because courts only respond to cases that are brought before them so the scope of the doctrine in a particular state will depend on the happenstance of litigation raising the issue.

WATERS AND OTHER RESOURCES COVERED BY THE PUBLIC TRUST DOCTRINE.

In England the doctrine was applied primarily to the bed of the sea and to tidelands. The United States, in contrast, has large navigable rivers such as the Mississippi and Columbia Rivers, flowing inland for hundreds of miles. Not surprisingly the United States courts extended the doctrine to cover navigable fresh waters. Thus in this country the doctrine covers all waters "navigable in fact," whether fresh or salt.

In a number of western states the doctrine also applies to waters that are navigable only for pleasure craft. That is, they are not large enough to be navigable for commercial use.¹¹ In the California Mono Lake case, the court applied the doctrine to non-navigable

¹¹Some courts initially assumed the doctrine was based on state ownership arising from the doctrine of equal footing. Under this doctrine each state, as it came into the Union, automatically received title to the beds of all commercially navigable waters, either fresh or salt. This rule was based on the fact that the original 13 states had been held to

tributaries of navigable waters, citing the potentially adverse effects of extractions from such tributaries on navigable Mono Lake.

The public trust doctrine protects the public interest in the beds of navigable waters, up to mean high tide on the ocean, and mean high water mark on fresh waters. No use can be made of the beds of such waters without meeting conditions imposed by the doctrine.

In Massachusetts the doctrine has been extended to cover state parks,¹² and swamps,¹³ whether or not connected to navigable waters. Thus the Massachusetts highway department could not build a highway on public trust land (a swamp) under its general authority to use "public lands" for highway construction. Such authority did not extend to public trust lands. With these lands the department would have to get specific authority from the legislature, indicating the legislature was fully aware that the highway would destroy or damage public trust resources.

In Meunsch v. Public Service Commission,¹⁴ the Wisconsin court used the public trust doctrine to deny a local government the power to commit a statewide resource (a fishing stream) to power generation purposes, thus requiring more broadly based political decision-making. And in United Plainsmen Association v. North Dakota State Water Conservation Commission,¹⁵ the court prohibited issuance of water appropriation permits

hold such title, therefore each new state, coming into the Union on an equal footing with the original 13, were also entitled to ownership of the beds of these waters. But Wisconsin and some other states have held the public trust applies to waters that are too shallow to be commercially navigable, and are only navigable for pleasure craft.

¹²Gould v. Greylock Reservation Commission, 350 Mass. 410, 215 NE2d 114 (1966).

¹³Robbins v. Department of Public Works, 355 Mass. 328, 244 NE2d 577 (1969).

¹⁴350 Mass. 410, 215 NE2d 114 (1966).

¹⁵247 N.W.2d 457 (N.D. 1976).

for coal-related power and energy production facilities until a comprehensive state wide water-use plan was completed which would take account of such in-place uses as navigation, commerce, and fisheries. The court specifically ruled that the public trust doctrine applied to the allocation of water as well as to conveyances of land that underlie or abut water resources.

In 1896 the Wisconsin Court held, in Priewe v. Wisconsin State Land and Improvement Co.,¹⁶ that a state law was void that authorized the draining of Muskogee Lake, a navigable body of water, for the purpose of private development for a housing project. The Court said that "the state is powerless to divest itself of its trusteeship as to the submerged lands under navigable water in this state."

In Alaska the public trust doctrine, as defined in the Constitution, Article VIII, Section 3, applies to "fish, wildlife, and water resources." Both "navigable" and "public" waters are declared to be held in trust by AS 01.10.070(c). The constitution clearly extends the trust in Alaska beyond traditional boundaries when it protects "wildlife", because this trust protects wildlife, wherever found. This includes land as well as water areas. The statute also makes it clear that the Alaska trust goes beyond "navigable" waters, by declaring that it applies to both "navigable" and "public" waters.¹⁷ This, indeed, gives the public trust doctrine a broad reach in Alaska.

ACTIVITIES PROTECTED BY THE PUBLIC TRUST DOCTRINE.

¹⁶93 Wis. 534, 67 N.W. 918 (1896), aff'd on rehearing, 103 Wis. 537, 79 N.W. 780 (1899).

¹⁷It would seem that all waters "wherever occurring in a natural state" are public waters under AS 46.15.030. See also, Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977).

The traditional list of protected interests covers commerce, navigation and fisheries. This, in itself, is quite broad, because protection of fisheries necessarily includes protection of water quality. Even in the early days, however, the interests protected were often stated even more broadly, and more specifically. In Arnold v. Mundy the court included "fowling, sustenance and all other uses of the water and its products...." Recent cases have said explicitly that other interests are protected. The California Court, in the oft-cited case of Marks v. Whitney¹⁸, said that:

Public trust easements are traditionally defined in terms of navigation, commerce, and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes...and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [citing cases].

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another [citing cases]. There is a growing public recognition that one of the most important public uses of the tidelands - a use encompassed within the tidelands trust - is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

Increasingly the courts are recognizing that the public trust doctrine protects against water pollution. Upon close examination we find that the Mono Lake case involve pollution. The extraction of water from the tributaries resulted in lowering the lake, reducing its assimilative capacity, and causing it to become more saline. This would predictably kill the brine shrimp on which the birds live, thus causing damage to the bird population.

¹⁸6 Cal. 3d 251, 259-60, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). Marks v. Whitney has been broadly cited by other state courts since 1971.

STATE POWERS TO CONVEY AWAY PUBLIC TRUST RESOURCES OR TO DESTROY PUBLIC TRUST INTERESTS

Ever since the 1892 Illinois Central case, courts have held that legislatures have the power to destroy public trust interests by legislative action. In Illinois the U.S. Supreme Court said that grants of land burdened by the public trust would be justified if occupation by private persons did "not substantially impair the public interests in the lands and waters remaining" or if the public interest in navigation and commerce is improved.

For legislation to accomplish this, the legislative intent must be either express or exceptionally clear. The Massachusetts and California Courts have spoken most extensively on this issue. The Berkeley¹⁹ case held that privately owned tidelands in San Francisco Bay were burdened by the public trust. In referring to the Berkeley decision, the Mono Lake court said "we held that the grantees' title was subject to the trust, both because the Legislature had not made clear its intention to authorize a conveyance free of the trust and because the 1870 act and the conveyances under it were not intended to further trust purposes." The Berkeley Court also stated that "statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.

Significantly, in *Mono Lake*, the California Supreme Court held that the 1913 Water Commission Act²⁰ (California's basic appropriation code), and appropriation permits issued in 1940 under that code to the Los Angeles Department of Water and Power

¹⁹ City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P. 2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980).

²⁰Water Commission Act of 1913, 1913 Cal. Stat. ch. 592.

(DWP) to extract water from tributaries to Mono Lake for domestic use in Los Angeles, did not terminate the public trust interests in Mono Lake.²¹ The California Water Board, in issuing the 1940 permits, explicitly stated that it had "no choice" but to grant the applications, despite the harm that would occur to the lake. The Board said,

It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing this office can do to prevent it. The use to which the City proposed to put the water under its Applications [domestic use] . . . is defined by the Water Commission Act as the highest to which the water may be applied This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effects that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.²²

In 1982, when reviewing the Water Board's 1940 decision, the California Supreme Court said,

The water rights enjoyed by DWP were granted, the diversion was commenced, and has continued to the present without any consideration of the impact upon the public trust. An objective study and reconsideration of the water rights in the Mono Basin is long overdue. The water law of California -- which we conceive to be an integration including both the public trust doctrine and the Board-administered appropriative rights system -- permits such a reconsideration; the values underlying that integration require it.²³

The court later added,

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public

²¹33 Cal. 3d at 447-48, 658 P.2d at 719, 189 Cal.Rptr. at 365-66.

²²*Id.* at 428, 658 P.2d at 714, 189 Cal.Rptr. at 351.

²³*Id.* at 426, 6548 P.2d at 712, 189 Cal.Rptr. at 349. The *Mono Lake* court went even further in dicta. "The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust." *Id.* at 447, 658 P.2d at 728, 189 Cal.Rptr. at 365. See also, *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, *** Cal. 3d ***, ***, ***, P.2d ***, ***, 244 Cal. Rptr. 830, 832 (1988).

interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.²⁴

The California court did not believe that the 1913 Code and the permits issued under it were sufficiently clear to destroy the public trust interest in Mono Lake.²⁵

Thus one of the important new applications of the public trust doctrine is to burden prior appropriation rights, that is, the right to extract water from public streams and lakes for irrigation, mining, manufacturing, and other beneficial uses. Until recently it was often said that prior appropriation rights were "vested property rights". If they were "taken" by the state then constitutional compensation would be required. The cases²⁶ and writings²⁷ assert this is no longer the full story.

Viewed historically, the prior appropriation system (including the Alaska system) is viewed as a special interest doctrine. The system was designed as a means of allocating water among appropriators. It was not intended to allocate water vis-a-vis other uses. It was specifically not designed to include public trust interests. Again, it was specifically not designed to cover water quality problems.

²⁴33 Cal.3d at 447, 658 P.2d at 723, 189 Cal.Rptr. at 365. Alaska and Idaho courts recently cited the *Mono Lake* decision with approval. See *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988); *Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 1056 Idaho 622, 671 P.2d 1085 (1983).

²⁵The California Supreme Court sent *Mono Lake* back to the trial court for allocation of the waters of the tributaries to Mono Lake, consistent with the court's opinion.

In 1984, the United States Supreme Court held that the California public trust doctrine did not apply to property that originally came from Mexican land grants where the owner's title had been confirmed in federal patent proceedings without any mention of the public trust doctrine, and where, by federal statute, the validity of the titles was to be decided according to Mexican law. *Summa Corp. v. California ex rel. State Lands Comm'n.* 466 U.S. 198 (1984).

²⁶See the *Mono Lake* case.

²⁷See, Johnson, "Water Pollution and the Public Trust Doctrine." 14 *Environmental Law* 1 (1989).

Until recently the prior appropriation system and the public trust doctrine operated entirely independently of each other. The prior appropriation cases simply are not concerned with pollution. Because of this vacuum a substantial body of statutory and regulatory water pollution control laws have been enacted, at both the federal and state levels. Meantime the prior appropriation system has rolled along, concerning itself almost not-at-all with pollution.

The public trust doctrine is based on the proposition that polluters do not acquire vested property rights to pollute, and that all, or virtually all appropriations cause pollution. Extractions of water cause temperature changes, and reduce assimilative capacity. Extractions also produce return flows containing natural salts, selenium, and other chemicals leached from the soil, which cumulatively affect water quality. These return flows carry oil residues, pesticides, herbicides, fungicides, fertilizers, and other polluting agents back into public waters. Individual extractions, although not necessarily significant in themselves, cumulatively degrade water quality. Individual actions that cumulatively cause pollution are clearly proper subjects of regulation or prohibition.

If the public trust doctrine is the basis for regulating or reducing the pollution causes it does not raise the constitutional issue of a "taking", because the public trust system antedates the prior appropriation system. Under the easement imposed by this trust, no one can acquire a "vested" property right to pollute that violates trust interests.

It is thus apparent that the public trust doctrine, as it is now being construed by the courts, can become a major source of control of all kinds of pollution, including oil pollution.

THE PUBLIC TRUST DOCTRINE IN ALASKA

The public trust doctrine in Alaska is articulated in the state constitution and statutes, as well as in recent court decisions. Until recently court opinions had not addressed the doctrine directly, however in 1988 the Alaska Supreme Court decided two cases focussing on the doctrine.

The public trust doctrine in Alaska constitutional law applies to water, fisheries, and wildlife. Nearly all caselaw deals with the protection of fisheries or wildlife resources, however in a proper case the doctrine would apply to water quality as well.

The Alaska State Constitution. Article VIII of the Alaska state constitution is dedicated to development and preservation of natural resources. Several sections of Article VIII could be used to further develop the public trust doctrine. For example, Section 14 provides for free access by the public to navigable waters; Section 15 protects individual interests in the use of waters, subject to the state's powers of eminent domain. It is in Section 3, known as the "common use" clause, that the courts have found the embodiment of the public trust doctrine. Section 3 states simply: "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use."

The framers of the Alaska constitution did not refer explicitly to the public trust doctrine as developed in the common law of other state courts.²⁸ However, Convention papers clearly indicate an understanding of the historical underpinnings of the public trust doctrine,²⁹ and an intent to prevent monopoly control of trust protected natural resources. Article VIII reserves resources to the public use while permitting some regulation in the process.

²⁸ 4 Proceedings of the Alaska Constitutional Convention (PACC) pp. 2462-63 (1956).

²⁹ 6 PACC, App. V., p. 98.

Two points are important. First, the Alaska Courts have not yet determined whether the scope of Article VIII, Section 3's public trust mandate is coextensive with that found in common law development of the doctrine, illustrated by *Illinois Central Railroad v. Illinois*,³⁰ and its progeny. Second, permissible regulation as envisioned in this constitutional article is limited. For example, passage of the Limited Entry Act,³¹ regulating state fisheries, required a constitutional amendment to Article VIII, Section 15, in order to square its aims and procedures with common use principles.

Alaska statutes on the public trust doctrine. Many Alaska statutes and regulations are potentially affected by the common use clause, as discussed below. Three such statutes expressly incorporate public trust principles into the statutory scheme.

1) The Alaska Water Use Act,³² governs use and appropriation of public waters. Section 46.15.030 directly incorporates language from the common use clause of the constitution into the statute's policy introduction. No cases have yet been adjudicated over the public trust aspects of this statute. One federal case, *Alaska Public Easement Defense Fund v. Andrus*,³³ found in the Water Use Act a requirement of public access to navigable waters through ANCSA lands, noting that the state of Alaska owns and controls all lands under its navigable waters, including navigable fresh waters, and that those lands are constitutionally reserved for public use. In addition, the people of Alaska have the right to use the water itself on non-navigable rivers and streams for boating, transportation, and other purposes.

³⁰ 146 U.S. 387 (1892).

³¹ A.S. 16.43.

³² A.S. 46.15.

³³ 435 F. Supp 664 (D. Alaska. 1977).

If and when in-stream flows become an issue in Alaska water management AS 46.15.030's constitutionally based public trust principles should be useful in resolving conflicts in favor of fish, and against oil pollution, whether intentional or accidental. Similarly the state water pollution statute, AS 46.03 (the Environmental Conservation Act) should be subject to common-use strictures. In its Declaration of Policy,³⁴ the Act calls for environmental regulation by the state in order to "fulfill its responsibility as trustee of the environment," but goes no further in incorporating public trust goals into the statute. However this language probably protects the statute from constitutional challenge, because it indicates that the statute is based on public trust principles rather than, or in addition to the state's police power authority. It would also seem to make clear that no one can claim a vested right to pollute, e.g., discharge oil into public waters, because such "right" has always been subject to the public's trust interest in the water resources.

In 1985, the Alaska state legislature enacted a law codifying specific public trust principles.³⁵ The Act provides that "the people of the state have a constitutional right to free access to the navigable or public waters of the state", that "...the state has full power and control of all the navigable or public waters of the state, both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state...ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public trust."

³⁴ AS 46.03.010.

³⁵ Ch. 82, Section 1, SLA 1985, Temporary and Special Acts.

This act received minor attention in recent public trust cases, but has not yet been used as a basis for decision in any public trust litigation.

Alaska caselaw on the public trust doctrine. Two important 1988 cases tell us most of what we know about judicial policy on the public trust doctrine. First, however, we will examine the earlier cases that brush lightly across the doctrine.

In Wernberg v. State,³⁶ the court found a highway bridge obstruction to the plaintiff's tidewater access to deep waters too be a compensable taking. In so finding, the court rejected the state's argument that Article VIII permitted the taking of private littoral rights without compensation, citing Section 3.

In State Dept. of Natural Resources v. City of Haines,³⁷ the state argued that its public trust obligations should prevent an abandonment of public use by operation of a law passing tidelands to Alaskan cities. The court did not rule on the public policy argument, but noted the city's response that it too was subject to the same public trust obligations as the state.

In State v. Ostrosky,³⁸ the court interpreted the 1972 amendment to Article VIII, Section 15, providing for limited entry regulation of the state's fisheries, to be applicable to all sections of the constitution defining state fisheries as a common use resource. Judge Rabinowitz' dissent argued that while the limited entry amendment did in fact apply to Article VIII, Section 3, that clause mandated implementation of the least restrictive means possible.³⁹

³⁶ 516 P.2d 1191 (1973).

³⁷ 627 P.2d 1074 (1981).

³⁸ 667 P. 2d 1184 (1983), appeal dismissed, 467 U.S. 1201 (1984).

³⁹ In Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256 (1988), plaintiff's challenged the regulatory scheme for a non-distressed fishery. The court noted the tension between the limited entry amendment to the constitution and Article VIII, Section 3 and 15's common use directives, and agreed with the Rabinowitz dissent in Ostrosky

The following two 1988 cases address directly the application of the public trust doctrine in Alaska. In CWC Fisheries, Inc. v. Bunker,⁴⁰ the court examined the tidelands conveyance provisions of the Alaska Land Act. Plaintiffs owned title to a tideland tract and sought ejectment of defendant, who had engaged in set-net fishing on the same site for 20 years. Defendant argued, and the court agreed, that ownership of the tidelands was necessarily subject to a public right of entry for purposes of navigation, commerce, and fisheries. The court adopted the Illinois Central test to require that a conveyance of tidelands free of public trust obligations must be made (1) in furtherance of a specific public trust purpose, and 2) without substantial impairment of the public's interest in the land conveyed. The court then found the tideland conveyance conflicted with the first prong of the Illinois Central test, relying in part on Article VIII, Section 3 as evidence of a public trust mandate to the legislature. The court further found that a statutory scheme as broad as the tidelands conveyance statute could not possibly have been intended to give away the public trust interest in vast amounts of Alaska's shoreline.⁴¹ It is especially noteworthy that the Alaska court cited and relied on the leading California⁴² and Washington state cases,⁴³ cases that have gone the farthest in broadly construing the public trust doctrine.

that fisheries regulation should encroach as little as possible, and within constitutional guidelines, on common use resources.

⁴⁰ 755 P.2d 1115 (1988).

⁴¹ The court also said that where the conflict at issue is between two public trust uses (not the case here), the legislature will be granted broad authority to prioritize those uses.

⁴² The court cites with approval the Mono Lake case, National Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr.346, 658 p.2d 709, cert. denied, 464 U.S. 977 (1983); Marks v. Whitney, 6 Cal.3d 251, 98 Cal.Rptr.790, 491 P.2d 374 (1971).

⁴³ Orion Corp. v. State, 109 Wash.2d 621, 747 P.2d 1062 (Wash. 1987).

The other 1988 case that adds significantly to our knowledge of the public trust doctrine in Alaska is Owsichek v. State Guide Licensing and Control Board.⁴⁴ The Court again relied on Article VIII, Section 3, this time to invalidate the state's hunting guide licensing statute. AS 08.54 provides for the establishment of exclusive areas to which hunting guides receive permits to conduct commercial guide business. Despite specific legislative enactments, including retroactive reform measures, the court held such exclusive use permits to be unconstitutional, in violation of the common use clause, absent a constitutional amendment similar to Article VIII, Section 15's limited entry clause. The court noted that Article VIII, Section 3 provides "independent protection of the public's access to natural resources." Finally the court stated that the ruling in this case was not meant to challenge leasing and concession programs that are of limited duration and subject to competitive bidding.

Alaska constitutional, statutory, and judge-made law, is clearly launched down the public trust doctrine path. Whether and to what extent it will continue down that path cannot be judged with certainty at this time, but the strength of the constitutional and statutory language, the importance of natural resources in Alaska, and the character of the Alaska Supreme Court's decisions on the doctrine suggest that the court will likely follow an approach similar to California. Our conclusions, which follow, assume that the Alaska cases continue to apply, and to develop the public trust doctrine.

⁴⁴ 763 P.2d 488 (1988).

CONCLUSIONS.

What impact might the public trust doctrine have on the issues raised by oil transportation and oil spills in Alaska?

a) *The public trust doctrine as a basis for legislation.* First, the federal preemption issue should be noted. This issue is being covered by Professor Allison Reiser and thus will not be analyzed here, other than to say that it is an important, pervasive issue. Although no cases seem to have addressed the question directly, it seems likely that the courts will tend toward finding no preemption when public trust resources are involved - because of the traditionally strong state interest in managing these resources.

The public trust doctrine can serve as the basis for state legislation. This is true whether the doctrine appears in the Constitution, as it does in Article VIII, Section 3 of the Alaska Constitution, or whether it is a product of common law court decisions. In Alaska it is not yet clear whether the public trust doctrine provision of the constitution is exactly the same as the common law doctrine, or is greater, lesser, or significantly different than the common law doctrine. One thing is clear, however. In Alaska the public trust doctrine applies to land as well as to waters and their beds, because the Constitution, Article VII, Section 3, *provides for protection of wildlife and does not confine that protection to water related areas.*

One of the clearest examples of using the public trust doctrine as a basis for legislation is illustrated in Orion Corporation v. State.⁴⁵ In 1971 the Washington legislature enacted the Shoreline Management Act. Under that Act cities and counties zoned all lands within 200 feet of wetlands, beds of rivers, streams, lakes, and the sea to mean high tide. Under this state authority the county had zoned tidelands owned by the Orion

⁴⁵ 109 Wash.2d 621, 747 P.2d 1062 (Wash. 1987).

Corporation for natural uses, in other words, prohibiting filling and construction of houses as Orion planned. Orion brought suit claiming that the zoning was an unconstitutional "taking" of its property. But the Washington Court held that these tidelands were subject to the public trust doctrine, from long prior to Orion's acquisition of title and because of the existence of this public "easement" the zoning was justified and did not raise "takings" questions. The zoning was an acceptable means of protecting these public trust resources.

Such an analysis means that the standard constitutional challenge - that the zoning or other regulations "go too far", or otherwise violate constitutional due process or uncompensated takings rules must fail. If the public has an easement on the property, and it antedates the private owners title, then no "takings" issue remains.

A similar line of analysis applies to pollution control, including oil pollution. The reasoning goes this way. The public trust protects water quality; this is essential to protect fisheries and wildlife habitat. As the public trust doctrine dates from time immemorial, this means that it clearly antedates anyone's right to cause pollution, either by dumping wastes into public waters, or by appropriating and extracting waters that reduce assimilative capacity and worsen water quality, or that cause degradation of water quality by chemicals brought back to the stream by non point "return flows." Under this analysis the state is justified in adopting any level of water quality control it chooses. Again, no polluter can argue that he has a "vested property" right to continue depositing wastes, or extracting water, because all such rights are subject to the pre-existing burden of the public trust doctrine.

As applied to oil transportation or legislation concerning the control of spill risks, this approach allows the state to adopt any level of control it chooses, because it is protecting a public trust resource. Such controls might create higher standards for oil

transportation safety, zone against oil transportation facilities in ecologically sensitive areas, provide a basis (at least a political one, if not legal) for state oversight of federal activities that might adversely impact public trust resources, or squeeze federal preemption to its narrowest scope on the ground of traditional state control of public trust resources - regarding regulation of petroleum transportation as well as spill risks.

b) *The public trust doctrine as the basis for litigation.*

The state attorney general can enforce the public trust by bringing suit against anyone violating, or threatening to damage or destroy public trust resources. Moreover any citizen or group of citizens, or organization made up of citizens of the state can sue to enforce the public trust and protect public trust resources.⁴⁶ Such citizen suits are important where the attorney general declines to protect public trust resources, for whatever reason.

Litigation could be brought to enjoin oil transportation activity that happened to "fall between the cracks" of state or federal regulations. The public trust doctrine would provide its own standard absent a statutory or regulatory standard. The public trust doctrine, especially as constitutionalized in Alaska, provides a basis for striking down legislation, regulations, or other state actions that adversely impact public trust resources.

Nonpoint pollution, including pollution from oil transportation, is a difficult problem to solve, so difficult in fact, that congress only authorized its "study" in the 1972 Federal Water Pollution Control Act Amendments, and again in further amendments in 1987. No comprehensive regulatory scheme for controlling this increasingly important form of pollution has ever been adopted, or mandated, by Congress. Because of this lack of regulation, the public trust doctrine could be an important methodology for getting hold of the problem. Any action that causes or contributes to lowering water quality, and which

⁴⁶ See *Marks v. Whitney*, 6 Cal.3d 251, 98 Cal.Rptr.790, 491 P.2d 374 (1971).

damages fish or wildlife habitat, is subject to judicial control under the public trust doctrine. The doctrine could be used, for example, to require that all oil transporters in the state use the "best practicable", or the "best conventional", or the "best available," technology, or even that oil transporters develop new technologies where existing ones are inadequate.

Aside from the preemption issue, these remedies would apply anywhere in the state of Alaska, including the territorial waters of Prince William Sound, Bristol Bay, or the Gulf of Alaska. And, as indicated above, any citizen, group of citizens, or organization, could institute a suit to protect public trust resources.

Depending on how the public trust doctrine is developed by the Alaska courts, it can become a powerful tool to regulate the more egregious problems posed by oil transportation and storage. Common law standards can be developed by the courts in such cases.

Under the proposed new federal oil spill liability law, states will possibly be given power to set "higher" standards than the federal act requires. These higher standards could be set either by legislation, or by judicial decisions protecting the public trust interest in resources.

The public trust doctrine is a powerful legal theory for protecting the environment against damage from oil spills. Although its scope has not been fully defined by the Alaska courts, the decisions on the doctrine to date indicate that it will be applied expansively by the Alaska courts. It can be an important tool in achieving the Commission's goal of better management of oil transportation and storage, over land, wetlands, coastal zone, and in coastal waters.

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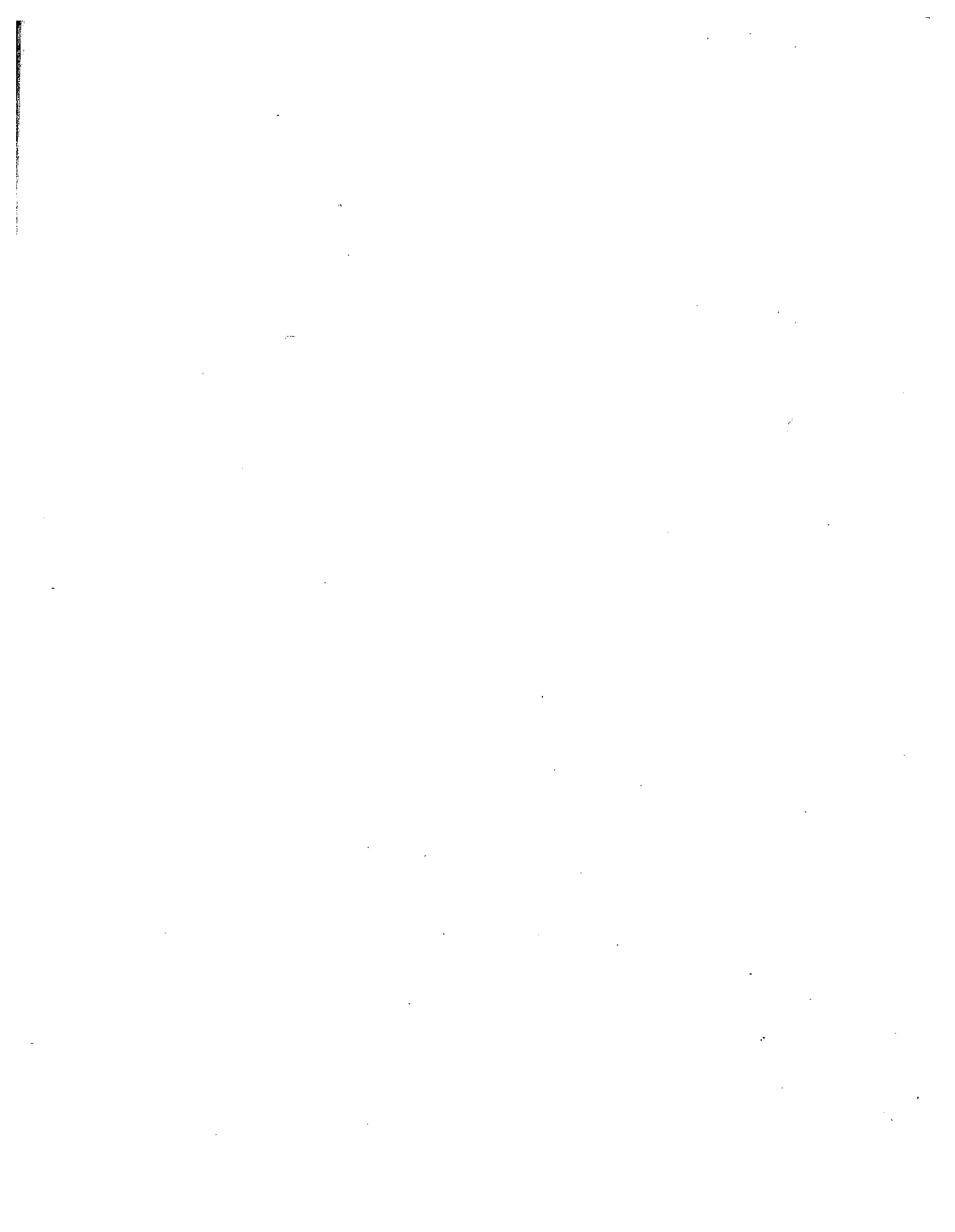
LEGAL RESEARCH REPORT

No. 9.2

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

Draft submitted: 13 December 1989
Principal Investigator: Harry Bader

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



FINAL

I. PROSPECTUS

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

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

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

II. INTRODUCTION

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

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

There are basically two types of compacts which can take on any one or part of three forms. The traditional compact is the multi-state agreement. A newer type, pioneered under the Delaware River Compact is a multi-state/federal organization. The forms of compact may be a self-sustaining service compact such as the New York Port Authority, which operates the New York City commercial port, or the

nonregulatory cooperative management agreement such as the Atlantic States Fisheries Commission, 56 Stat.267(1942), or a regulatory compact with substantive teeth such as the Northwest Power Planning Council, 16 USC 839. An effective compact among the Pacific states and provinces for the regulation of oil shipments would most effectively be an amalgamation of the regulatory and management forms.

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

III. PROSPECTS

WHAT IS A COMPACT?

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

The constitutional basis for compacts is found in article, I, section 10 clause 3, which holds that "... no state shall, without the Consent of Congress...enter into any Agreement or Compact with another state or with a foreign power." Through this simple clause, the Constitution recognizes the inherent sovereign power of states to form agreements aimed at regional problem solving. Because a compact is essentially a contract between states, the basic tenets of contract law have traditional been applied to

compact relationships. Pursuant to these agreements, the Supreme Court has confirmed that states have the ability to delegate their political powers to, and to devise financing for, the activities contemplated by compacts. Dyer Sims 341 US 22 (1951).

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

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

WHAT ARE THE POWERS OF A COMPACT?

Because a compact is approved by congress, the compact is federal, not state, law for consideration of Constitutional objections. Cuyler at 438. Therefore, a compact cannot, by definition, be a state law impermissibly interfering with interstate commerce or federal supremacy interests, nor do traditional pre-emption problems apply. This transformation occurs because Congress, in approving the agreement, exercises its legislative power that the compact threatens to encroach upon, and declares the compact to be consistent with Congress's supreme power in that area. Intake Water Company at 297. Therefore the compact agency may address resource problems with regulations that compacting members could not do as individual states. For example, many of the Alaska state regulations (SB 406) concerning oil tanker regulation, risk avoidance charges, the coastal protection fund, and tanker searches, prohibited by

federal district judge Fitzgerald in

Chevron v. Hammond in 1979, or dropped by the state after Ray v. Atlantic Richfield could, theoretically have been permitted to stand had they been enacted by a compact to which Alaska was a member. Likewise Alaska, through authority delegated by the compact commission, could exert regulatory controls over the North Slope production areas, the pipeline, terminal operations and off-shore production, even in areas otherwise pre-empted.

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

POLICY BENEFITS OF A COMPACT ORGANIZATION

Several benefits accrue from the structural organization and inherent powers of a compact. Chief among these benefits is enhanced state sovereignty over issues of

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

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

In addition to allowing states to travel waters normally reserved as a federal province, a compact necessarily increases an individual state's representational power within a given context. Alaska, for example, is only a voice of 3 within a din of 535 legislators in the federal Congress. Whereas in a Pacific states compact, Alaska could compose fully 25% of the decision making body as one of four equal partners.

Equally important is a compact's role in increasing regulatory responsiveness to community needs and values. This sensitivity to the local population is achieved because of the great accountability with a compact organization. Citizens can have

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

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

Enhanced oversight is another benefit. A good industry record for 12 years in Prince William sound led to complacency in enforcement of safety standards and preparedness which led to unsafe conditions and an inability to respond to the Exxon Valdez tragedy. If a particular state or agency is lulled into an ineffective enforcement role, the interests and agents of other states could stimulate additional oversight. Compacts increase the number of watch dogs by increasing the number of participant within the regulatory and enforcement scheme.

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

Compacts provide a unified and cohesive agency through which decision making is streamlined and coordinated. Such a management scheme would have

enhanced oil spill recovery efforts this past March. The Skinner-Reilly Report, prepared by the National Response Team for President Bush, found that the various contingency plans for Prince William Sound did not refer to each other or establish a workable response command hierarchy. This situation resulted in confusion and delay during the critical first days of the response in the Exxon oil spills, exacerbating the devastating environmental consequences.

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

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

HOW IS A COMPACT FORMED?

...questions of joining or not joining an interstate compact, or creating one, renewing or not renewing it, of appropriating money for its support, of sanctioning and implementing activities, are uniquely the responsibilities of the states and their people, and it is the state and their people which should have an intense concern for what they may be gaining, losing, delegating or benefiting through the path of interstate compacts

...

M. Ridgeway

Interstate Compacts: A Federal Question

1971

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

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

Because Congressional consent to begin negotiations is not mandated by the Constitution, a compacting team ought not to seek this protracted strategy before beginning substantive consultations. Many feel that having prior Congressional approval for negotiating enables Congress to guide the states and contributes significantly to eventual federal ratification chances. However, this advantage can typically be gained with the inclusion of a nonvoting federal official in the negotiating team.

Crucial to success has been the involvement of local leaders from potentially affected communities and interest groups. This does not mean allocating formal positions to such groups, but it does require the creation of a standardized mechanism of communication and meaningful participation. This approach not only expands the information horizon contributing to better compacts, but serves a legitimization

function, thereby reducing potentially disorientating opposition from within state. Rarely will Congress give its stamp of approval to a compact perceived as eviscerated internally by intra-state strife.

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

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

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

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

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

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

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

The extent of federal power to intervene in the internal affairs of an approved compact is the subject of much debate. While the courts have sidestepped this constitutional issue, dicta provides insight to the judiciary's hesitancy to permit wholesale federal intrusion into compact operations. "We have no way of knowing what ramification would result from a holding that congress has the implied constitutional power to alter, amend, or repeal its consent to an interstate compact. Certainly, in view of the number and variety of compacts in effect today, such a holding would stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts. No doubt the suspicion of even potential impertinency would be damaging to the very concept of interstate compacts." Tobin v. United States 306 F.2d 270 at 273 (1962).

WHAT ELEMENTS ARE NECESSARY FOR AN EFFECTIVE COMPACT DOCUMENT?

After the Clean Air act, a flurry of compacting activity erupted in the attempt to control regional air pollution. To assist congress in sifting through the flood of compact proposals, the Department of Health, Education, and Welfare created a set of Guidelines denoting key indicators of competent compact drafting. The indicators were expected to reveal which documents showed the highest potential for achieving their

stated goals. See: Air Pollution, 1968 Hearings on Air Pollution Compacts, S2350, S.J. Res. 95 Before the Subcommittee on Air Pollution, 90th Congress, 2nd sess. 3 (1968). Combined with subsequent Compact debates, a beacon can be constructed which provides safe passage for would be compact drafters. An enumerated discussion of important draft criteria, based upon the foregoing, follows.

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

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

The multistate agreement needs to also explain what type of administrative agency will effectuate its purposes. Two basic options are available. Each party state may use its own agencies if they appear to be fully equipped to carry out compact policy, or if the complexity of the arrangement necessitates, a special interstate agency may be created. The compact should be able to delegate authority, but it should not be required to refrain from taking enforcement action until other entities have had an opportunity to do so. In order to coordinate its activities with the federal government, the compact ought to be authorized to designate liaisons to work and communicate with federal agencies involved with the same regional problems.

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

Finally, in order to retain the flexibility demanded in the field of resource protection, a host of housekeeping provisions must be contained within the documents. The organization should have the power to conduct investigations, make studies, hold

hearings, prepare findings, adopt rules and regulations, carry out enforcement actions (including litigation), and the ability to enter into contracts.

2. Each state must have equal representation

It is well settled that compacting states possess equal voting power, despite economic, population, and geographic disparities. Allocating several voting representatives to each state allows a greater range of expertise to be present on the authoritative body, as well as minimizing the potential of special interest capture of a particular state or representative. Another important provision concerning representation involves the ability of states to render their representative accountable and sensitive to their constituency. The accountability dilemma is a real quandary because interstate compacts transcend state lines and political units, thereby circumventing the accustomed channels and structures of responsibility in the American political system. The apparent freedom that compacts enjoy from their home legislatures must be circumscribed to prevent administrative tyranny without emasculating the agency, rendering it unfit for achieving its mission.

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

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

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

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

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

6. A valid regionalist justification must be presented.

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

7. Miscellaneous

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

No clearer example exists of the consequences to Alaska due to curt misinterpreting of state intent than the Ninth circuit's inquiry into Alaska's definition of "rural" under the subsistence provisions found in ANILCA. Kenaitze Indian Tribe v. Alaska 860 F.2d. 312,316 (1988). In that case the court paid no special attention to the

uniqueness of Alaska's remote bush regions, and held that what constituted rural in Iowa would serve as an appropriate definition for rural in Alaska. This decision, which devastated Alaska's state subsistence provisions in 1988, was a result due in part to the state's failure to adequately explain the rationale employed in reaching this particular definition. The lesson of this case ought not to be lost on compact designers attempting to protect resources under the unique conditions faced in the Pacific Rim Region.

IV POLICY APPLICATIONS FOR RESOURCE PROTECTION

This section attempts to portray the spectrum of possibilities available under compact theory for regulation the oil industry, federal agencies, and state government, in order to protect the natural resources for which the Pacific Rim is famed. This is by no means an exhaustive analysis, rather, its intent is merely informative and designed to reveal the changes that can be reaped, both minor and radical, under the case law offer by Cuyler and its progeny.

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

for the world. Travelling past these environmentally sensitive shores, tankers carry one-fifth of the country's crude oil consumption. Cumulatively, these factors form a regional portrait, separate from the broad stroke of the federal brush.

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

When assessing these policy applications, bear in mind that some would require express federal consent acknowledging subtle changes to the scope of the Ports and Waterways Safety Act and the Clean Water Act. Finally, it is prudent to note that the Alaska legislature has already invited the application of compact to the task of oil pollution control through AS Section 47.04.100 (1984), authorizing the Governor to pursue compacting in order to achieve the purposes of oil pollution protection. The basis of a compact may be premised upon the very effective Pacific Oil and Ports Group created in 1975 by Dennis Dooley of the Alaska Oil Tanker Task Force under the direction of Walt Parker. The group involved Alaska, California, Idaho, Oregon, and Washington, and promulgated a set of Tanker standards.

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

Findings:

1. Contingency Planning

The sheer multitude of plans and agencies involved in oil recovery stymied effective response because of a fundamental failure to unify under a coordinated

command hierarchy. Organizational responsibilities were unclear, decision making wallowed as a "team concept" broke down into adversarial relationships.

2. Coast Guard

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

3. Department of Environmental Conservation

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

4. Industry

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

5. Interior Pipeline Maintenance and spill Prevention

Over the past 12 years, more than 1.5 million gallons of hot crude oil have boiled across fragile tundra and fouled miles on Interior streams. Innovations in leak detection and response technology have not been adopted by Alyeska. DEC has not pursued inspection of strategic spill equipment caches. A litany of spill examples bodes ill for the lands traversed by the pipeline. Past terrestrial spills have been surprisingly large, due in part to the company's reliance on visual or olfactory detection of leaks.

The 650,000 gallons that poured out at Steel Creek and the 240,000 gallons that polluted 30 miles of the Atigun Valley were all detected by human inspection, rather than electronic or mechanical means. Pipe check valves and bends have all been the source of major spills totalling 1000,000's of gallons. Aging equipment and corrosion offer new sources for concern and need immediate regulation and monitoring. A spill on the Yukon or Tazlina and their many tributaries could devastate the subsistence fishery upon which tens of thousands of rural Alaskans and an ancient culture depend.

Recommendations

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

Recommendations for an Improved Oil Spill Prevention Regulatory System: LEGAL RESEARCH REPORT

Soon after the oil tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound on March 24, 1989, Alaska Sea Grant assembled a team of legal scholars to explore legal tools that the State of Alaska might use to bolster its oversight of marine transport of crude oil and other hazardous substances. This book is the Alaska Sea Grant Legal Research Team's final report, published in 1990. The team was composed of Zygmunt Plater (coordinator), Boston College Law School; Alison Rieser, University of Maine Law School; Ralph Johnson, University of Washington Law School; and Harry Bader, University of Alaska Fairbanks College of Natural Resource Development and Management.

The Alaska Oil Spill Commission, appointed in 1989 by Governor Steve Cowper, adopted many of the recommendations contained in this report. That action led to profound improvements in the way Alaska and its citizens oversee the marine transport of hazardous substances. This eight-section Alaska Sea Grant research report was published as Appendix M in the Alaska Oil Spill Commission's final report to the governor, titled *Spill: The Wreck of the Exxon Valdez*.

Through this report and associated collaboration with the Alaska Oil Spill Commission, the Alaska Sea Grant Legal Research Team helped the State of Alaska recognize and exercise its right to petition the U.S. government for federal rulemaking. This legal tool was wielded by the State of Alaska to induce the federal government into including components in federal law that, in effect, strengthened Alaska's oversight of how the oil industry operates in Alaska. Elements of the ASG legal research helped inform the content of the federal Oil Spill Act of 1990.

Another key recommendation of the Alaska Sea Grant Legal Research Team, adopted by the State of Alaska as presented by the Alaska Oil Spill Commission, was establishment of citizen advisory councils. These diversely populated citizen oversight bodies would provide a substantive means by which Alaskans at the grassroots level could influence how industry and government maintains and improves its joint responsibility to prevent and effectively respond to oil spills, and deal with related problems and issues. Dubbed "regional citizens advisory councils" (RCAC), two were formed and remain active: the Prince William Sound Regional Citizens' Advisory Council and the Cook Inlet Regional Citizens Advisory Council.

The Alaska Oil Spill Commission, and subsequently the State of Alaska, adopted a recommendation by the Alaska Sea Grant Legal Research Team that the State of Alaska set up a citizen council to oversee the safe transport of oil, gas, and other hazardous substances. Alaska Sea Grant Legal Research Team member, Harry Bader, was appointed chair and a work plan was written. However, the council was disbanded in 1994.

Cover photo: A tanker escort tugboat operated by the Alyeska Pipeline Service Company in the company's Ship Escort and Response Vessel System (SERVS) steams away from the Valdez Marine Terminal. Developed as one of many safety improvements after the *Exxon Valdez* oil spill, a fleet of these powerful escort tugs helps ensure the safe passage of oil tankers to and from the Valdez Marine Terminal. The terminal is the loading point for Alaska's crude oil that is pumped south some 800 miles across Alaska from the Prudhoe Bay oil field to Valdez in the Trans Alaska Pipeline System. *Photo by Kurt Byers, Alaska Sea Grant.*

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