

**United States v. Locke,
529 U.S. 89 (2000)***

TABLE OF CONTENTS

I.	INTRODUCTION	951
II.	BACKGROUND	954
	A. <i>The Locke Decision</i>	954
	1. <i>Factual Background</i>	954
	2. <i>The Holding</i>	959
	B. <i>Federal Preemption and Other Applicable Law</i>	962
	1. <i>Legislative History: Ocean and Coastal Law</i>	962
	2. <i>International Treaties</i>	968
III.	THE <i>LOCKE</i> DECISION IS DISTINGUISHABLE	969
IV.	CONCLUSION	971

I. INTRODUCTION

The Ports and Waterways Safety Act (PWSA) authorizes, but does not require, the United States Coast Guard to enact prophylactic measures for regulating ocean vessel traffic, protecting waterway navigation, and protecting the marine environment.¹ The United States Supreme Court recently decided that individual states do not have the authority to enact oil tanker laws and regulations that are more restrictive than the federal

* J.D. candidate 2001, University of San Diego School of Law; M.A. Education 1996, Pepperdine University; M.B.A. 1996, Pepperdine University; B.A. Political Science 1994, Pepperdine University. I would like to thank my parents, family, and friends for their continuing love, support, and understanding throughout my academic career.

1. 33 U.S.C. § 1223(a) (1994). The Tank Vessel Act of 1936, which includes PWSA, was originally enacted to “effect a ‘reasonable and uniform set of rules and regulations concerning ship construction . . .’” *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 166 (1978) (quoting H.R. REP. NO. 74-2962, at 2 (1936)).

PWSA. Citing the Supremacy Clause,² the Supreme Court, in *United States v. Locke*,³ held that a federal determination that a vessel is sufficiently safe to navigate United States waters trumps contrary or inconsistent state determinations.⁴ This Casenote questions the *Locke* Court's holding.

Prior to the *Locke* decision, coastal states such as Washington, pursuant to the "savings clauses" contained in the Oil Pollution Act of 1990 (OPA 90),⁵ enacted more stringent laws than those passed by Congress. OPA 90 and its savings clauses⁶ establish liability standards and financial prerequisites associated with the release of oil into the marine environment.⁷ The State of Washington maintained that Congress "expressly indicated its intent *not* to preempt state law in the

2. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.") (emphasis added)).

3. 529 U.S. 89 (2000).

4. *Id.* at 115–16.

We have determined that Washington's regulations regarding general navigation watch procedures, English language skills, training, and casualty reporting are pre-empted. . . . The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate.

Id. at 116–17.

5. 33 U.S.C. § 2718 (1994). The Oil Pollution Act of 1990 was enacted subsequent to the 1989 Exxon Valdez disaster, in which more than 53 million gallons of crude oil spilled into Prince William Sound, Alaska. The Exxon Valdez spill was the largest in United States history. Both Congress and the State of Washington responded. See *United States v. Locke*, 529 U.S. at 94. The Oil Pollution Act outlines a comprehensive strict liability system. It holds the responsible party strictly liable for all clean-up costs and resultant damages flowing from an oil spill.

[T]he responsible party must report the oil spill if it is aware of the incident, provide all reasonable requested cooperation with officials responsible for removal of the oil, comply with any Section 311 clean-up order, and establish that it exercised due care with respect to the handling of the oil.

JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW: CASES AND MATERIALS* 647 (3d ed. 1999); see, e.g., *Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Del.*, 122 F.3d 1062, 1997 WL 560047 (4th Cir. 1997) (unpublished table decision).

6. In a statute, a savings clause is "an exception of a special thing out of the general things mentioned in the statute. Ordinarily a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted repeal." *BLACK'S LAW DICTIONARY* 698 (5th ed. 1983). At issue in *Locke* is whether the OPA 90 savings clauses protect state authority to enact oil spill prevention regulations. *United States v. Locke*, 529 U.S. at 102.

7. See generally Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 *TUL. MAR. L.J.* 481 (2000) (discussing the liabilities imposed during the full tenure of OPA 90).

field of oil-spill prevention when it passed § 1018 of the Oil Pollution Act of 1990.”⁸ The Supreme Court declined to apply such a broad interpretation of section 1018. The Court emphasized the importance of a uniform federal regime and applied an expanded preemption analysis to strike down most of the challenged Washington laws concerning oil tankers.⁹

Locke can be distinguished from the cases upon which the Supreme Court based its decision.¹⁰ Further, an application of the proper constitutional standards and concurrent related federal statutes for determining state power to regulate coastal waterways does not support the *Locke* Court’s conclusion.¹¹ Consequently, this Casenote argues that while the importance of a uniform federal regime controlling the design of oil tankers is

8. *Intertanko v. Locke*, 148 F.3d 1053, 1059 (9th Cir. 1998) (emphasis added), *rev’d sub nom.* *United States v. Locke*, 529 U.S. 89 (2000). Section 1018 of OPA 90, codified at 33 U.S.C. § 2718, states in pertinent part:

(a) Preservation of State authorities . . .

Nothing in this Act or the Act of March 3, 1851 shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State. . . .

(c) Additional requirements and liabilities; penalties

Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.

33 U.S.C. § 2718 (1994).

9. *United States v. Locke*, 529 U.S. at 96–100.

10. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992) (declining to give broad interpretation of savings clause where such interpretation disrupts federally established regulatory scheme); *City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) (“[A] federal agency [such as the Coast Guard] . . . may pre-empt state regulation’ and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.” (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368–69 (1986))); *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 152–54 (1982) (explaining field preemption as leaving no provision for state regulation of matters at issue in the present case, such as design, construction, and manning of tankers); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 174 (1978) (holding that certain state tanker specifications, such as pilotage requirements, limitations on tanker size, and tanker design and construction rules, are preempted by PWSA and Coast Guard regulations promulgated under PWSA).

11. *See* discussion *infra* Part II.B.1.

appropriately considered, the Court's decision goes too far by undervaluing the development and implementation of state coastal management programs¹² and other federal environmental and maritime statutes.

II. BACKGROUND

A. *The Locke Decision*

1. *Factual Background*

The State of Washington holds some of the Nation's most vital waters.¹³ The inland sea of Puget Sound¹⁴ is of particular significance to oil vessel traffic. Under the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region of 1979,¹⁵ traffic inbound from the Pacific Ocean through the Strait of Juan de Fuca, regardless of United States or Canadian destination, is routed through Washington's waters. Outbound traffic through the Strait of Juan de Fuca, regardless of United States or Canadian origination, is directed through Canadian waters.¹⁶

Washington's Puget Sound is the destination and point of shipment for

12. "Management program" is the term to refer to the process by which a coastal state . . . proposes . . . to manage land and water uses in the coastal zone so as to reduce or minimize a direct, significant and adverse affect upon those waters, including the development of criteria and of the governmental structure capable of implementing such a program. . . . The Committee does not intend to provide for management programs that are static but rather to create a mechanism for continuing review of coastal zone programs on a regular basis and to provide a framework for the allocation of resources that are available to carry out these programs.

S. REP. NO. 92-753, at 10 (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4784. For additional discussion on management programs under the Coastal Zone Management Act (CZMA) generally, see Jack H. Archer & Robert W. Knecht, *The U.S. National Coastal Zone Management Program—Problems and Opportunities in the Next Phase*, 15 COASTAL MGMT. 103, 108 (1987).

13. These include the Columbia River estuary, which divides Washington from Oregon; Grays Harbor; Willapa Bay; and most significantly Puget Sound. For additional information about the significance of these resources to the American economy and the current issues facing commerce in these waterways, see *13th Coast Guard District*, at <http://www.uscg.mil/d13/> (last modified Sept. 2000).

14. Puget Sound is a 2,500 square mile inland sea consisting of inlets, bays, channels, and more than 200 individual islands. Puget Sound sustains fisheries, plant life, and animal life of immense value to the Nation and to the world. *United States v. Locke*, 529 U.S. at 95.

15. *Maritime Matters: Vessel Traffic Management System for the Juan de Fuca Region*, Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377, 380.

16. *Id.* For additional information regarding the Juan de Fuca Region and the laws governing its commercial activities, see *USCG Puget Sound Vessel Traffic Service*, at <http://www.uscg.mil/d13/units/vts/cvtsinfo.html> (last modified Feb. 6, 2000) and *People for Puget Sound*, at <http://www.pugetsound.org> (last visited Nov. 27, 2000).

huge volumes of oil and petroleum products.¹⁷ Crude oil from Alaska and other oil drill sites is regularly shipped via tankers into Puget Sound to the many refineries located adjacent to the Sound in oil refinery ports.¹⁸ The immensity of these vessels,¹⁹ the frequency of transport,²⁰ and the millions of tons of crude oil transported by such vessels,²¹ often with but one or two layers of metal separating the crude oil from the fragile Pacific waters, present serious risks.²² To help protect against these risks, the Washington legislature created the Office of Marine Safety.²³ The Office of Marine Safety was tasked with establishing “standards for spill prevention plans to provide ‘the best achievable protection [BAP] from damages caused by the discharge of oil.’”²⁴ The Office of Marine Safety accordingly promulgated the oil tanker design, equipment, reporting, and operating requirements at issue in *Locke*.²⁵

17. The total oil processed in Puget Sound annually is in excess of 7.6 billion gallons. See *Chapter 3: Oil Refineries: Introduction*, at <http://www.pugetsound.org/p2/reportfolder/ch3a.html> (1996).

18. “Washington’s close proximity to Alaskan crude oil, and the ease of shipping that oil to Puget Sound, is the main reason that crude oil is refined in the Puget Sound region. This has made Washington the sixth largest oil refining state in the country.” *Id.* (citation omitted).

19. Some tankers have cargo capacities in excess of 175,000 deadweight tons. See *United States v. Locke*, 529 U.S. at 96, (citing 1 M. TUSIANI, *THE PETROLEUM SHIPPING INDUSTRY* 79 (1996)).

20. For additional commercial information on Puget Sound, see *Puget Sound Business Journal*, at <http://seattle.bcentral.com/seattle/> (last modified Jan. 29, 2001).

21. Of the many refineries in Puget Sound, five of the largest “process over 500,000 barrels of oil per day (one barrel of oil equals 42 gallons).” This equates to 21 million gallons of oil processed per day. *Chapter 3: Oil Refineries: Introduction*, at <http://www.pugetsound.org/p2/reportfolder/ch3a.html> (1996).

22. Washington’s waters have been subjected to oil spills and further threatened by near misses. In December 1984, for example, the tanker ARCO Anchorage grounded in Port Angeles Harbor and spilled 239,000 gallons of Alaskan crude oil. The most notorious oil spill in recent times was in Prince William Sound, Alaska, where the grounding of the *Exxon Valdez* released more than 11 million gallons of crude oil and, like the *Torrey Canyon* spill before it, caused public officials *intense* concern over the threat of a spill.

United States v. Locke, 529 U.S. at 96 (emphasis added).

23. *Id.* at 97; see also *About MSO Puget Sound*, at <http://www.uscg.mil/d13/units/msopuget/welcometomsops.html> (last modified Sept. 1, 2000).

24. *United States v. Locke*, 529 U.S. at 97 (quoting WASH. REV. CODE § 88.46.040(3) (1994)).

25. *Id.* at 97.

The district court summarized the challenged regulations as follows:

1. Event Reporting – WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that

-
- occur thereafter for tankers that operate in Puget Sound.
2. Operating Procedures – Watch Practices – [WAC 317-21-200]. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the “standard practice throughout the owner’s or operator’s fleet,” and which organizes responsibilities and coordinates communication between members of the bridge.
 3. Operating Procedures – Navigation – WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.
 4. Operating Procedures – Engineering – WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.
 5. Operating Procedures – Prearrival Tests and Inspections – WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.
 6. Operating Procedures – Emergency Procedures – WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.
 7. Operating Procedures – Events – WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.
 8. Personnel Policies – Training – WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.
 9. Personnel Policies – Illicit Drugs and Alcohol Use – WAC 317-21-235. Requires drug and alcohol testing and reporting.
 10. Personnel Policies – Personnel Evaluation – WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.
 11. Personnel Policies – Work Hours – WAC 317-21-245. Sets limitations on the number of hours crew members may work.
 12. Personnel Policies – Language – WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.
 13. Personnel Policies – Record Keeping – WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.
 14. Management – WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.
 15. Technology – WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

The regulations at issue include a variety of policies and procedures intended to prevent oil and petroleum-related disasters. These regulations include accident and other event reporting requirements, navigational and lookout practices, engineering and monitoring practices, prearrival tests and inspections, emergency procedures, and various personnel training and skill requirements.²⁶

The Strait of Juan de Fuca is a major artery to the heart of oil refining and processing facilities in Puget Sound. Many of the regulations appear to be drafted with the peculiarities of these waters in mind. Under the Washington rules, noncompliant vessels may be sanctioned, operationally restricted, or most significantly, denied access or entry into state waters.²⁷ Intertanko,²⁸ a confederation of impacted tanker fleets, challenged the rules on several related grounds. First, Intertanko argued that the State of Washington, through its BAP policy, substantially and impermissibly invaded the regulatory province of the Federal Government.²⁹ Second, Intertanko asserted that the imposition of such regionally specific and unique requirements necessarily defeats any national attempt to achieve a uniform standard for petroleum transport by sea.³⁰ Third, Intertanko contended that the allowance of such

16. Advance Notice of Entry and Safety Reports – WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.

Intertanko v. Locke, 148 F.3d 1053, 1057–58 (9th Cir. 1998) (citing *Intertanko v. Lowry*, 947 F.Supp. 1484, 1488–89 (W.D. Wa. 1996)), *rev'd sub nom.* *United States v. Locke*, 529 U.S. 89 (2000).

26. See *Intertanko v. Locke*, 148 F.3d at 1057–58.

27. WASH. REV. CODE §§ 88.46.070–.090 (West 1996).

28. International Association of Independent Tanker Owners (“Intertanko”) is a trade association representing “approximately 80% of the world’s independently owned tanker fleet.” *United States v. Locke*, 529 U.S. at 1142. About “60% of the oil imported to the United States is carried on Intertanko vessels.” *Id.* For additional information on Intertanko, see *Intertanko: For Safe Transport, Cleaner Seas and Free Competition*, at <http://www.intertanko.com/> (last visited Nov. 27, 2000).

29. *United States v. Locke*, 529 U.S. at 97. See also *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (stating that “[t]he purpose of Congress is the ultimate touchstone” of preemption analysis (quoting *Retail Clerks v. Schermmerhorn*, 375 U.S. 96, 103 (1963))); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that analyses of preemption issues begin “with the assumption that the historic police powers of the States [are] not to be superseded by [Federal Acts] unless that [is] the clear and manifest purpose of Congress.”).

30. See *United States v. Locke*, 529 U.S. at 97. The arguments raised in this case by Intertanko are consistent with its stated mission to advance “free competition” in the oil transport industry. See *Intertanko: For Safe Transport, Cleaner Seas and Free*

differing regulatory regimes, within local political subdivisions of each maritime nation, would render impossible the goal of national governments to develop effective environmental and safety standards.³¹

To underscore Intertanko's position and solicit intervention by the United States, thirteen concerned governments of ocean-going nations expressed significant distress, consistent with Intertanko's position, through a diplomatic note directed to the United States.³² Specifically, the note expressed apprehension at the inconsistent regulations among the several states within the United States.³³ It further contended that such lack of uniformity would inescapably result in uncertainty and confusion within the global marketplace with regard to transoceanic petroleum shipment and transfer.³⁴ Lastly, the note warned that such inconsistency would set an unwelcome precedent for the thirteen signers and other federally administered countries.³⁵ In sum, Intertanko and the diplomatic note sought to have the Washington State regulations struck down and argued that the PWSA and OPA 90 be recognized as the exclusive and controlling oil tanker regime throughout all United States ports and waterways.³⁶

Groups interested in environmental preservation intervened in defense of the Washington laws challenged by Intertanko.³⁷ The state defendants cited section 1018 of OPA 90 as Congress' express indication of intent to abstain from preempting state law in the field of oil spill prevention.³⁸ Specifically, the state defendants argued that "by providing that nothing in OPA 90 preempts states from imposing 'additional liability or requirements with respect to the discharge of oil or other pollution by oil,' . . . § 1018 grants states broad authority to enact oil-spill prevention regulations."³⁹ Intertanko counterargued that the savings clauses only

Competition, supra note 28.

31. *United States v. Locke*, 529 U.S. at 97.

32. *Id.* at 98. (citing Note Verbale from the Royal Danish Embassy, to the U.S. Dep't of State 1 (June 14, 1996)).

33. *Id.*

34. *See id.* The United States declined to intervene at the district court level. However, the United States did intervene at the Ninth Circuit level. *Id.*

35. *Id.*

36. John A. Duff, *Supreme Court Strikes Down State Tanker Laws*, 22(1) COASTAL SOC'Y BULL., 2000, at 23.

37. Three environmental organizations intervened on behalf of the state defendants at the appellate level. These groups included, "the Washington Environmental Council, the Natural Resources Defense Council, and Ocean Advocates." *Intertanko v. Locke*, 148 F.3d 1053, 1058 (9th Cir. 1998), *rev'd sub nom. United States v. Locke*, 529 U.S. 89 (2000). Although the issues in *Locke* arguably extend to other states beyond the State of Washington, only Washington and its environmental groups were involved in this litigation.

38. 33 U.S.C. § 2718 (1994); *Intertanko v. Locke*, 148 F.3d at 1059.

39. *Intertanko v. Locke*, 148 F.3d at 1059 (quoting 33 U.S.C. § 2718(a)).

apply to state laws concerning liability and penalties, not to the OPA 90 Titles concerning oil spill prevention.⁴⁰ Although the Ninth Circuit found the state defendants' argument persuasive,⁴¹ the Supreme Court applied a much narrower interpretation of the savings clauses within OPA 90.⁴²

In response to Intertanko's contention that the Washington laws necessarily frustrate international uniformity in tanker regulation, the state defendants urged that international agreements do not require strict international uniformity, but rather a commitment to certain identified minimum standards.⁴³ Intertanko asserted that the more significant problem was inconsistency within a nation's borders, not exclusively international inconsistency.⁴⁴ Unlike the Ninth Circuit, the Supreme Court gave substantial weight to the international and intranational consistency argument offered by Intertanko. To fully understand how the Supreme Court reached its decision, it is necessary to review its actual holding and the reasons on which the Supreme Court rested its decision.

2. *The Holding*

The district court granted the State of Washington's motion for summary judgment, effectively upholding each of the challenged provisions.⁴⁵ Intertanko filed a timely appeal with the Ninth Circuit. After finding that the savings clauses of OPA 90 apply to all eight Titles of the Act, the Ninth Circuit proceeded with a federal preemption analysis.⁴⁶ "Because § 1018 of OPA 90 does not by its plain language

40. *Id.* See *supra* text accompanying note 6.

41. *Intertanko v. Locke*, 148 F.3d at 1059–60.

42. *United States v. Locke*, 529 U.S. 89, 105 (2000).

43. *Intertanko v. Locke*, 148 F.3d at 1063.

44. *Id.* The international argument is clearly related to the intranational argument. It is arguably more difficult to reach international agreements when the individual signatories have inconsistent maritime laws within their own borders.

45. *Intertanko v. Lowry*, 947 F.Supp. 1484, 1500–01 (W.D. Wash. 1996).

46. See *Intertanko v. Locke*, 148 F.3d at 1060–69. The Supreme Court has recognized three separate forms of federal preemption. Conflict preemption is "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 100–01 (1989) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Field preemption occurs when the federal law is so complete "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141.

affect preemption by federal Acts other than OPA 90, [the court considered] whether such Acts otherwise impliedly or expressly preempt the BAP Regulations.”⁴⁷ The Ninth Circuit found only one of the sixteen challenged provisions to be preempted by federal law.⁴⁸ Washington’s “technology” requirements,⁴⁹ which included a mandatory global positioning system, two separate radar systems, and an emergency towing system, were preempted by the PWSA.⁵⁰ This conclusion was based on the prior Supreme Court decision in *Ray v. Atlantic Richfield Corp.*⁵¹ The Ninth Circuit held that “the navigational equipment requirements imposed [in WAC section 317-21-265] are virtually indistinguishable from the radar and navigation devices that the *Ray* Court found to be regulated preemptively by the PWSA.”⁵²

The Washington Tanker Law challenged in *Ray* required ‘[t]wo radars in working order and operating, one of which must be collision avoidance radar.’ . . . The . . . Court, after reviewing the requirements of the Washington Tanker Law, including the radar and navigational equipment requirements, stated that ‘*the foregoing design requirements, standing alone, are invalid in light of the PWSA and its regulatory implementation.*’⁵³

Viewing the regulations as substantially similar, the Ninth Circuit accordingly declined to uphold Washington’s technology requirements in *Locke*.

On appeal, the Supreme Court expanded the preemption analysis. First, it found that the Ninth Circuit had interpreted the savings clauses of OPA 90 in a manner too broad to pass muster.⁵⁴ Second, the Court expanded the application of *Ray* by expressly including the entirety of Title II of PWSA in its purview.⁵⁵ The combination of these holdings

153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Express preemption is where Congress explicitly states a conscious intent to usurp state law in the text of the actual statute. See *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992).

47. *Intertanko v. Locke*, 148 F.3d at 1060.

48. See *id.* at 1066.

49. See *supra* text accompanying note 25.

50. See *Intertanko v. Locke*, 148 F.3d at 1066.

51. 435 U.S. 151, 160 (1978).

52. *Intertanko v. Locke*, 148 F.3d at 1066.

53. *Id.* (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 160–61 (1978)).

54. *United States v. Locke*, 529 U.S. 89, 106 (2000).

We think it quite unlikely that Congress would use a means so indirect as the saving clauses in Title I of OPA to upset the settled division of authority by allowing States to impose additional unique substantive regulation on the at-sea conduct of vessels. We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

Id.

55. Contrary to the suggestion of the Court of Appeals, the field of preemption established by § 3703(a) cannot be limited to tanker ‘design’ and

resulted in the determination that “Washington’s regulations regarding general navigation watch procedures, English language skills, training, and casualty reporting are preempted. . . . It is preferable that the remaining claims be considered by the Court of Appeals or by the District Court within the framework . . . discussed.”⁵⁶ Specifically, the Court remanded the following regulations for preemption determination: engineering operating procedures, prearrival test and inspection operating procedures, emergency procedures, illicit drug and alcohol use personnel policies, personnel evaluation policies, work hours policies, training record keeping policies, management policies, and advance notice of entry and safety report requirements.⁵⁷

The Supreme Court affirmed a “longstanding and constitutionally-based” commitment to the federal government’s goal of uniformity in regulation among maritime commerce by concluding that the PWSA and other federal laws, including OPA 90, create a comprehensive oil tanker regime.⁵⁸ However, the Court did note that federal law permits a state, such as Washington, to regulate its ports and waterways in such limited circumstances where “the peculiarities of local waters . . . call for special precautionary measures.”⁵⁹ The Supreme Court failed to consider the application of several other highly relevant statutes affecting state rights in navigable waterways and marine resources.⁶⁰ It

‘construction,’ terms which cannot be read in isolation from the other subjects found in that section. Title II of the PWSA covers ‘design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning’ of tanker vessels. Congress has left no room for state regulation of these matters.

Id. at 111 (citation omitted) (quoting 46 U.S.C. § 3703(a) (1994)).

56. *Id.* at 116.

57. *Id.* at 112–19.

The United States did not participate in these cases until appeal. Resolution of these cases would benefit from the development of a full record by all interested parties. We infer from the record that Washington is not now enforcing its regulations. If, pending adjudication of these cases on remand, a threat of enforcement emerges, the Court of Appeals or the District Court would weigh any application for stay under the appropriate legal standards in light of the principles we have discussed and with recognition of the national interests at stake.

Id. at 116–17.

58. Duff, *supra* note 36, at 23.

59. *United States v. Locke*, 529 U.S. at 109 (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 171 (1978)).

60. See discussion *infra* Part II.B.1. The Court neither acknowledged nor explained this omission in its opinion.

further failed to consider the challenged Washington laws within the purview of the narrow exception for local waters requiring special precautionary measures.

B. Federal Preemption and Other Applicable Law

1. Legislative History: Ocean and Coastal Law

The Constitution delegates to Congress the power to “regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.”⁶¹ The Supreme Court first defined the nature of Congress’s commerce power in *Gibbons v. Ogden*.⁶² The power to “regulate commerce” includes the power and authority to regulate navigation and thus the management of navigable waters.⁶³ The ability to preserve federal control over the nation’s navigable waterways was granted to the Secretary of the Army, who in turn delegated authority to the Army Corps of Engineers, in the Rivers and Harbors Act of 1899.⁶⁴

In 1936, Congress enacted the Tank Vessel Act,⁶⁵ which today includes the PWSA, and pertains to maritime tanker transports generally. The PWSA, subsequently amended by the Port and Tanker Safety Act of 1978,⁶⁶ granted the Coast Guard authority to control ocean transports and strengthened the standards for vessel construction and design in direct response to the growing issue of oil pollution in the marine environment.⁶⁷ The primary difference in the power of the Army Corps vis-à-vis the Coast Guard is that the Army Corps has authority over all

61. U.S. CONST. art. I, § 8, cl. 3.

62. 22 U.S. (9 Wheat.) 1, 83 (1824). “Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” *Id.*

63. *Gibbons v. Ogden* was itself a case concerning navigation rights within New York waters. *Id.* at 1.

64. Rivers and Harbors Act of 1899, ch. 425, § 9, 30 Stat. 1151 (codified as amended at 33 U.S.C. § 401 (1994)). See Thomas Addison & Timothy Burns, *The Army Corps of Engineers and Nationwide Permit 26: Wetlands Protection or Swamp Reclamation?*, 18 *ECOLOGY L.Q.* 619, 624 (1991).

65. Tank Vessel Act of 1936, Pub. L. No. 74-765, ch. 729, 49 Stat. 1889.

66. Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978).

67. See KALO, *supra* note 5, at 688.

[T]he Act authorizes the Secretary of Transportation to deny licensing to applicants refusing to disclose information contained in the National Driver Register; review criminal records of applicants for licensing; require testing and revoke licenses, certificates of registry, and merchant mariners’ documents for drug and alcohol abuse. . . .

The Act also establishes a nationwide planning and response system for spills including spill contingency plans for facilities handling oil and hazardous substances.

Id. at 690.

construction activities and other obstructions to navigation within the mean high-tide line of all tidal waters, as well as all navigable nontidal waters.⁶⁸ The Coast Guard has broad powers to control the movement of the actual vessels in ports and other areas where hazardous conditions exist, and its jurisdiction extends well beyond the mean high-tide line.⁶⁹ As vessel traffic has continued to expand,⁷⁰ so too has concern for ecological factors within the marine environment.⁷¹

In the landmark case of *Zabel v. Tabb*,⁷² ecological factors were first accepted as legitimate and proper areas of concern for enforcement of the Rivers and Harbors Act. In *Zabel*, the court held that ecological considerations must be taken into account when the Army Corps permits

68. See generally 33 C.F.R. §§ 329.4–.12 (1999) (defining the term “navigable waters of the United States”). Mean high tide line is “the average of all high tides over an 18.6 year cycle, as determined by the Department of Commerce.” KALO, *supra* note 5, at 46. No comprehensive federal definition of navigable waters exists. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Originally, navigable waters were understood to be those waters subject to the ebb and flow of the tide. See *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). This definition was later expanded to include all fresh waters used in commercial navigation in interstate and international commerce. See *Ex parte Boyer*, 109 U.S. 629, 632 (1884); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453 (1851). For rivers, where the “ebb and flow” test is not appropriate, the Court has held such waters must be navigable in fact and regarded as public navigable rivers in law. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). For an excellent summary of the history of the law on navigable waters, see KALO, *supra* note 5, at 15–20.

69. See 33 U.S.C. § 1221 (1994).

70. “Between 1955 and 1968, the world tanker fleet grew from 2,500 vessels to 4,300 By December 1973, 366 tankers in the world tanker fleet were in excess of 175,000 tons . . . , and by 1998 the number of vessels considered ‘tankers’ in the merchant fleets of the world numbered 6,739.” *United States v. Locke*, 529 U.S. 86, 96 (2000) (citations omitted).

71. For example:

Washington’s water quality program has had a turbulent history and major shortcomings. In 1988, the first Puget Sound Water Quality Management Plan identified a number of weaknesses in the management of industrial discharges and called for a series of changes to be made throughout the permit system. In 1990, the State Commission on Efficiency and Accountability in Government studied [Washington State Department of] Ecology’s waste discharge permit program and made over 80 recommendations for improvement. In 1991, 12 environmental groups, including People for Puget Sound, petitioned EPA to either correct the problems with Washington’s water pollution control program or end the delegation of the program to Washington State. Even with all the attention paid and effort made to improve the wastewater discharge permit program, many concerns remain.

People for Puget Sound, *Industrial Pollution in Puget Sound: Executive Summary*, at <http://www.pugetsound.org/p2/execsum.html> (1995-97).

72. 430 F.2d 199 (5th Cir. 1970).

actions under the National Environmental Policy Act.⁷³ The National Environmental Policy Act (NEPA)⁷⁴ is a significant piece of federal environmental legislation in that it embodies a comprehensive national policy of preserving and protecting the environment.⁷⁵ “It does not prohibit agency action that may result in environmental degradation, but it requires the environmental costs of any major agency action to be disclosed to the public and to be a significant consideration in the decision-making process.”⁷⁶

In 1972, Congress enacted a series of statutes that had a direct bearing on the impact of commerce on the marine environment. These include The Clean Water Act (CWA),⁷⁷ the Coastal Zone Management Act (CZMA),⁷⁸ and the Marine Mammal Protection Act of 1972 (MMPA).⁷⁹ Shortly thereafter, Congress enacted the Endangered Species Act of 1973 (ESA).⁸⁰ Each statute is briefly discussed below.

The CWA was enacted to protect and preserve the quality of the nation’s waters and to further expand the power of the Army Corps of Engineers by granting authority to regulate “the discharge of dredged or filled material into the navigable waters.”⁸¹ It essentially makes all discharge of pollutants into the Nation’s waters illegal unless otherwise provided by statute.⁸² The statute itself creates an inherently unstable relationship between the Army Corps of Engineers and the EPA.⁸³ Specifically, except for dredge and fill activity, the statute names the EPA as the administrator of the Act.⁸⁴ “The EPA sees itself as having an

73. *Id.* at 211, 213.

74. 42 U.S.C. §§ 4321, 4331–4335, 4341–4347 (1994).

75. KALO, *supra* note 5, at 108.

76. *Id.* For more on NEPA, see Joseph Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239 (1973).

77. Federal Water Pollution Control Act, Pub. L. No. 92-240, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1151, 1251–1265, 1281–1292, 1311–1328, 1341–1345, 1361–1376 (1994)).

78. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1464 (1994)).

79. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. §§ 1361, 1362, 1371–1384, 1401–1407 (1994)).

80. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1972) (codified as amended at 7 U.S.C. § 136, 16 U.S.C. §§ 460k-1, 460l-9, 668dd, 715i, 715s, 1362, 1371, 1372, 1402, 1531–1543 (1994)).

81. 33 U.S.C. § 1344 (1994). Section 404 of CWA uses the term “navigable waters.” Note that the definitional section of the statute defines navigable waters as the (arguably much broader) “waters of the United States.” 33 U.S.C. § 1362(7) (1994). The meaning of the later phrase is still a subject of litigation.

82. 33 U.S.C. § 1311 (1994). “Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.” *Id.*

83. KALO, *supra* note 5, at 128.

84. See 33 U.S.C. § 1344 (1994); KALO, *supra* note 5, at 128.

obligation to protect the environment from degradation; the Corps sees its role as making a determination of whether, after consideration of all the relevant factors, the proposed project, for which a permit is requested, is in the 'public interest.'"⁸⁵ Both agencies play an active, albeit not always consistent, role in water pollution prevention, clearly a significant issue in the oil transport industry.

Unlike the CWA, the CZMA outlines a significant intergovernmental relationship of direct importance to the several states vis-à-vis the federal government. The primary purpose of the CZMA is to provide federal funding for states to develop and administer coastal programs according to the guidelines enumerated in the statute.⁸⁶ The CZMA "generally defines the coastal zone to include the territorial sea and adjacent lands 'to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters.' Each state defines the limits of its coastal zone in its management program."⁸⁷ The most significant provision of the CZMA is its reverse preemption feature.⁸⁸ Section 1456(c) requires the federal government to be consistent with state regulations concerning the coastal zone management of that state.⁸⁹ Essentially, the Act operates to provide federal funding for states to develop and administer coastal programs according to the guidelines set out in the Act. However, it further establishes a reverse preemption whereby a state regulation will trump federally construed regulations so long as the objectives are consistent.⁹⁰ Under this provision, state regulations that have objectives consistent with stated federal policy preempt federal regulations that are in conflict

85. See KALO, *supra* note 5, at 167. "The EPA-Corps philosophical disagreement is most pronounced on the questions of 'no practicable alternative' and 'mitigation' measures. Neither entity will readily give ground on these issues . . ." *Id.* For more information on the relationship between the EPA and the Army Corps of Engineers, see *id.* at 167-86.

86. See 16 U.S.C. § 1452 (1994).

87. KALO, *supra* note 5, at 202.

88. See 16 U.S.C. § 1456(c)-(d) (1994).

89. The Act "currently require[s] consistency . . . with 'the enforceable policies of approved State management programs.'" KALO, *supra* note 5, at 228.

90. The constitutionality of this provision is hotly debated. See Jack H. Archer & Joan M. Bondareff, *Implementation of the Federal Consistency Doctrine—Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115 (1988); Scott C. Whitney, George R. Johnson, Jr., & Steven R. Perles, *State Implementation of Coastal Zone Management Consistency Provisions: Ultra Vires or Unconstitutional?*, 12 HARV. ENVTL. L. REV. 67 (1988).

with the state regulations.⁹¹

Unlike the CWA or CZMA, the MMPA focuses directly on the protection of marine mammals. The MMPA establishes a broad moratorium on marine mammal takings.⁹² The MMPA's key standard for identifying protected classes of marine mammals is "optimum sustainable population" (OSP). OSP is the population of a particular species of marine mammal "that is at a level of maximum ecological productivity, that is at the limit of the environment to sustain healthy populations indefinitely, and that does not adversely affect the ecosystem of which it is a part."⁹³ The primary variable in the OSP is *maximum productivity*.⁹⁴ The National Marine Fisheries Service (NMFS), Administrator of the MMPA, adopted regulations emphasizing maximum productivity over the health of the marine ecosystem.⁹⁵ When a species is below OSP (as measured by maximum productivity), it is considered depleted and the nonwaivable moratorium goes into effect.⁹⁶ All commercial or other nonscientific activity identified as presenting a risk to the continued survival of the species must then be terminated under the Act.⁹⁷ Although the MMPA has strict language concerning the preservation of marine mammals, it is substantially less restrictive than the ESA.

The ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."⁹⁸ Any agency seeking to undertake such action

must consult the service having jurisdiction over the relevant endangered

91. For example, assume a federal policy to significantly curtail the discharge of oil pollutants into navigable waters. If the federal government passes a law permitting no increase in current oil pollutant discharge rates, and a state government (through its coastal management program) passes a law requiring a 1% reduction in oil pollutant discharge rates, the state regulation trumps the federal regulation. The preemption occurs when the state regulation is consistent with the federal policy. Here, the only difference between the state regulation and the federal regulation (both of which are consistent with federal policy) is that the state regulation is more aggressive in its implementation of the federal policy.

92. See 16 U.S.C. § 1362-63 (1994).

93. Sanford E. Gaines & Dale R. Schmidt, *Wildlife Population Management Under the Marine Mammal Protection Act of 1972*, 6 ENVTL. L. REP. 50,096, 50,101 (1976).

94. See KALO, *supra* note 5, at 556.

95. See James A. R. Nafziger, *The Management of Marine Mammals After Fisheries Conservation and Management Act*, 14 WILLAMETTE L.J. 153, 171 (1977) (arguing that NMFS's emphasis on productivity rather than populations is contrary to legislative intent but has been embraced by leading marine mammal scientists).

96. KALO, *supra* note 5, at 556-57.

97. See 16 U.S.C. § 1362 (1994).

98. 16 U.S.C. § 1536(a)(2) (1994) (emphasis added).

species; the service then issues a biological opinion that details how the proposed action “affects the species or its critical habitat,” including the impact of “incidental takings” of the species. If a species might be endangered by the agency action, the service suggests “reasonable and prudent alternatives” to the agency’s proposal. The agency is not required to adopt the alternatives suggested in the biological opinion; however, “[i]f [the Secretary] deviates from them, he does so subject to the risk that he has not satisfied the standard of section 7(a)(2).”⁹⁹

Whenever the acting agency’s undertakings would be halted by the ESA, the head of the agency can petition a special Endangered Species Committee for an exemption.¹⁰⁰ The exemption is extremely narrowly construed and particularly difficult to obtain.¹⁰¹

Puget Sound supports a vibrant ecosystem of various plants, fishes, and mammals. However, continued industrial contamination threatens the longevity of the fragile ecosystem. The oil industry is one of the most significant culprits of sustained waste dumping.¹⁰² Pollution in the water also affects the health and safety of nearby beaches and other coastal lands. The various federal statutes discussed above clearly apply to land within the jurisdiction of the federal government. However, much of the nation’s coastal land falls within the ambit of individual state jurisdiction.

Under the Submerged Lands Act of 1953,¹⁰³ the federal government “granted the states ownership to and proprietary use of all lands under their navigable waters for a distance of three geographical miles from their coastlines, or to the historic seaward boundaries as they existed at the time the states became members of the Union.”¹⁰⁴ The land grant also stated that “the right and power to manage, administer, lease, develop, and use the said lands and natural resources *all in accordance with applicable State law be*, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in” that State.¹⁰⁵ The federal government retained the right to “all its navigational servitude and rights in and powers of regulation and control of said lands

99. *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988) (citations omitted).

100. *See* 16 U.S.C. § 1536(e)–(h) (1994).

101. *See id.* § 1536(h).

102. *See* People for Puget Sound, *Industrial Pollution in Puget Sound: Executive Summary*, at <http://www.pugetsound.org/p2/execsum.html> (1995–97).

103. Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301–1303, 1311–1315 (1994)).

104. *KALO*, *supra* note 5, at 371.

105. 43 U.S.C. § 1311(a)(2) (1994) (emphasis added).

and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership.”¹⁰⁶ Essentially, the federal government expressly stated an intent to retain any constitutional power to regulate coastal waters under the Commerce Clause.¹⁰⁷ However, not only was this express statement omitted from the CZMA, but it was arguably replaced by the language establishing the reverse preemption power.

Each of these statutes has application in the oil tanker industry or the management of state property interests, but they are not the sole regulation of the coastal waters. In addition to domestic regulation of the marine environment, various international treaties have been signed to further the preservation of ocean resources. These treaties provide additional guidelines and regulations concerning the transport of dangerous goods via ocean vessels.

2. *International Treaties*

Several international conventions have squarely addressed oil pollution and marine environment preservation. The 1954 Oil Pollution Prevention Convention prohibited discharge of oil and oily mixtures into the sea in identified areas of particular concern.¹⁰⁸ The 1969 Convention on Intervention on High Seas presents signatory nations significant authority to “prevent, mitigate, or eliminate” risk to the coastal environment.¹⁰⁹ The 1969 Convention on Civil Liability for Oil Pollution Damage provides a legal basis for damages claims for injuries to the territorial sea and coast of a signatory state.¹¹⁰ The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage supplements the 1969 Liability Convention’s compensation limits and provides additional compensation to individuals who suffer the requisite pollution damage but are unable to obtain remuneration under that Convention.¹¹¹ The

106. 43 U.S.C. § 1314(a) (1994).

107. See U.S. CONST. art. I, § 8, cl. 3. “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes” *Id.*

108. International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 2990, 2992.

109. Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, art. I, para. 1, 26 U.S.T. 765, 767.

110. International Convention on Civil Liability for Oil Pollution Damage, amended by 1984 Protocols Amending the Civil Liability and Fund Conventions on Oil Pollution Damage, Nov. 6, 1985, 1985 U.S.T. LEXIS 231, *4-5.

111. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, amended by 1984 Protocols

1973 Convention for the Prevention of Pollution from Ships (MARPOL) and the 1978 protocol supercede the 1954 Convention and extend the scope significantly.¹¹² The 1982 Law of the Sea Convention offers substantial opportunities for proactive, global pollution prevention.¹¹³ “Although international efforts have had a significant effect in the area of liability and clean-up costs for pollution from oil... many commentators believe that the conventions have actually provided very little relief from chronic discharges from vessels. The major weakness of the conventions is inadequate coastal-state enforcement authority”¹¹⁴

III. THE *LOCKE* DECISION IS DISTINGUISHABLE

The facts of *Locke* are distinguishable from the facts of prior Supreme Court decisions. In *Ray*, the Court held that while some state safety regulations applicable to tankers were preempted, others were not. The finding of implied preemption was limited to tanker design, such as the Washington technology requirements and construction. In contrast, the “tug-escort” requirement was not a design requirement, but “more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures.”¹¹⁵

Puget Sound is a complex and dynamic waterway. It contains more than two hundred individual islands, hundreds of bays and channels, and is subjected to heavy precipitation and freezing winter storms. Where the Secretary of the Army has not imposed a similar requirement for tug escorts in light of the peculiarities of local waters, the “State’s requirement need not give way under the Supremacy Clause.”¹¹⁶ The *Ray* Court further qualified its holding by saying “operating rule[s]”, unlike design and construction requirements, are not automatically subject to field preemption by the PWSA.”¹¹⁷ In contrast, the

Amending the Civil Liability and Fund Conventions on Oil Pollution Damage, Nov. 6, 1985, 1985 U.S.T. LEXIS 231, *5-6.

112. The MARPOL Protocol, Feb. 17, 1978, 1978 U.S.T. LEXIS 322.

113. See generally Third United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

114. *KALO*, *supra* note 5, at 692.

115. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 171 (1978).

116. *Id.* at 171-72.

117. *Intertanko v. Locke*, 148 F. 3d 1053, 1065 (9th Cir. 1998) (citations omitted) (quoting *Ray*, 435 U.S. at 171), *rev'd sub nom.* *United States v. Locke*, 529 U.S. 89 (2000).

regulations in *Locke* were primarily operating rules, with several personnel policies, management guidelines, and technology requirements. The Court must balance the interests of the state with the federal government. Where the facts are not controlled by precedent, the Court must move to a balancing test that considers both the peculiarities of local waters that call for special precautionary measures and the need for a uniform federal regime controlling the design and operation of oil tankers.

Washington and other coastal states have a special interest in the marine environment. The CZMA acknowledges a concern for local government control over local environmental risks and other environmental issues consistently recognized under federal policy. The *Locke* Court failed to consider these important local interests. The federal government has a special interest in promoting international commerce. The regulations at issue in *Locke* were not so extreme as to create a more than incidental or direct extraterritorial impact on the operations of the Intertanko membership.¹¹⁸ The Supreme Court holding completely strips coastal states of any power to regulate the entrance of tankers into state waters. *Locke* ignores the CZMA reverse preemption clause as well as the “peculiarities of local waters” exception in the *Ray* holding itself. The CZMA and other previously discussed statutes evince a concern for local environmental control that the Court did not take into account in *Locke*. The citizens of the coastal states must bear the weight of tanker disasters, but they have little if any means by which to proactively mitigate the risk of catastrophe.

A better alternative for the Court would be to consider the impact of the regulation on the industry as weighed against its preventative benefits. In circumstances where the regulation bears a rational relation to the potentiality of disaster, the regulation should be given presumptive power over the tankers within those state waters. The rational relation to disaster drives the presumption. In other words, the burden of persuasion of the unreasonableness of the regulation as applied to the tankers should rest on the challenging party, not the state. However, if the relation is not sufficiently tied to the mitigation of risk, the burden should be borne by the state to prove that the regulation is necessary because of the peculiarities of local waters. The critical factors triggering the presumption in favor of local regulation are the high risk of disaster and the correlative nature of the regulations designed to avert that disaster.

118. See *United States v. Locke*, 529 U.S. 89 (2000). See also *Zschernig v. Miller*, 389 U.S. 429 (1968). *Zschernig* is the only case in which the Supreme Court struck down a state statute as violative of the foreign affairs power on the ground that it had “more than ‘some incidental or indirect effect in foreign countries.’” *Id.* at 434, 440 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

Upon a showing that such correlation is absent, as measured by a rational relation to the risk involved, the burden should shift to the state to show the reasonableness of the regulation vis-à-vis the peculiarities of local waters that call for special precautionary measures.

The courts should give great deference to the findings of state marine safety offices. Marine safety offices have the benefit of specific and complex scientific knowledge of the local environs. Where the intrusiveness of local law is slight, courts should be loath to set them aside on constitutional or other grounds. The *Locke* Court, in its strict reading of *Ray*, unnecessarily limited previously available discretion enjoyed by the coastal states to balance local dangers against economic burdens to industry. Coastal states have no alternative means whereby to proactively regulate the use and often destruction of marine and coastal environments. Placing full faith and credit in the federal regulatory scheme, particularly in environmental law, oversimplifies and underemphasizes a significantly local matter. It is unreasonable to assume the federal government can or will adequately manage the health and welfare of local marine environments.

IV. CONCLUSION

The *Locke* Court appropriately applied a preemption analysis and correctly considered the importance of a uniform federal regime controlling the design of oil tankers. However, the Court failed to consider the various coastal, environmental, and international laws and treaties that balance commercial interests with state rights and ecological health, and subsequently arrived at the wrong result. Because the Court did not consider the CZMA and various other statutes, it never reached the reverse preemption clause as applied to the development and implementation of state coastal management programs. The *Locke* Court criticized the Ninth Circuit for placing too much emphasis on the OPA 90 savings clauses. The *Locke* Court arguably overemphasized the “preemptive analysis” portion of the *Ray* holding while it simultaneously underemphasized the “preservation of state authority to regulate the peculiarities of local waters” portion of the *Ray* holding. In sum, the *Locke* Court reached its decision, not by properly considering all statutes applicable to the issue, but by narrowly concluding that all state regulations for oil tankers are preempted by federal standards under the *Ray* decision.

The SLA granted states the ownership of all lands under navigable

waters up to three miles from the mean high tide line. The ESA requires that any action authorized by a federal agency not be likely to jeopardize the continued existence of any endangered species. The CZMA allows for reverse preemption of federal to state laws where states adopt coastal management programs for coastal areas, so long as they are consistent with federal policy. The *Locke* holding substantially reduces these intended allocations of state power to protect local, state-owned coastal environments, and removes years of progress in environmental law. The federal government now has absolute authority on a matter of arguably local concern. Consequently, the Supreme Court holding in *Locke* created a substantial obstacle for coastal states seeking to protect the local marine environments through regulations aimed at diminishing the risk of pollution and oil spills by reserving that duty to the federal government.

KRISTEN A. ASCHENBECK