# State Power Yields to Supertankers: *Ray v. Atlantic Richfield Co.*

## I. INTRODUCTION

The headline "Supertanker Oil Spill" has become a feared caption around the world in recent years. A recent spill involving the vessel *Amoco Cadiz* off the coast of Brittany, France, ruined the fishing and tourist industries of the area because of the heavy ooze of oil which covered the waters and beaches of the region. The natural "flushing" action of the open seas could not prevent an enormous oil slick from forming on the waters and washing upon the beaches.[1] Unfortunately for the region of Brittany this oil spill is the worst tanker spill on record, pouring close to 228,000 tons of crude oil into the sea. It occurred eleven years to the week after the *Torrey Canyon* oil spill which previously held the record as the worst tanker spill in history. The *Torrey Canyon* spilled its 120,000 ton cargo of oil into the seas off of England, polluting many of the nearby English and French coastal areas.[2]

*Ray* v. *Atlantic Richfield Co.*[3] arose when the State of Washington, alarmed by such tanker spills, enacted Chapter 125 of the

1. Although under Liberian registry, the supertanker, *Amoco Cadiz*, is owned by a subsidiary of Standard Oil Company (Indiana). It was a 228,513 ton tanker. N.Y. Times, Mar. 23, 1978, at 2, col. 3. The world tanker fleet is registered in approximately fifty-five countries with Liberia accounting for twenty-nine percent of total tonnage in 1974. European maritime nations registered nearly fifty percent of world tanker tonnage in 1974 and the United States only four percent. Eleven percent of the world tanker tonnage was of Japanese registry. Pretrial Order, at 58, Ray v. Atlantic Richfield Co., 46 U.S.L.W. 4200 (1978).

2. N.Y. Times, Mar. 23, 1978, at 2, col. 3.

3. 46 U.S.L.W. 4200 (1978). White, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart and Blackmun, J.J., joined; in all but Parts V and VII of which Powell and Stevens, J.J., joined; and in all but Parts IV and VI of which Brennan, Marshall, and Rehnquist, J.J., joined. Marshall, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Rehnquist, J.J., joined. Stevens, J., filed an opinion concurring and dissenting in part, in which Powell, J., joined.

Washington Tanker Law (Tanker Law) on September 8, 1975,[4] to regulate supertankers within the ecologically sensitive inland marine bodies of the Puget Sound and adjacent waters.[5] The Tanker Law was an attempt to regulate the design, size, and movement of oil tankers, both enrolled and registered in Puget Sound and adjacent waters.[6]

On the day that the law became effective, Atlantic Richfield Company (ARCO)[7] filed suit in federal district court challenging the constitutionality of the statute and seeking an injunction against its enforcement.[8] The suit named state and local officials responsible for the enforcement of the Tanker Law as defendants.[9] Four environmental groups—Coalition Against Oil Pollution, National Wildlife Federation, Sierra Club, and Environmental Defense Fund, Inc.—and the prosecuting attorney for King County, Washington, intervened as defendants.[10]

A three-judge panel of the district court heard the arguments on the basis of a detailed stipulation of facts.[11] The United States filed an amicus curiae brief, which contended that the Tanker Law was preempted in its entirety by the Ports and Waterways Safety Act of

4. WASH. REV. CODE ANN. §§ 88.16.170-88.16.190 (West Supp. 1976).

5. "Puget Sound and adjacent waters" (hereinafter Puget Sound) is defined in the Tanker Law as those waters east of a line extending from Discovery Island Light, off Victoria, British Columbia, and the New Dungeness Light east of Port Angeles on Washington's Olympic Peninsula. *Id.*

6. "Enrolled vessels are those 'engaged in domestic or coastwide trade or used for fishing,' whereas registered vessels are those engaged in trade with foreign countries. Douglas v. Seacoast Products, Inc., 421 U.S. 265, 272-273 (1977)." 46 U.S.L.W. at 4202 n.7.

7. Arco is a Pennsylvania corporation with its principal place of business in Los Angeles, California. It is an integrated petroleum company in domestic and international commerce, active in all phases of exploration, development, production, transportation, refining and marketing of petroleum and petroleum products. Pretrial Order at 41.

8. 46 U.S.L.W. at 4201.

9. Daniel J. Evans, then Governor of the State of Washington, was the named defendant of the original suit, Atlantic Richfield Co. v. Evans, No. C-75-648 (W.D. Wash. Sept. 24, 1976). On January 12, 1977, Dixie Lee Ray became Governor of the State of Washington and replaced Evans as named defendant. Brief of Appellants at 4 n.1.

10. 46 U.S.L.W. at 4201 n.4. King Country includes the city of Seattle and is adjacent to Puget Sound. Appellee Seatrain Lines, Inc. (Seatrain) was later permitted to intervene as a plaintiff. 46 U.S.L.W. at 4201. Seatrain is a Delaware corporation with its principal place of business in New York. Seatrain owns and operates vessels in domestic and international commerce and is a shipbuilder in the United States. Pretrial Order at 41.

11. 46 U.S.L.W. at 4201.

1972 (PWSA),[12] and other federal legislation.[13] The district court,

12. Title I of the PWSA focuses on traffic control at local ports. 33 U.S.C. §§ 1221-1227 (Supp. V 1970). Title II concerns tanker design and construction. 46 U.S.C. § 391a (Supp. V 1970).

The provisions of Title I relevant to this discussion are:

§ 1221

In order to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or loss, the Secretary of the department in which the Coast Guard is operating may—

(1) establish, operate, and maintain vessel traffic services and systems for ports . . . ;

(2) require vessels which operate in an area of a vessel traffic service or system to utilize or comply with that service or system, including the carrying or installation of electronic or other devices necessary for the use of the service or system;

(3) control vessel traffic in areas which he determines to be especially hazardous . . . by—

(i) specifying times of entry, movement, or departure to, from, within, or through ports . . . ;

(ii) establishing vessel traffic routing schemes;

(iii) establishing vessel size and speed limitations and vessel operating conditions; and

(iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which he considers necessary for safe operation under the circumstances;

. . . .

(5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved;

§ 1222

. . . .

(c) In the exercise of his authority under this chapter, the Secretary shall consult with other Federal agencies, as appropriate, in order to give due consideration to their statutory and other responsibilities, and to assure consistency of regulations applicable to vessels, structures, and areas covered by this chapter. The Secretary may also consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities.

. . . .

(e) In carrying out his duties and responsibilities under this chapter . . . the Secretary shall consider fully the wide variety of interests which may be affected by the exercise of his authority hereunder. In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall, among other things, consider—

(1) the scope and degree of the hazards;

in a six-page opinion, agreed with the plaintiffs and with the United States. It ruled that under the supremacy clause of the Federal Constitution, federal law preempted the "Tanker Law" in its entirety and it enjoined the State of Washington from enforcing any of the statute's provisions.[14] The State of Washington appealed and Mr. Justice Rehnquist stayed the injunction.[15] Early in 1977, the Supreme Court noted probable jurisdiction.[16]

## II. The Value of Puget Sound

The Puget Sound and adjacent waters are confined waters in the northwestern part of Washington. They are of substantial economic, recreational, environmental, scientific, educational and aesthetic value to Washington and the nation.[17] The first section of the Tanker Law highlights this interest:

> Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

(2) vessel traffic characteristics including minimum interference with the flow of commercial traffic, traffic volume, the size and types of vessels, the usual nature of local cargoes, and similar factors;
(3) port and waterway configurations and the difference in geographic, climatic, and other conditions, and circumstances;
(4) environmental factors;
(5) economic impact and effects;
(6) existing vessel traffic control systems, services, and schemes; and
(7) local practices and customs . . . .

. . . .

§ 1224 Rules and Regulations

The Secretary may issue reasonable rules, regulations, and standards necessary to implement this chapter . . . . In preparing proposed rules, regulations, and standards, the Secretary shall provide an adequate opportunity for consultation and comment to State and local governments, representatives of the marine industry, port and harbor authorities, environmental groups, and other interested parties.

13. The United States as amicus curiae contended that in addition to the PWSA, Chapter 125 is preempted by the Merchant Marine Act of 1936, 49 Stat. 1985, *as amended by* 46 U.S.C. §§ 1101-1294 (1970); and the Enrollment and Licensing Act of Feb. 18, 1793, 1 Stat. 305 (codified at 46 U.S.C. §§ 251-336 (1970)). Brief for the United States as Amicus Curiae at 29-44.

14. Atlantic Richfield Co. v. Evans, No. C-75-648 (W.D. Wash. Sept. 24, 1976).

15. 429 U.S. 1334 (1976) (Rehnquist, J., *temporary stay granted*). 429 U.S. 1035 (1977) (*temporary stay granted*).

16. 430 U.S. 905 (1977).

17. 46 U.S.L.W. at 4201 n.1.

> The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any oil spill.
>
> The legislature further recognizes that certain areas of the Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.[18]

As a result of the human and marine resources centered around Puget Sound, this body of water is the focal point of the state.[19] Puget Sound and adjacent waters have attracted over 65% of the state's population to their shores. Of the 1,984,000 acres of marine waters in the state, Puget Sound and adjacent waters comprise 1,280,000 of the total.[20] The value of the beds, tidelands, and waterfront lands adjacent to Puget Sound are estimated to exceed two billion dollars.[21] The state has a substantial proprietary interest in these lands, owning nearly all of the beds and approximately 43% of the tideland frontage.[22] The fishing industry of Puget Sound contributes over 170 million dollars annually to Washington's economy.[23]

There are more than 2,000 different species of plant and animal life located in or on the waters of Puget Sound or on immediate or adjacent uplands within one mile of Puget Sound.[24] The area also is the site of sixteen fish and wildlife preserves and refuges, thirteen of which are operated by the federal government. There are 158 federal, state, county and local public parks or recreation sites located on or abutting Puget Sound. Scientific research and educational programs are conducted by more than five institutions of higher learning and by the state and federal governments.[25]

The Puget Sound is an estuary consisting of 2,500 square miles of inlets, bays, and channels. More than 200 small islands are located within the Sound, and numerous marshes, tidal flats, wetlands, and beaches are found along the 2,000 miles of shoreline.

18. WASH. REV. CODE ANN. §§ 88.16.170 (West Supp. 1976).
19. Brief of Appellants at 11-13.
20. Pretrial Order at 68.
21. *Id.* at 73.
22. *Id.*
23. *Id.* at 71.
24. *Id.* at 69.
25. *Id.* at 74-75.

The distinctive topographical characteristics of Puget Sound are shared by no other large estuarine system in the continental United States.[26]

In the stipulated facts presented in the Pretrial Order to the Supreme Court, both parties agreed that an oil spill in the Puget Sound and adjacent waters would have "a significant potential for causing injury or death to biota which live in, on and adjacent to the waters of Puget Sound. . . . It also has a significant potential for damaging real and personal property."[27]

A recent study by the National Academy of Sciences said that damage from an oil spill was most severe when "the oil spill was massive relative to the site of the affected area, and the spill was confined naturally or artificially to a limited area of relatively shallow water for a period of several days."[28] The study found that coastal marshes and estuaries would suffer more damage from an oil spill than would open waters because of their isolation and lower natural "flushing" of the oil from the marshes and estuaries.[29] Recovery periods could vary from a few months to several years for such areas.[30] The Puget Sound is such an area of confined and marshy waters and would suffer enormous damage if a massive oil spill such as the *Amoco Cadiz* disaster were to occur within its environs.

## III. Oil Transport in the Puget Sound

Six oil refineries are located in the Puget Sound and adjacent waters.[31] The largest, ARCO's Cherry Point, began operations in 1971.[32] Supertankers have depth limitations as do the oil refinery

26. The shoreline and bottom configuration of Puget Sound is irregular and characterized by many channels, bays, and inlets. Rivers and streams flowing from the Cascade and Olympic mountain ranges discharge into Puget Sound. The distinctive topography of the Sound is primarily a result of glacial activity. This combination of characteristics is shared by three other large estuarine systems in the United States: Cook Inlet, Alaska; Prince William Sound, Alaska; and the Alexander Archipelago of Southeast Alaska. *Id.* at 69.

27. *Id.* at 76.

28. *Id.* at 77.

29. *Id.* at 78-79.

30. *Id.* at 78.

31. ARCO owns and operates a refinery at Cherry Point, Washington. Mobil Oil owns a refinery at Ferndale, Washington. Shell Oil and Texaco, Inc. each own an oil refinery at Anacortes, Washington. U.S. Oil & Refining Company and Sound Refining, Inc. each own an oil refinery at Tacoma, Washington. *Id.* at 44-48.

32. *Id.* at 45.

dock facilities. Five of the oil refineries have depth limitations of 45 feet or less, while the sixth, Cherry Point, has a 55 foot limitation.[33] A 120,000 deadwieght tonnage (DWT)[34] tanker has a draft of 52 feet.[35] Thus only one of the oil refineries, Cherry Point, can handle oil tankers of more than 120,000 DWT.

The shipping channel to Cherry Point imposes another depth limitation on supertanker access to the refinery because the route goes through Rosario Strait, one of the shallowest and narrowest tanker channels in the estuary.[36] At its narrowest, Rosario Strait is less than one-half mile wide,[37] and at its shallowest only 60 feet deep.[38]

Maneuverability is another major drawback of the supertankers. At sixteen knots the stopping distance of 120,000 and 190,000 DWT tankers is almost two and one-half and three and one-half miles.[39] As the wreck of the *Amoco Cadiz* showed, distance and maneuverability are vital to the protection of the environment. The *Amoco Cadiz* was only three miles off shore when it lost its steering and drifted to shore.[40] The State of Washington determined

33. *Id.* at 47-48.

34. The term "deadweight tons" is defined for purposes of the Tanker Law as the cargo-carrying capacity of a vessel, including necessary fuel oils, stores, and potable waters, as expressed in long tons (2,240 pounds per long ton). 46 U.S.L.W. at 4201 n.3.

Deadweight tonnage is the primary determinant of draft (i.e., the distance the hull protrudes below the water), but a vessel's dimensions (e.g., length, width) also affect its draft. Controlling depth is defined as the maximum draft vessel that can enter the port at extreme low tide. Pretrial Order at 50 nn.4 & 5.

35. Tankers of the same deadweight tonnage vary substantially in dimensions and operating characteristics. However, the United States used the following standards at the 1973 International Conference on Marine Pollution:

| Deadweight (DWT) | 21,000 | 75,000 | 120,000 | 190,000 | 250,000 |
|---|---|---|---|---|---|
| Depth (ft.) | 40 | 54 | 68 | 82 | 84 |
| Draft (ft.) | 31 | 41 | 52 | 61 | 65 |
| Stopping Distance (ft.), 16 knots | 6,000 | 10,500 | 13,000 | 17,000 | 20,000 |
| Stopping Distance (ft.), 6 knots | 1,500 | 2,500 | 3,000 | 3,600 | 4,000 |

*Id.* at 80.

36. Brief of Appellants at 14.

37. *Id.* at 14 n.20.

38. Pretrial Order at 65.

39. Brief of Appellants at 15.

40. N.Y. Times, Mar. 18, 1978, at 20, col. 5.

that this drawback was especially threatening to the Puget Sound and adjacent waters because the shipping channel for the supertankers goes through the San Juan Islands, a group of small, nearly pristine islands located in the northern part of the estuary.[41]

## IV. Federal Preemption

In its opinion handed down on March 6, 1978,[42] the Supreme Court concurred with the district court's view that federal preemption principles governed the analysis of the constitutionality of Chapter 125.[43] However, the Court did not agree that federal law, in particular the PWSA, has completely preempted the field from state legislation.[44] The Court determined that Congress manifests its views of federal preemption in three ways and that complete foreclosure of state regulation is not necessarily a result of Congressional action.[45] Congressional purpose may be shown by 1) a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ," or by 2) an Act of Congress that touches "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the same subject," or by 3) federal laws which reveal the same purpose in their object sought to be obtained as in the character of obligations imposed by such laws.[46] Any state statute that conflicts with valid federal law is void.[47] Such conflict is found where federal regulations make compliance with state law a physical impossibility[48] or when compliance with state law would thwart the "full purposes and objectives of Congress."[49]

The majority opinion by Mr. Justice White analyzes each of the three operative provisions of Chapter 125 separately within the framework of federal preemption principles.[50] The first operative provision of the statute requires that both enrolled and registered

41. Reply Brief of Appellants at 14-15.
42. 46 U.S.L.W. 4200 (1978).
43. *Id.* at 4201-4202.
44. *Id.* at 4202.
45. *Id.* at 4201.
46. *Id.* (quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
47. 46 U.S.L.W. at 4201.
48. *Id.* at 4201-02 (quoting from Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43. (1963)).
49. *Id.* at 4202 (quoting from Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
50. 46 U.S.L.W. at 4202-07.

oil tankers of at least 50,000 DWT take on a pilot licensed by the State of Washington while navigating Puget Sound and adjacent waters.[51] The Court held that under two sections of federal law[52] enrolled vessels are exempt from such a state law, but that registered vessels were clearly subject to state pilotage regulation while the vessels were entering and leaving a particular state's ports.[53] The Court noted that the PWSA drew the same distinction, authorizing the Secretary of Transportation to require pilots on registered vessels " 'until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved . . . .' "[54] The majority opinion also commented that this section of the PWSA plainly shows the intent of Congress to leave control over local pilotage requirements for registered vessels in the hands of the state.[55] If a state does not act, the federal government may, but the majority opinion held that under this section the state may regain or enter the field at any time with its own pilot requirements for registered vessels.[56]

In a thorough analysis, Mr. Justice White examined the next operative provision of the Tanker Law, which requires certain design features on all enrolled and registered oil tankers from 40,000 to 125,000 DWT.[57] The Court's opinion indicates that case law, legislative history, and statutory language all point to one conclu-

51. *Id.* at 4202.
52. 46 U.S.C. §§ 215 & 364 (1958).
53. 46 U.S.L.W. at 4202.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* The design provision of the Tanker Law requires that

(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed . . . if such tanker possesses all of the following standard safety features:

(a) Shaft horsepower in the ration [*sic*] of one horsepower to each two and one-half deadweight tons; and

(b) Twin screws; and

(c) Double bottoms, underneath all oil and liquid cargo compartments; and

(d) Two radars in working order and operating, one of which must be collision avoidance radar; and

(e) Such other navigational position location systems as may be prescribed from time to time . . . ;

*Provided*, That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply. . . .

WASH. REV. CODE ANN. § 88.16.190(2) (West Supp. 1976).

sion: oil tanker design standards are to be determined at the national level by the federal government and under the supremacy clause, a federal judgment as to what those standards are must prevail over any contrary state judgment.[58] The opinion notes that in *Kelly* v. *Washington*,[59] the Court had observed that ship design and construction standards were matters for national attention that could not be left to the "diverse action of the states" because each state might enact different standards.[60]

In addition, this operative provision of Chapter 125 requires that any oil tanker over 40,000 DWT that cannot meet the design requirements must have a tug escort at all times while in Puget Sound and adjacent waters.[61] The Court determined that Title I of the PWSA gives the Secretary of Transportation the authority to establish rules to control vessel traffic in navigable waters (this authority is delegated to the Coast Guard), but does not require the Secretary to exercise that authority.[62] The Court noted that the Coast Guard has as yet not promulgated any tug escort rules for Puget Sound and adjacent waters and held that until it does the State of Washington can enact such legislation.[63]

The Court also found that such a tug escort rule is not an unreasonable burden on interstate commerce since the direct monetary cost for the tug escort was only $277,500 a year, a fraction of the total cost to the industry and to the public for the oil products.[64] In addition, the Court rejected the assertion by plaintiffs that the tug requirement was subtle pressure on the tanker owners to comply with design standards and thus an interference with interstate commerce.[65] The Court thought the cost differential between complying with the design standards or complying with the tug re-

58. 46 U.S.L.W. at 4202-4204.

59. 302 U.S. 1 (1937).

60. 46 U.S.L.W. at 4202 n.15.

61. "It is . . . the intent and purpose of sections 2 and 3 of this 1975 act to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs, while navigating on certain areas of Puget Sound and adjacent areas." WASH. REV. CODE ANN. § 88.16.170 (West Supp. 1976).

62. 46 U.S.L.W. at 4204-06.

63. *Id.* at 4205. The Coast Guard has put a notice in the Federal Register stating that it is considering tug escort rules, but none have been issued yet. 43 Fed. Reg. 12,840 (1978).

64. 46 U.S.L.W. at 4205-06 n.25. *See also* Brief of Appellees at 57-61.

65. 46 U.S.L.W. at 4205-06 n.25. *See also* Brief of Appellees at 57-61.

quirements to be so vast ($8.8 million for a new 150,000 DWT tanker to $227,000 a year for tug escorts for all of ARCO's tankers) that it would be "very doubtful" that any tanker owners would choose the design standards over the tug requirement.[66]

In its analysis of the third operative provision of the Tanker Law the Supreme Court relies on the same theories as in its analysis of the second operative provision. This third provision excludes any oil tanker over 125,000 DWT from Puget Sound and adjacent waters.[67] The Court concluded that both Title I and Title II of the PWSA show that the Secretary of Transportation has the authority to establish vessel size limitations for the estuary and "that local Coast Guard officials have been authorized to exercise this power on his behalf."[68] After a review of the stipulated facts, the Court decided that the Coast Guard has exercised this authority in one instance—in the Rosario Strait (one of the "adjacent waters" to Puget Sound)—thus preempting the state from enacting any vessel-size regulation of its own.[69]

## V. THE DISSENT

It is clear that both titles of the PWSA give the Secretary (and therefore the Coast Guard) the authority to establish vessel size limitations in navigable waters.[70] However, the Court's reasoning that the Rosario Strait "rule"[71] establishes that the Coast Guard has in fact exercised its authority is challenged by Mr. Justice Marshall in his dissent. He states that the Rosario Strait "rule" is "unwritten" and is "the sole evidence cited by the Court to show that size limitations for Puget Sound have been considered by federal authorities."[72]

66. 46 U.S.L.W. at 4205-06 n.25.

67. WASH. REV. CODE ANN. § 88.16.190 (1) (West Supp. 1976).

68. 46 U.S.L.W. at 4206.

69. *Id.*

70. *See* note 12 *supra*.

71. "[T]he rule prohibits the passage of more than one 70,000 DWT vessel through Rosario Strait in either direction at any given time, and in periods of bad weather, the 'size limitation' is reduced to approximately 40,000 DWT." 46 U.S.L.W. at 4206.

72. *Id.* at 4208. (Marshall, J., concurring in part and dissenting in part).

With the passage of the PWSA in 1972, the Coast Guard, for the first time, was given the authority to establish, operate and maintain vessel traffic services in congested ports and waterways of the United States. A 1973 study by the Coast Guard (Vessel Traffic Systems, Analysis of Port Needs, 1973) established that seven United States ports or waterways needed vessel traffic services. They were New York, Houston-Galveston, the Mississippi River from the Gulf of Mexico to Baton Rouge,

Mr. Justice Marshall further points out that the Rosario Strait "rule" in no way evidences Coast Guard consideration of vessel size limitations for all of the Puget Sound and adjacent waters.[73] Indeed, the dissent notes, even assuming the Rosario Strait "rule" resulted from consideration of a vessel size limitation for the entire estuary, no showing was made that the rule conflicted with the Tanker Law.[74] Title I of the PWSA expressly requires consideration be given to "existing vessel traffic control systems"[75] and no evidence was presented to show such consideration when the Rosario Strait "rule" was promulgated.[76] Thus, the dissent argues, the inference may be drawn "that the Coast Guard's own limited rule was built upon, and is thereby entirely consistent with, the framework already created by the Tanker Law's restrictions."[77]

Cheasapeake Bay, San Francisco, Puget Sound, and several sections of the Gulf Intracoastal Waterway (ICW). Less than one month after the effective date of rules for vessels operating in the Puget Sound Vessel Traffic Services area the Commanding Officer, United States Coast Guard Vessel Traffic Service, Seattle, Washington, issued certain supplementary guidelines on October 12, 1974, for vessels in Puget Sound. Section 2.6.7 is the applicable guideline for Rosario Strait. It states in part:

> (b) Vessels exceeding 75,000 deadweight tons shall not be allowed to meet or overtake any other deep draft vessel between buoys "RB" and "C". When said vessels will be between those buoys no other vessel shall be permitted to enter ahead of them . . . . Tugs and tows already in Rosario Strait shall be instructed to give the vessel as wide a berth as possible by operating as close as possible to the shoreline. No additional deep draft or tugs and tows will be permitted to enter Rosario Strait until such time as they can enter astern of the larger vessel, and they shall not be permitted to overtake the large vessel.

U.S. Coast Guard, Seattle, Washington, Traffic Center Manual section 2.6.7 (Oct. 12, 1974).

According to the Coast Guard the guidelines were promulgated by the commanding Officer in Seattle after an evaluation of the specific navigation problems in that area. The Commanding Officer based his decision on "an assessment of the characteristics of vessels which normally transit Rosario Strait, the environmental, geographic and hydrographic conditions encountered during those transits, and the risks involved with permitting encounter situations, between large vessels with each other, or with smaller vessels such as tugs with tows." Enclosures with letter from Rear Admiral A.F. Fugaro, United States Coast Guard, Chief, Officer of Marine Environment and Systems (May 17, 1978).

Captain Richard Malm, Commanding Officer, United States Coast Guard, Seattle, Washington stated that no 70,000 DWT top limit/40,000 DWT bottom limit ever existed for Rosario Strait. The other applicable size limitation is the guideline established on October 12, 1974. Telephone interview with Captain Richard Malm (April 13, 1978).

73. 46 U.S.L.W. at 4208.
74. *Id.*
75. 33 U.S.C. § 1222(e) (6) (Supp V 1970).
76. 46 U.S.L.W. at 4208.
77. *Id.* at 4208-09.

The dissent notes further that the Court seems troubled by the tenuousness of its analysis as indicated by its attempt to show that even if the 125,000 DWT tanker limitation is not preempted by Title I of the PWSA, that Title II preempts the limitation.[78] In its analysis on this point the majority opinion speculates that the size limitation may represent a "state judgment that, as a matter of safety and environmental protection *generally*, tankers should not exceed 125,000 DWT."[79] Mr. Justice Marshall challenges this assertion and points out that the Tanker Law was not an attempt to regulate oil tanker design worldwide, but an attempt "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."[80]

## VI. CONCLUSION

The Supreme Court's review of the collision between federal law and Chapter 125 on federal preemption grounds is analytically sound at the beginning. However, the opinion breaks down when Mr. Justice White applies the legal principles of federal preemption to the evidence presented on the 125,000 DWT tanker limitation's conflict with federal law. The "evidence" given by the majority to substantiate its opinion—the existence of a Rosario Strait rule—is one paragraph out of 153 paragraphs in the Pretrial Order. Mr. Justice Marshall's dissent cogently argues that the record presents no clear evidence of where the Rosario Strait DWT size limitation "rule"[81] comes from, nor whether it is contained in any written rule or regulation.[82]

There is no evidence that the Rosario Strait "rule" resulted from a comprehensive review of the vessel size limitations of the entire estuary. Indeed, there is evidence that it may be merely another rule in a long line of rules specifically tailored to the unique topography of Rosario Strait.[83] The Coast Guard has enacted a vessel traf-

78. 46 U.S.L.W. at 4206.
79. *Id.*
80. *Id.* at 4209.
81. *See* note 71 *supra.*
82. 46 U.S.L.W. at 4208 n. 3.
83. The Operating Manual of the Puget Sound Vessel Traffic Service has rules for traffic control in Rosario Strait which apply to all vessels that pass through the Strait. *See* note 87 and accompanying text *infra.*

fic control program for Puget Sound based on vessel traffic flow and movement[84] including rules grouped as the "Rosario Strait Rules."[85] However, the Rosario Strait Rules are distinct from the Rosario Strait "rule" mentioned by the majority opinion.[86] Although the entire traffic control program applies to Rosario Strait, the Rosario Strait Rules only apply to all vessels of 300 or more gross tons propelled by machinery; to all vessels of 100 or more gross tons carrying one or more passengers for hire; and to all commercial vessels of 26 feet or over in length engaged in towing.[87] No other size limitation is mentioned for Rosario Strait. These size limitations are clearly minimal size standards for the traffic separation scheme and are not enacted specifically for large DWT vessels in the 40,000 DWT range and above.[88]

Thus, regulations for some vessel control in Puget Sound have been enacted by the Coast Guard, but no federal regulations have been issued that are aimed specifically at the problem of super-

The Coast Guard publishes supplementary information along with the Rules themselves. The supplementary text for Rosario Strait emphasizes the unique topography of the Strait which has necessitated rules which differ from the other shipping areas of Puget Sound.

> Separated traffic lanes do not exist within Rosario Strait as in the rest of the Vessel Traffic Service. Due to the narrow width of Rosario Strait, a single lane has been established. . . . Masters and pilots are encouraged to adjust the speed of their vessels so as to limit movement of large vessels through Rosario Strait to one direction at a time. Under hazardous conditions such as reduced visibility or high winds, vessels may be required by the Vessel Traffic Center (VTC) to adjust time of arrival at Rosario Strait so as to limit movement of large vessels through Rosario Strait to one direction at a time.

U.S. COAST GUARD, PUGET SOUND VESSEL TRAFFIC SERVICE OPERATING MANUAL 28-29 (Feb., 1978).

84. Puget Sound Vessel Traffic Service Rules, 33 C.F.R. 161.101-161.189 (1978). In an introduction to its Operating Manual the Coast Guard describes the Puget Sound Vessel Traffic Service.

> The Puget Sound Vessel Traffic Service is comprised of two major components, a traffic separation scheme, and a vessel movement reporting system. The traffic separation scheme comprises a network of one-way traffic lanes, separation zones in between, and precautionary areas. The traffic lanes are each 1,000 yards wide, and are separated by 500 yard wide separation zones. Each traffic lane has a minimum depth of 60 feet . . . . The vessel movement reporting system is based upon a VHF-FM communications network maintained continously by the Coast Guard Vessel Traffic Center in Seattle.

U.S. COAST GUARD, PUGET SOUND VESSEL TRAFFIC SERVICE OPERATING MANUAL (Feb., 1978).

85. 33 C.F.R. §§ 161.170-161.174 (1978).

86. *See* note 71 *supra*.

87. 33 C.F.R. § 161.101(b) & (c).

88. *See* note 71 *supra*.

tanker operations in the estuary.[89] Indeed, a statement by Secretary of Transportation Brock Adams, issued on March 14, 1978, confirms this: "Although there are certain operating restrictions currently in effect for Rosario Strait because of navigational hazards peculiar to that area, the Coast Guard has not yet taken action to limit the size of vessels entering Puget Sound."[90] Secretary Adams then issued a "Puget Sound Interim Navigation Rule" prohibiting entry of oil tankers in excess of 125,000 DWT into the United States waters of Puget Sound east of Discovery Island Light and New Dungeness Light.[91]

The Secretary thought this rule necessary because the Department of Transportation had decided that the March 6, 1978 decision[92] by the Supreme Court left the Puget Sound estuary without a continuing scheme for vessel control of large oil tanker traffic in those waters. Secretary Adams determined this situation to be "especially hazardous" and issued the interim rule.[93]

This statement by Secretary Adams seems to corroborate Mr. Justice Marshall's assertions that the Coast Guard had not issued any size limitation rules for oil tankers for Rosario Strait or any other part of Puget Sound. The majority opinion's reliance on the Rosario Strait "rule" to find the exercise of federal authority to issue vessel size limitations for the entire estuary is specious.

Environmental groups may deplore the opinion in *Ray v. Atlantic Richfield Co.* since it seems to leave state governments defenseless against the onslaught of supertankers entering state marine waters. However, as the appellant's brief cogently points out:

> [E]very state, can accomplish *de facto* [regulation] through its power to regulate land use in harbor areas, approve docking facilities, and authorize dredging in ports and harbors. Every

89. *See* notes 83-88 and accompanying text *supra*.

90. 43 Fed. Reg. 12,257 (1978).

91. *Id.* Secretary Adams served as a Representative in the United States House of Representatives for the Puget Sound area prior to his appointment as Secretary of Transportation. This may account for his sensitivity to the special needs of the area.

92. *See* note 3 *supra*.

93. Subpart B - Vessel Traffic Services

Apendix A - Puget Sound Interim Navigation Rule

(a) No person may operate or cause or authorize the operation of any oil tanker in excess of 125,000 deadweight tons bound for a port or place in the United States in waters of the United States lying east of a straight line extending from Discovery Island Light to New Dungeness Light and to all points in the Puget Sound area north and south of these lights.

43 Fed. Reg. 12,257 (1978).

> port and harbor is unique, with its own draft limitations and specific hazardous conditions. If the state prohibits, as it validly may, the construction of a docking facility for the supertankers or the dredging of deeper channels, they are effectively excluded.[94]

Puget Sound and adjacent waters are de facto protected from supertankers of more than 190,000[95] DWT because there are no oil terminal facilities large enough to handle a supertanker bigger than that.[96] The State of Washington has made it clear that if the oil companies request clearance to build bigger oil facilities, no such clearance will be given for Puget Sound and adjacent waters. Additional protection for the estuary was enacted by Congress in 1977, in legislation that specifically prohibits any federal official or entity from approving any plans to build facilities that would increase the "volume of crude oil capable of being handled at any such facility . . . other than oil to be refined for consumption in the State of Washington."[97]

The estuary is also protected from the entry of oil tankers larger than 125,000 DWT because of Secretary Adam's "Puget Sound

94. Brief of Appellants at 68-69 n. 76.

95. *See* notes 33-35 and accompanying text *supra*. Exhibit D of the Pretrial Order lists all of the crude oil tankers in excess of 125,000 DWT that have discharged oil at Cherry Point since it began operations. The largest fully loaded tanker was 138,000 DWT. Pretrial Order at 113.

96. *See* notes 31-35 and accompanying text *supra*.

97. Sen. Magnuson (D. Wash.) sponsored an amendment to the Marine Mammal Protection Act which specifically protects Puget Sound from supertankers. It states:

> (a) The Congress finds that—
>
> (1) The navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;
>
> (2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and
>
> (3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.
>
> (b) Notwithstanding any other provision of law, on and after the date of enactment of this section, no officer, employee, or other official of the Federal Government shall, or shall have authority to issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility . . . other than oil to be refined for consumption in the State of Washington.

33 U.S.C.A. § 476 (West Supp. 1978).

Interim Navigation Rule."[98] Although this is only an interim rule, the Coast Guard issued a statement on March 27, 1978 that it intended to hold meetings to enable it to arrive at the best solution for protection of Puget Sound.[99]

Although Puget Sound and adjacent waters are in effect protected from the supertankers, the dispute highlights the need for comprehensive, environmentally sensitive rules for the vessel traffic control of supertankers in the navigable waters of our country. Although the PWSA gives the Secretary of Transportation authority to issue such rules, it is apparent that no systematic review of the capabilities of ports around the country for such traffic has been made.[100] As the wreck of the *Amoco Cadiz* only too painfully shows, environmentally sound rules are desperately needed to protect the marine resources of our navigable waters.

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98. *See* notes 91-93 and accompanying text *supra*.

99. 43 Fed. Reg. 12,840 (1978).

100. Many bills have been introduced in both the Senate and House of Representatives in the 95th Congress directing the Secretary of Transportation to establish and maintain vessel traffic systems for the waters of the nation's maritime safety zone. *See, e.g.*, H.R. 3796 sponsored by Rep. Studds (D. Mass.) introduced on Feb. 22, 1977, entitled "Tanker Safety Act,"; *see also* S. 182 sponsored by Sen. Kennedy (D. Mass.) introduced on Jan. 11, 1977, entitled "Federal Tanker Safety and Marine Anti-Pollution Act"; *see also*, S. 682 sponsored by Sen. Magnuson introduced on Feb. 10, 1977, entitled "Equitable Cargo Share Act; Ports and Waterways Safety Act Amendments; Tanker Safety Act."