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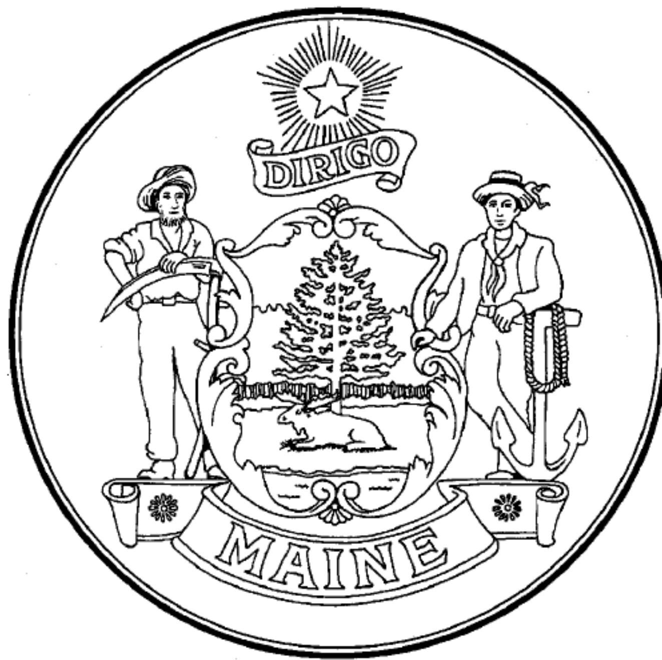

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Environmental protection: validity of BEP tanker restrictions under Supremacy Clause

#79-2

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January 3, 1979

To: Henry E. Warren, Commissioner Dept. of Environmental Protection

From: John M. R. Paterson, Deputy Attorney General

Subject: Validity of Board of Environmental Protection Conditions in Pittston Permit

The Office of the Attorney General has been requested by the Commissioner of the Department of Environmental Protection to determine whether the conditions established by the Order of the Board of Environmental Protection with regard to the application for approval of an oil refinery submitted by the Pittston Company are enforceable. The conditions described in the Board's Order of March 12, 1975 and amended June 4, 1975 include restrictions on the design, structure and navigation of vessels which can be used in conjunction with refinery activity in Eastport, Maine. The legal issue we address is whether the Board conditions have been pre-empted pursuant to Art. VI Cl. 2 of the United States Constitution (hereinafter the Supremacy Clause).

The Order of the Board of Environmental Protection contains conditions which establish design and construction standards for tankers used in conjunction with the Pittston oil refinery. The Order states that the refinery can not use tankers which do not have segregated ballast and double bottoms (D 8), gas inerting systems (D 9), bilge residue tanks (D 10), bridge control systems (D 11), docking collision avoidance systems (D 12), and redundant ship to shore communications (D 6). The Order also conditions the delivery of oil to the site. Oil can be transported through Head Harbor Passage in vessels less that 150,000 DWT only if the visibility is greater than 1 mile (D 2), only if it occurs between sunrise and sunset (D 3), only if it is assisted by two 4000 H.P. tugs (D 7), and after prior clearance from Harbor Control Officer with full access to the refineries navigational facilities (D 17). Moreover, entrance to Head Harbor must be made

on ebb and departure on flood tide (D 5), entrance to Estes Head and East Quoddy is prohibited when another vessel is in it (D 6), and anchorage in Friar Road is permitted only in an emergency (D 14).

In 1972, Congress passed the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221, et seq. ("Title I") and 46 U.S.C. § 391a("Title II"), hereinafter the "Port Act," to regulate the design, construction and navigation of vessels in the navigable waters of the United States. Title I of the Port Act authorizes the Secretary of Transportation to establish and operate vessel traffic systems and services for ports subject to congested traffic. He may specify times for vessel movement, establish size and speed limitations, vessel operating conditions and restrict operations to vessels with particular operating conditions, § 1221(1), (2) and (3). He may also require pilots for registered vessels, § 1221(5), establish minimum safety equipment requirements for shore structures, and waterfront safety zones, § 1221(8). Finally, authority has been delegated to Coast Guard Commanders to direct the anchoring, mooring and movement of vessels, and to specify vessel size and speed limitations, and operating conditions § 1221(3) and 33 C.F.R. § 160.35 (1976). Title II of the Port Act requires comprehensive minimum standards of design, construction, alteration, repair, maintenance and operation for oil tankers, § 391a(1), to provide for vessel safety and to protect the marine environment and authorizes the inspection and certification of vessels in compliance with regulations for safety and the protection of the marine environment, § 391a(5) and (6).

Unquestionably, the conditions of the Board Order approving the Pittston oil refinery relate to vessel design and operation standards which are also dealt with by the Port Act. The issue is whether the design, construction and navigational conditions imposed by the Board can be enforced as a condition of its authority to regulate site location of development or have they been pre-empted by the Port Act?

In its recent decision in <u>Ray v. Atlantic Richfield</u>, 435 U.S. 151 (1978), the Supreme Court held that design and construction standards of the Washington State Tanker Law which regulated navigation in Puget Sound was pre-empted by the Port Act. The design and construction standards of the Washington Tanker Law are in some respects identical to the conditions imposed by the Board's Order. The Tanker Law contained navigational safety requirements for 40,000-125,000 DWT oil tankers, including the shaft horse power, twinscrews, double bottoms, resonant radar and navigational position location systems. Wash. Rev. Code 88.16.190. With respect to these requirements, the Supreme Court found the Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations would be barred by state law from operating in the navigable waters of the United States, <u>Ray</u> at 164, and that

enforcement of the state requirements would at least frustrate "the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." On this basis, the Court concluded that the shaft horsepower, twinscrew, double bottom, redundant radar and navigational location systems requirements of the Tanker Law are "at odds with the object sought to be obtained by Title II and the character of the obligation imposed by it." Ray at 168.

There is merit to the argument that the pre-emption of the tanker design and construction standards of Washington's Tanker Law would require pre-emption of the substantially similar conditions of the Board Order. Since the judgment underlying the Board's conditions is concerned with the same consequences as the regulations promulgated by the Secretary pursuant to the Port Act, it is reasonable to conclude that enforcement of state requirements would "frustrate the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." Thus, from this perspective, the similarity, indeed, identity of the tanker design conditions and the undeniable fact that the Board's concern was that vessels which did not meet its design conditions were not safe enough to protect the marine environment surrounding Eastport, support the conclusion that the Board's conditions are regulations of navigation which are pre-empted by the Port Act.

Despite the similarity of the Board conditions to the Washington Tanker Law requirements, significant differences exist. Unlike the Tanker Law, which regulates navigation, the purpose of the Board conditions is to manage land use. Moreover, the conditions reflect a judgment regarding the safety of vessel design characteristics in a particular location, not generally, and are precedent to approval of a land use power traditionally within the prerogative of local government. 1/ Since the conditions do not affect a tanker entering Head Harbor Passage or navigating through to Eastport Harbor, it is difficult to characterize the conditions as a regulation of navigation. Moreover, the conditions do not represent a general judgment about the environmental safety of vessel design characteristics, but rather a judgment about the

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1/ Recent federal legislation confirms the primary role of states in land use decision making in the coastal area. The purpose of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451, et seq., is to encourage the states to exercise their full authority over lands and waters in the coastal zone, 16 U.S.C. § 1451(h). The Legislative History of the Act establishes the Congressional intent that the States might consider the interrelationship of all factors affecting the coastal zone in developing their management plans. Legislative History of the Coastal Zone Management Act of 1972, prepared for the Senate Commerce Committee pursuant to Sen. Res. 222 94th Congress, 2d session (1976). The History specifically indicates that states should consider navigational factors in their programs. Id. at p. 203, p. 300.

utilization of a particular site on the Maine coast. These differences indicate that pre-emption of the Board's conditions presents a significantly different issue than was decided in the Ray case.

While the Port Act and regulations undoubtedly pre-empt State enforcement of vessel design criteria against vessels generally navigating in Maine waters, that is not to say that a state is prevented from conditioning land use upon vessel design standards. This issue is closer to the issue decided in Huron Portland Cement v. Detroit, 362 U.S. 440 (1960) where the Supreme Court upheld the smoke abatement ordinance which the City of Detroit had enforced against a nonconforming vessel at its docks. Although to comply with Detroit's ordinance, the boiler system the Coast Guard had approved for navigational safety purposes would have to have been structurally modified, the Supreme Court upheld the local ordinance against a pre-emption challenge. The Huron case established that the mere fact that a state's law required modification of a federally approved vessel design characteristic is not in itself a basis for pre-emption. Consequently, the mere similarity between the requirements of the Tanker Law and the Board's conditions do not require pre-emption. The Huron case also points out the importance the Court will attribute to the purpose of the state law in deciding pre-emption. The purpose of the Site Location of Development Law is to decide whether particular projects are appropriate for particular locations, and not to regulate navigation. The Board's conditions are designed to prevent the land of the State of Maine from being used in a way that would attract environmental risks the state considers unacceptable. Citing the Huron holding, the Ray Court said:

> "We do not question in the slightest the prior cases holding that enrolled and registered vessels must conform to reasonable nondiscriminatory conservation and environmental protection measures proposed by a state." Id. at 164.

To conclude that the Board's conditions on Pittston were pre-empted by the Port Act would mean that the Board was prohibited from "looking seaward" in judging the suitability of Eastport for an oil refinery and terminal since in doing so the Board would be exercising an independent judgment regarding navigational issues determined by the Federal Government in FPWSA. We do not believe that Ray can be read as prohibiting the state, in the context of a decision related to land use, from making an independent judgment about the impact of vessel navigation on a particular land use. Nothing in Ray compels the State to permit a particular land use if it finds the impact of

tankers to be an unacceptable risk. Conversely, nothing in Ray prohibits the State from disapproving a land use if it finds the hazards associated with tanker traffic to be unacceptable. It follows from that conclusion that just as the State might disapprove the site, having found the FPWSA standards not to be rigorous enough, so the State might approve the site with limits on vessel design.

We also believe that the Board's conditions on Pittston can be viewed as being comparable to the tug option given the tanker operator under Washington's Tanker Law. In Ray, the Court held that the state was not prevented from using vessel design characteristics to trigger the enforcement of tug requirements the state had authority to impose. Since the state could deny the application to use the Eastport location on the grounds that the project would create consequences which did not satisfy the Site Law criteria, 2/ nothing in Ray prevents the state from using the vessel design conditions to trigger the denial. This technique places less restriction on the developer since it gives him the choice to use the site under conditions acceptable to the Board or to forego his project altogether.

Based on all the foregoing, we conclude that the Ray decision clearly pre-empts state enforcement of general vessel design criteria in regulating navigation, but we do not believe that Ray holds that the state cannot condition its permission to use land upon vessel design criteria. In the absence of a clearer Supreme Court decision on this point, we are unable to conclude that the Board's conditions affecting vessel design criteria have been pre-empted.

For similar reasons, we are also unable to conclude that the Board's navigational conditions are pre-empted. The Supreme Court's decision in the Ray case provides additional support for this conclusion. As distinguished from the aspects of its decision dealing with vessel design restrictions, the Court held that Washington was not prevented from imposing operating restrictions on vessel navigation before the Coast Guard had made its own determination under Title I of the Port Act. 3/ Since the Coast Guard has not promulgated vessel traffic regulations for Eastport or Head Harbor Passage pursuant to its Title I authority, the operating conditions contained in the Board Order are not pre-empted by the Port Act

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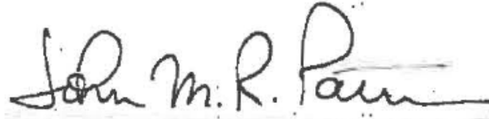
2/ See In Re Maine Clean Fuels, Inc., 310 A.2d 736, 755-57 (Me., 1973).

3/ The Washington Tanker Law requires enrolled and registered vessels to take a state licensed pilot, Wash. Rev. Code 88.16.180, establishes an optional tug requirement and excludes tankers in excess of 125,000 DWT from Puget Sound. Wash. Rev. Code 88.16.190.

even if they are judged by the same criteria which the Supreme Court applied to the Washington Tanker Law. Thus, we conclude that the tanker size limitation, tug requirements and the weather, time and tide restrictions of the Board's Order are not pre-empted not only because they are conditions of land use, not navigation, but also because the Coast Guard has not acted pursuant to Title I in a manner which conflicts with these criteria.



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