



USCG Proposed Rulemaking on Preemption of State Regulations

Briefing to Cook Inlet Regional Citizens Advisory Council

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Nuka Bay is a remote inlet in the northern Gulf of Alaska, filled with crystal glaciers, abundant wildlife, and grand scenic views. Our work is inspired by such places.

Overview



- Process to date
- Contents of Proposed Rule
 - What is Pre-emption?
- Implications to Alaska spill prevention & contingency planning
- Cook Inlet RCAC Concerns
- Next Steps

Process to date



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- USCG published rule
 - 90-day comment period (3/27/2014)
 - No stakeholder outreach
 - No public meetings
- Flurry of extension requests
 - CIRCAC, WA, AK, OR, CA, MA, States/BC Task Force
- Public comment extended until 5/27/2014
 - Public hearings Seattle & Arlington

Proposed Rule (NPRM)



- Assert pre-emption over state laws and regulations in areas covered by the Ports and Waterways Safety Act (PWSA).
 - Title I: regulations that control vessel traffic, protect navigation, and protect the marine environment
 - Title II: regulations that address the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualifications & manning of vessels

What is Pre-emption?



- U.S. Constitution – Supremacy Clause
 - Express pre-emption (stated in federal statute)
 - Implied pre-emption
 - Conflict pre-emption
 - Field pre-emption

What is Pre-emption?



- **Express preemption** applies when Congress, by an express statement, specifically precludes State regulation in a given area. The prohibition against State pilotage regulations for coastwise vessels in an example.

What is Pre-emption?



- **Field preemption** applies when the Federal regulatory regime pervades a specific area of regulation to the extent that courts conclude that Congress has left no room for State regulation. Examples are the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels.

What is Pre-emption?



- **Conflict preemption** applies in cases where the Coast Guard has regulated, or affirmatively decided not to regulate, on a particular subject and a State attempts to regulate on the same subject. Factors to consider are whether the State law conflicts with Federal law, whether compliance with both the State law and Federal law is impossible, and whether State law stands as an obstacle to the accomplishment of the full purpose of the Federal law.

Pre-emption in Maritime Law



- Balance need for uniformity (interstate commerce) with states' rights to protect marine environment
- Pre-emption is often determined by the courts.
 - Complex case law history, particularly relating to vessels and oil spills
 - OPA 90 has specific non-pre-emption provisions that reserve some rights for states

Contents of Proposed Rule



- **USCG is attempting to apply a mix of conflict pre-emption and field pre-emption to state laws and regulations that overlap with specified areas of the USC and CFR.**

Contents of Proposed Rule



- **“Current and future state law is pre-empted”** by USCG regulations at:
 - 33 CFR 157, 163 & 168
 - 46 CFR 2, 8, 13, 15, 30, 31, 32, 34, 35, 36, 38, 39, 50, 52, 53, 54, 56, 57, 58, 59, 61, 62, 63, 64, 98, 105, 110, 111, 112, 162, 163, 164, 170, 172, 174, 175, 178, 179 & 199
- **“Fields that are foreclosed from regulation by a state:**
 - 33 CFR 96, Parts of 33 CFR 151, 153, 155, 164, 173
 - 33 CFR 155.100-155.1030; 155.1055-55.1060; 155.1110-155.1120; 155.1135-155.1150
 - 33 CFR 156.100-156.115; 156.120-156.210; 156.225; 156.320-330
 - Parts of 33 CFR 162.65, 162.75, 162.80, 162.90, 162.117, 162.255
 - 46 CFR 70, 71, 76, 78, 90-93, 95-98, 105, 107-108, 110-122, 125-134, 147, 147A, 148, 150-151, 153-154, 159-164, 166-169, 170-174, 175-185, 188-190, 193-196, 199
 - Parts of 46 CFR 4, 35, 197 & 401
- **State regulations that are “similar, identical, or contrary” are pre-empted by:**
 - Parts of 33 CFR 151, 155 & 157
 - 33 CFR 156.118, 156.215, 156.220, 156.230, 156.300, 156.310
 - 33 CFR 160.1-160.7; 160.115-160.215; 160.101, 160.103, 160.109, 160.111 & 160.113
 - 33 CFR 162.1-162.40; parts of 162.65, 162.75, 162.80, 162.90, 162.117, 162.120-162.125
 - 33 CFR 164.01-164.03; parts of 164.11, 164.19, 164.51, 164.53, 164.55, 164.61, 164.70, 164.78, and 164.82
 - Parts of 33 CFR 165.150, 165.510, 165.540, 165.803, 165.811, 165.923, 165.1152, 165.1181, 165.1704
 - 33 CFR 165.1-165.150 (parts), parts of 165.501, 165.510, 165.540, 165.803, 165.810, 165.811, 165.923, 165.1152, 165.1181, 165.1704, 165.1706, 165.2030
- **Subjects or areas where USCG has determined that “no regulations are needed”:**
 - Determinations to be made through Formal decisions in response to: recommendations of advisory committees; correspondence in response to Congressional inquiries; and response to requests or actions by State and local governments, the industry, or the public.
 - Determinations “may or may not be published in the Federal Register.”

NPRM Implications to Alaska



- Proposed rule may pre-empt state laws/regulations for oil spill prevention & contingency planning:
 - Prevention requirements for vessels
 - Oil spill reporting and record-keeping
 - Oil transfer and lightering procedures
 - Ballast water practices
 - Vessel inspections
 - Vessel safety equipment or operations

NPRM Implications to Alaska



- May impeded ADEC enforcement/inspection authority over areas of shared or overlapping jurisdiction
 - ADEC’s “on the ground” presence complements USCG
 - ADEC regulations incorporate federal requirements by reference, allowing state to enforce/audit

NPRM Implications to Alaska



- Creates uncertainty for regulators, industry, public
 - Potential legal challenges
 - Un-level playing field
- Undermines cooperative approach between ADEC and USCG

Cook Inlet RCAC Concerns



- Rulemaking process
 - NPRM issued December 27, 2013
 - No state or stakeholder outreach
 - Original notice had no public comment
- Headquarters-driven
 - Field units (USCG) unaware
 - Regulatory intent unclear

Cook Inlet RCAC Concerns



- Is this within USCG's authority?
 - Executive agency taking on judicial role
 - Pre-emption issues typically addressed by courts
 - Rulemaking likely targeting escort tug and pilot provisions based on Massachusetts lawsuit
 - Is USCG aware of contingency planning implications?

Next Steps



- Cook Inlet RCAC developing comments for docket
 - Coordinating with ADEC, other states
 - Written comment period closes 5/27
- Outreach to USCG D-17
- Public hearings mid-May (5/13 & 5/18)

Questions?



- To review or comment on proposed rule:
 - www.regulations.gov
 - Docket USCG-2009-1259
 - LCDR Lineka Quijano 202-372-3865
 - **Comments close May 27, 2014**