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## Out the Smokestack: Retooling California's Marine Vessel Rules For Federal Authorization

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## NOTE

# OUT THE SMOKESTACK: RETOOLING CALIFORNIA'S MARINE VESSEL RULES FOR FEDERAL AUTHORIZATION

### INTRODUCTION

The early morning light just permeates the fog as the first large cargo vessel of the day passes under the Golden Gate Bridge. After dropping off hundreds of containers at the port of Long Beach, the vessel is on its way to make Oakland its next port of call. It had steamed up the coast of California during the night, its vast lighting and heating system running continuously. For its entire trip along the coast, the vessel was running two engines: one to power the propulsion, and the other, an auxiliary engine, to create electricity for the vessel. Both engines ran nearly constantly, emitting airborne pollutants that travel with the prevalent winds into California's coastal areas. The health risks from these airborne pollutants include higher incidence of asthma, acute bronchitis and even premature deaths.<sup>1</sup>

Each year, thousands of large ocean-going vessels similar to the one above make port in California.<sup>2</sup> From large cargo vessels to cruise ships, they move goods and people from all corners of the earth.<sup>3</sup> With

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<sup>1</sup> George Raine, *Making the Air Shipshape: Maersk's Cleaner Fuel Is Reducing Pollution*, S.F. CHRONICLE, Oct. 5, 2006, at C1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/05/BUGPLLICBN1.DTL&hw=maersk&sn=001&sc=1000>.

<sup>2</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, III-5 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf>.

<sup>3</sup> *Id.* at III-5.

California supporting two of the largest ports in the United States, it has become one of the major distribution hubs in the Pacific.<sup>4</sup> Indeed, because of this role as a major hub, it is expected that the number of large ocean-going vessels visiting California will only increase.<sup>5</sup> This increase in vessel traffic in California's ports and along its coastline will in turn increase the concentration of airborne pollutants in the state.<sup>6</sup>

In 2005, California's Air Resources Board (CARB), the state body tasked with limiting airborne pollutants, identified the emissions from auxiliary engines on ocean-going vessels as a significant source of air pollution in the state.<sup>7</sup> As a result, CARB promulgated a series of new regulations, the Marine Vessel Rules, which required large ocean-going vessels to burn a lower sulfur-content fuel for use in auxiliary engines.<sup>8</sup> Predictably, a shipping industry representative, the Pacific Merchant Shipping Association (PMSA), quickly challenged these rules in court.<sup>9</sup>

The ultimate decision on this challenge was made by a panel of the Ninth Circuit in a case entitled *Pacific Merchant Shipping Association v. Goldstene*.<sup>10</sup> In *Pacific Merchant*, the Ninth Circuit addressed the issue of whether the federal Clean Air Act (CAA) preempts the Marine Vessel Rules as promulgated by CARB, and more generally, whether it preempts California from regulating the emissions of auxiliary engines on ocean-going vessels.<sup>11</sup> Examining the language of the CAA, the court found that the Marine Vessel Rules were impliedly preempted.<sup>12</sup>

However, despite this ruling, the regulatory door is not completely shut for California. Because of California's leading role in regulating air pollution prior to the passage of the CAA, it was given the option to obtain authorization from the Environmental Protection Agency (EPA) to regulate non-road mobile sources of air pollution.<sup>13</sup> Accordingly,

<sup>4</sup> THE IMPACT PROJECT, GOODS MOVEMENT 101, 14 (2007), <http://hydra.usc.edu/scehsc/Web/Resources/Conference%20Resource%202007/~%20CONTENTS%20FOR%20PRINTING%20~/III.%20Intro%20and%20GM%20101/III.%20B.%20GM%20101%20Materials%202007/III.%20B.%20GM%20101.pdf>.

<sup>5</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, ES-5 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf>.

<sup>6</sup> *Id.* at ES-5.

<sup>7</sup> *Id.* at IV-3.

<sup>8</sup> CAL. CODE REGS. tit. 13, § 2299.1 (2008).

<sup>9</sup> *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1109-10 (9th Cir. 2008).

<sup>10</sup> *Id.* at 1113.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1115.

<sup>13</sup> See *Pac. Merch. Shipping Ass'n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL

because its Marine Vessel Rules have been preempted, California is currently utilizing this option by applying for EPA authorization of these regulations.<sup>14</sup>

Unfortunately, CARB's strategy for utilizing this option is flawed and thus risks failure. In submitting the regulations for authorization, CARB did not make any changes to the Marine Vessel Rules.<sup>15</sup> Instead, CARB is in the process of simultaneously promulgating a new set of regulations on ocean-going vessels.<sup>16</sup> However, this is not CARB's best option for promulgating viable regulation in this area. CARB's best option would be to first *alter* its existing regulations on ocean-going vessel emissions, using *Pacific Merchant* as a guide to draft new rules, and *then* apply for EPA authorization of these updated rules. By doing so, the updated rules would be more likely to be authorized, because they would not force the EPA into a conflict with the Ninth Circuit in order to approve them.

To illustrate how California can effectively regulate the emissions from auxiliary engines on ocean-going vessels, Part I will provide an overview of California's regulatory authority in this area. It will then illustrate how CARB responded to the harms caused by the regulatory failures at the international and national level with the Marine Vessel Rules. Part II provides an overview of the Marine Vessel Rules and the procedural history that led to the Ninth Circuit's decision in *Pacific Merchant*. Part III examines the reasoning of *Pacific Merchant* in determining the Marine Vessel Rules were a preempted emission standard. Part IV discusses how California responded to the ruling by seeking authorization on the Marine Vessel Rules and promulgating new in-use regulations, and suggests that a better option would be for California to instead seek authorization on the new rules. Finally, Part V concludes by noting California is in the unique position of being able to get authorization from the EPA, and that option should be utilized in addressing global climate change.

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2492681, at \*3-4 (E.D. Cal. Aug. 30, 2007); 42 U.S.C.A. § 7543(e)(2)(A) (Westlaw 2009).

<sup>14</sup> Pac. Merch. Shipping Ass'n v. Goldstene, 517 F.3d 1108, 1115 (9th Cir. 2008).

<sup>15</sup> CALIFORNIA AIR RESOURCES BOARD, CALIFORNIA TO DISCONTINUE ENFORCEMENT OF THE OCEAN-GOING VESSEL AUXILIARY DIESEL ENGINE REGULATION (2008), [www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf](http://www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf).

<sup>16</sup> CALIFORNIA AIR RESOURCES BOARD, UPDATED INFORMATIVE DIGEST, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES FROM BASELINE (2009), <http://www.arb.ca.gov/regact/2008/fuelogv08/uid.pdf>.

I. THE MARINE VESSEL RULES RESPONDED TO A LACK OF REGULATION AT THE FEDERAL LEVEL AND TOOK SHAPE UNDER A BROAD INTERPRETATION OF AN “IN-USE EXCEPTION”

During the process of promulgating the Marine Vessel Rules, CARB explained the need for regulating ocean-going vessels.<sup>17</sup> The areas of particular concern were the “communities closest to port operations” since they have a “greater localized risk due to high exposures to high levels of diesel [particulate matter].”<sup>18</sup> With the need identified, CARB could then assess whether it had authority to regulate ocean-going vessels.<sup>19</sup> Upon analysis, CARB determined that although seemingly preempted by the CAA, the Marine Vessel Rules were actually explicitly permitted under the CAA as a type of “in-use exception.” An “in-use exception” is a form of regulation on mobile sources of airborne pollution that is expressly reserved for states under section 209(d) of the CAA.<sup>20</sup> Specifically, this section grants the states the authority to regulate the use of vehicles by methods such as creating carpool lanes, limiting idling engines, and restricting the type of fuel used in vehicles.<sup>21</sup> CARB decided it could rely on this form of state regulation for its authority and went forward with implementing the Marine Vessel Rules.

A. CARB PROMULGATED THE MARINE VESSEL RULES TO ADDRESS SOURCES OF POLLUTION THAT WERE NOT COVERED BY INTERNATIONAL OR NATIONAL EMISSION STANDARDS

In promulgating the Marine Vessel Rules, CARB evaluated the national and international rules governing emissions from auxiliary engines and concluded that they were inadequate.<sup>22</sup> On the international

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<sup>17</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, ES-17-18 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf>.

<sup>18</sup> *Id.* at ES-1.

<sup>19</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE Appendix B (2005), <http://www.arb.ca.gov/regact/marine2005/appb.pdf>.

<sup>20</sup> *Id.*; see 42 U.S.C.A. § 7543(d) (Westlaw 2009).

<sup>21</sup> *Pac. Merch. Shipping Ass'n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681, at \*9 (E.D. Cal. Aug. 30, 2007).

<sup>22</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS

level, emissions from auxiliary engines are regulated by the International Maritime Organization (IMO), which has adopted a set of regulations known as Annex VI to the International Convention on the Pollution from Ships ("MARPOL").<sup>23</sup> Annex VI to the MARPOL treaty limits emissions by placing a fuel standard on vessels over 400 gross tons.<sup>24</sup>

Although there is a wide variety of grades of fuel for use in ocean-going vessels over 400 gross tons,<sup>25</sup> they are all classified according to their level of refinement.<sup>26</sup> One of the defining characteristics of these different grades of marine fuel is the fuel's concentration of sulfur.<sup>27</sup> Generally, fuels with a higher level of refinement have a lower concentration of sulfur.<sup>28</sup> Highly refined distillate fuels, like marine gas oil, or marine diesel oil, contain the lowest concentrations of sulfur.<sup>29</sup> On the other end of the refinement spectrum, heavy fuel oil has relatively high concentrations of sulfur.<sup>30</sup> Correspondingly, in the middle are various grades of medium fuel oil.<sup>31</sup>

The IMO requires fuel used in ocean-going vessels to have a sulfur content of no more than 4.5 percent, the amount generally present in heavy fuel oil.<sup>32</sup> In evaluating these international standards, CARB

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<sup>23</sup> INTERNATIONAL MARITIME ORGANIZATION, SAFE, SECURE, AND EFFICIENT SHIPPING ON CLEAN OCEANS, [http://www.imo.org/includes/blastData.asp/doc\\_id=3018/What\\_is\\_Posted\\_Final\\_Artwork.pdf](http://www.imo.org/includes/blastData.asp/doc_id=3018/What_is_Posted_Final_Artwork.pdf) (last visited May 14, 2009).

<sup>24</sup> Int'l Maritime Org., *Text of the Protocol of 1997 and Annex VI to the International Convention for the Prevention of Pollution from Ships*, (1997) [http://www.imo.org/Conventions/contents.asp?doc\\_id=678&topic\\_id=258#30](http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#30).

<sup>25</sup> EPA, IN USE MARINE DIESEL FUEL, 4 (1999) [www.epa.gov/oms/regs/nonroad/marine/ci/fr/dfuelrpt.pdf](http://www.epa.gov/oms/regs/nonroad/marine/ci/fr/dfuelrpt.pdf).

<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *See id.*

<sup>29</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, ES-4 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf>.

<sup>30</sup> *Id.* at ES-4.

<sup>31</sup> *Id.* at ES-4.

<sup>32</sup> Int'l Maritime Org., *Text of the Protocol of 1997 and Annex VI to the International Convention for the Prevention of Pollution from Ships*, (1997) [http://www.imo.org/Conventions/contents.asp?doc\\_id=678&topic\\_id=258#30](http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#30). By limiting the amount of sulfur in the fuel, the IMO will be lowering the amount of sulfur oxides emitted from burning the fuel. *Id.*

found that this IMO sulfur limit of 4.5 percent on bunker fuel was woefully inadequate.<sup>33</sup> CARB noted that this rule did little to regulate fuels because very few fuels actually exceed that level of sulfur concentration.<sup>34</sup>

Meanwhile, on the national level, the EPA sets the limits on emissions from large ocean-going vessels.<sup>35</sup> In 2003, the EPA implemented a new set of emission standards for large ocean-going vessels.<sup>36</sup> However, this set of standards has two severe limitations. First, it only applies to ships flagged<sup>37</sup> in the United States, and second, it only applies to new engines on those U.S.-flagged ships.<sup>38</sup> This is a small proportion of ships, because the vast majority of ships are not flagged in the United States.<sup>39</sup> In addition, even of this small percentage of U.S.-flagged ships that it does apply to, it does nothing to control emissions from old engines already in use on ships.<sup>40</sup> Thus, when CARB evaluated the EPA's emission standards for ocean-going vessels, it concluded that they were too limited in their application.<sup>41</sup> CARB wanted its version of the Marine Vessel Rules to cover auxiliary engines from both U.S. and non-U.S.-flagged vessels, and it wanted them to take effect immediately

<sup>33</sup> CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, ES-17-18 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf>.

<sup>34</sup> *Id.* at ES-17, 18.

<sup>35</sup> See 42 U.S.C.A. § 7521(a) (Westlaw 2009).

<sup>36</sup> Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746 (Env'tl. Prot. Agency Feb. 28, 2003) (codified at 40 C.F.R. § 94.1 (2009)).

<sup>37</sup> See Samantha Bomkamp, *Higher Costs Keep U.S. Flagged Ships Numbers Down*, MIAMI HERALD, Apr. 10, 2009, available at <http://www.miamiherald.com/business/nation/story/994081.html> (explaining that being flagged in a nation is like being registered to operate under the nation's rules and regulations).

<sup>38</sup> Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746 (Env'tl. Prot. Agency Feb. 28, 2003) (codified at 40 C.F.R. § 94.1 (2009)).

<sup>39</sup> Samantha Bomkamp, *Higher Costs Keep U.S. Flagged Ships Numbers Down*, MIAMI HERALD, Apr. 10, 2009, available at <http://www.miamiherald.com/business/nation/story/994081.html>.

<sup>40</sup> See CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, ES-18 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf> (in comparing EPA regulations to its own proposal, CARB noted that EPA "[s]tandards only apply to U.S.-flagged vessels," and that EPA "[b]enefits phase in slowly with vessel turnover").

<sup>41</sup> *Id.* at ES-17 (2005) ("existing regulations will achieve relatively modest diesel P[articulate] M[atter] reductions . . .").

without having to wait for new engines to be built in compliance.<sup>42</sup>

To address the inadequate regulation of auxiliary engines from the IMO and the EPA, CARB undertook studies to examine the types of fuel used in those engines.<sup>43</sup> Auxiliary engines often run on heavy fuel oil because it is the cheapest liquid petroleum available.<sup>44</sup> One survey of incoming large ocean-going vessels by CARB found that about seventy-five percent of the ships visiting California ports use heavy fuel oil for running their auxiliary engines.<sup>45</sup> As described above, heavy fuel oil emits higher concentrations of air pollutants, such as particulate matter, sulfur oxides and nitrogen oxides, than marine gas oil or marine diesel oil.<sup>46</sup> Accordingly, CARB decided the best way to lower these pollutants would be to require vessels to use more highly refined marine gas oil or marine diesel oil.<sup>47</sup>

To illustrate the introduction of pollutants from vessels using heavy fuel oil, CARB pointed to studies that modeled the airflow along California's coast.<sup>48</sup> These airflow models demonstrated prevailing winds that carry gaseous materials onshore.<sup>49</sup> In some of these studies, scientists released indicator gases from eight to twenty miles off the California coastline and then measured the concentration of the indicator gases at testing stations.<sup>50</sup> These studies found that the indicator gases came onshore "spanning over wide distances."<sup>51</sup> This influx of gaseous materials led CARB to conclude that airborne pollution from ocean-going vessels was impacting the air quality in California's coastal communities.<sup>52</sup> With these harms from auxiliary-engine emissions

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<sup>42</sup> *Id.* at ES-18.

<sup>43</sup> *See id.* at III-6-8.

<sup>44</sup> *Cf.* Guy Wilson-Roberts, *Maersk Fuel Switching "Very successful,"* SUSTAINABLE SHIPPING, July 10, 2007, available at <http://www.sustainableshipping.com/news/2007/07/68418>.

<sup>45</sup> *See* CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, ES-4 (2005), <http://www.arb.ca.gov/regact/marine2005/isor.pdf>.

<sup>46</sup> *Id.* These pollutants can increase the risk of respiratory cancers and other non-cancer respiratory diseases such as asthma and bronchitis. *Id.*

<sup>47</sup> *Id.* at ES-8.

<sup>48</sup> *Id.* at IV-7-8.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at IV-7-8 (noting tracer studies where inert gases were released from points on the ocean, then found onshore, thus illustrating the transport of airborne pollutants).

<sup>51</sup> *Id.* at IV-7-8.

<sup>52</sup> *Id.* at IV-8 ("From these studies we can infer that pollutants emitted from offshore vessels can be transported to onshore areas and be available to participate in onshore atmospheric processes, influencing onshore air quality.").



identified, CARB began to shape the Marine Vessel Rules.

**B. INSTEAD OF SEEKING EPA AUTHORIZATION, CARB BASED ITS AUTHORITY TO REGULATE NON-NEW NON-ROAD VEHICLES ON A BROAD INTERPRETATION OF THE CAA SECTION 209(D) “IN-USE EXCEPTION”**

The Clean Air Act broadly prohibits states from enforcing emissions standards on new motor vehicles and their engines.<sup>53</sup> The Supreme Court has broadly defined impermissible emission standards as those that impose restrictions on manufacturers of engines.<sup>54</sup> However, the CAA contains an “in-use exception” that allows some small-scale regulation of non-road vehicles by all state and local governments.<sup>55</sup> In particular, the CAA provides that “[n]othing in this part shall preclude or deny to any state or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.”<sup>56</sup> Thus, in *Engine Manufacturers Ass’n v. U.S. EPA*, the Court of Appeals for the District of Columbia Circuit noted that the “longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations – such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles – that are expressly intended to control emissions.”<sup>57</sup> This has been interpreted to empower state governments to enact limited forms of restrictions on the use of mobile engines as long as the restrictions are not emission standards.<sup>58</sup> In other words, states may enact in-use requirements.

However, CARB was operating under an overly broad interpretation of section 209(d)’s “in-use exception.”<sup>59</sup> CARB reasoned as follows:

<sup>53</sup> 42 U.S.C.A. § 7543(a) (Westlaw 2009).

<sup>54</sup> See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (determining that the rules at issue were standards because “[t]o meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions”).

<sup>55</sup> 42 U.S.C.A. § 7543(d) (Westlaw 2009).

<sup>56</sup> *Id.*

<sup>57</sup> *Engine Mfrs. Ass’n v. U.S. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996).

<sup>58</sup> *Allway Taxi v. New York City*, 340 F. Supp. 1120, 1124 (S.D. N.Y. 1972).

<sup>59</sup> See CALIFORNIA AIR RESOURCES BOARD, STAFF REPORT: INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING; PROPOSED REGULATION FOR AUXILIARY DIESEL ENGINES AND DIESEL-ELECTRIC ENGINES OPERATED ON OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE Appendix B (2005), <http://www.arb.ca.gov/regact/marine2005/appb.pdf>.

Indeed, States and their political subdivisions may regulate the use of marine engines once placed into service. Such in-use requirements, whether adopted by a state or local government, including California or its political subdivisions, are not subject to potential federal preemption and therefore do not need U.S. EPA authorization. Permissible in-use requirements include, but are not limited to, hours of usage, daily mass emission limits, and sulfur limits in the marine engine fuel. The limit to such in-use requirements is that they can neither place additional requirements on the original engine manufacturer nor require a retrofit of the engine.<sup>60</sup>

Because of this broad interpretation of an “in-use exception,” CARB thought it had authority under the CAA for the Marine Vessel Rules, and as a result, it did not attempt to obtain authorization from the EPA.<sup>61</sup>

Because of California's leading role in the regulation of air quality, it has the unique ability to act as a testing ground for new regulations.<sup>62</sup> Section 209(e)(2)(A) of the CAA gives California the ability to craft new regulations on non-road vehicles through an EPA authorization process.<sup>63</sup> Specifically, under section 209(e)(2)(A), once California makes a determination that its proposed regulations on non-road vehicles are at least as protective as applicable federal regulations, it may then seek authorization from the EPA.<sup>64</sup> However, the Administrator of the EPA can grant an authorization only if 1) the determination by California is not arbitrary and capricious, 2) California has compelling or extraordinary conditions, and 3) the standards are consistent with section 209.<sup>65</sup> Once approved by the Administrator of the EPA, the emission

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<sup>60</sup> *Id.* at B-12.

<sup>61</sup> See 42 U.S.C.A. § 7543(a) (Westlaw 2009).

<sup>62</sup> See 42 U.S.C.A. § 7543(e)(2)(A) (Westlaw 2009).

<sup>63</sup> *Id.*; see *Pac. Merch. Shipping Ass'n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681, at \*3 (E.D. Cal. Aug. 30, 2007) (noting that California is a leader in establishing standards for regulation of air pollutants).

<sup>64</sup> 42 U.S.C.A. § 7543(e)(2)(A) (Westlaw 2009).

(A) In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that— (i) the determination of California is arbitrary and capricious, (ii) California does not need such California standards to meet compelling and extraordinary conditions, or (iii) California standards and accompanying enforcement procedures are not consistent with this section.

*Id.*

<sup>65</sup> *Id.*

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standards can be adopted by any other state, as long as they are identical to California's regulation.<sup>66</sup> Therefore, this authorization process provides California with a specific, but limited, ability to regulate auxiliary engines on marine vessels.<sup>67</sup>

### C. CARB MADE A FUEL REQUIREMENT THE BACKBONE OF THE MARINE VESSEL RULES

The Marine Vessel Rules resulted in two unique regulations.<sup>68</sup> The regulations provided, in part, that *all* ocean-going vessels, both domestic and foreign-flagged, would be subject to the regulations.<sup>69</sup> This was in contrast to the current domestic EPA regulations, which addressed only new engines in vessels flagged in the United States.<sup>70</sup> The Marine Vessel Rules also specified that auxiliary engines would be prohibited from burning fuels that emitted concentrations of particulate matter, nitrous oxides, or sulfur oxides above the levels they would have emitted had the engines burned marine distillate fuels.<sup>71</sup> By using this standard, CARB was supplementing the IMO's sole focus on sulfur content in fuels.<sup>72</sup> The regulations also provided for a presumption that the emissions from an auxiliary engine would be in compliance if it used either marine gas oil or marine diesel oil.<sup>73</sup>

Further, vessels could be in compliance if they adopted alternative measures to reduce airborne pollution.<sup>74</sup> Under the Alternative Control of Emissions, or the "ACE" program, the Marine Vessel Rules allowed ships to provide proof that their emissions were as clean as if the engines

<sup>66</sup> *Id.* § 7543(e)(2)(B).

<sup>67</sup> 42 U.S.C.A. § 7543(a) (Westlaw 2009).

<sup>68</sup> See CAL. CODE REGS. tit. 13, § 2299.1(b) (2008); CAL. CODE REGS. tit. 17, § 93118 (2008).

<sup>69</sup> CAL. CODE REGS. tit. 13, § 2299.1(b) (2008).

<sup>70</sup> See Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746 (Env'tl. Prot. Agency Feb. 28, 2003) (codified at 40 C.F.R. § 94.1 (2009)).

<sup>71</sup> CAL. CODE REGS. tit. 13, § 2299.1(e)(1)(A) (2008).

<sup>72</sup> See Int'l Maritime Org., *Text of the Protocol of 1997 and Annex VI to the International Convention for the Prevention of Pollution from Ships*, [http://www.imo.org/Conventions/contents.asp?doc\\_id=678&topic\\_id=258#30](http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#30), (1997).

<sup>73</sup> CAL. CODE REGS. tit. 13, § 2299.1(e)(1)(C) (West 2008); see *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1111 (9th Cir. 2008) ("Compliance with the Marine Vessel Rules is presumed where a vessel uses the specified fuels.")

<sup>74</sup> See *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1111 (9th Cir. 2008) ("[A] vessel owner may also comply by 'alternative emission control strategies . . . [that] result in emissions . . . that are no greater than the emissions that would have occurred' using the specified fuels.") (citing CAL. CODE REGS. tit. 13, § 2299.1(g)(1)(A) (West 2008)).

had been burning distillate fuel oil.<sup>75</sup> To ensure that the vessels were in compliance with this regulation, the ships were required to keep logs of the time and location that they entered the regulated area, and the type of fuel used in each engine while in the regulated area.<sup>76</sup> Owners or lessors of vessels not in compliance with these regulations were subject to injunctions, fines, prosecution and possible imprisonment.<sup>77</sup> The *Pacific Merchant* case addressed the validity of these rules.

## II. FACTS AND PROCEDURAL HISTORY OF *PACIFIC MERCHANT*

In January of 2007, CARB began enforcing the regulations by inspecting ships as they entered various California ports.<sup>78</sup> The PMSA is an organization that represents the interests of several companies that own or lease vessels that would be subject to the Marine Vessel Rules.<sup>79</sup> The PMSA filed suit against CARB in the U.S. District Court for the Eastern District of California.<sup>80</sup> The PMSA challenged the constitutionality of the Marine Vessel Rules, arguing that they were preempted under the Clean Air Act and the Submerged Lands Act.<sup>81</sup>

The district court explained that moving vehicles are primarily regulated by the federal government.<sup>82</sup> This is because making them conform to differing regulations as they move from state to state would create the “spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers.”<sup>83</sup> Because of the expected burden on manufacturers of new engines and vehicles, section 209(e)(1) expressly preempted state regulation of new road engines, as well as new engines for trains, farm equipment, and construction equipment.<sup>84</sup> However, the court noted California’s special exemption from preemption, section 209(e)(2)(A), did not expressly preempt any state regulation.<sup>85</sup>

<sup>75</sup> See CAL. CODE REGS. tit. 13, § 2299.1(g)(1)(A) (2008).

<sup>76</sup> *Id.* § 2299.1(e)(2).

<sup>77</sup> *Id.* § 2299.1(f)(1).

<sup>78</sup> *Pac. Merch. Shipping Ass’n v. Goldstene*, 517 F.3d 1108, 1109 (9th Cir. 2008).

<sup>79</sup> *Id.* at 1112.

<sup>80</sup> *Id.*

<sup>81</sup> *Pac. Merch. Shipping Ass’n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681, at \*4 (E.D. Cal. Aug. 30, 2007).

<sup>82</sup> *Id.* at \*2.

<sup>83</sup> *Id.* (quoting *Motor & Equip. Mfrs. Ass’n, Inc. v. EPA*, 627 F.2d 1095, 1109, (D.C. Cir. 1979)).

<sup>84</sup> 42 U.S.C.A § 7543(e)(1)(A)-(B) (Westlaw 2009).

<sup>85</sup> *Pac. Merch. Shipping Ass’n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681, at \*5 (E.D. Cal. Aug. 30, 2007) (“Unlike CAA § 209(e)(1), CAA § 209(e)(2) does not

Thus, the district court looked to *Engine Manufacturers Ass'n v. U.S. EPA (EMA)* for guidance on whether state regulation of non-new, non-road vehicles was impliedly preempted.<sup>86</sup> *EMA* found that although the CAA does not expressly state that regulation of non-new, non-road engines is preempted, it found that regulation of non-new, non-road engines is impliedly preempted without EPA authorization.<sup>87</sup> After deciding to adopt the ruling in *EMA*, the district court found that the CAA impliedly preempts California from regulating the emissions of ocean-going vessels.<sup>88</sup> It found that the regulations were preempted standards, not in-use requirements, “[b]ecause the regulations set numerical requirements for the reduction of emissions relating to particular emissions rather than a fleet as a whole.”<sup>89</sup> Because of this decision, the Marine Vessel Rules were permanently enjoined from being enforced.<sup>90</sup> CARB then appealed this decision to the U.S. Court of Appeals for the Ninth Circuit.<sup>91</sup>

### III. THE NINTH CIRCUIT’S ANALYSIS OF THE *PACIFIC MERCHANT* CASE FOCUSED ON THE ABILITY OF CALIFORNIA TO SEEK AUTHORIZATION FROM THE EPA

The Ninth Circuit also determined that the Marine Vessel Rules were impliedly preempted. It found that regulations on ocean-going vessels would fit in a “sphere of implied preemption” absent authorization.<sup>92</sup> To determine the boundaries of this sphere, the Ninth Circuit turned to *Engine Manufacturers Ass'n v. U.S. EPA* (“*EMA*”) for its discussion of section 209.<sup>93</sup> In addition, the court used the Supreme

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expressly preempt any state regulation.”) (citing *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996)).

<sup>86</sup> *Id.* at \*5-6.

<sup>87</sup> See *Pac. Merch. Shipping Ass'n v. Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681, at \*5 (E.D. Cal. Aug. 30, 2007) (“[T]he D.C. Circuit held that CAA § 209(e)(2) implies preemption. . . . In a well reasoned, 2-1 decision, the *EMA* court determined that the scope of this implied preemption provision applied to both new and non-new equipment and vehicles. . . . Thus, according to the majority, the implied preemption under CAA § 209(e) (2) for nonroad vehicles and engines is broader than the express preemption of road vehicles and engines under CAA § 209(a)-the latter applying only to new sources.”) (citing *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1087-93 (D.C. Cir. 1996)).

<sup>88</sup> See *id.* at \*11 (“CAA § 209(e)(2) preempts California from setting emission standards without EPA approval for both new and non-new nonroad sources.”).

<sup>89</sup> *Id.* at \*12.

<sup>90</sup> *Id.*

<sup>91</sup> *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1113 (9th Cir. 2008).

<sup>92</sup> *Id.* at 1113.

<sup>93</sup> *Id.*; see *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075 (D.C. Cir. 1996).

Court's decision *Engine Manufacturers v. South Coast Air Quality Management District* ("SCAQMD") to find that the Marine Vessel Rules were an emission standard, and not an in-use requirement.<sup>94</sup>

A. THE NINTH CIRCUIT ADOPTED THE REASONING OF THE *EMA* DECISION TO CLARIFY THE PREEMPTIVE VALUE OF THE CAA ON NON-NEW, NON-ROAD ENGINES

The court noted that section 209(e)(1) does not expressly preempt state regulation of marine vessels.<sup>95</sup> Further, it does not state whether non-new non-road engines can be regulated by a state without EPA authorization.<sup>96</sup> To help clarify the interpretation of these two sections, the Ninth Circuit looked to the *EMA* decision.<sup>97</sup> The *EMA* court focused on the language of section 209(e)(2)(A), specifically the absence of "new" after the word "any" in the statute.<sup>98</sup> Because it was not clear from section 209(e)(2)(A) whether states are required to seek authorization from the EPA *only* when they seek to regulate new non-road engines, the *EMA* court concluded that all regulations on emissions from all non-road engines and vehicles – *whether new or non-new* – are impliedly preempted without authorization.<sup>99</sup>

The Ninth Circuit decided that the Marine Vessel Rules would need to be authorized by the EPA before they could be valid.<sup>100</sup> Indeed, the Ninth Circuit explained that

The district court adopted the holding of the *EMA* majority that the implied preemption of § 209(e)(2) applies both to new and non-new engines. So do we, because it is sound and because neither the EPA nor Congress has challenged the *EMA* holding in the nearly twelve years since it was decided. Thus, we join the D.C. Circuit and hold that the implied preemption of § 209(e)(2) applies to 'any nonroad vehicles or engines,' including new and non new sources.<sup>101</sup>

The Ninth Circuit's adoption of this decision played an important

<sup>94</sup> See *Pac. Merch.*, 517 F.3d at 1114; *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004).

<sup>95</sup> *Pac. Merch.*, 517 F.3d at 1113.

<sup>96</sup> See 42 U.S.C.A. § 7543(e)(2)(A) (Westlaw 2009).

<sup>97</sup> See *Pac. Merch.*, 517 F.3d at 1113; *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996).

<sup>98</sup> *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1090 (D.C. Cir. 1996).

<sup>99</sup> *Id.* at 1087-93.

<sup>100</sup> *Pac. Merch.*, 517 F.3d at 1113.

<sup>101</sup> *Id.*

role in *Pacific Merchant* because California's Marine Vessel Rules applied to marine engines already existing on ships – i.e., non-new, non-road engines.

**B. THE NINTH CIRCUIT DETERMINED THAT THE MARINE VESSEL RULES WERE A PREEMPTED “EMISSION STANDARD” AND NOT A VALID “IN-USE EXCEPTION”**

Once the Ninth Circuit found that the CAA impliedly preempted regulation of this class of vehicles, the court turned to the regulation itself. The second issue the Ninth Circuit had to resolve was whether the Marine Vessel Rules were an in-use exception or an emission standard.<sup>102</sup> If the Marine Vessel Rules were deemed an in-use exception, then the rules would not be preempted, because this was a form of regulation reserved for the states. However, if the rules were determined to be an emission standard, then the rules would be preempted.

The Ninth Circuit used the Supreme Court's *SCAQMD* decision to guide its analysis of the Marine Vessel Rules.<sup>103</sup> In that case, state regulation required owners of fleets of cars for rental or lease to only purchase vehicles that met a certain fuel efficiency standard.<sup>104</sup> In an opinion by Justice Scalia, the Court in *SCAQMD* broadly interpreted the definition of an emission standard. Justice Scalia relied on Webster's Dictionary, which defined a “standard” as that which “is established by authority, custom, or general consent, as a model or example; criterion; test.”<sup>105</sup>

The Ninth Circuit addressed this definition of an emission standard:

The criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of “standards” throughout Title II of the [Clean Air Act] (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, e.g. 42 U.S.C. § 7521(a)(3)(B)(ii), or emission-control technology with which

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<sup>102</sup> *Id.* at 1114.

<sup>103</sup> *Id.*

<sup>104</sup> *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 250-52 (2004).

<sup>105</sup> *Id.* at 252-53.

they must be equipped, e.g., § 7521(a)(6).<sup>106</sup>

Applying the *SCAQMD* decision, the Ninth Circuit in *Pacific Merchant* found that CARB had set a fuel quality standard, which the vessels must meet by either using marine distillate fuels or alternative compliance measures.<sup>107</sup> The Ninth Circuit noted that the inclusion of alternative compliance measures would require an emission control technology to be installed on the vessels' engines, thus making the Marine Vessel Rules an emission standard.<sup>108</sup>

The court then turned to evaluating CARB's argument that the rules were an "in-use exception" under section 209(d) of the CAA.<sup>109</sup> If the "in-use exception" applied, California would be allowed to regulate the operation of vehicles to limit pollution, including requiring certain types of fuels to be used in the vehicles.<sup>110</sup> The court noted that the Marine Vessel Rules did not simply require that a certain fuel be used, but instead offered alternative means of compliance.<sup>111</sup> While vessels using marine distillate fuels were presumed to be in compliance, a vessel would also be in compliance through alternative compliance methods.<sup>112</sup> The alternative compliance measures required the emissions of the vessel to match levels it would have emitted had the vessel been using marine distillate fuel.<sup>113</sup> Because these alternative compliance measures did not require the use of a specific fuel, but instead required an emission standard, the Ninth Circuit concluded that the Marine Vessels Rules were not an in-use requirement.<sup>114</sup> Thus, the court affirmed the district court's decision that the Marine Vessel Rules were preempted.

#### IV. CARB'S RESPONSE TO *PACIFIC MERCHANT*

Since the Ninth Circuit decision in *Pacific Merchant*, the CAA now impliedly preempts states from regulating both non-new engines (those already existing on ships) and new engines as ships are built.<sup>115</sup> California has already taken some steps in response to the decision in

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<sup>106</sup> *Pac. Merch.*, 517 F.3d at 1114 (quoting Engine Mfr. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 253 (2004)).

<sup>107</sup> *See id.* at 1114-15.

<sup>108</sup> *See id.*

<sup>109</sup> *Id.* at 1115.

<sup>110</sup> 42 U.S.C.A. § 7543(d) (Westlaw 2009).

<sup>111</sup> *Pac. Merch.*, 517 F.3d at 1115.

<sup>112</sup> CAL. CODE REGS. tit. 13, § 2299.1(g) (2008).

<sup>113</sup> *Id.* § 2299.1(g)(1).

<sup>114</sup> *Pac. Merch.*, 517 F.3d at 1115.

<sup>115</sup> *See id.* at 1114-15.



*Pacific Merchant*.<sup>116</sup> First, CARB expressed its intent to seek authorization from the EPA for the same Marine Vessel Rules that were at issue in *Pacific Merchant*.<sup>117</sup> Second, CARB began promulgating new regulations to limit emissions from ocean-going vessels based on the authority granted in section 209(d)'s "in-use exception."<sup>118</sup>

#### A. CARB'S PROPOSED REGULATIONS

CARB's proposed regulations, the Regulations for Fuel Sulfur and Other Operational Requirements ("Fuel Sulfur Limit Regulation"), took steps to make the rules more closely resemble an "in-use exception."<sup>119</sup> The new regulations removed the alternative compliance measure,<sup>120</sup> required the use of marine gas oil or marine diesel oil,<sup>121</sup> reduced the penalties for noncompliance,<sup>122</sup> and provided an exemption for vessels that would need essential modifications.<sup>123</sup>

Most in-use regulations simply require the use of a particular quality of fuel, and this is exactly one of the changes CARB made in the Fuel Sulfur Limit regulations.<sup>124</sup> The original Marine Vessel Rules had required ships either to burn distillate fuel oil, the highest priced and lowest polluting marine fuels, or to use alternative measures to reach the same emission levels.<sup>125</sup> The existence of the alternative compliance provisions led the Ninth Circuit to decide that the regulations were not

<sup>116</sup> CALIFORNIA AIR RESOURCES BOARD, CALIFORNIA TO DISCONTINUE ENFORCEMENT OF THE OCEAN-GOING VESSEL AUXILIARY DIESEL ENGINE REGULATION (2008), <http://www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf>.

<sup>117</sup> *Id.* ("[C]ARB does not intend to withdraw the regulation at this time from the California Code of Regulations. Instead, [C]ARB plans to submit a request for authorization from U.S.EPA, pursuant to CAA § 209(e), to enforce the existing regulation.").

<sup>118</sup> CALIFORNIA AIR RESOURCES BOARD, FINAL REGULATION ORDER, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE (2009) <http://www.arb.ca.gov/regact/2008/fuelogv08/fro13.pdf>.

<sup>119</sup> CALIFORNIA AIR RESOURCES BOARD, INITIAL STATEMENT OF RULEMAKING, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, APPENDIX B, B-10-11 (2009) <http://www.arb.ca.gov/regact/2008/fuelogv08/appbfuel.pdf>.

<sup>120</sup> CALIFORNIA AIR RESOURCES BOARD, FINAL REGULATION ORDER, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE (2009) <http://www.arb.ca.gov/regact/2008/fuelogv08/fro13.pdf>.

<sup>121</sup> *Id.* at 10.

<sup>122</sup> *Id.* at 12.

<sup>123</sup> *Id.* at 13.

<sup>124</sup> *See Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1115 (9th Cir. 2008).

<sup>125</sup> *See CAL. CODE REGS. tit. 13, § 2299.1* (2008).

in-use fuel requirements because “no particular fuel is required to be used at all.”<sup>126</sup> Thus, CARB was correct to require the use of a particular fuel in its new proposed regulation because it more resembles an in-use requirement.

## B. CARB SHOULD OBTAIN EPA AUTHORIZATION OF ITS NEW REGULATIONS

Although the new regulations are a great first step, a better option would be for CARB to seek authorization for the newly promulgated regulations. Despite taking a form similar to an in-use exception, these new regulations are nevertheless likely to be another target for a lawsuit challenging their validity. This is because of the limited scope courts have given section 209(d)'s “in-use exception.”<sup>127</sup> In addition, one commentator has noted that “where a state statute has implemented a substantively liberal position, particularly one concerning the protection of the environment, it is unlikely to be afforded the increased protection and deference of the presumption against preemption by the Supreme Court.”<sup>128</sup> Thus, seeking EPA authorization is a better option for California, as CARB is likely to obtain authorization for its recent regulatory changes on emissions from ocean-going vessels.

As discussed above, the authorization process under section 209(e)(2) establishes that the Administrator of the EPA can authorize California to have stricter emission standards than the national level if 1) the levels are at least as protective as the national standard, 2) the levels are not arbitrary and capricious, and 3) California has compelling and extraordinary conditions deserving the regulation.<sup>129</sup> California meets the first prong because the Fuel Sulfur Limit Regulations would require ocean-going vessels to use fuel with sulfur content of 1.5% or below,<sup>130</sup> while the applicable federal regulation does not require a sulfur level lower than 1.5% in fuel for ocean-going vessels.<sup>131</sup> Thus, because the

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<sup>126</sup> *Pac. Merch.*, 517 F.3d at 1115.

<sup>127</sup> See *Engine Mfr. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008).

<sup>128</sup> Michael Gadeberg, “Presumptuous Preemption: How “Plain Meaning” Trumped Congressional Intent in *Engine Manufacturers Association v. South Coast Air Quality Management District*,” 32 *ECOLOGY L.Q.* 453, 483 (2005).

<sup>129</sup> 42 U.S.C.A. § 7543(e)(2) (Westlaw 2009).

<sup>130</sup> CALIFORNIA AIR RESOURCES BOARD, FINAL REGULATION ORDER, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE 10 (2009) <http://www.arb.ca.gov/regact/2008/fuelogv08/fuelogv08.htm>.

<sup>131</sup> Control of Emissions from New Marine Compression-Ignition Engines at or Above 30

lower sulfur fuel has lower levels of pollutants, the Fuel Sulfur Limit Regulations are at least as protective as the national standard.

For the second prong, California can show that its decision to enact the Fuel Sulfur Limit Regulations was not arbitrary and capricious. When examining California's request for authorization on its regulation of small off-road engines, the EPA determined that CARB's use of a record to make this determination was enough to show that CARB was not acting in an arbitrary or capricious manner.<sup>132</sup> CARB has a similar record in the form of the Initial Statement of Reasons for Proposed Rulemaking report, which will show that the Fuel Sulfur Limit Regulations are not arbitrary and capricious.<sup>133</sup> This report makes the connection between the airborne emissions from ships and the increase in health risks.<sup>134</sup> The Statement of Rulemaking of the Fuel Sulfur Limit Regulations illustrates the harms from the pollutants by pointing to both cancer risk studies and studies showing the transport of airborne pollutants onshore.<sup>135</sup> Because there is a connection between the regulated action, polluting ships, and the public health of California, the regulation will not be deemed arbitrary and capricious by the EPA.

The most difficult requirement in complying with CAA section 209(e)(2) would be the "compelling and extraordinary conditions" prong.<sup>136</sup> The EPA has previously found that California has compelling and extraordinary conditions that require stricter regulation because it has some of the worst air quality in the nation.<sup>137</sup> The fact that off-road emissions are a significant contributor to that poor air quality was enough to establish compelling and extraordinary conditions.<sup>138</sup>

In addition, the emissions from auxiliary engines present a unique problem in California largely due to the strong influence of winds from

Liters Per Cylinder, 68 Fed. Reg. 9746-01 (Feb. 28, 2003) (codified at 40 C.F.R. § 94.01 (2009)).

<sup>132</sup> EPA, CALIFORNIA STATE NONROAD ENGINE AND VEHICLE POLLUTION CONTROL STANDARDS: DECISION OF ADMINISTRATOR 10 (2006), <http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801f1f93&disposition=attachment&contentType=pdf>.

<sup>133</sup> CALIFORNIA AIR RESOURCES BOARD, INITIAL STATEMENT OF RULEMAKING, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, II-2-7 (2009) <http://www.arb.ca.gov/regact/2008/fuelogv08/ISORfuelogv08.pdf/fuelogv08.htm>.

<sup>134</sup> *Id.* at II-3.

<sup>135</sup> *Id.* at II-4, IV-6.

<sup>136</sup> See 42 U.S.C.A. § 7543 (e)(2)(A)(ii) (Westlaw 2009).

<sup>137</sup> EPA, CALIFORNIA STATE NONROAD ENGINE AND VEHICLE POLLUTION CONTROL STANDARDS: DECISION OF ADMINISTRATOR 11 (2006), <http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801f1f93&disposition=attachment&contentType=pdf>.

<sup>138</sup> *Id.*

the Pacific Ocean spreading the airborne pollution over a larger area.<sup>139</sup> This increases the risk of asthma, acute bronchitis and even premature death over a much larger area than in other states, especially since many vessels travel up and down the length of California's coast.<sup>140</sup> Although other states suffer some of these problems, California's unique geography allows it to support two of the largest ports in the United States.<sup>141</sup> This fact, coupled with the long coastline that many ocean-going vessels traverse, puts California in a position of unique environmental and health-related harm due to ship-based emissions.<sup>142</sup> Governor Schwarzenegger has recognized that California is particularly vulnerable to environmental harms.<sup>143</sup> This shows that California will likely meet this element and will obtain EPA authorization.

By seeking the regulatory authority under section 209(e)(2), California would not be resting the new Fuel Sulfur Limit Regulations on the weakened "in-use exception." Instead, it would have an express grant from the EPA to regulate ocean-going auxiliary engines. With express authorization from the federal government, California can reduce the harms from airborne pollution caused by a source over which many local governments have little regulatory power.

## V. CONCLUSION

California's position as a hub in the international movement of goods puts it in the position of suffering the environmental and health harms caused by the carriers of those goods. Recognizing these harms, California has been attempting to address this problem for many years. Although the recent *Pacific Merchant* case was a setback, it also provides California an opportunity to address this source of pollution in a regulation able to withstand judicial scrutiny. In many other jurisdictions and in other countries, where the local governments have even less political power, the public near the coastline is constantly being

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<sup>139</sup> CALIFORNIA AIR RESOURCES BOARD, INITIAL STATEMENT OF RULEMAKING, REGULATIONS FOR FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE, VI-6 (2009) <http://www.arb.ca.gov/regact/2008/fuelogv08/ISORfuelogv08.pdf/fuelogv08.htm>.

<sup>140</sup> *Id.* at ES-10.

<sup>141</sup> *Id.* at ES-10.

<sup>142</sup> *Id.* at ES-7.

<sup>143</sup> See Kevin M. Davis, *The Road to Clean Air is Paved with Many Obstacles: The U.S. Environmental Protection Agency Should Grant a Waiver for California to Regulate Automobile Greenhouse Gas Emissions via Assembly Bill 1493*, 19 *FORDHAM ENVTL. L. REV.* 39, 40 (2009) (citing Arnold Schwarzenegger, Governor of California, Executive Order S-3-05, June 1, 2005, available at <http://www.climatechange.ca.gov/documents/index.html>).

subjected to a disproportionate level of the environmental and health harms while the nation as a whole receives the benefits. California's unique position of being able to seek authorization for the regulations it promulgates should be utilized as a shield against future judicial challenges.

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