Alan C. Lloyd, Ph.D.
Agency Secretary

Air Resources Board

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Arnold Schwarzenegger
Governor

January 31, 2006

Ms. Renee Klimczak, President
BHP Billiton LNG International Inc.
1360 Post Oak Boulevard, Suite 150
Houston, Texas 77056

Dear Ms. Klimczak:

Thank you for your recent meeting with the Air Resources Board (ARB) staff regarding BHP Billiton's proposed Cabrillo liquefied natural gas project. We would like to summarize our understanding and position on the emissions mitigation measures that were discussed at the meeting.

Based on the information that you have submitted, oxides of nitrogen (NOx) emissions from the stationary operations of the project (includes some marine vessels that operate in the close proximity of the stationary source) are estimated to be about 68 tons per year. In addition, estimated NOx emissions from the marine operations that occur outside the boundary of the stationary source are estimated to be about 163 tons per year. Total NOx emissions are about 231 tons per year.

We understand that BHP Billiton has agreed to mitigate the emissions from the stationary operations of the proposed project. Possible mitigation measures include the re-powering (convert from diesel to natural gas) of several trash trucks in Ventura County and possibly a number of crew boats that operate within Port Hueneme. Although potential estimated reduction of NOx emissions from these mitigation measures could exceed 100 tons per year, BHP Billiton is committing to mitigate 68 tons per year. We further understand that negotiations with Crawely Marine Services resulted in no potential opportunities that could be identified to address the unmitigated NOx emissions from marine vessels.

In regards to the mitigation of stationary emissions, we fully support BHP's proposal to re-power several trash trucks and crew boats within the jurisdictional boundaries of Ventura County. However, we believe that BHP should fully implement all feasible measures to mitigate total emissions (stationary and marine vessels) from the proposed project. We want to reiterate our position that unmitigated marine vessel emissions that are emitted within California Coastal Waters would add to the air pollution burden in California and should be mitigated to the extent feasible. The definition of California

Costal Waters is presented in Appendix B of the Initial Statement of Reasons for Proposed Rulemaking, "Proposed Regulation for Auxiliary Diesel Engines Operated on Ocean-going Vessels Within California Coastal Waters and 24 Nautical Miles of the California Baseline", October 2005 (enclosed).

As we have discussed, the California Environmental Quality Act (CEQA) requires consideration of all potential adverse environmental impacts of a project, along with alternatives and mitigation measures to eliminate or lessen those impacts. As required by CEQA, a complete and accurate analysis must be performed on the project (See No Oil v. City of LA (1974) 13 Cal. 3d 68). From an air quality perspective, all emissions associated with the project must be included in the analysis. Directly associated emissions are those that would not occur "but for" the project.

With the proposed Liquefied Natural Gas (LNG) project, vessel emissions of visiting tankers are direct emissions. These emissions must be counted in determining the impact of the proposed project and whether the impact has the potential to have a significant adverse effect on air quality.[1] Although ARB has not established relevant significance criteria, these emissions clearly exceed the "significance threshold" of 55 pounds per day for NOx emissions that the South Coast Air Quality Management District (SCAQMD), the region most affected by vessel emissions, has established.

We have reviewed the air quality modeling analysis that you have performed and encourage you to include this in the CEQA review. While we have no specific comments on the methodology used in the analysis, we do note that the magnitude of the emissions make meaningful analysis of the results difficult.

As discussed, we support moving forward on the CEQA process to facilitate the California State Lands Commission's preparation of the Environmental Impact Report. As this process moves forward, we encourage BHP to continue to evaluate possible

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[1] Counting vessel emissions in an LNG project is directly analogous to counting vehicular emissions that are part of an overall project in a land-based project. Courts have struck down the CEQA analysis in cases where such vehicular emissions were not addressed. (See Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692. In this case, the lead agency wrongly concluded that the effects of a cogeneration plant were less than significant by failing to consider the onsite and vehicular emissions together in assessing the impact of the project. Because the lead agency did not consider the combined effect of all pollution sources, the agency had no evidentiary basis for supporting the conclusion that air quality impacts were less than significant. The mere fact that a project may comply with an applicable regulatory standard for a stationary source does not negate the need to consider the emissions from all vehicular sources associated with the project.)

mitigation opportunities that may exist in the South Coast Air Basin such as unfunded Carl Moyer projects. We will be contacting SCAQMD and will advise BHP if these opportunities exist.

Again, thank you for meeting with us. If you have any questions regarding this letter, please call me at (916) 322-2890, or Mr. Dean C. Simeroth, Chief, Criteria Pollutants Branch, at (916) 322-6020.

Sincerely,

Michael H. Scheible
Deputy Executive Officer

Enclosure

cc: Mr. Rick Abel
BHP Billiton
300 Esplanade Drive, Suite 1800
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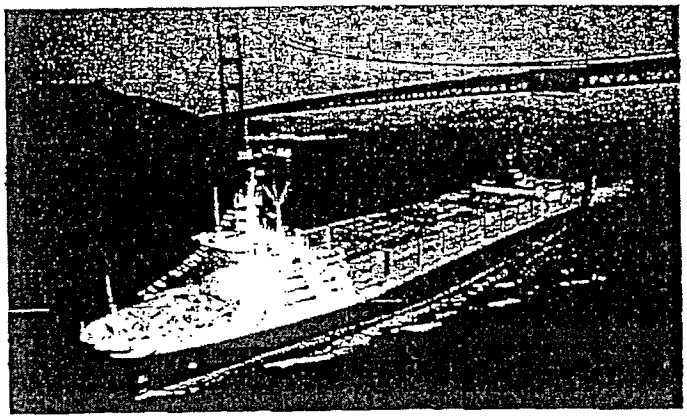
Mr. Dean C. Simeroth, Chief
Criteria Pollutants Branch

California Environmental Protection Agency

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

Stationary Source Division
Emissions Assessment Branch
October 2005

Appendix B

ARB's Legal Authority

I. Overview

Under State and federal law, the Air Resources Board (ARB or Board) can regulate both criteria pollutant and toxic diesel PM emissions from marine vessels. State law authorizes ARB to regulate marine vessels to the extent such regulation is not preempted by federal law. The proposed regulation is not preempted under the Ports and Waterways Safety Act (PWSA), and it does not conflict with the implementing U.S. Coast Guard regulations. Federal authorization under the Clean Air Act (CAA) is required for regulating new marine engines and for requiring retrofits on existing engines. However, no CAA authorization is required for implementing in-use operational requirements on existing marine vessel engines, such as the in-use emission limits in the proposed regulation. As a nondiscriminatory regulation with substantial benefits, the proposed regulation does not violate the Commerce Clause. And federal and state cases support ARB's authority to regulate both U.S. and foreign-flag vessels within "California Coastal Waters."[1]

Based on this authority, ARB staff has proposed a regulation to be considered by the Board in its December 2005 hearing. The proposed regulation would apply emission limits to the auxiliary engines on ocean-going vessels operating within "Regulated California Waters," which is a subset of "California Coastal Waters" and is a zone generally extending 24 nautical miles (nm) seaward of the California coastline.[2] The limits apply to emissions of diesel particulate matter (PM), oxides of nitrogen (NOx), and sulfur oxides (SOx). The regulation applies these emission limits as performance standards; that is, vessel operators would

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1 "California Coastal Waters" should be distinguished from California's territorial waters, a zone extending 3 nautical miles (nm) off California's coast that is commonly used for jurisdictional purposes and establishing subsoil mineral rights. "California Coastal Waters" is a zone off California's coast, ranging from about 24 nm to 90 nm (27 to 102 miles), in which ARB has established, through extensive studies, that meteorological, atmospheric, and weather conditions exist such that emissions of air pollutants in that zone are transported to the coastal communities and adversely affect the health, welfare and safety of the people in those communities and the surrounding regions. *See* "Status Report Regarding Adoption by Local Air Pollution Control Districts of Rules for the Control of Emissions from Lightering Operations," Appendix A, ARB Agenda Item 78-4-1 (February 23, 1978) (ARB, 1978); *and* title 17, California Code of Regulations, § 70500(b)(1).

2 "Regulated California Waters" is a subset of "California Coastal Waters." We have defined "Regulated California Waters" in the proposed regulation to include all California inland waters, all estuarine waters, and any portion of the Territorial Sea, the Contiguous Zone, and any California port, roadstead, or terminal facility located generally within 24 nm of the California baseline from the Oregon border to about Point Conception, at which point the zone is defined as straight line segments that are about 24 nm from the California coastline to the Mexico border. *See* proposed title 17, California Code of Regulation (CCR), section 93118(d)(3) ("Baseline") and (d)(26) ("Regulated California Waters"), Appendix A of this Staff Report: Initial Statement of Reasons (Staff Report or ISOR). The reasons for choosing a subset of "California Coastal Waters" for regulating auxiliary ehgine emissions are discussed in more detail in Ch. IV and V of the ISOR.

need to limit engine emissions of diesel PM, NOx, and SOx to the levels that would occur had the regulated engines used low sulfur distillate fuels.[3] The regulation does not require vessel operators to use these low sulfur distillate fuels, but ARB will presume the operators are in compliance with these limits if the engine is fueled with the low sulfur distillates. In addition, the proposed regulation provides a high degree of flexibility with its Alternative Compliance Plan (ACP) provision, which allows the operator to implement alternative emission control strategies that the operator chooses under an ARB-approved ACP.[4]

II. Background

In 1984, Air Resources Board (ARB) staff drafted a legal opinion that concluded that the State of California, acting through ARB and the local air pollution control districts (APCDs) and air quality management districts (AQMDs), possesses the legal authority to regulate emissions from marine vessels.[5] At that time, we considered the case of Ray v. Atlantic Richfield Co., (1978) 435 U.S. 151, and found an exception from federal preemption for valid state environmental regulations that do not constitute design or construction specifications that are preempted under the PWSA.[6] Nevertheless, the industry analysis reached a different conclusion and relied heavily on Ray in asserting that the federal government has preempted all state regulation of marine vessel emissions.[7]

In 1988, we decided to revisit this issue to ensure the accuracy of our previous opinion and noted that in its extensive discussion of case law, the industry failed to mention the case of Chevron USA, Inc. v. Hammond, (9th Cir., 1984) 726 F.2d. 483, which analyzed Alaska's deballasting statute in considerable detail.[8] In that case, the Court upheld Alaska's regulatory scheme, which imposed requirements on vessels for the purpose of water pollution control

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3 Starting January 1, 2007, the emission limits for the regulated pollutants are equivalent to the levels that would have resulted had the engine used marine gas oil (MGO) or marine diesel oil (MDO) with a maximum of 0.5 percent by weight sulfur. Starting January 1, 2010, these limits would decrease to the levels based on the use of MGO with a maximum of 0.1 percent by weight sulfur. *See* Id. at § 93118(e)(1).

4 Id. at § 93118(g).

5 "Report to the California Legislature on Air Pollutant Emissions from Marine Vessels," Air Resources Board, June 1984 (ARB 1984), Appendix J.

6 Id. at J-14 to J-15.

7 ARB, 1984, *supra*, Appendix B-4.

8 "Public Meeting to Consider a Plan for the Control of Emissions from Marine Vessels," Appendix E to the Staff Report (ARB 1991), pp. E.1-E.2, citing Chevron USA, Inc. v. Hammond, (9th Cir., 1984) 726 F.2d. 483, *cert.* denied 471 U.S. 1140.

similar to those which California is considering to control emissions of air contaminants from vessels. Detailed air quality data indicate that such emissions find their way onshore from up to 102 miles from California's coast and, if uncontrolled, would exacerbate the air quality problem of coastal districts.[9]

On the basis of Hammond, as well as the cases discussed in our previous opinion, we reached the same conclusion as before. That is, in order to protect the state's air quality, California may impose operational requirements on vessel operators carrying out activities in California and U.S. territorial waters, as well as on the high seas, to the extent that the emissions affect coastal zone air quality and such operational requirements do not constitute design or construction specifications. We concluded that the authority to impose these operational requirements is based on a coastal state's authority to impose conditions on vessels for visiting California ports.

Since Hammond, there have been significant statutory and case law developments that warrant a further revisit of the ARB's authority to regulate marine vessel emissions. Further, state and local regulatory authority was recently analyzed at length by the Port of Los Angeles (POLA)/Port of Long Beach (POLB) No Net Increase (NNI) Legal Working Group.[10] Based partly on the NNI analysis, our own prior opinions, and our evaluation of current federal and State statutes and case law, we again conclude that the State of California, acting through ARB and the local APCDs and AQMDs, has legal authority to regulate the emissions from ocean-going vessels, including both U.S. and foreign-flagged vessels, as far out as 102 miles offshore.

III. State Law Authorizes the Proposed Regulation

Before we address the question of federal preemption, it is important to first establish our authority to regulate marine vessel emissions under California law. Under State law, ARB can regulate both criteria pollutant and toxic diesel PM emissions from marine vessels. Health and Safety Code (H&SC) sections 43013 and 43018 authorize ARB to regulate marine vessels to the extent such regulation is not preempted by federal law.[11] Also, H&SC § 39666 requires ARB to regulate emissions of toxic air contaminants (TAC) from nonvehicular sources,

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9 ARB, 1978, *supra*; *see also*, ARB, 1984, *supra* at Appendix J.

10 "Report to Mayor Hahn and Councilwoman Hahn by the No Net Increase Task Force," Section 5 (Legal Authority), pp. 5-1 to 5-100, June 24, 2005. The Legal Working Group was a subgroup of the No Net Increase (NNI) Task Force and was comprised of a diverse group of attorneys and other members representing local, State, and federal governments, private industry, environmental groups, and local community activists. The Legal Working Group was tasked with evaluating the legal issues associated with numerous air pollution control measures proposed for the POLA/POLB and its neighboring communities.

11 California Health and Safety Code, §§ 43013(b), 43018(a) and (d)(3).

which include ocean-going vessels.[12] The proposed regulation reduces or limits diesel PM, which is both a TAC and criteria pollutant, and NOx and SOx, which are both criteria pollutants.

As discussed in the Initial Statement of Reasons (ISOR or Staff Report) for this proposed regulation, the vast majority of ocean-going vessels and harborcraft use large, diesel-powered engines, both for propulsion and for auxiliary power uses. The ARB has identified diesel exhaust as a toxic air contaminant (TAC). As such, the diesel exhaust from ocean-going vessels is subject to regulation under the statutory framework established under California law for reducing public exposure to TACs.[13]

Under California law, marine vessels are considered to be nonvehicular sources.[14] Traditionally, the local air districts have primary jurisdiction over nonvehicular sources.[15] However, under H&SC §§43013 and 43018, the Legislature directed ARB to regulate the emissions from marine vessels.[16] Because H&SC §§43013 and 43018 do not provide exclusive authority to ARB over marine vessels, there appears to be concurrent authority to regulate marine vessels with the local air districts.[17]

The ARB has regulated marine vessels in prior rulemakings (i.e., new outboard, personal watercraft, inboard, and sterndrive marine engines),[18] for which ARB is seeking but has not yet received U.S. EPA authorization. The local districts have also regulated emissions from marine vessels for decades (e.g., visible emissions and hydrocarbon emissions from lightering operations).[19] In this regulation, we are proposing to require that the auxiliary engines on ocean-going vessels visiting California ports emit no more than the equivalent amount of diesel PM, NOx, and SOx emissions those engines would have emitted had the engines used low sulfur distillate fuels. Future rulemakings will focus on reducing

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[12] California Health and Safety Code, § 39666(a) and (c).

[13] California Health & Safety Code, §39650 *et seq.*

[14] Ocean-going ships are not motor vehicles. California law defines "motor vehicle" as a vehicle that is self-propelled." Vehicle Code §415(a). A "vehicle" is "a device by which any person or property may be propelled, moved or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks." Vehicle Code §670. Because they do not operate on the highway, ocean-going vessels are not "vehicles." *See also* California Health & Safety Code, §39059.

[15] California Health & Safety Code, §40000.

[16] California Health & Safety Code, §43013(b).

[17] Manaster & Selmi, *California Environmental Law and Land Use Practice*, § 41.06(2).

[18] *See*, <http://www.arb.ca.gov/regact/marine01/marine01.htm>, last visited October 10, 2005.

[19] *E.g.*, SCAQMD Rule 1142, "Marine Tank Vessel Operations" (adopted July 19, 1991).

emissions from harborcraft and the main propulsion engines of ocean-going vessels.

IV. Federal Law Does Not Preempt the Proposed Regulation

A. Bases for Preemption

The primary question we need to consider is whether federal law preempts all state regulation of marine vessel emissions and, if not, to what extent the state may regulate to control such emissions. The two primary federal laws at issue are the Ports and Waterways Safety Act of 1972 (PWSA) and the federal Clean Air Act (CAA), as amended in 1990, along with their implementing regulations. In this section, we will analyze the PWSA and its preemptive effects on the proposed regulation, if any.

When federal laws preempt state laws under the Supremacy Clause of the U.S. Constitution, they do so either by express preemption, where Congress has explicitly preempted state laws with clear statutory language, or by implied preemption. In the absence of express preemption language, courts will analyze a state regulation to determine if it is impliedly preempted. Implied preemption can generally be found when there is a pervasive federal scheme evidencing Congress' intent to completely occupy the field that is the subject of the state regulation (i.e., "field preemption"). Such implied preemption can also be found under the doctrine of "conflict preemption," either when there is a direct conflict with federal regulations (i.e., it is impossible to comply with both the state and federal regulations) or when the state regulation "frustrates the federal objectives" underlying the comparable federal regulations and statutes.

B. The Ports and Waterways Safety Act of 1972 Does Not Preempt State Regulations Tied to the Peculiarities of Local Waters

The Ports and Waterways Safety Act of 1972 (PWSA; 33 U.S.C. 1221 et seq., 46 U.S.C. 391a et seq.), as amended in 1978 by the Tank Vessel Act and the Port and Tanker Safety Act, provides for vessel safety and protection of the marine environment through the promulgation of comprehensive minimum standards of design, construction, equipment, alteration, repair, maintenance, manning, operation, and training for vessels carrying certain bulk cargoes, primarily oil and fuel tankers.[20] The regulations are issued by the Secretary of the agency in which the Coast Guard is a branch; currently, that agency is the Department of Homeland Security. By its terms, the PWSA does not explicitly preempt state regulations. Therefore, in the absence of explicit preemption language, the appropriate question to ask is whether the PWSA impliedly preempts the proposed regulation under the doctrines described above.

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[20] ARB, 1984, *supra* at J-13.

The question of federal preemption of state regulations governing vessel equipment and operations was recently discussed at length in U.S. v. Locke, 529 U.S. 89 (2000), upon which we will now focus. In Locke, the Court noted that Title I of the PWSA authorizes, but does not require, the Coast Guard to enact measures for controlling vessel traffic or for protecting navigation and the marine environment.[21] In addition, the Court noted that Title II of the PWSA requires the Coast Guard to issue regulations addressing the design, construction, alteration, repair, maintenance, operation, equipping, personnel, qualification, and manning of covered vessels.[22]

With the regulations challenged under Locke, the State of Washington attempted to impose "best achievable protection" measures on tanker vessels to prevent and mitigate damages caused by the discharge of oil in state waters. The Washington regulations sought to accomplish this by imposing requirements on tanker vessel design, equipment, reporting, manning and operations. However, the Locke Court held that the Washington regulations dealing with these aspects of vessel design and operations were preempted under Title II of the PWSA because Congress has evinced its intent, through the PWSA and its implementing regulations, that the federal government occupy the field of tanker vessel design, construction, equipment, reporting, and operations. Because the Locke decision is based on an analysis of the PWSA provisions applying to tanker vessels, it is likely that the decision applies only to regulatory requirements affecting tanker vessels, rather than all ocean-going vessels. However, we will assume for the purposes of this analysis that the Locke holding can apply to all ocean-going vessels and will frame our analysis accordingly.

While the Locke Court held that Title II preempted most of Washington's tanker vessel regulations concerning vessel design, equipment, reporting and training requirements under the doctrine of field preemption, the Court noted that portions of the regulations tied to the peculiarities of local Washington waters may still be valid under a conflict preemption analysis under Title I. In other words, the Locke Court carved out an exception to field preemption under Title II if the regulation is tied to the peculiarities of the local waters that call for special precautionary measures. To illustrate, the Court in Locke remanded the case back to the lower courts to permit Washington to argue that certain parts of its regulations, such as its watch requirement in times of restricted visibility, are of limited extraterritorial effect, are necessary to address the peculiarities of Puget Sound, and are therefore not subject to Title II field preemption, but should instead be evaluated under Title I conflict preemption analysis.[23]

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[21] U.S. v. Locke, (2000) 529 U.S. 89, 90 (referring to 33 U.S.C. § 1223(a)).

[22] Id. (referring to 46 U.S.C. § 3703(a)). "Covered vessels" in this case refers to tanker vessels.

[23] Id. at 92. The Court also noted that state regulations must not conflict with Coast Guard regulations, "affect vessel operations outside the [state's] jurisdiction," do not "require adjustment of systemic aspects of the vessel," and do not impose a "substantial burden on the vessel's operation" within those areas subject to the state's jurisdiction. As discussed in

Unlike Washington's preempted tanker regulations dealing with vessel design, equipment, training, and reporting requirements, the proposed regulation deals strictly with the external emissions of air pollutants that leave a vessel in California waters and are likely to adversely affect shoreside communities. As documented in the Staff Report, ARB has determined that emissions from ocean-going vessels within California Coastal Waters adversely affect the health and environment of the coastal communities.[24] These effects are the result of meteorological, atmospheric and wind conditions peculiar to the zone off California's coast known as the California Coastal Waters. To our knowledge, these conditions are unique to California and make it likely that emissions in this zone, the outer limits of which range from about 27 miles to 102 miles (about 24 to 90 nm), are transported to communities and adversely affect public health in those regions. Thus, special precautions are called for to reduce the health and environmental effects from these vessels on the shoreside communities.

Because the proposal is tied to meteorological, atmospheric, and weather conditions peculiar to California Coastal Waters that call for special precautions, the proposed regulation is similar to Washington's watch requirements in times of restricted visibility. Moreover, the regulation has limited extraterritorial effects because it does not apply beyond this zone. Thus, under the Locke Court's reasoning, we believe the proposed regulation is not subject to field preemption under Title II of the PWSA, but it would instead be subject to a conflict preemption analysis under Title I because it is tied specifically to the peculiarities of the local California Coastal Waters.

As we will discuss below, the proposed regulation provides several options for complying with the emission limits. First, vessel operators can, but are not required to, use low-sulfur distillate fuels that meet Coast Guard and international standards; the use of such fuels creates a presumption that the operator has met the proposed emission limits. Second, vessel operators, with due consideration for safety concerns, costs, or any other appropriate criteria specific to that operator's vessel, can select alternative emission control strategies for use in an ARB-approved Alternative Compliance Plan (ACP). Because of these reasons, we conclude that the proposed regulation does not conflict with Title I of the PWSA and its implementing Coast Guard regulations.

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this Appendix B to the Staff Report, the proposed regulation does not conflict with any Coast Guard regulations. Also, because most vessels will likely comply with the proposed regulation by using low sulfur fuels many of them already use, the burden on vessel operations is minor, and we have established the requisite nexus for the 24 nm jurisdictional zone, we believe the proposed regulation would also meet these tests. Id. at 112.

[24] ISOR, *supra* at Ch. IV.

C. The U.S. Coast Guard Regulations Do Not Preempt the Proposed Regulation Because There Are No Conflicts with the Coast Guard Regulations

As noted previously, a state regulation may be preempted if it conflicts with federal statutes and regulations, either by direct conflict or by "frustrating" the objectives underlying federal law. Based on the reasons discussed below, ARB staff does not believe the proposed regulation conflicts with federal law. For purposes of this section, the federal regulations of interest are those enacted by the U.S. Coast Guard, which implements the PWSA and other similar federal statutes.

The Locke Court discussed the Coast Guard's broad authority (shared to a degree with the U.S. EPA, as discussed below) over vessel design, construction, equipment and other aspects of vessel operations. Based on this authority, the Coast Guard has implemented regulations primarily focused on vessel safety and protection of the marine environment from the release of pollutants into U.S. waters. But the Coast Guard has not promulgated regulations to control air pollution from vessels to any significant degree. On the other hand, the U.S. EPA's regulation of air pollutants from ocean-going vessels focuses strictly on new engines to be installed on U.S.-flagged vessels. In either case, the proposed regulation in no way conflicts with the regulations of the Coast Guard or the U.S. EPA.

The Coast Guard's primary regulation on fuel oil used in main and auxiliary vessel engines has one main requirement: Such fuel oil must have a flash point no less than 60 degrees Celsius except as otherwise approved by the Coast Guard.[25] The proposed regulation imposes emission limits based on the use of cleaner distillate fuels, either marine gas oil (MGO) or marine diesel oil (MDO) with reduced sulfur. As specified in the proposal, fuel oils would need to meet certain International Maritime Organization (IMO) specifications in order to qualify as MGO or MDO. Among other criteria, the IMO specifications call for MGO and MDO to have flash points at or above 60 degrees Celsius. Thus, the proposed regulatory action is completely consistent with the Coast Guard's regulation on fuel oils.

Further, the proposed regulation limits the emissions from auxiliary engines on the regulated vessels to the levels that would result from the use of the specified cleaner distillate fuels. The vessel operator may, but is not required to, use the enumerated cleaner distillate fuels in order to meet the emission limits.

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[25] Title 46, Code of Federal Regulations, Part 58.01-10 (generally requiring fuel oils for main and auxiliary engines to have flash points no lower than 60 °C (140 °F)). It is ARB staff's understanding that the cleaner distillate fuels enumerated in the proposed regulation are both (1) already required to meet this specification under applicable International Organization for Standardization (ISO) and ASTM International specifications and, (2) already used by vessels). *See*, ISOR at Ch. VI.

Or the vessel operator may choose other fuels that will result in no greater emissions of diesel particulate matter (PM), nitrogen oxides, and sulfur oxides (SOx). Either way, the regulation does not dictate which fuel to use.

Moreover, the regulation does not tell vessel operators how to meet these limits, nor does the regulation tell operators what equipment they must use to meet these limits or how to operate such equipment. In addition, the regulation provides operators with flexibility to meet these limits through the ACP provision, which permits operators to use any number of alternative emission control strategies that they choose under an approved ACP.[26]

Finally, the proposed regulation expressly states that the regulation does not modify, supersede or otherwise change in any way any applicable Coast Guard regulations. Thus, the regulated vessel operators would need to comply with both Coast Guard regulations and the proposal. As discussed in the Staff Report, there are many vessels that already use the fuels enumerated in the proposed regulation, which means that the use of these fuels does not violate Coast Guard regulations. Moreover, vessel operators have flexibility to use other fuels or alternative emission control strategies that achieve the same emission reductions as the enumerated fuels. Thus, there is no reason to believe that a vessel operator will find it impossible to comply with both the proposed regulation and existing Coast Guard regulations.

Additionally, we do not believe the proposed regulation "frustrates" the federal objectives underlying the Coast Guard regulation. As noted previously, the Coast Guard's primary requirement for fuel oil is a minimum flash point of 60 degrees Celsius. Clearly, the objective here is to ensure a minimum level of fire safety on vessels by reducing the possibility of uncontrolled fires. Indeed, many of the Coast Guard's regulations are focused primarily on the prevention or elimination of onboard fires. The proposed regulation does nothing to frustrate this federal objective because, as stated previously, the cleaner distillate fuels enumerated in the regulation already must comply with the Coast Guard's flashpoint requirement, the vessel operators have many choices with which to comply with the emission limits, and the regulation expressly makes no modifications to applicable Coast Guard regulations.

Because of the reasons discussed above, ARB staff believes the PWSA does not preempt the proposed regulatory action, under either field or conflict preemption doctrines.

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[26] *See*, proposed ARB regulations 13 CCR § 2299.1(g) and 17 CCR § 93118(g) in Appendix A of the Staff Report; the proposed regulations are identical, but they would appear in both titles 13 and 17 to provide maximum notice to the regulated community.

D. The Federal Clean Air Act Does Not Preempt the Proposed Regulation Because the Regulation Imposes In-Use Operational Requirements

The federal Clean Air Act (CAA) specifically allows California to seek a waiver of potential preemption for its nonroad engine regulations, and marine vessel engines are by definition considered as nonroad engines.[27] To do so, California first adopts its regulations and then seeks authorization from U.S. EPA to enforce its regulations.[28] California may regulate both new and used marine engines, but it must in either case obtain U.S. EPA authorization.[29] In light of this, U.S. EPA has determined that California engine retrofit requirements must also receive

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[27] Clean Air Act (CAA) § 209(e), 42 USCA § 7543(e), which reads in pertinent part:

"(1) No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter--

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.
(B) New locomotives or new engines used in locomotives.

Subsection (b) of this section shall not apply for purposes of this paragraph.

(2) Other nonroad engines or vehicles

(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."

The term "nonroad engine" is defined in title II, CAA, section 216(10), as "an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 of this title or section 7521 of this title." 42 U.S.C.A. 7550(10) (1994).

[28] 40 CFR §85.1604. *See also*, 59 FR 36969 (July 20, 1994). ("EPA believes that while California may adopt nonroad regulations before receiving EPA authorization, its adoption must be conditioned upon EPA's authorizing those regulations under 209(e). In short, California may adopt, but not enforce, nonroad standards prior to EPA authorization.").

[29] EMA v. U.S. EPA, 88 F.3d. 1075, 1094 (D.C. Cir., 1996).

U.S. EPA authorization.[30] Neither of these circumstances applies to the proposed regulation, because the proposed regulation applies only to existing engines and it does not require retrofits.

Indeed, States and their political subdivisions may regulate the use of marine engines once placed into service.[31] 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.

Because the proposed regulation imposes in-use operational requirements, there is no conflict with the U.S. EPA regulation governing engines used on ocean-going vessels. The U.S. EPA regulation (40 CFR Part 94) applies only to new engines; regulates only NOx, particulate matter (PM), total hydrocarbons (THC), and carbon monoxide (CO); and is less stringent than the proposed regulation for controlling NOx and diesel PM.[32] The federal regulation applies to manufacturers of new engines (i.e., generally, those for which equitable title has not yet been transferred) and rebuilders of engines, whereas the proposed regulation applies to engines that are already installed on vessels that are operating in regulated California waters. Thus, there is no conflict with the U.S. EPA regulation because compliance with both the proposed regulation and the federal regulation is reasonably feasible, and the proposed in-use operational requirements do not frustrate the federal objective of uniformity in specifications for new marine vessel engines.

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30 Appendix A to 40 CFR Part 89, Subpart A, as discussed at 62 FR 67733, 67735 (December 30, 1997).

31 Clean Air Act, §209(d). *See also*, Appendix A to 40 CFR Part 89, Subpart A, as discussed at 62 FR 67333 (December 30, 1997).

32 40 CFR Part 94 (Control of Emissions from Marine Compression-Ignition Engines). These standards generally reflect international standards as specified by the IMO; according to Ch. VI of the Staff Report, the proposed regulatory emission limits are substantially cleaner than the IMO's current minimum standards and equivalent to the IMO's 2010 standards; thus, compliance with the proposed regulation should automatically result in compliance with the IMO standards.

V. The Commerce Clause Does Not Prohibit the Proposed Regulation

A. Federal Authorization Would Render a State Regulation Invulnerable to Commerce Clause Challenge

Under the Commerce Clause of the U.S. Constitution, the federal government has broad authority to regulate the instrumentalities of interstate commerce or any activity that has a substantial impact on interstate commerce. The Commerce Clause grants Congress the power to regulate commerce with foreign nations and among the states, and limits State power to "erect barriers against interstate trade."[33] This affirmative grant of power in the Commerce Clause has been interpreted to limit state and local governments from interfering with interstate or foreign commerce (i.e., the "dormant" Commerce Clause).[34]

Presently, no federal court has ruled on the question as to whether California's authorization to set standards for new and in-use nonroad engines under section 209(e)(2)(A) of the Clean Air Act exempts ARB emission standards and other emission-related requirements from preemption under the dormant Commerce Clause.[35] However, obtaining authorization from U.S. EPA to regulate nonroad marine engines effectively waives federal preemption for California for such engines. Congress, in fashioning the waiver from preemption, made a determination that interstate commerce would not be disrupted by California having exclusive authority among the states to establish separate, more stringent regulations than adopted by U.S. EPA for the rest of the nation.[36] In addition, an authorized California regulation on new nonroad engines presents no dangers of multiple standards in different areas of the country, because other states that are contemplating the regulation of new or existing marine vessels are preempted from doing so unless they adopt the California regulations.[37] In this way, Congress has assured sufficient national uniformity while allowing California to establish appropriate emission standards on nonroad sources like new marine vessel engines.

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33 NNI, 2005, *supra* at 5-18, citing U.S. Const. Art. 1, §8, cl. 3 and Maine v. Taylor, 477 U.S. 131, 137 (1986).

34 Id.

35 "Legal Authority for Air Toxics Control Measures for Diesel Particulate Matter from In-Use Diesel Engines," Memorandum from Diane Moritz Johnston, General Counsel, to Alan Lloyd, Chairman of the Board and Honorable Board Members, p. 7, February 23, 2004, <http://www.arb.ca.gov/regact/trude03/2nd15att2.pdf>, last visited September 21, 2005.

36 Id.

37 CAA §209(e), *supra*.

B. Even Without Federal Authorization, the Proposed Regulation Does Not Violate the Commerce Clause Because It Is Non-Discriminatory and the Benefits Clearly Outweigh the Burden on Interstate Commerce

Because the proposed regulation imposes in-use operational requirements on ocean-going vessel engines, no authorization under CAA section 209(e) is required. Given this, the next step in our analysis is to determine if the proposal violates the dormant Commerce Clause. In general, a dormant Commerce Clause analysis is a two-step process: first, to determine if the regulation is discriminatory[38] and second, if it is not discriminatory, to determine if the regulation's putative benefits are clearly outweighed by the burdens imposed on interstate commerce.[39]

If a state regulation affirmatively discriminates either on its face or in practical effect against interstate or foreign commerce, "the burden falls on the State to demonstrate both the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means."[40] "'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[41] Similarly, a regulation discriminates against foreign commerce when it prefers domestic commerce over foreign commerce.[42] Such discriminatory regulations undergo strict scrutiny by the courts and are "virtually *per se* invalid" under the dormant Commerce Clause and the dormant Foreign Commerce Clause.[43]

On its face, the proposed regulation is non-discriminatory, as it applies equally to all ocean-going vessels in the regulated California waters, whether U.S. or foreign-flagged, in-state or out-of-state. To the extent that the regulation may have the practical effect of favoring domestic commerce, ARB staff believes

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38 Maine v. Taylor, 477 U.S. 131 (1986).

39 Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

40 *Compare* Maine v. Taylor, *supra* 477 U.S. at 138 (upheld a facially discriminatory statute serving to protect the state's fisheries where the purpose could not be served as well by available nondiscriminatory means), *with* Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951) (overturned a Madison ordinance requiring all milk sold in the city to be bottled within 5 miles of Madison's central square where other reasonable and nondiscriminatory means were available to accomplish the city's objectives).

41 Oregon Waste Systems Inc. v. Dept. of Environmental Quality, 511 U.S. 93, 99 (1994).

42 NNI, 2005, *supra* at 5-19, *citing* Kraft General Foods v. Iowa Dept. of Revenue & Finance, 505 U.S. 71, 79 (1992).

43 Id., *citing* Oregon Waste Systems Inc., 511 U.S. at 99 (dormant Commerce Clause), and National Foreign Trade Council v. Natsios, 181 F.3d 38, 67 (1st Cir. 1999) (dormant Foreign Commerce Clause), affirmed on other grounds in Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

the emissions from these vessels create a legitimate local purpose (i.e., protection of public health from the effects of toxic diesel PM and other pollutants) that cannot be served by less discriminatory means.

A different and less demanding test applies in judging the validity of a state regulation that does not discriminate on its face against out-of-state or foreign business, but nevertheless has some incidental effect on it.[44] If a regulation's effects on interstate commerce are only incidental, it will be upheld under the dormant Commerce Clause unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.[45] Courts have upheld certain environmental restrictions against Commerce Clause challenges.[46] As discussed in Chapter VII of the Staff Report, the health and environmental benefits to the State are substantial and would likely be found by a court to clearly outweigh any burdens imposed on interstate commerce.

A more extensive constitutional inquiry is required of courts analyzing the validity of a state regulation that burdens commerce with foreign nations.[47] Because it is crucial to the efficient execution of the nation's foreign policy that the "Federal Government...speak with one voice when regulating commercial relations with foreign governments,"[48] any regulation that frustrates the ability of the Federal Government to do so is invalid under the dormant Foreign Commerce Clause.[49] This inquiry is a fact-dependant one. The Supreme Court has upheld certain measures affecting foreign commerce against challenges based on the one-voice doctrine.[50]

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44 Id. at 5-20.

45 Id., *citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

46 Id., *citing* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (upholding a pre-Clean Air Act, local city ordinance prohibiting visible smoke emissions from boilers of ships engaged in interstate commerce, where the ordinance did not discriminate against interstate commerce and the goal of the regulation was to reduce air pollution); *and* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472-473 (1981) (upholding a state law prohibiting use of plastic nonreturnable milk containers, finding that the incidental burden imposed on interstate commerce was not clearly excessive "in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems").

47 Id. at 5-22, *citing* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446 (1979); *and* South-Central Timber Development Inc. v. Wunnicke, 467 U.S. 82, 100 (1984).

48 Id., *citing* South-Central Timber, *supra* at 467 U.S. at 100.

49 Id., *citing* Japan Line, *supra* at 441 U.S. at 446.

50 Id., *citing* Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298, 320-31 (1994).

Arguably, Congress has already spoken with one voice when it enacted section 209(e) of the Clean Air Act, which impliedly permits states to regulate nonroad sources (e.g., marine vessels) through in-use operational requirements, like the emission limits in the proposed regulation, without requiring a federal authorization. Presumably, Congress has made the determination that allowing states such as California to regulate these in-use nonroad sources would not frustrate the federal government's ability to speak with one voice. Moreover, we have previously concluded that the Clean Air Act clearly evidences Congress' intent to make the protection and improvement of air quality a collaborative federal/state effort rather than an exclusively federal one.[51] Thus, it appears that Congress has already determined that the collaborative federal/state effort envisioned within the framework of the Clean Air Act to reduce air pollution from nonroad sources would not disrupt or interfere with federal objectives.

Further, if one of the Clean Air Act's federal objectives is to avoid state interference with the goals or implementation of international treaties or conventions, the proposed regulation would not frustrate that purpose either. While not a signatory to the United Nations Convention on the Law of the Sea (UNCLOS of 1982), the U.S. has recognized it as customary international law to which the U.S. would be bound to follow.[52] It is well established under international law that coastal states may place conditions on vessels wishing to enter state ports.[53] Those vessels that voluntarily enter state waters and its ports are voluntarily subjecting themselves to the rules and regulations of that port state.[54] Thus, the ability of states to impose reasonable conditions on port entry of foreign vessels, as permitted under the Clean Air Act, is consistent with well-established international law.

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51 ARB, 1991, *supra*, at E.5-E.6.

52 Presidential Proclamation No. 7219 of August 2, 1999, 64 F.R. 48701 (September 8, 1999). Customary law and conventional law are primary sources of international law. Customary international law results when states follow certain practices generally and consistently out of a sense of legal obligation. Conventional international law derives from international agreements and may take any form that the contracting parties agree upon. Customary law and law made by international agreement have equal authority as international law. Restatement (Third) of Foreign Relations Law of the United States § 102 (1987).

53 UNCLOS 1982, Art. 21.1 (coastal states may adopt laws and regulations applicable to foreign vessels in territorial seas for the preservation of the environment and control of pollution); Art. 25.2 ("In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject."); and Art. 211.3 (recognizes the right of coastal states to establish "requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports...").

54 Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country.").

VI. California Can Apply Regulations Promulgated Pursuant to the Clean Air Act and Its Police Power Authority to Foreign-Flagged Vessels

As permitted under federal statute and as a valid exercise of its traditional police powers, California may regulate the emissions from foreign vessels, provided the regulation does not affect a matter that involves only the "internal order and discipline" of the foreign vessel, and the regulated vessels affect domestic concerns.[55] In Spector v. Norwegian Cruise Line, Ltd., 125 S.Ct. 2169 (2005), the U.S. Supreme Court recently observed that general statutes may not apply to foreign-flag vessels, if they affect matters that involve only the "internal order and discipline" of the vessel, unless there is an express indication by Congress that the statutes apply to such vessels (i.e., the so-called "clear statement rule").[56] However, the Court found that it is reasonable to presume that Congress intends that its statutes apply to entities in U.S. territories insofar as they affect domestic concerns.[57] Thus, the Court held that, while there was no clear statement from Congress that the Americans with Disabilities Act (ADA) applies to foreign flagged cruise ships, the ADA nevertheless applies to such vessels to the extent the vessels affect domestic concerns.

In the present case, ARB staff is proposing to regulate the emissions from foreign-flag vessels under our authority in CAA section 209(e). Like Spector, Congress did not explicitly state that section 209(e) applies to foreign-flag vessels; indeed, Congress broadly defined the scope of section 209(e) as governing "nonroad sources," which by definition includes ocean-going vessels. Therefore, the determination of whether the proposed regulation, promulgated pursuant to CAA section 209(e), can apply to foreign-flag vessels hinges on whether the regulation involves only the "internal order and discipline" of the vessels and whether the vessels' activities have impacts on "domestic concerns."

In this proposed action, ARB will be regulating the emissions of toxic diesel PM and criteria pollutants from shipboard auxiliary engines. As established in the Chapter IV of the Staff Report, these emissions leave the immediate area of the ship and are eventually transported to the California shoreline, where the emissions adversely affect coastal communities and regional air quality. Thus, the emissions that are the subject of this regulation clearly have an impact on California's domestic concerns.

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[55] Spector v. Norwegian Cruise Line, Ltd., 125 S Ct. at 2177.

[56] Id. at 2171, *citing* Benz *and* McCulloch v. Sociedad Nacional de Marineros de Honduras, 373 U.S. 10, 83 (1963). For example, labor laws that address the rights and duties of a ship and its crew relate solely to the internal operations of the vessel and, therefore, do not apply to foreign vessels.

[57] Id. at 2178.

Further, the regulation does not solely involve matters of the vessel's "internal order and discipline" because the regulation involves the control of air pollutants that leave the regulated vessels and affect shoreside communities. The regulation does not specify or prescribe how the ship owner or operator will reduce the emissions or what equipment to use. Rather, the regulation provides ship operators with a high degree of flexibility to control emissions from these engines through one of several methods. These methods include meeting emission limits based on the use of lower sulfur fuels and operation under an approved Alternative Compliance Plan (ACP). An approved ACP will permit ship owners and operators to meet the equivalent emission rates using any enforceable, surplus, and quantifiable techniques that they wish to propose.

Clearly, the proposed regulation is non-prescriptive, and it seeks to control air pollutants that escape from the regulated vessels and adversely affect California coastal communities. Because of these reasons, we believe the proposed regulation does not solely involve matters of the vessels' "internal order and discipline," and the emissions from the regulated vessels necessarily affect California's domestic concerns. Accordingly, we believe the courts will hold that the State is authorized to apply regulations promulgated pursuant to the Clean Air Act to marine vessels, including foreign-flag vessels, which adversely affect coastal communities through their air emissions.

VII. California Can Apply Regulations to Vessels Operating Within Regulated California Waters as Reasonable Port Entry Conditions or Provided a Sufficient Nexus Exists Between the State and the Activity at Issue

As we noted previously, we believe the meteorological, atmospheric, and wind conditions prevalent in the California Coastal Waters call for special precautions that justify the State's assertion of regulatory authority in waters up to 102 miles offshore. However, for the purposes of this rulemaking, we will be applying the proposed regulation to a subset of the California Coastal Waters; the region subject to the proposed regulation ("Regulated California Waters") will generally be only up to 24 nautical miles (about 27 miles) seaward of the California baseline/coastline (see Footnote 2). This is because most of the air pollutants that are emitted from auxiliary engines and are transported to California coastal communities occur within this 24 nm zone. By contrast, for future rulemakings involving the main propulsion engines, it is likely that we will apply the proposed regulations for those engines farther offshore because those are much larger engines with substantially greater emissions than auxiliary engines. As shown in Chapter IV, emissions from propulsion engines have a larger impact on coastal communities from farther offshore than auxiliary engines.

The 24 nm Regulated California Waters, in which we are asserting regulatory jurisdiction under the proposed regulation, goes beyond the traditional 3 nm

California territorial waters boundary. Historically, the 3 nm boundary has been used for a variety of regulatory purposes and the allocation of subsoil mineral rights between State and federal entities. Nevertheless, we believe we can properly assert jurisdiction to regulate emissions within the Regulated California Waters because the regulation is a permissible condition for right of entry into California ports and because there is a sufficient nexus between the activity at issue and the State.

A. It is Well-Established that Coastal Nations and States Can Impose Reasonable Port Entry Conditions on Vessels

As noted previously, it is a well-established principle that coastal nations and states can impose reasonable conditions on foreign vessels prior to allowing entry into domestic ports.[58] Coastal states and nations can impose reasonable conditions on vessels prior to port entry to protect the coastal environment and human health from vessel activities occurring offshore.[59] Through extensive studies of prevailing wind patterns and meteorological models, ARB has determined that emissions of air pollutants many miles offshore are more likely than not to reach coastal communities.[60] From these studies, ARB defined California Coastal Waters as the offshore zone, ranging from 27 miles to 102 miles, in which emissions of air pollutants are likely to be transported to coastal communities.[61] Thus, as discussed in Chapter IV of the Staff Report, ARB staff has documented the effects vessels in California Coastal Waters have on coastal communities and has therefore established the need to impose reasonable port entry conditions on such vessels.

For the reasons discussed below, the proposed regulation would apply reasonable port entry conditions on vessels that travel through the Regulated California Waters and stop at a California port. First, it is important to establish the fact that the proposed regulation applies only to those vessels that traverse the 24 nm zone and actually make a visit to a port, roadstead, or terminal facility within that zone or enter internal California waters. In other words, the proposed regulation does not apply to vessels in "innocent passage." Thus, the regulation actually serves as a port entry condition rather than a regulation on all vessel

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58 *See* UNCLOS 1982 and Benz, *supra*. *See also*, Patterson v. Bark Eudora, 190 U.S. 169, 178 (1902). *See generally*, Christopher P. Mooradian, *Protecting "Sovereign Rights": The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone*, 82 B.U.L. Rev. 767 (June 2002).

59 *See* FN 53.

60 "Status Report Regarding Adoption by Local Air Pollution Control Districts of Rules for the Control of Emissions from Lightering Operations," Appendix A, ARB Agenda Item 78-4-1 (February 23, 1978) (ARB 1978).

61 Id., *See also* FN 1.

activities, including innocent passage, occurring in the Regulated California Waters.

Second, there are a number of considerations that make the proposed regulation reasonable. As discussed in Chapter VI of the Staff Report, the proposed emission limits can readily be met with the use of low sulfur distillate fuels that many vessel operators already use in their auxiliary engines. For these vessels, little or no additional training will likely be required to comply with the proposed regulation. Also, the proposed regulation does not apply extra-territorially beyond the 24 nm Regulated California Waters; outside that zone, vessel operators can switch back to whatever fuels they desire, if they chose to use low sulfur fuels to comply with the proposed regulation. Further, vessel operators are not even required to use such low sulfur fuels, but can instead select alternative emission control strategies appropriate for their particular vessels under an ARB-approved Alternative Compliance Plan. Finally, as discussed in Chapter VIII of the Staff Report, the costs for complying with the proposed regulation are relatively low when compared to the total costs for operating an ocean-going vessel.

Based on the reasons noted above, we believe the proposed regulation imposes reasonably port entry conditions on vessels operating within the Regulated California Waters.

B. Coastal Nations and States Can Regulate Vessels Operating Beyond Traditional State Territorial Waters Provided a Sufficient Nexus Exists Between the State and the Regulated Activity

Despite the traditional three geographical mile limit on California's territory, courts have held, in limited situations, that states may assert regulatory jurisdiction beyond that limit. For example, states may apply their pilotage requirements 30 or more miles from the coast.[62] Such pilotage requirements are generally designed to ensure the safety of vessels traveling near a state by requiring vessel pilots to have the necessary qualifications, skills and knowledge to enable safe navigation in and near state waters.

There is also a series of cases holding that states may regulate exterritorial activities, such as fishing on the high seas adjacent to their coasts either by residents of that state or residents of other states when there is a sufficient nexus between the activities in question and the state. For example, in Jacobson v. Maryland Racing Commission, 261 Md. 180 (1971), the Court of Appeals held that a nonresident had become a "racing citizen" of that state such that he could be punished for sale of a horse in violation of a Maryland claim-racing law

[62] Gillis v. State of Louisiana, 294 F.3d 755, 761 (5th Cir. 2002) (33 miles); Wilson v. McNamee, 102 U.S. 572, 573-574 (1881) (about 50 miles); The Whistler, 13 F. 295, 296 (D.Or. 1882) (about 30 miles).

although the sale occurred in another state. Alaska applied the same principle to nonresidents crabbing on the high seas in violation of Alaska law, noting the contacts with the state and services supplied.[63] The court cited the "general proposition that acts done outside a jurisdiction which produce detrimental effects inside it justify a state in punishing he who caused the harm as if he had been present at the place of its effect."[64] These cases rely in part on Skiriotes v. Florida, 313 U.S. 69, 77 (1941), in which the U.S. Supreme Court held that a state may govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress.[65] Finally, there is a principle derived from the so-called "landing law cases," where courts have upheld states' assertion of jurisdiction once a vessel has landed over conduct that occurred beyond the territorial confines of a state, if that regulation facilitates conservation of a state resource.[66]

All of these principles apply to the proposed regulation, which establishes the requisite nexus by applying only to those ocean-going vessels that operate their auxiliary engines in the Regulated California Waters and actually stop or anchor at a California port, roadstead, or terminal facility. Because of this, it is likely that numerous vessel operators would have sufficient nexus with California ports to be subject to the proposed regulation. At the least, vessel operators that visit California ports and make use of port services could be held to be "shipping citizens" of the state for purposes of regulating certain aspects of their conduct beyond the territorial limits of the state.[67] Also, it seems that, at a minimum, the ships owned by on-shore facilities, as well as those owned by companies making more than occasional visits, would appear to have the requisite nexus with the State.

Regulating vessels that have the necessary nexus with the state (i.e., those which stop at California ports and whose activities result in emissions of air pollutants within the Regulated California Waters) is within the principle that a state may regulate conduct occurring beyond its borders where the conduct results in detrimental effects within the state. As discussed previously, ARB staff has already established that emissions from vessels within the California Coastal Waters, and particularly within 24 nm of the coastline, result in adverse health

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63 Alaska v. Bundrant, 546 P.2d 530 (1976).

64 Id. at 555; *see also*, State of Alaska v. Sieminski, 556 P.2d 929, 933 (1976) (holding that the state may regulate outside its territorial jurisdiction against persons having a certain minimum relationship or nexus with the state, which nexus "can be satisfied in any number of ways.").

65 *See also* Felton v. Hodges, 374 F.2d 337 (1967) (holding Florida may regulate commercial fishing beyond the seaward boundary of the state).

66 Sieminski *supra*, 556 P.2d at 931.

67 For example, the proposed regulation's emission limits (based on the use of cleaner fuels) would appear to be analogous to the rules that governed the location of fishing and type of fishing gear which were upheld in the above-cited cases.

and environmental effects for the coastline communities and other regions in California.

Based on the reasons discussed above, ARB staff believes it is proper for ARB to assert regulatory jurisdiction on vessels operating beyond 3 nm of the coastline. Further, this authority would properly be extended to the control of vessel emissions within the California Coastal Waters, a region ranging from 27 to 102 miles (about 24 nm to 90 nm) offshore. As discussed earlier and in the Staff Report, we have elected to apply the proposed regulation to the auxiliary engines on ocean-going vessels operating within 24 nm offshore. Such authority would be based either on a coastal state's well-established right to place reasonable conditions for entry in state ports or on the principle of a state regulating harmful conduct occurring beyond its boundaries if the vessels' activities have a sufficient nexus with the State.