

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PACIFIC MERCHANT SHIPPING ASSOCIATION ("PMSA"), a California Mutual Benefit Corporation,

No. 2:09-cv-01151-MCE-EFB

Plaintiff,

v.

AMENDED MEMORANDUM AND ORDER¹

JAMES GOLDSTENE, in his official capacity as Executive Officer of the California Air Resources Board,

Defendant,

NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., and SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,

Defendants-Intervenors.

///

///

¹ The sole purpose of this Amended Memorandum and Order is to certify the Court's decision as amenable to immediate appeal under 28 U.S.C § 1292(b). Otherwise it is identical to its June 30, 2009 predecessor.

1 Through the present action, Plaintiff Pacific Merchant
2 Shipping Association ("PMSA" or "Plaintiff") seeks to prevent
3 implementation of regulations recently adopted by the California
4 Air Resources Board ("CARB"), and scheduled to go into effect on
5 July 1, 2009. Plaintiff sues Defendant James Goldstene, as
6 CARB's Executive Director, on grounds that the regulations in
7 question, which seek to specify fuel requirements for seagoing
8 vessels traveling within twenty-four nautical miles of the
9 California coast, are unconstitutional and contrary to federal
10 law. In now moving for summary judgment, Plaintiff seeks
11 declaratory and injunctive relief that the regulations are
12 preempted by the federal Submerged Lands Act, 43 U.S.C. §§ 1301,
13 et seq. CARB opposes Plaintiff's Motion. In addition, the
14 Natural Resources Defense Council, Inc. ("NRDC"), the Coalition
15 for Clean Air, Inc. ("CCA") and the South Coast Air Quality
16 Management District ("SCAQMD"), who have intervened in support of
17 CARB, join in opposing Plaintiff's Motion.

18 For the reasons set forth below, Plaintiff's Motion will be
19 denied.

20 21 **BACKGROUND**

22
23 On April 16, 2009, the CARB regulations at issue in this
24 matter were transmitted to the California Secretary of State for
25 filing pursuant to California Government Code § 11349.3. Under
26 the terms of the regulations, enforcement will commence on
27 July 1, 2009.

28 ///

1 The express purpose of the regulations (hereinafter referred
2 collectively as the "Vessel Fuel Rules" or the "Rules") is to
3 reduce air pollutants affecting the State of California by
4 requiring ocean-going vessels² to use cleaner marine fuels.
5 Under the Rules, vessel operators are required to use cleaner
6 marine fuels in diesel and diesel-electric engines, main
7 propulsion engines, and auxiliary boilers on vessels operating
8 within twenty-four nautical miles off the California coastline.
9 Cal. Code Regs. tit. 13, § 2292.2(a); tit. 17, § 93118.2(a).
10 Implementation is contemplated in two phases. Initially,
11 beginning in July 2009, vehicle operators must use either marine
12 gas oil (which typically averages 0.3% sulfur and is capped at
13 1.5%), or marine diesel oil with a sulfur limit of 0.5% or less.
14 Thereafter, by January 2012, both fuels must not exceed 0.1%
15 sulfur. Id. Failure to comply with the regulations subjects
16 vessel owners and operators penalties, injunctive relief and
17 other remedies as provided under California law. Id. at
18 § 2299.2(f)(1); § 93118.2(f)(1).

19 According to the State of California, ocean-going vessels,
20 which typically utilize large diesel engines, are a significant
21 source of air pollution in California, due in part to their
22 widespread use of low-grade bunker fuel. Bunker fuel consists
23 primarily of thick, tar-like residual fuel formulated from the
24 residues remaining after primary fuel distillation.

25
26 ² The Rules define "ocean-going vessel" as a vessel that is
27 either registered under a foreign flag, has a overall length of
28 more than 400 feet, weighs in at a gross registered tonnage in
excess of 10,000, or is propelled by a marine compression engine
with a per-cylinder displacement of 30 liters or more. 13 Cal.
Code Regs. § 2299.2(d) and 17 Cal. Code Regs. § 93118.2(d).

1 Decl. Of Paul Milkey in Support of CARB's Opp'n to Mot. for Summ.
2 J., ¶ 16. As a result of its viscous nature, bunker fuel has to
3 be heated before it can be pumped and injected into an engine for
4 combustion. NRDC/CCA Undisputed Fact ("UF") No. 5. Residual
5 fuel contains an average of about 25,000 parts per million (ppm)
6 of sulfur, as opposed to diesel fuel for trucks and other motor
7 vehicles, which is limited to 15 ppm sulfur. Id. at No. 6. The
8 proposed Vehicle Fuel Rules mandate that ocean-going vessels
9 coming into California ports use distillate fuel with a maximum
10 sulfur level falling between these two extremes.

11 2006 data generated by CARB suggests that ocean-going
12 vessels traveling within twenty-four nautical miles of
13 California's coast generate approximately 15 tons per day of
14 diesel particulate matter ("PM"), 157 tons per day of nitrogen
15 oxides ("NOx"), and 117 tons daily of sulfur oxides ("SOx").
16 CARB UF No. 1. This makes SOx emissions from such vessels the
17 single largest source of SOx emissions in the state, responsible
18 for some forty percent of all SOx emitted. Milkey Decl., ¶ 13.
19 Importantly, too, both NOx and SOx are precursors of PM2.5, or
20 fine particulate matter pollution. SCAQMD UF No. 17. The PM
21 emissions from ocean-going vessels are also significant and have
22 been estimated as equivalent on a daily basis to approximately
23 150,000 big rig trucks traveling 125 miles per day. Milkey
24 Decl., ¶ 13.

25 ///

26 ///

27 ///

28 ///

1 Long Beach and Los Angeles ports are collectively constitute
2 the largest port in the United States. Some forty percent of all
3 national imports are estimated to move through those two
4 California ports. See Decl. of Dr. Elaine Chang in Support of
5 SQAQMD's Opp. to Mot. for Summ. J., ¶ 27. Research shows that
6 pollutants discharged offshore migrate to the California coast.
7 Vehicle emissions are likely to be transported onshore from even
8 beyond the twenty-four nautical mile boundary used in the Rules.
9 SQAQMD UF No. 8.

10 PMSA does not dispute that implementation of the Vessel Fuel
11 Rules, which were adopted following a lengthy process which
12 included consultation with both the public, state and local
13 agencies, and the federal government, is estimated to reduce PM
14 emission by 13 tons per day, NOx by 10 tons per day, and SOx by
15 109 tons per day. See CARB UF No. 6. For sulfur oxides, that
16 reduction amounts to some ninety percent fewer estimated
17 emissions upon full implementation of the Rules. SQAQMD UF

18 No. 30 PMSA does not contend that compliance with the new Rules
19 is technically impossible or even difficult. NRDC UF No. 22.
20 Only costs are cited. It nonetheless appears that compliance
21 would increase costs of imported goods by an insignificant
22 amount. See NRDC UF No. 23.

23 From a public health and safety perspective, it is
24 undisputed that twenty-seven million Californians, or eighty
25 percent of the population, are exposed to ocean-going emissions
26 that increase cancer risks. CARB UF No. 4, SQAQMD UF No. 41.

27 ///

28 ///

1 Diesel emissions are known to cause premature death, cancer,
2 aggravated asthma and other respiratory illnesses, and increased
3 risk of heart disease. CARB UF Nos. 10, 11. The problem
4 particularly prevalent in the Southern California area
5 encompassed by the South Coast Air Basin, where over eighty
6 percent of the population is exposed to PM2.5 levels exceeding
7 federal standards. SCAQMD UF No. 22. In fact, CARB has
8 calculated that over fifty percent of the total population-
9 weighted exposure to PM2.5 levels exceeding federal standards in
10 the entire nation occurs in the South Coast Air Basin, although
11 the Basin has only five percent of the nation's population. Id.
12 at No. 23. Not surprisingly, the South Coast Air Basin has
13 consequently been unable to attain national air quality
14 standards.

15 CARB estimates that directly-emitted diesel particulate
16 matter from ocean-going vehicles causes about 300 premature death
17 statewide every year, not including cancer effects. SCAQMD UF
18 No. 45. In contrast, research indicates that implementation of
19 the Vessel Fuel Rules between 2009 and 2015 alone will prevent
20 some 3,500 premature deaths, nearly 100,000 asthma attacks, and
21 significantly reduce cancer risk. NRDC/CCA UF No. 14.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Plaintiff PMSA is an organization whose members own and
2 operate U.S. and foreign-flagged ocean-going vessels subject to
3 the proposed new Vessel Fuel Rules. As indicated above, PMSA now
4 moves for summary judgment and seeks a judicial determination
5 that the Rules at issue are preempted by the SLA, or are
6 otherwise unlawful. PMSA further requests that a permanent
7 injunction be issued against enforcement of the regulations more
8 than three nautical miles seaward from the California coast.

9
10 **STANDARD**

11
12 The Federal Rules of Civil Procedure provide for summary
13 judgment when "the pleadings, depositions, answers to
14 interrogatories, and admissions on file, together with
15 affidavits, if any, show that there is no genuine issue as to any
16 material fact and that the moving party is entitled to a judgment
17 as a matter of law." Fed. R. Civ. P. 56(c). One of the
18 principal purposes of Rule 56 is to dispose of factually
19 unsupported claims or defenses. Celotex Corp. v. Catrett, 477
20 U.S. 317, 325 (1986). Under summary judgment practice, the
21 moving party

22 "always bears the initial responsibility of informing
23 the district court of the basis for its motion, and
24 identifying those portions of 'the pleadings,
25 depositions, answers to interrogatories, and admissions
26 on file together with the affidavits, if any,' which it
27 believes demonstrate the absence of a genuine issue of
28 material fact."

26 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting
27 Rule 56(c).

28 ///

1 If the moving party meets its initial responsibility, the
2 burden then shifts to the opposing party to establish that a
3 genuine issue as to any material fact actually does exist.
4 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
5 585-587 (1986); First Nat'l Bank v. Cities Ser. Co., 391 U.S.
6 253, 288-289 (1968).

7 In attempting to establish the existence of this factual
8 dispute, the opposing party must tender evidence of specific
9 facts in the form of affidavits, and/or admissible discovery
10 material, in support of its contention that the dispute exists.
11 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that
12 the fact in contention is material, i.e., a fact that might
13 affect the outcome of the suit under the governing law, and that
14 the dispute is genuine, i.e., the evidence is such that a
15 reasonable jury could return a verdict for the nonmoving party.
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52
17 (1986); Owens v. Local No. 169, Assoc. of Western Pulp and Paper
18 Workers, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way,
19 "before the evidence is left to the jury, there is a preliminary
20 question for the judge, not whether there is literally no
21 evidence, but whether there is any upon which a jury could
22 properly proceed to find a verdict for the party producing it,
23 upon whom the onus of proof is imposed." Anderson, 477 U.S. at
24 251 (quoting Improvement Co. v. Munson, 14 Wall.442, 448, 20
25 L.Ed. 867 (1872)). As the Supreme Court explained, "[w]hen the
26 moving party has carried its burden under Rule 56(c), its
27 opponent must do more than simply show that there is some
28 metaphysical doubt as to the material facts ...

1 Where the record taken as a whole could not lead a rational trier
2 of fact to find for the nonmoving party, there is no 'genuine
3 issue for trial.'" Matsushita, 475 U.S. at 586-87.

4 5 ANALYSIS

6 A. Plaintiff Has Not Shown As A Matter Of Law That The 7 Vessel Fuel Rules Are Preempted By The SLA, As It Must 8 To Prevail On Summary Judgment.

9 1. Purpose of the SLA.

10 The SLA sets the geographic boundary of the State of
11 California at three geographical miles seaward of the State's
12 coastline. 43 U.S.C. § 1312; United States v. California, 381
13 U.S. 139, 148 (1965). The SLA was enacted in 1953 to restore
14 state ownership and control over the ocean seabed up to three
15 miles offshore and to promote the harvesting of natural
16 resources, namely oil and gas. 43 U.S.C. §§ 1311, 1312,
17 Judiciary Committee Report, H.R. Rep. No. 83-215 (1953),
18 reprinted in U.S.C.C.A.N. 1385, 1386. Passage of the SLA was
19 precipitated by a 1947 Supreme Court decision holding that the
20 federal government was the exclusive owner of all submerged lands
21 and any minerals found therein. United States v. California, 332
22 U.S. 19 (1947). Because California's law had previously
23 delineated California's sea boundary as extending three miles
24 into the Pacific Ocean (see People v. Weeren, 26 Cal. 3d 654, 660
25 (1980)), and because California had entered into leases for the
26 extraction various natural resources from the seabed based on
27 those perceived boundaries, the SLA was enacted to restore state
28 historic ownership of submerged lands.

1 There is no indication in either the SLA itself, or within
2 its legislative history, to suggest that Congress intended the
3 SLA to prevent coastal states like California herein from
4 regulating offshore air pollution from ocean-going vessels.
5 Although by its terms, state ownership and control is limited to
6 submerged lands and their overlying navigable waters within three
7 miles of the coastline, available case law indicates that state
8 regulation may extend beyond that boundary under appropriate
9 circumstances.

10 With respect to pilotage, anchorage and mooring, for
11 example, the Supreme Court has long recognized that such rules
12 are best left to the state absent compelling governmental
13 interest to the contrary. Significantly, in Gillis v. Louisiana,
14 294 F.3d 755 (5th Cir. 2002), the Fifth Circuit held that
15 Louisiana's regulation of pilotage, even outside the three-mile
16 limit, is not preempted by the SLA. As the Gillis court
17 reasoned: "The Submerged Lands Act addressed only who retains
18 title to submerged lands both within and beyond the three-mile
19 line with particular reference to ownership and exploration of
20 natural resources in the seabed and subsoil. It does not address
21 the regulation of pilotage on the waters above." Id. at 762.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Similarly, in Warner v. Dunlap, 532 F.2d 767 (1st Cir. 1976), the
2 First Circuit rejected an analogous SLA preemption challenge,
3 state that “[s]tates have been permitted to assert their pilotage
4 regulations at distances considerably greater than three miles
5 from their shores.... and there is no statutory or other basis
6 for imposing a three-mile limit on such regulation.” Id. at
7 772.³

8 The Court is well aware that pilotage, which establishes an
9 integrated system for ship navigation, is different than fuel
10 regulations designed to control offshore pollutants from
11 migrating offshore. Both Warner and Gillis nonetheless stand for
12 the proposition that given the limited purpose of the SLA, it
13 should not be applied mechanically in overriding all state
14 regulation beyond three miles from a state’s coastline. With
15 that flexible approach in mind, we now turn to whether the
16 particular Vessel Fuel Rules at issue in this litigation are
17 preempted by the SLA, as Plaintiff contends.

18
19 **2. Principles of Preemption.**
20

21 Federal preemption of state statutes or regulations can be
22 either express or implied. Express preemption occurs when
23 Congress “explicitly state[s]” that it intends a statute to have
24 that effect.

25
26

³ The leading Ninth Circuit case on the interface between
27 state regulation of coastal waters and the provisions of the SLA,
28 Barber v. Hawai’i, 42 F.3d 1185 (9th Cir. 1994), does not
specifically address whether states have authority to promulgate
regulations beyond three miles seaward.

1 Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Here it is
2 undisputed that the SLA does not expressly preempt the Vessel
3 Fuel Rules; rather, Plaintiff's only argument is that the Rules
4 are preempted by implicit field preemption. Field preemption
5 applies only when state law "regulates conduct in a field that
6 Congress intended the Federal Government to occupy exclusively."
7 English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990). "Such an
8 intent may be inferred from a scheme of federal regulation.... so
9 pervasive as to make reasonable the inference that Congress left
10 no room for the State to supplement it, or when an Act of
11 Congress 'touch[es] a field in which the federal interest is so
12 dominant that the federal system will be assumed to preclude
13 enforcement of state laws on the same subject." Id. (internal
14 quotations omitted); see also Ray v. Atlantic Richfield Co., 435
15 U.S. 151, 157 (1978).

16 In assessing the merit of Plaintiff's field preemption
17 argument, then, the Court's "sole task is to ascertain the intent
18 of Congress." PMSA v. Aubry, 918 F.2d 1409, 1415 (9th Cir.
19 1990). Field preemption applies only where the congressional
20 intent to preempt state law is "clear and manifest." Sprietsma
21 v. Mercury Marine, 537 U.S. 51, 69-70 (2002). Moreover, a
22 presumption against preemption applies to protect a state's
23 historic police power in protecting the health and safety of its
24 citizenry, unless the clear and manifest purpose of Congress
25 dictates otherwise. Rice v. Santa Fe Elevator Corp., 331 U.S.
26 218, 230 (1947). This is because states have regulated health
27 and safety issues throughout the nation's history. Medtronic,
28 Inc. v. Lohr, 518 U.S. 470, 475 (1996).

1 PMSA argues, relying on United States v. Locke, 529 U.S. 89
2 (2000), that this presumption does not apply because the Vessel
3 Fuel Rules bear upon maritime commerce. Locke is factually
4 distinguishable from the present case, however, because the state
5 regulations at issue in that case served precisely the same
6 purpose as analogous provisions of federal law under the Ports
7 and Waterways Safety Act of 1972 ("PWSA"). The issue in Locke
8 was consequently not whether any maritime regulation is
9 inherently federal; instead the Court had to consider the scope
10 of appropriate local regulation under the narrow confines of the
11 PWSA. Fednav, Ltd. v. Chester, 547 F.3d 607, 622 (6th Cir.
12 2008).

13 The Supreme Court, in its recent decision in Wyeth v.
14 Levine, 129 S. Ct. 1187 (2009) clarified that the proper analysis
15 for determining application of the presumption against preemption
16 is not the absence of federal regulation, but instead the
17 historic presence of state law. Id. at 1195 n.3. The state law
18 being applied here relates to pollution, not maritime commerce.
19 "Air pollution prevention falls under the broad police powers of
20 the states, which include the power to protect the health of
21 citizens in the state.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Exxon Mobil Corp. v. U.S. Env'tl. Prot. Agency, 217 F.3d 1246,
2 1255 (9th Cir. 2000); Huron Portland Cement Co. v. City of
3 Detroit, 362 U.S. 440, 442 (1960) ("Legislation designed to free
4 from pollution the very air that people breathe clearly falls
5 within the exercise of even the most traditional concept of what
6 is compendiously known as the police power," an area in which the
7 states may act).⁴

8 Significantly, too, in enacting the Clean Air Act, 42 U.S.C.
9 § 7401 et seq., Congress itself pointed to state authority in
10 preventing air pollution. As the Ninth Circuit explains:

11 "States retain the leading role in regulating matters
12 of air quality: "air pollution prevention (that is, the
13 reduction or elimination, through any measures, of the
14 amount of pollutants produced or created at the source)
and air pollution control at its source is the primary
responsibility of States and local government." 42
U.S.C. § 7401(a) (3).

15 Exxon Mobil Corp. v. U.S. Env'tl. Prot. Agency, 217 F.3d at 1254.

16 In short, because pollution is an area falling within
17 police powers historically delegated to the states, the
18 presumption against preemption applies in this case. Given that
19 presumption, we now move to whether there is any basis for field
20 presumption that will overcome it.

21 _____
22 ⁴ In arguing that consistent federal standards in
23 implementing pollution standards is paramount, Plaintiff points
24 to language from the Supreme Court's decision in Chevron U.S.A.,
25 Inc. v. Hammond, 726 F.2d 483 (1982) to the effect that federal
26 interest in uniformity is paramount "as to environmental
27 regulation of deep ocean waters....beyond our nation's
28 jurisdiction." Id. at 492 n.12. That language does not apply
here, however, inasmuch as the United States has established a
24-mile contiguous zone for purposes of exercising territorial
control. See, e.g., Presidential Proclamation No. 7219
(August 2, 1999). The area at issue in this case falls within
that twenty-four mile zone and does not extend to international
deep waters falling outside that boundary.

1 **3. Plaintiff has not established that the SLA**
2 **provides a basis for field preemption in this**
3 **case.**

4 In order to invoke field preemption against a state law, the
5 state law must also have some "direct and substantial effect" on
6 the allegedly preempted field, here navigation and commerce.
7 English v. Gen. Elec. Co., 496 U.S. at 85. Therefore, a federal
8 "interest" in navigation and commerce alone does not suffice, if
9 that interest is not sufficiently pervasive. Id.

10 No evidence has presented by PMSA that the challenged Rules
11 would in any way impede commerce or navigation. PMSA admits that
12 compliance with the Rules is not technically impossible or even
13 difficult. NRDC/CCA UF No. 22. PMSA has not shown that the
14 required fuel is unavailable. It has not argued that use of
15 cleaner fuel would adversely affect ship operations. Instead,
16 the only impairment identified is the economic impact associated
17 with the increased cost of higher grade diesel. In that regard,
18 PMSA argues that the Rules will cost each ship operator some
19 \$30,000.00 per vessel call in California. In placing that figure
20 into perspective, however, any increased cost associated with
21 compliance is less than one percent of the typical cost of a
22 trans-Pacific voyage. Id. at No. 23. That cost has been
23 estimated by CARB to amount to only a \$6.00 increase per 20-foot
24 shipping container, a sum that would equate to only an extra 12.5
25 cents in the cost of a plasma TV. SCAQMD UF No. 58, 59.

26 ///

27 ///

28 ///

1 Such minimal cost increases hardly constitute a "direct and
2 substantial" effect on international commerce, as they must in
3 order to overcome the presumption against preemption that applies
4 to this case in the first place.

5 Under these circumstances, Plaintiff has not shown that he
6 is entitled to summary judgment. Moreover, it all but defies
7 logic to argue that the Vessel Fuel Rules regulate commerce at
8 all instead of curbing air pollution. The Rules simply require
9 ships intending to enter California ports to reduce their
10 polluting activities as they approach the California coast. They
11 do not purport to specify who may or may not engage in commerce,
12 or who may or may not navigate in waters beyond the three-mile
13 limit.

14
15 **B. Plaintiff Has Not Demonstrated That The Vessel Fuel**
16 **Rules Are Otherwise Unlawful For Purposes Of**
17 **Establishing Its Entitlement To Summary Judgment.**

18 Plaintiff's primary argument in challenging imposition of
19 the Vessel Fuel Rules rests with its contention that California
20 is categorically precluded from enacting Rules extending beyond
21 three miles seaward of its coastline under principles of
22 preemption. As set forth above, the Court disagrees. It thus
23 becomes necessary to consider whether the proposed Rules are
24 otherwise "unlawful and impermissibly regulate navigation and
25 foreign and domestic commerce as delegated to the United States
26 Congress," or are "contrary to law" as Plaintiff contends. See
27 Pl.'s Compl. 14:20-26. Plaintiff has not demonstrated that it is
28 entitled to summary judgment on that basis, either.

1 Under the so-called "effects test", California may enact
2 reasonable regulations to monitor and control conduct that
3 substantially affects its territory. In addition to failing to
4 show the requisite direct and substantial effect on maritime
5 commerce that Plaintiff must establish to invoke field
6 preemption, Plaintiff has also failed to adequately rebut
7 California's argument (and that of Intervenors) that the Vessel
8 Fuel Rules target pollution substantially affecting the State and
9 are reasonable in light of the demonstrable effects linked to
10 that pollution. Plaintiff has therefore not shown that the
11 Vessel Fuel Rules, even to the extent they apply on an
12 extraterritorial basis, are unlawful.

13 There is no question that California can exercise its police
14 power within three nautical miles of its coastline. The only
15 issue is whether that police power, in the form of environmental
16 regulation, can also extend seaward between three and twenty-four
17 nautical miles.

18 It should be initially noted that such regulations are not
19 contrary to precepts of international law. Modern international
20 law permits coastal states to establish "requirements for the
21 prevention, reduction, and control of pollution of the marine
22 environment as a condition for the entry of foreign vessels into
23 their ports."⁵ It is uncontroverted that the Vessel Fuel Rules
24 at issue herein are limited to vessels visiting California ports.
25 ///

27 ⁵ See United Nations Convention on the Law of the Sea,
28 [http://www.un.org/Depts/los/convention_agreements/texts/
unclos_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos_e.pdf)).

1 The Rules accordingly appear consistent with traditional
2 principles of international law allowing the imposition of port
3 entry conditions.⁶

4 Under United States law, when state regulations have
5 extraterritorial effects, the propriety of such regulations are
6 judged against the effects test described above, which is
7 designed to ensure that regulations with applicability beyond the
8 geographic confines of a particular state are reasonable and
9 directed at conduct that has a substantial effect in the state.
10 See, e.g., Strassheim v. Daily, 221 U.S. 280, 284-85 (1911).⁷

11 ///

12
13 ⁶ Plaintiff's reliance on the provisions of MARPOL Annex VI
14 of the International Convention for the Prevention of Pollution
15 from Ships, 1973 ("MARPOL VI") is equally unavailing. While PMSA
16 asserts that Congressional ratification of the MARPOL VI
17 regulations reflect a federal interest in being the sole
18 authority for all matters governed therein, including pollution
19 form ocean-going vessels, Section 1911 of the implementing
20 regulations in fact contains an express savings clause preserving
21 state rights. 33 U.S.C § 1911. Such a savings clause "is
22 fundamentally incompatible with complete field preemption." In
23 re NOS Communications, 495 F.3d 1052, 1058 (9th Cir. 2007). In
24 addition, there is nothing in MARPOL VI that even purports to
25 limit the ability of a coastal state to regulate air pollution
26 that originates offshore.

27 ⁷ Cases in several different areas confirm that where state
28 regulations are directed at conduct having a substantial effect
on the state, such regulations are upheld even if they extend
beyond state territorial limits. In addition to the Gillis and
Warner cases already discussed, which deal with pilotage rules,
the Ninth Circuit, in PMSA v. Aubry, 918 F.2d at 1426, held that
California had a strong interest in applying its overtime pay
provisions to maritime employees working on the high seas off
California's coastline, given the close contacts between such
employees and the State and the critical importance of their work
to the State. Additionally, in State v. Stupansky, 761 So. 2d
1027, 1035-36 (Fla. 2000), the Florida Supreme Court found that
Florida properly exercised jurisdiction over a criminal assault
that occurred beyond Florida's territorial waters, since no
conflict with federal existed and because unprosecuted crime
could have a substantial negative impact on Florida's tourism
industry.

1 The effects test consequently requires that two issues be
2 addressed: first, whether the Rules regulate conduct that has a
3 substantial effect within California, and second whether the
4 regulation is reasonable. See Restatement (Third) of Foreign
5 Relations Law of the United States, § 402(1)(c), § 403. As
6 already summarized in the Background section of this Memorandum
7 and Order, the effects on California from ocean-going vessel
8 pollution are both substantial and beyond any reasonable doubt.⁸
9 The State has submitted evidence indicating that emissions from
10 vessels traveling within three and twenty-four nautical miles
11 from the California coast is blown in to California. Decl. of
12 Daniel E. Donohoue in Support of CARB's Opp'n to Mot. for Summ.
13 J., ¶ 7. The emissions from such vessels expose twenty-seven
14 million people, or eighty percent of the state's population, to
15 cancer risks of at least ten in a million. Id. at ¶ 12; SCAQMD
16 UF No. 22. Particulate pollution caused by vessel exhaust also
17 contributes significantly to the risk of premature death,
18 respiratory illness and heart disease. CARB UF Nos. 10, 11. The
19 problem is particularly pronounced in Southern California with
20 its concentration of major shipping ports of entry.

21 ///

22 ///

23 ///

24
25 ⁸ The Court notes that Plaintiff has objected to the
26 introduction of facts concerning the scope and extent of
27 pollution occasioned by ocean-going vessels using bunker fuel as
28 not material to the issues presented by its request for summary
judgment. The Court overrules those objections since such facts
are plainly relevant to both the reasonableness and impact prongs
of the effects test as discussed above.

1 Just as significantly, the benefits from implementation of
2 cleaner fuel requirements appear equally plain. As indicated
3 above, PMSA does not dispute research showing that implementation
4 of the Vessel Fuel Rules between 2009 and 2015 alone will prevent
5 some 3,500 premature deaths, nearly 100,000 asthma attacks, and
6 significantly reduce cancer risk. NRDC/CCA UF No. 14. On a
7 percentage basis harmful emissions will be reduced by as much as
8 ninety percent. SCAQMD UF No. 30. Given these tangible and far-
9 reaching benefits, the Court is wholly unable to conclude that the
10 Rules at issue are unreasonable. Because the effects on California
11 of ocean-going vessel pollution are equally plain, Plaintiff
12 cannot establish any illegality on the basis of the effects test,
13 and the Rules withstand summary judgment on that basis.⁹

14 Nor do the provisions of the Clean Air Act doom the Vessel
15 Fuel Rules. Although the Act does preempt states from adopting
16 "emission standards" for marine vessels without federal
17 authorization, such authorization is not required for "in use
18 requirements" such as sulfur limits on fuel for existing, "in-
19 use" marine vessels and their engines. 55 U.S.C. § 7543; Engine
20 Mfrs Ass'n v. EPA, 88 F.3d 1075, 1094 (D.C. Cir. 1996). Additionally,
21 the Vessel Fuel Rules in their present form avoid preemption
22 issues by imposing a direct fuel mandate as opposed to an
23 emissions standard.

24
25 ⁹ Although Plaintiff argues that state jurisdiction over
26 activities affecting California could extend on an ad infinitum
27 basis if, for example, a determination was made that polluting
28 practices in Shanghai Harbor were found to affect California, the
pervasive effect here, as well as the dramatic benefits to be
gained from mandating ocean-going fuel requirements for vessels
entering California ports, make resort to such an attenuated
analogy misguided.

1 While PMSA did successfully argue Clean Air Act preemption under
2 an earlier version of the Rules setting such standards,¹⁰ it
3 makes no Clean Air Act challenge to the present case.
4

5 **CONCLUSION**
6

7 For all the foregoing reasons, Plaintiff's Motion for
8 Summary Judgment is DENIED.¹¹ In the opinion of the Court,
9 however, this Order qualifies for immediate appellate review as
10 involving "a controlling question of law as to which there is
11 substantial ground for difference of opinion and that an
12 immediate appeal from the order may materially advance the
13 ultimate termination of the litigation." 28 U.S.C. § 1292(b).
14 This Court hereby certifies this Order as meeting those
15 prerequisites.

16 IT IS SO ORDERED.

17 Dated: August 27, 2009
18

19 

20 MORRISON C. ENGLAND, JR.
21 UNITED STATES DISTRICT JUDGE
22
23

24
25 ¹⁰ See PMSA v. Goldstene, 517 F.3d 1108 (9th Cir. 2008).
26 While PMSA asserted both SLA and Clean Air Act preemption in that
27 case, because the Ninth Circuit granted relief under the Clean
28 Air Act it did not address SLA preemption. Id. at 1115.

¹¹ Because oral argument was not of material assistance, the
Court ordered this matter submitted on the briefs. E.D. Cal.
Local Rule 78-230(h).