

Ninth Circuit Prevents California from Regulating Toxic Maritime Emissions

INTRODUCTION

In *Pacific Merchant Shipping Association v. Goldstene*, the Ninth Circuit upheld a federal district court's ruling that enjoined California from enforcing its recent regulations designed to reduce emissions from auxiliary engines on commercial, government, and military vessels operating within regulated California waters.¹ The appellate court held that the regulations, enacted by the California Air Resources Board (CARB), are preempted by the Clean Air Act (CAA).² The court acknowledged that under the CAA the Environmental Protection Agency (EPA) may authorize California to adopt emission standards, but noted that California "has neither sought nor obtained" such authorization.³ Although the Ninth Circuit's ruling checked California's assertion of jurisdiction over reducing these toxic emissions, the state is pursuing a CAA waiver from the EPA and simultaneously is attempting to draft new regulations that will not be preempted.⁴

OVERVIEW

CARB enacted regulations designed "to reduce emissions of diesel particulate matter (PM), nitrogen oxides, and sulfur oxides" from auxiliary diesel and diesel-electric engines on commercial, government, and military vessels operating within regulated California waters.⁵ CARB began enforcing the new regulations on January 1, 2007.⁶ The Pacific Merchant Shipping

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1. *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1109–10 (9th Cir. 2008); 13 CAL. ADMIN. CODE § 2299.1(a), (d)(21) (2006) (describing the purpose of the regulations and specifying the types of vessels affected by the regulations). The regulations are codified both as 13 CAL. ADMIN. CODE § 2299.1 and 17 CAL. ADMIN. CODE § 93118 (2006).

2. *Goldstene*, 517 F.3d at 1110.

3. *Id.* at 1111; 42 U.S.C. § 7543(e)(2)(A) (2006). Whether the EPA would grant a waiver for the CARB regulations is unknown; however, the EPA does support reducing diesel emissions near marine ports. *See, e.g.*, EPA, Clean Ports USA, <http://www.epa.gov/cleandiesel/ports/index.htm> (last visited Aug. 30, 2008).

4. Advisory Notice, Cal. Air Res. Bd., California to Discontinue Enforcement of the Ocean-Going Vessel Auxiliary Diesel Engine Regulation (May 7, 2008), available at <http://www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf>.

5. 13 CAL. ADMIN. CODE § 2299.1(a), (d)(21) (2006).

6. *Goldstene*, 517 F.3d at 1109.

Association (PMSA), a nonprofit organization based in California and Washington State that “represents owners and operators of marine terminals and US and foreign vessels,”⁷ sued CARB in federal district court to prevent enforcement of the new regulations.⁸ PMSA claimed that the regulations were preempted by the CAA, the Submerged Lands Act, and the Ports and Waterways Safety Act, and furthermore that the regulations violate the Commerce Clause of the United States Constitution.⁹

On August 30, 2007, the district court found that the CARB regulations were preempted by the CAA and therefore enjoined enforcement of the regulations pending authorization from the EPA.¹⁰ Due to the finding of preemption, PMSA’s other legal arguments became moot. On October 23, 2007, the Ninth Circuit stayed the lower court’s injunction pending appeal.¹¹

On appeal, the Ninth Circuit revisited the district court’s legal analysis and affirmed the lower court’s findings that the CARB regulations were preempted by the CAA.¹² The appellate court examined two major issues: (1) whether federal preemption of state regulation of emissions from the diesel engines is limited to new engines or also applies to non-new engines and (2) whether the CARB regulations are emission standards or in-use requirements.¹³

FEDERAL PREEMPTION OF STATE REGULATION OF EMISSIONS FROM DIESEL ENGINES
APPLIES TO BOTH NEW AND NON-NEW ENGINES

The CAA authorizes federal regulation, and explicitly preempts state regulation, of air pollutant emissions from “new motor vehicles or new motor vehicle engines.”¹⁴ The statute, however, provides for the possibility of a waiver of the state regulation preemption for any state that has “adopted [such] standards . . . prior to March 30, 1966;”¹⁵ California is the only state that meets this criterion.¹⁶

The 1990 Amendment to the CAA defines *nonroad* motor vehicles and engines (which applies to maritime vessels) and divides them into two

7. Pacific Merchant Shipping Association, About PMSA, http://www.pmsaship.com/who_we_are.html (last visited Aug. 30, 2008).

8. Pac. Merch. Shipping Ass’n v. Witherspoon, No. CIV. S-06-2791, 2007 WL 1080789, at *1 (E.D. Cal. Apr. 4, 2007). The Natural Resources Defense Council, the Coalition for Clean Air, the South Coast Air Quality Management District, and the City of Long Beach joined CARB in the suit as intervenor defendants after demonstrating to the court their interests in the action. *Id.* at *1, *2.

9. *Id.* at *1.

10. Pac. Merch. Shipping Ass’n v. Cackette, No. CIV. S-06-2791, 2007 WL 2492681 at *12 (E.D. Cal. Aug. 30, 2007).

11. *Goldstene*, 517 F.3d at 1113.

12. *Id.* at 1110, 1113–15.

13. *Id.*

14. 42 U.S.C. §§ 7521(a)(1), 7543(a) (2006).

15. *Id.* § 7543(b)(1).

16. Pac. Merch. Shipping Ass’n v. Cackette, No. CIV. S-06-2791, 2007 WL 2492681 at *3 n.6 (E.D. Cal. Aug. 30, 2007).

categories.¹⁷ All parties agreed that the diesel engines at issue are not included in the first category.¹⁸ The engines therefore fall into the second, catch-all category (hereinafter Category 7543(e)(2)). While the statute does not explicitly preempt state regulation for Category 7543(e)(2), the statute can be read to imply such preemption, as the D.C. Circuit found in 1996 in *Engine Manufacturers Association v. EPA* (hereinafter *EMA*).¹⁹

The scope of this implied preemption for Category 7543(e)(2) nonroad motor vehicles and engines is ambiguous. On one hand, the preemption could apply only to new engines and vehicles, in accordance with other subsections of the statute that explicitly refer to new engines and vehicles.²⁰ In 1994, the EPA interpreted the statute in this way, restricting the scope of the preemption to exclude non-new (e.g., in-use) engines and vehicles.²¹ On the other hand, given that the statutory text of Category 7543(e)(2) does not specify the term “new,” the preemption could be read to apply to both new and non-new engines and vehicles.²² In 1996, the *EMA* majority adopted this interpretation, finding that the EPA’s earlier interpretation was unsupported and that the implied preemption was not restricted to new engines and vehicles.²³ The dissent in the *EMA* court, however, agreed with the EPA’s interpretation, finding that it best reflected the intent of Congress.²⁴

In the instant case, the district court found that it had the discretion to adopt either interpretation because neither was binding in the Ninth Circuit.²⁵ The district court found the rationale of the majority of the *EMA* court more convincing.²⁶ The court also reasoned that if the *EMA* majority’s interpretation was contrary to congressional intent, Congress had had enough time to amend the statute in the eleven years since the *EMA* decision.²⁷ Thus the district court held that Category 7543(e)(2) and the implied preemption therein “covers both new and non-new nonroad [motor] vehicles and engines.”²⁸ The Ninth Circuit affirmed this holding.²⁹

17. 42 U.S.C. § 7543(e). The first category comprises “[n]ew engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower” and “[n]ew locomotives or new engines used in locomotives.” *Id.* § 7543(e)(1)(A),(B). The second category comprises all “[o]ther nonroad engines or vehicles.” *Id.* § 7543(e)(2).

18. *Cackette*, 2007 WL 2492681 at *5.

19. *Engine Mfrs. Ass’n, ex rel. Certain of Its Members v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996).

20. *See, e.g.*, 42 U.S.C. §§ 7521(a)(1), 7543(e)(1).

21. Air Pollution Control, Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36,969, 36,973 n.14 (July 20, 1994) (to be codified at 40 C.F.R. pt. 85).

22. 42 U.S.C. § 7543(e)(2) (2006).

23. *Engine Mfrs. Ass’n*, 88 F.3d at 1092–93.

24. *Id.* at 1105.

25. *Pac. Merch. Shipping Ass’n v. Cackette*, No. CIV. S-06-2791, 2007 WL 2492681 at *6 n.9 (E.D. Cal. Aug. 30, 2007).

26. *Id.* at *6.

27. *Id.*

28. *Id.*

29. *Pac. Merch. Shipping Ass’n v. Goldstene*, 517 F.3d 1108, 1113 (9th Cir. 2008).

THE CARB REGULATIONS ARE EMISSION STANDARDS AND ARE NOT IN-USE REQUIREMENTS

PMSA contended that the CARB regulations were emission standards and therefore were subject to preemption under the CAA.³⁰ The defendants argued, however, that the regulations were merely local in-use requirements regulating the sulfur content in fuels.³¹ As in-use requirements, the regulations would not be preempted by the CAA.

The distinction between emission standards and in-use requirements is not obvious. Regarding the former, the Supreme Court has interpreted the CAA statutory phrase “*standard* relating to the control of *emissions*”³² as “denot[ing] requirements such as numerical emission levels with which vehicles or engines must comply.”³³ As to the latter, the CAA expressly permits *in-use requirements*, granting state and local governments “the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.”³⁴ The distinction between the two is material because local in-use requirements may be designed to control emissions through, for example, “carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles.”³⁵

In the instant case, the Ninth Circuit found that the contested CARB regulations were emission standards because they prohibit emitting levels of diesel PM, nitrogen oxides, and sulfur oxides above certain rates which “are susceptible to precise quantification.”³⁶ The court dismissed the defendants’ argument that the CARB regulations are in-use fuel requirements, noting that “the plain language . . . regulates emissions, not fuel” and that the regulations do not require use of any particular fuel.³⁷

THE CARB REGULATIONS ARE PREEMPTED BY THE CLEAN AIR ACT

Thus, on February 27, 2008, the Ninth Circuit found that the CARB regulations on emissions from diesel engines on vessels operating within regulated California waters established emission standards on non-new Category 7543(e)(2) engines and, therefore, held that the regulations were preempted by the CAA.³⁸ The court reinstated the district court’s injunction on enforcement of the regulations pending authorization from the EPA.³⁹

30. *Cackette*, 2007 WL 2492681 at *6.

31. *Goldstene*, 517 F.3d at 1115.

32. 42 U.S.C. § 7543(a) (2006) (emphasis added).

33. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004); 42 U.S.C. § 7543(a).

34. 42 U.S.C. § 7543(d).

35. *Engine Mfrs. Ass’n, ex rel. Certain of Its Members v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996).

36. *Goldstene*, 517 F.3d at 1114.

37. *Id.* at 1115.

38. *Id.*

39. *Id.*

CONCLUSION

In adopting the D.C. Circuit's interpretation that Category 7543(e)(2) includes both new and non-new engines and vehicles, the Ninth Circuit prevented California from enforcing the CARB regulations. Although this decision inhibits, at least temporarily, California from mandating reduced emission of pollutants near its shores, some vessels are voluntarily complying with the regulations.⁴⁰ Meanwhile, CARB is seeking authorization from the EPA for its regulations.⁴¹ Furthermore, while the contested regulations would limit emission levels, CARB is developing new regulations that would require vessels to use low-sulfur fuel.⁴² By designing the new regulations to correspond with the *Pacific Merchant Shipping Association* court's interpretation of in-use fuel requirements, CARB is attempting to avoid federal preemption in its efforts to reduce local pollution.

Beyond attempting to assert jurisdiction over regulating maritime pollution, California is also endeavoring to increase the stringency of that regulation.⁴³ The International Convention for the Prevention of Pollution from Ships (MARPOL) is a series of international regulations on marine pollution.⁴⁴ MARPOL Annex VI, which regulates air pollution from ships, came into general effect in May, 2005⁴⁵ and was signed into United States law in July, 2008.⁴⁶ Annex VI caps the sulfur content in fuel oil at 4.5% and, in special control areas, at 1.5%.⁴⁷ However, California has been seeking stricter controls. The enjoined CARB regulations restricted emission levels to those of marine gas oil with 1.5% sulfur content (down to 0.1% by 2010) or marine diesel oil with 0.5% sulfur content.⁴⁸

40. See, e.g., Marla Cone, *Limits on Ship Exhaust Rejected*, L.A. TIMES, Feb. 28, 2008, at 1 (noting that "[s]ome shipping companies have already complied with the rule by switching to low-sulfur fuels, lowering speeds voluntarily or using shore-side electrical power").

41. Advisory Notice, *supra* note 4.

42. STATIONARY SOURCE DIV., EMISSIONS ASSESSMENT BRANCH, CAL. AIR RES. BD., INITIAL STATEMENT OF REASONS FOR PROPOSED RULEMAKING: FUEL SULFUR AND OTHER OPERATIONAL REQUIREMENTS FOR OCEAN-GOING VESSELS WITHIN CALIFORNIA WATERS AND 24 NAUTICAL MILES OF THE CALIFORNIA BASELINE ES-1 to ES-2 (June 2008) [hereinafter REASONS FOR PROPOSED RULEMAKING], available at <http://www.arb.ca.gov/regact/2008/fuelogv08/ISORfuelogv08.pdf>.

43. Advisory Notice, *supra* note 4.

44. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319; see also International Maritime Organization (IMO), MARPOL, http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258 (describing the provisions, amendments, and history of the convention) (last visited Aug. 30, 2008).

45. INTERNATIONAL MARITIME ORGANIZATION, ANNEX VI OF MARPOL 73/78: REGULATIONS FOR THE PREVENTION OF AIR POLLUTION FROM SHIPS AND NO_x TECHNICAL CODE (1998) [hereinafter MARPOL ANNEX VI]; IMO, The Protocol of 1997, http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#30 (last visited Aug. 30, 2008).

46. Maritime Pollution Prevention Act, Pub. L. No. 110-280, 122 Stat. 2611 (2008).

47. MARPOL ANNEX VI, *supra* note 45, at 16-17.

48. 13 CAL. ADMIN. CODE § 2299.1(e)(1)(A),(B) (2006). The initial sulfur content cap for marine gas oil, 1.5%, is based on "the specifications for DMX or DMA grades as defined in Table 1 of International Standard ISO 8217, as revised in 2005." *Id.* § 2299.1(d)(16). See ISO 8217:2005,

Other institutions are also endeavoring to enact stricter controls on air pollution from ships. First, the International Maritime Organization has proposed amendments to MARPOL Annex VI that would progressively reduce the general sulfur content cap from the current 4.5% to 3.5% by 2012 and to as low as 0.5% by 2020.⁴⁹ The amendments would reduce the cap in special control areas to 1.00% by March 2010 and to 0.10% by 2015.⁵⁰ Second, legislators in both houses of Congress have introduced identical bills that would reduce the permissible sulfur content in fuel further and faster, to between 0.1% and 0.2% by 2010.⁵¹ Nevertheless, CARB sees the need to pass its own regulations; the congressional bills might fail, and the timeline in the proposed Annex VI amendments is too lax—the health risks of the continued pollution from ships are too significant for further delay.⁵² After *Pacific Merchant Shipping Association*, CARB should carefully craft its new regulations to avoid further preemption.⁵³

—Harry Moren

PETROLEUM PRODS.—FUELS (CLASS F)—SPECIFICATIONS OF MARINE FUELS tbl. 1 (Int'l Org. for Standardization 2005).

49. IMO, MEPC 57 Outcome, http://www.imo.org/environment/mainframe.asp?topic_id=233#review (last visited Aug. 30, 2008).

50. *Id.*

51. Marine Vessel Emissions Reduction Act of 2008, S. 1499, 110th Cong. § 3 (2008); Marine Vessel Emissions Reduction Act of 2007, H.R. 2548, 110th Cong. § 3 (2007).

52. REASONS FOR PROPOSED RULEMAKING, *supra* note 42, at ES-7 to ES-10, ES-23 to ES-24.

53. CARB adopted the new regulations while this Article was going to press. *See* Press Release, Cal. Air Res. Bd., Ships off California's Coast Must Adhere to World's Strictest Diesel Emission Regulation (July 24, 2008), *available at* <http://www.arb.ca.gov/newsrel/nr072408b.htm>.

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