



December 8, 2006

John McLaurin
(415) 352-0710 office

**Statements on the Litigation Regarding
the California Air Resources Board (CARB) Auxiliary Engine Regulations**

- The maritime industry accepts its responsibility to reduce air emissions and is working in earnest to reduce environmental impacts to the maximum extent possible at the earliest possible date. However, this is a global issue that requires global and national solutions. Instead of promoting regional fixes we believe the state should show leadership by supporting more comprehensive and broader internationally-recognized solutions to our air quality challenges. As such, this lawsuit is about who should have the jurisdiction to impose and enforce requirements on international trade.
- While this litigation concerns the arbitrary and legally flawed jurisdictional authority asserted by CARB in their rule and stands for the fundamental need to address emissions from ships at the federal and international levels, the Pacific Merchant Shipping Association (PMSA) is supportive of clean fuel strategies and other efforts to reduce emissions.
- The CARB regulations would expand the State's authority over vessels engaged in international commerce at distances far greater than that exercised by the federal government and will invite a patchwork of unique and conflicting regulations and requirements throughout the state and the country. Only through consistent and harmonized federal and international standards can we obtain meaningful and sustainable emission reductions from ships engaged in international trade.
- PMSA members will be in compliance with the CARB auxiliary engine regulations on January 1 and will continue to seek to implement clean fuel strategies while this litigation progresses. Setting requirements through federal and international efforts including ratification of MARPOL Annex VI and the development of a North American Sulfur Emission Control Area are important steps in achieving these goals.
- The maritime industry is engaged in a number of efforts to reduce emissions from vessels and marine terminal equipment up and down the Pacific Coast. PMSA members are involved in many emissions reduction programs including the use of low sulfur fuels, slide valve technology, voluntary speed reduction, cold ironing, alternative shoreside emission reduction proposals and "sock" technology. All of these efforts have been accomplished ahead of any regulatory mandates by CARB.
- PMSA continues to support regulations by CARB that address marine terminal cargo handling equipment through accelerated turnover of yard equipment to the cleanest technologies available.
- PMSA has been involved in very few lawsuits in its history. The most recent in which PMSA initiated litigation with the State of California was PMSA vs. Voss, which was unanimously decided in favor of PMSA by the California State Supreme Court in 1995. PMSA also filed amicus briefs in Intertanko vs. Locke before the U.S. Supreme Court in 2001.

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90831-1800
(562) 435-2626

1 Erich P. Wise/State Bar No. 63219
2 Nicholas S. Politis/State Bar No. 92978
3 Aleksandrs E. Drumnalds/State Bar No. 237101
4 FLYNN, DELICH & WISE LLP
5 One World Trade Center, Suite 1800
6 Long Beach, California 90831-1800
7 Telephone: (562) 435-2626
8 Facsimile: (562) 437-7555

7 James B. Nebel/State Bar No. 69626
8 Conte C. Cicala/State Bar No. 173554
9 FLYNN, DELICH & WISE LLP
10 One California Street, Suite 350
11 San Francisco, California
12 Telephone: (415) 693-5566
13 Facsimile: (415) 693-0410

12 Attorneys for Plaintiff

13 PACIFIC MERCHANT SHIPPING ASSOCIATION,
14 a California Mutual Benefit Corporation

15 UNITED STATES DISTRICT COURT

16 EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO

18 PACIFIC MERCHANT SHIPPING)
19 ASSOCIATION, a California Mutual)
20 Benefit Corporation,)

21 Plaintiff,)

22 vs.)

23)
24 CATHERINE E. WITHERSPOON, in)
25 her official capacity as Executive)
26 Officer of the California Air)
27 Resources Board,)

27 Defendant.)
28 _____)

) CASE NO.:
)
) COMPLAINT FOR INJUNCTIVE
) AND DECLARATORY RELIEF

1 For its complaint in the captioned matter, PACIFIC MERCHANT
2 SHIPPING ASSOCIATION ("PMSA"), a California Mutual Benefit
3 Corporation, alleges and avers as follows:
4

5 I.

6 PRELIMINARY STATEMENT

7
8 1. This action asks the Court to enjoin the adoption and enforcement
9 of section 2299.1 of Title 13 and section 93118 of Title 17 of the California
10 Code of Regulations ("CCR") by the California Air Resources Board and to
11 declare the regulations unconstitutional and contrary to federal law. The
12 California Air Resources Board ("CARB") has adopted the challenged
13 regulations and will begin enforcing them on January 1, 2007. The regulations
14 require all vessels calling at California ports, including vessels owned or
15 operated by members of plaintiff PMSA, to meet CARB's air emissions
16 standards for auxiliary and diesel electric engines while operating within 24
17 nautical miles of the California coast. They require ship operators to maintain
18 detailed records regarding both the internal operations of their vessels within
19 twenty-four nautical miles of the California coast and the purchase and quality
20 of fuel oil used by those vessels. They impose substantial fines and penalties
21 and allow for unspecified injunctive relief against the vessels and their owners
22 in the event of non-compliance.
23
24
25
26
27
28

2. 13 CCR § 2299.1 and 17 CCR § 93118 contravene the
Supremacy Clause of the United States Constitution because they conflict with
or are otherwise preempted by:

a) Section 209(e) (2) (A) of the federal Clean Air Act, 42
U.S.C. § 7543(e) (2), and United States Environmental Protection Agency
regulations thereunder;

b) The federal Submerged Lands Act, 43 U.S.C. §§ 1301-
1315;

c) Title II of the Ports and Waterways Safety Act ("PWSA"),
and 46 U.S.C. § 3701, et seq.; and United States Coast Guard regulations
thereunder; and

d) The limitations imposed on state regulation of interstate
and foreign maritime commerce by Article I, § 8, cl. 3 (the Commerce Clause),
and Article III § 2, cl. 1 (the Admiralty Clause) of the United States
Constitution.

3. PMSA's members are required to comply with these unlawful
regulations and they are subject to fines, penalties, and potential exclusion from
the ports of California if they fail to do so. Furthermore, unless enforcement of
the regulations is enjoined important interests of the United States in the
national and international uniformity of laws and standards applicable to
interstate and foreign maritime commerce will be compromised.

4. By this complaint, therefore, the PMSA seeks a permanent injunction against enforcement of the regulations and a declaratory judgment that they are unlawful and unconstitutional.

II.

JURISDICTION

5. This is an action arising under the Constitution and laws of the United States, including Article I, § 8, cl. 3 (Commerce Clause), Article III, § 2, cl. 1 (Admiralty Clause), and Article VI, § 1 cl. 2 (Supremacy Clause) of the Constitution; the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq.; § 209(e)(2)(A) of Clean Air Act, 42 U.S.C. § 7543(e)(2)(A); and Title II of the Ports and Waterways Safety Act, 46 U.S.C. § 3701, et seq. This court has original jurisdiction over the case pursuant to the federal question, maritime and admiralty, and commerce regulation jurisdictional statutes, 28 U.S.C. §§ 1331, 1333, and 1337, and the power to issue declaratory relief pursuant 28 U.S.C. § 2201.

III.

VENUE

6. Venue is proper in the Eastern District of California pursuant to 28 U.S.C. § 1391(b). Catherine Witherspoon, sued in her official capacity as the Executive Officer of CARB, is the only defendant in this matter and resides within this District. A substantial part of the events giving rise to this action,

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW

One World Trade Center, Suite 1800

Long Beach, California 90831-1800

(502) 435-2828

1 including the adoption of the challenged regulation by CARB, has occurred in
2 Sacramento, and the regulations will be enforced against vessels that call within
3 this district at the Ports of Stockton and Sacramento.
4

5 IV.

6 THE PARTIES

7 7. Plaintiff PMSA is a mutual benefit corporation that is organized
8 and existing under the laws of the State of California. Its principal purposes
9 include representation and promotion of its members' interests in legislative,
10 legal, and administrative matters affecting its members in the State of
11 California. The members of the PMSA include twenty-two companies that own
12 or operate foreign and United States-flagged ocean-going commercial vessels,
13 including tank vessels within the meaning of Title II of the Ports and Waterways
14 Safety Act 46 U.S.C. §§ 3701, et seq. PMSA members and their ships are
15 subject to the CARB regulations at issue. These members of the PMSA operate
16 their vessels in international and interstate maritime commerce at sea off of the
17 coast of California and in sea-ports in California. The members of the PMSA
18 also include twelve companies that operate marine terminals and/or provide
19 stevedoring and marine terminal services to vessels in international or interstate
20 commerce that call at California ports. The vessels of the PMSA's ship
21 owner/operator members use auxiliary or diesel electric engines during
22 navigation and when alongside the dock, and they will be subject to 13 CCR §
23
24
25
26
27
28

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW
One World Trade Center, Suite 1600
Long Beach, California 90801-1800
(562) 435-2626

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90801-1800
(562) 435-2626

2299.1 and 17 CCR § 93118 when enforcement of the regulations begins on January 1, 2007. The vessels operated and served by PMSA members are the express subjects of the challenged regulations, and the vessel owner/operator members of the PMSA have received an advisory letter from CARB announcing CARB's intent to enforce the regulation against the PMSA members' vessels commencing January 1, 2007.

8. Defendant Catherine Witherspoon is the Executive Officer of CARB. Pursuant to California Health & Safety Code, §§ 39515 and 39516, she is charged as Executive Officer with enforcement of regulations adopted by CARB. By its Board Resolution No. 05-63, CARB specifically directed Ms. Witherspoon, as the Board's Executive Officer, to enforce 13 CCR § 2299.1 and 17 CCR § 93118 statewide. She is sued in her official capacity of Executive Officer of CARB.

V.

FIRST CLAIM FOR RELIEF

**[For Declaratory And Injunctive Relief Based On
Preemption By Title II Of The Clean Air Act,
42 U.S.C. §§ 7521, et seq.]**

9. Plaintiff realleges and incorporates here by reference the allegations of Paragraphs 1 through 8 of this Complaint as if set out here in full.

10. On December 8, 2005, the California Air Resources Board approved Board Resolution 05-63, adopting two regulations, 13 CCR § 2299.1

1 and 17 CCR § 93118. CARB subsequently proposed modifications to the
2 approved regulations and made such modified versions available for public
3 comment on May 18, 2006. Plaintiff PMSA participated in the administrative
4 proceedings held by CARB regarding the proposed regulations and timely
5 provided extensive written comments on the regulations.
6

7
8 11. On October 20, 2006, CARB certified and transmitted the
9 regulations as adopted and modified to the California Office of Administrative
10 Law ("OAL") for filing with the California Secretary of State pursuant to
11 California Government Code § 11343. On December 6, 2006, the OAL gave its
12 final approval to the regulations and filed the regulations with the California
13 Secretary of State pursuant to California Government Code § 11349(a).
14 Pursuant to California Government Code § 11346.2 and as provided for in the
15 regulations and the OAL's transmittal of the final regulations to the California
16 Secretary of State, the effective date of the regulations is December 6, 2006, and
17 enforcement of the regulations will commence January 1, 2007.
18
19
20

21 12. Both regulations establish standards relating to the emission of
22 diesel particulate matter (PM), sulfur oxides (SOx), and nitrogen oxides (NOx)
23 from diesel auxiliary and diesel electric engines of ocean going vessels,
24 including U.S. and foreign-flag ships that operate within twenty-four nautical
25 miles of the base low water line along the California coast. The substance of
26 both regulations is the same, although 13 CCR § 2299.1 was adopted as a
27
28

1 regulation of "emissions limits and requirements" and 17 CCR § 93118 was
2 adopted as an "airborne toxic control measure."

3
4 13. Subsection (e) of the regulations:

5 A. Prohibits operation of:

6 "any auxiliary diesel engine [including any diesel electric
7 engine], while the vessel is operating in any of the Regulated
8 California Waters [within 24 miles of the California baseline],
9 which emits levels of diesel PM, NOx, or SOx in exceedance of
10 the emission rates of those pollutants that would result had the
11 engine used the following fuels:

12 "(A) Beginning January 1, 2007:

- 13 1. marine gas oil...; or
- 14 2. marine diesel oil,...with a sulfur content of no more
15 than 0.5 percent by weight;

16 "(B) Beginning January 1, 2010: marine gas oil with a sulfur
17 content of no more than 0.1 percent by weight..." and

18 B. Requires vessel owners and operators subject to the regulations to
19 maintain records that contain the type of fuel used in each
20 auxiliary engine operated within the twenty-four nautical miles of
21 the California baseline, the "types, amounts, and the actual
22 percent by weight sulfur content of all fuels purchased for use on
23 the vessel," and the date, local time and position of each vessel:

- 24 1. Upon entry into and departure from within twenty-
25 four nautical miles of the California baseline; and
26
27
28

1 2. At the initiation and completion of any fuel
2 switching procedures used to comply with the
3 section prior to entry into or within the twenty-four
4 nautical mile zone.

5 14. Pursuant to their subsection (b), the regulations apply to all
6 commercial vessels registered in, flagged in, or operating under the authority of
7 the United States or any other country.

8 15. Subsection (f)(1) of the regulations provides for imposition of
9 “penalties, injunctive relief, and other remedies specified in [California] Health
10 and Safety Code, section 42400 et seq., other applicable sections in the Health
11 and Safety Code; and other applicable provisions as provided under California
12 law for each violation.” Such penalties, relief and remedies include, among
13 other things, injunctive relief, misdemeanor prosecution, civil and criminal fines
14 of \$25,000 to \$75,000 for every day of non-compliance, and imprisonment for
15 up to one year for each day of non-compliance to secure payment of civil
16 penalties. Subsection (f)(2) of the regulations provides that “[a]ny failure to
17 meet any provision, standard, criteria, or requirement” of the regulations “shall
18 constitute a single, separate violation of this section for each hour that a person
19 operates an ocean going vessel within” twenty-four nautical miles of the
20 California coast “until such provision, standard, criteria, or requirement has
21 been met.”
22
23
24
25
26
27
28

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90801-1800
(562) 435-2028

FLYNN, DELICH & WISE LLP
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90801-1500
(562) 435-2828

1 16. Section 213 of the Clean Air Act, 42 U.S.C. § 7457, required the
2 Administrator of the United States Environmental Protection Agency ("EPA")
3 to conduct a study of the effect of emissions from new and existing nonroad
4 engines and, if appropriate, to adopt regulations that establish emissions
5 standards and requirements for new nonroad engines. Pursuant to this statute,
6 the EPA has adopted regulations to govern emissions from new engines on
7 United States flagged and registered vessels that are similar in content to and
8 consistent with the standards established by an international treaty known as
9 MARPOL, Annex VI. See 40 C.F.R., Part 94; 68 F.R. 9746 (February 3, 2003).
10 The EPA has, however, postponed a decision on whether it has the authority to
11 regulate marine engines on foreign-flagged vessels and deferred adoption of any
12 regulations for engines on such vessels, concluding that doing so will, among
13 other things, "facilitate the development of more stringent consensus
14 international requirements" and potentially "maximize the level of emission
15 reductions achieved from emission control on U.S. and foreign vessels." 68
16 F.R., at 9759. The EPA determined that it was appropriate to defer regulation of
17 engines on foreign vessels because it could "fully expect that foreign vessels
18 will comply with the MARPOL standards," and, therefore, "there is no
19 significant loss in emissions reductions by not including them." *Ibid.*

20
21
22 17. Section 209(e)(2)(A) of the federal Clean Air Act, 42 U.S.C. §
23 7453(e)(2)(A), and regulations adopted pursuant to the Act by the EPA, 40

FLYNN, DELICH & WISE LLP
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90831-1600
(562) 435-2625

1 C.F.R. §§ 85.1601-85.1606, require California to obtain authorization from the
2 EPA in order to "adopt and enforce standards and other requirements relating to
3 the control of emissions" from "nonroad" engines other than new or rebuilt
4 locomotive engines or certain new engines used in farm or construction
5 equipment. This requirement for EPA authorization applies to regulation by
6 California of emissions from diesel auxiliary and diesel electric engines onboard
7 both U.S. and foreign-flag ocean-going vessels such as those owned and
8 operated by the members of the PMSA.
9

10
11 18. CARB has adopted and intends to enforce 13 CCR § 2299.1 and
12 17 CCR § 93118 commencing January 1, 2007, but has neither sought nor
13 obtained EPA authorization to do so. CARB's adoption and enforcement of the
14 regulations without EPA authorization violates § 209(e) (2) (A) of the Clean Air
15 Act and regulations thereunder, including 40 C.F.R. § 85.1604.
16

17
18 19. Section 209(e)(2)(A) is the keystone statutory provision in the
19 national scheme for uniform regulation of emissions from nonroad engines other
20 than new locomotive, farm and construction vehicles or engines governed by the
21 Clean Air Act. Although it provides California with the authority to adopt and
22 enforce standards and other requirements relating to emissions from certain
23 nonroad engines within the State of California, the Act also requires California
24 to obtain EPA authorization of any emissions standards or requirements related
25 to engine emissions that California seeks to adopt or enforce. Authorization is
26
27
28

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW
One World Trade Center, Suite 1500
Long Beach, California 90801-1800
(562) 435-0636

1 to be granted if California has determined that its standards will be at least as
2 protective of public health and welfare as those of the EPA. No authorization
3 can be granted by the EPA, however, if the EPA determines that this finding by
4 California is "arbitrary and capricious," that the California regulations are not
5 needed to meet "compelling and extraordinary conditions," or that the
6 California standards are "not consistent" with Section 209 of the Act. Only
7 after California obtains the required EPA authorization for such regulations does
8 § 209(e) (2) (B) of the Clean Air Act, 49 U.S.C. § 7543(e) (2) (B), allow other
9 states to adopt the emissions standards for nonroad engines, but the standards
10 adopted by other states must be the same as the California standards and all such
11 regulations are subject to a two-year waiting period. By these provisions, the
12 Clean Air Act guarantees that users of nonroad engines in interstate and
13 international commerce in the United States will be subject to only one set of
14 uniform emissions standards and requirements and not to a patchwork of
15 requirements that vary from one state to another, from county to county within a
16 state, or among cities even within the same state or county.

20. California's failure to comply with the Act's requirements
jeopardizes the foregoing national scheme of uniformity and creates the
potential for the adoption and enforcement of differing emissions standards and
requirements by other states, and by local municipalities and local and regional
political subdivisions within the State of California and other states. Such lack

FLYNN, DELICH & WISE LLP

ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90801-1800
(562) 435-0328

1 of national uniformity in emission standards will require the members of PMSA
2 and their vessels to take different actions, purchase different fuels, and modify
3 their vessels in different ways than required by the CARB standards to meet the
4 varying requirements of each such entity.
5

6 21. Because the regulations purport to adopt and enforce emissions
7 standards on nonroad engines used aboard ocean-going vessels and were
8 adopted without the EPA authorization required by the Clean Air Act, they
9 conflict with and are preempted by the Clean Air Act and contravene the
10 Supremacy Clause of the United States Constitution.
11

12 22. Adoption and enforcement of 13 CCR § 2299.1 and 17 CCR §
13 93118 by CARB will be contrary to the important interests of the United States
14 in the adoption of uniform of national and international standards regulating
15 marine engines used in interstate and foreign maritime commerce.
16

17 23. Based on the foregoing, the PMSA is entitled to a judgment that
18 enjoins defendant Witherspoon from giving effect to or enforcing 13 CCR §
19 2299.1 and 19 CCR § 93118 and declares that such regulations are preempted
20 by the Clean Air Act. In the alternative, the PMSA is entitled to a judgment that
21 enjoins defendant Witherspoon from giving effect to or enforcing these
22 regulations and declares that such regulations are pre-empted by § 209(e)(2)(A)
23 of the Clean Air Act unless and until the State of California obtains
24 authorization for such regulations from the United States Environmental
25
26
27
28

1 Protection Agency pursuant to § 209(e)(2)(A) of the Clean Air Act, 42 U.S.C. §
2 7543(e)(2)(A) and EPA regulations there under, including 40 C.F.R. § 85.1604.

3
4 **VI.**

5 **SECOND CLAIM FOR RELIEF**

6 **[For Declaratory And Injunctive Relief Based On Preemption**
7 **By The Submerged Lands Act, 43 U.S.C. § 1301 et seq.]**

8 24. Plaintiff realleges and incorporates by reference Paragraphs 1
9 through 8, and 10 through 15 of this Complaint as if set out here in full.

10 25. The territorial jurisdiction and boundary of the State of California
11 is limited by the federal Submerged Lands Act, 43 U.S.C. §§ 1301, 1311, and
12 1312, to a line within three geographical miles of the California coast line.

13 Under the Submerged Lands Act, the State of California has no jurisdiction to
14 regulate the conduct of vessels engaged in international or interstate commerce
15 in waters that are seaward from California's territorial boundary of three
16 geographical miles from its coast line.

17 26. Pursuant to 43 U.S.C. § 1314(a), the Submerged Lands Act also
18 provides that:

19 "The United States retains all its navigational
20 servitude and rights in and powers of regulation and
21 control of said lands and navigable waters for the
22 constitutional purposes of commerce, navigation,
23 national defense, and international affairs, all of which
24 shall be paramount to, but shall not be deemed to
25 include, proprietary rights of ownership, or the rights
26 of management, administration, leasing, use, and
27
28

1 development of the lands and natural resources which
2 are specifically recognized, confirmed, established,
3 and vested in and assigned to the respective States and
4 others by section 1311 of this title."

5 27. By Presidential Proclamations 5928 (promulgated December 27,
6 1988) and 7219 (promulgated August 2, 1999), the United States has extended
7 its territorial sea "to 12 nautical miles from the baselines of the United States
8 determined in accordance with international law," and its contiguous zone "to
9 24 miles from the baselines of the United States determined in accordance with
10 international law." By Proclamation 5928, the United States of America has
11 extended its national sovereignty and jurisdiction to the twelve mile limit "to
12 advance the national security and other significant interests of the United
13 States." The establishment of the 24-mile contiguous zone was accomplished
14 by Proclamation 7219 for the purpose of exercising control by the national
15 government "necessary to prevent infringement of its customs, fiscal,
16 immigration, or sanitary laws within its territory or territorial sea, and to punish
17 infringement of the above laws and regulations within its territory or territorial
18 sea."
19
20
21
22

23 28. Because the CARB regulations purport to regulate the conduct of
24 vessels and vessel owners outside of California's boundaries and to regulate and
25 control the conduct of vessels operating in interstate and international
26 commerce and navigation within the State's boundaries, they contravene the
27
28

FLYNN, DELICH & WISE LLP
ATTORNEYS AT LAW
One World Trade Center, Suite 1900
Long Beach, California 90801-1900
(562) 435-2020

FLYNN, DELICH & WISE LLP
ATTORNEYS AT LAW
One World Trade Center, Suite 1600
Long Beach, California 90801-1800
(562) 435-2525

1 three-mile limit on the State's territorial jurisdiction established by the
2 Submerged Lands Act and conflict with the express retention of the national
3 government's powers of regulation and control of the navigable waters within
4 the three-mile limit for purposes of commerce, navigation, national defense and
5 international affairs pursuant to 43 U.S.C. §1314(a)(1). The CARB regulations
6 are, therefore, preempted by the Submerged Lands Act and contravene the
7 Supremacy Clause of the United States Constitution.
8

9
10 29. Adoption and enforcement of 13 CCR § 2299.1 and 17 CCR §
11 93118 by CARB will be contrary to the important interests of the United States
12 in the uniformity of national and international standards regulating interstate and
13 foreign maritime commerce and navigation and the sovereignty of the United
14 States in the regulation and control of such commerce and navigation to the
15 exclusion of the various States within the territorial seas of the United States
16 declared by Presidential Proclamation No. 5928 and the contiguous zone
17 declared by President Proclamation No. 7219.
18
19

20
21 30. Based on the foregoing, the PMSA is entitled to a judgment that
22 enjoins defendant Witherspoon from giving effect to or enforcing 13 CCR §
23 2299.1 and 19 CCR § 93118 and declares these regulations preempted by
24 federal law, including the Submerged Lands Act and Presidential Proclamations
25 No. 5928 and 7219, and contrary to the Supremacy Clause of the United States
26 Constitution.
27
28

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

VII.

THIRD CLAIM FOR RELIEF

[For Declaratory And Injunctive Relief Based On
Preemption By The Ports And Waterways Safety Act,
46 U.S.C. §§ 3701 et seq.]

31. Plaintiff realleges and incorporates by reference Paragraphs 1 through 8 and 10 through 15 of this Complaint as if set out here in full.

32. Title II of the Ports and Waterways Safety Act of 1972 ("PWSA"), 46 U.S.C. § 3703(a), requires the United States Coast Guard to promulgate regulations regarding the "design, construction, alteration, repair maintenance, operation, equipping, personnel qualifications and manning of vessels . . . necessary for the increased protection against hazards to life and property, for navigation and vessel safety and for enhanced protection of the marine environment."

33. Federal regulations promulgated pursuant to Title II of PWSA impose requirements for main and auxiliary machinery fuel oil. Under 46 C.F.R. § 58.01-10(a)(1), no fuel oil with "a flashpoint of less than 60° C (140° F) may be used." Under 46 C.F.R. § 58.01-10(a)(4), a "fuel having a lower flashpoint than otherwise specified in this section--for example, crude oil--may be used provided that such fuel is not stored in any machinery space..." The emissions standards established by the CARB regulations effectively regulate fuel oil use and sulfur content aboard vessels subject to the provisions of 46

1 C.F.R. § 58.01 even though the federal government has already promulgated
2 specific requirements that govern such fuel oil which do not impose sulfur
3 content limitations.
4

5 34. 13 CCR § 2299.1 and 17 CCR § 93118 require the ship owner
6 and operator to keep specific records on when, where, what type, and how much
7 fuel is used aboard a vessel within 24 miles of the California coastline. The
8 federal government, however, has promulgated regulations regarding shipboard
9 recordkeeping. Specifically, 46 C.F.R. § 35.07-10(b)(5) states that entries shall
10 be in the logs of tankships with respect to: "Fuel oil data. Upon receipt of fuel
11 oil on board to be used as fuel. See Sec. 35.25-10."
12

13 35. Under 46 C.F.R. § 35.25-10(b), a chief engineer aboard a tank
14 vessel is required "to make an entry in the log of each supply of fuel oil received
15 on board, stating the quantity received, the name of the vendor, the name of the
16 oil producer, and the flashpoint...for which it is certified by the producer."
17

18 36. By requiring vessel auxiliary engines to meet emissions standards
19 equivalent to emissions by use of fuels with a prescribed sulfur content, CARB
20 will also be effectively requiring vessel operators to retrofit vessels, if
21 necessary, to accommodate the regulations. However, Title II of the PWSA, 46
22 U.S.C. § 3703(a)(1), already establishes exclusive federal domain over tank
23 vessel requirements relating to "superstructures, hulls, cargo holds or tanks,
24 fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and
25
26
27
28

FLYNN, DELICH & WISE LLP
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90801-1800
(562) 435-2805

1 boilers." The CARB regulations interfere with federal statutes and regulations
2 pertaining to the use of auxiliary machinery aboard vessels engaged in foreign
3 and interstate trade.
4

5 37. Adoption and enforcement of 13 CCR § 2299.1 and 17 CCR §
6 93118 by CARB will be contrary to the important interests of the United States
7 in the uniformity of national standards regulating regulation fuel oil used by
8 vessels entering U.S. navigable waters, the requirements of vessels for recording
9 of relevant fuel data, and the construction of vessel tanks, piping and machinery.
10

11 VIII.

12 FOURTH CLAIM FOR RELIEF

13 [For Declaratory And Injunctive Relief Based On The 14 Commerce Clause of the United States Constitution]

15 38. Plaintiff realleges and incorporates here by reference the
16 allegations of Paragraphs 1 through 8, 10 through 21 and 23 through 38 of this
17 Complaint as if set out here in full.
18

19 39. Article I, § 8, cl. 3 of the United States Constitution gives the
20 Congress the power "To regulate commerce with foreign nations, and among
21 the several states...."
22

23 40. By adoption and enforcement of 13 CCR § 2299.1 and 17 CCR §
24 93118, CARB has sought to regulate foreign and interstate commerce in the
25 field of maritime foreign and interstate commerce for which Congress has
26
27
28

FLYNN, DELICH & WISE LLP
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90801-1000
(562) 435-2626

1 imposed uniform national regulation and control pursuant to its authority under
2 the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution. The
3 CARB regulations thereby exceed the authority of the State of California under
4 the Commerce Clause.
5

6 41. Adoption and enforcement of 13 CCR § 2299.1 and 17 CCR §
7 93118 by CARB will be contrary to the important interests of the United States
8 in the adoption of uniform national and international standards regulating
9 marine engines used in interstate and foreign maritime commerce.
10

11 42. Based on the foregoing, the PMSA is entitled to preliminary and
12 permanent orders and a judgment that enjoin defendant Witherspoon from
13 giving effect to or enforcing 13 CCR § 2299.1 and 19 CCR § 93118 and declare
14 these regulations to be contrary to and unenforceable under the Commerce
15 Clause of the United States Constitution.
16
17

18 PRAYER FOR RELIEF

19 WHEREFORE, Plaintiff Pacific Merchant Shipping Association prays
20 for relief as follows:
21

22 A. For a declaration that: 1) 13 CCR § 2299.1 and 17 CCR § 98113
23 are unlawful and preempted by the Clean Air Act, 42 U.S.C § 7543(e)(2)(A)
24 and regulations thereunder, 40 C.F.R. § 85.1601 et seq.; the Submerged Lands
25 Act, 43 U.S.C. §§ 1301 et seq.; the Ports and Waterways Safety Act, 46 U.S.C.
26 § 3701 et seq. and regulations thereunder; and the Supremacy and Commerce
27
28

1 Clauses of the United States Constitution; and 2) it is contrary to law for
2 Defendant Witherspoon to enforce 13 CCR § 2299.1 and 17 CCR § 98113;
3

4 B. For a permanent injunction that bars defendant Witherspoon from
5 implementing or enforcing 22 CCR § 2299.1 and 17 CCR § 98113 or equivalent
6 regulations;
7

8 C. For costs and attorneys' fees as allowed by law;
9

10 D. For such other, further or different relief as this Court may deem
11 just and proper.
12

13 Signed at Long Beach, California this Eighth Day of December, 2006.
14

15
16 /s ERICH P. WISE

17 Flynn, Delich & Wise LLP

18 One World Trade Center

19 Suite 1800

20 Long Beach, California 90831-1800

21 (562) 435-2626

22 erichw@fdw-law.com
23

24 Attorneys for Plaintiff

25 PACIFIC MERCHANT SHIPPING

26 ASSOCIATION, a California Mutual

27 Benefit Corporation

28 State Bar No. 63219