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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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PACIFIC MERCHANT SHIPPING  
ASSOCIATION, a California mutual  
benefit corporation,

NO. CIV. S-06-2791 WBS KJM

Plaintiff,

v.

ORDER RE: MOTION FOR SUMMARY  
JUDGMENT

TOM CACKETTE, in his official  
capacity as Executive Officer  
of the California Air Resources  
Board, \_\_\_\_\_

Defendant,

and \_\_\_\_\_

NATIONAL RESOURCES DEFENSE  
COUNCIL, INC.; COALITION FOR  
CLEAN AIR, INC.; SOUTH COAST  
AIR QUALITY MANAGEMENT  
DISTRICT; CITY OF LONG BEACH,

Defendant-Intervenors.

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Plaintiff Pacific Merchant Shipping Association

1 ("PMSA") brought this action against defendant Tom Cackette<sup>1</sup> to  
2 enjoin the adoption and enforcement of 13 C.C.R. § 2299.1 and 17  
3 C.C.R. § 93118, and obtain a declaration that the regulations are  
4 preempted by federal law and/or unconstitutional. Currently  
5 before the court is plaintiff's motion for summary judgment, or  
6 in the alternative, partial summary judgement, on the claims that  
7 the California regulations are preempted by Title II of the Clean  
8 Air Act, 42 U.S.C. §§ 7521 et seq., and the Submerged Lands Act,  
9 43 U.S.C. §§ 1301 et seq.

10 I. Factual and Procedural Background

11 A. The Parties

12 PMSA is a mutual benefit corporation, organized and  
13 existing under the laws of California, and its members include  
14 companies that own or operate foreign and United States-flagged  
15 ocean-going vessels. (Def.'s Resp. to Pl.'s Statement of  
16 Undisputed Facts (Docket No. 65; Attachment 1) ## 1-3.) The  
17 vessels of PMSA's members use auxiliary or diesel electric  
18 engines during navigation and when alongside a dock. (Id. # 4.)

19 Defendant Tom Cackette, the Chief Deputy Executive  
20 Officer and Acting Executive Officer of the California Air  
21 Resources Board ("CARB"), is charged with enforcement of  
22 regulations adopted by CARB. Cal. Health & Safety Code §§ 39515,  
23 39516. Natural Resources Defense Council, Inc. ("NRDC"),  
24  
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26  
27 <sup>1</sup> Plaintiff's originally filed this action against  
28 Catherine E. Witherspoon, who has since resigned. Cackette is  
automatically substituted, pursuant to Federal Rule of Civil  
Procedure 25(d).

1 Coalition for Clean Air, Inc. ("CCA")<sup>2</sup>, South Coast Air Quality  
2 Management District ("SCAQMD"), and the City of Long Beach ("Long  
3 Beach") intervened as defendants, pursuant to this court's order  
4 of April 3, 2007. (April 3, 2007 Order.)

5 B. The Regulations

6 On October 20, 2006, CARB certified and transmitted two  
7 regulations, 13 C.C.R. § 2299.1 and 17 C.C.R. § 93118<sup>3</sup> (the  
8 "regulations"), to the California Office of Administrative Law  
9 ("OAL") for filing with the California Secretary of State. On  
10 December 6, 2006, the OAL approved the regulations and filed them  
11 with the California Secretary of State. CARB began enforcement  
12 of the regulations on January 1, 2007, by inspecting PMSA vessels  
13 upon arrival at California ports. (Def.'s Resp. to Pl.'s  
14 Statement of Undisputed Facts ## 5-7.) CARB did not obtain  
15 authorization from the United States Environmental Protection  
16 Agency ("EPA") for either of the regulations before it adopted or  
17 began enforcing the regulations. (Id. # 8.)

18 Both regulations establish limitations for emissions of  
19 diesel particulate matter ("PM"), sulfur oxides ("SOx"), and  
20 nitrogen oxides ("NOx") from the use of auxiliary diesel engines  
21 and diesel-electric engines on ocean-going vessels. 13 C.C.R. §  
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23 <sup>2</sup> The NRDC and CCA intervened and filed their papers  
24 jointly, and will therefore be referred to jointly as NRDC/CCA.

25 <sup>3</sup> The text of the two regulations is the same, although §  
26 2299.1 is described as "emission limits and requirements" under a  
27 chapter addressing "standards for fuels for nonvehicular  
28 sources," while § 93118 is described as an "airborne toxic  
control measure." 13 C.C.R. § 2299.1; 17 C.C.R. § 93118.  
Accordingly, where necessary, the court will cite to 13 C.C.R. §  
2299.1, with the understanding that identical, parallel  
provisions exist in 17 C.C.R. § 93118.

1 2299.1(a). The regulations prohibit any ship with an auxiliary  
2 diesel engine (including any diesel electric engine) with  
3 emission rates above those specified from operating within  
4 twenty-four miles of a large portion of the California coast. 13  
5 C.C.R. § 2299.1(d)(2), (d)(26)(F), (e)(1). In addition, vessel  
6 owners are required to keep detailed records of the type of fuel  
7 used in each engine operated within the regulated water, as well  
8 as the date, time, and location of each vessel whenever entering  
9 or exiting the regulated areas, or engaging in a fuel switching  
10 procedure. 13 C.C.R. § 2299.1(e)(2). These rules apply to all  
11 commercial vessels registered in, flagged in, or operating under  
12 the authority of the United States or any other country, and  
13 violations may be punished by injunctive relief, civil and  
14 criminal fines, misdemeanor prosecution, and imprisonment. 13  
15 C.C.R. § 2299.1(b), (f)(1).

16 C. The Clean Air Act

17 First enacted in 1955 as the Air Pollution  
18 Control-Research and Technical Assistance Act of 1955, the Clean  
19 Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), Pub. L. No. 84-159, 69  
20 Stat. 322, "is one of the most comprehensive pieces of  
21 legislation in our nation's history." Motor Vehicle Mfrs. Ass'n  
22 v. New York State Dep't of Env'tl. Conservation, 17 F.3d 521, 524  
23 (2d Cir. 1994) ("MVMA"). The CAA makes "the States and the  
24 Federal Government partners in the struggle against air  
25 pollution." Gen. Motors Corp. v. U.S., 496 U.S. 530, 532 (1990).  
26 This partnership has not significantly changed since it was  
27 established by the Air Quality Act of 1967, Pub. L. No. 90-148,  
28 81 Stat. 485 ("1967 Act"), and the Clean Air Amendments of 1970,

1 Pub. L. No. 91-604, 84 Stat. 1676 ("1970 amendments"). Engine  
2 Mfrs. Ass'n, ex rel. Certain of its Members v. EPA, 88 F.3d 1075,  
3 1078 (D.C. Cir. 1996) ("EMA") (further citations omitted). The  
4 1967 Act required the states to set ambient air quality  
5 standards. Id. The 1970 amendments transferred authority to set  
6 the ambient air quality standards, now known as national ambient  
7 air quality standards ("NAAQS"), from the states to the EPA. CAA  
8 § 109, 42 U.S.C. § 7409. To achieve and maintain these NAAQS by  
9 regulating sources of air pollution, each state is required to  
10 submit a state implementation plan ("SIP") to the EPA for  
11 approval. CAA § 110, 42 U.S.C. § 7410(a)(1).

12 The statutory scheme contemplates that "the states  
13 would carry out their responsibility chiefly by regulating  
14 stationary sources, such as factories and power plants." EMA, 88  
15 F.3d at 1078-79. Indeed, many of the statutory requirements for  
16 SIPs related to the regulation of stationary sources and  
17 penalties for failing to attain air quality standards focused on  
18 stationary sources. Id. at 1079 (analyzing the 1970 and 1977  
19 amendments).<sup>4</sup>

20 Unlike regulation of pollution from stationary sources,  
21 regulation of motor vehicles has been primarily a federal  
22 project. See, e.g., EMA, 1078-1082; MVMA, 17 F.3d at 524-27;  
23 Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1101-03,  
24 1108-11, (D.C. Cir. 1979) ("MEMA"), cert. denied, 446 U.S. 952  
25 (1980). A reason for the regulatory difference was the

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27 <sup>4</sup> 1977 amendments, § 108(a)(1) (CAA, § 110(a)(2)(I)), 91  
28 Stat. at 694. See also Chevron, U.S.A., Inc. v. NRDC, Inc., 467  
U.S. 837, 848-51 (1984); Citizens Against the Refinery's Effects  
Inc. v. EPA, 643 F.2d 183 (4th Cir. 1981).

1 difficulty of subjecting motor vehicles, which can easily move  
2 from one state to another, to control by individual states. EMA,  
3 88 F.3d at 1079. Additionally, the possibility of different  
4 state regulatory regimes created the "spectre of an anarchic  
5 patchwork of federal and state regulatory programs, a prospect  
6 which threatened to create nightmares for the manufacturers."  
7 MEMA, 627 F.2d at 1109. In 1967, just two years after Congress  
8 first authorized federal emissions regulations, Congress  
9 preempted states from adopting emission standards for motor  
10 vehicles.<sup>5</sup> EMA, 88 F.3d at 1079. The Second Circuit considers  
11 Congress' continued express preemption of state regulations of  
12 automobile emissions as "the cornerstone of Title II." MVMA, 17  
13 F.3d at 526.

14           However, there is an exception to the broad preemption  
15 of federal motor vehicle regulation. Because California was the  
16 "lead[er] in the establishment of standards for regulation of  
17 automotive pollutant emissions," Congress granted California an  
18 exemption from CAA § 209(a) preemption in CAA § 209(b)(1)

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22           <sup>5</sup> Section 209(a) provides:  
23           No State or any political subdivision thereof shall  
24           adopt or attempt to enforce any standard relating to  
25           the control of emissions from new motor vehicles or new  
26           motor vehicle engines subject to this part [CAA Title  
27           II, Part A]. No State shall require certification,  
28           inspection, or any other approval relating to the  
          control of emissions from any new motor vehicle or new  
          motor vehicle engine as condition precedent to the  
          initial retail sale, titling (if any), or registration  
          of such motor vehicle, motor vehicle engine, or  
          equipment.  
42 U.S.C. § 7543(a).

1 provided that the EPA approved California's standards.<sup>6</sup> MEMA,  
2 627 F.2d at 1109 n.26 (quoting S. Rep. No. 192, 89th Cong., 1st  
3 Sess. 5 (1965)). Accordingly, motor vehicles must be either  
4 "federal cars" designed to meet the EPA's standards or  
5 "California cars" designed to meet CARB's approved standards.  
6 MVMA, 17 F.3d at 526-27. Congress allowed other states to  
7 "piggyback" onto California's preemption exception by adopting  
8 the California standards. Id. at 527. However, to protect  
9 manufacturers and ensure that manufacturers would only need to  
10 cope with two regulatory regimes rather than 51, Congress  
11 required that "(1) an opt-in state must adopt standards that are  
12 identical to California's; (2) California must receive a waiver  
13 from the EPA for the standards; and (3) both California and the  
14 opt-in state must adopt the standards at least two years before  
15 the beginning of the automobile model year to which they apply."  
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17 <sup>6</sup> Section 209(b)(1) provides:  
18 The Administrator shall, after notice and opportunity  
19 for public hearing, waive application of this section  
20 to any State which has adopted standards (other than  
21 crankcase emission standards) for the control of  
22 emissions from new motor vehicles or new motor vehicle  
23 engines prior to March 30, 1966, if the State  
24 determines that the State standards will be, in the  
25 aggregate, at least as protective of public health and  
26 welfare as applicable Federal standards. No such waiver  
27 shall be granted if the Administrator finds that--

23 (A) the determination of the State is arbitrary  
and capricious,

24 (B) such State does not need such State standards  
to meet compelling and extraordinary conditions,  
or

25 (C) such State standards and accompanying  
enforcement procedures are not consistent with  
26 section 7521(a) of this title [CAA § 202(a)].

27 42 U.S.C. § 7543(b)(1) (1994). California is the only state that  
28 qualifies for the waiver, because it was the only state that had  
adopted emission control standards prior to March 30, 1966. EMA,  
88 F.3d at 1079.

1 Id. (citing CAA § 177, 42 U.S.C. § 7507).

2 Prior to 1990, nonroad vehicle emissions, the subject  
3 of this action, were not specifically mentioned. However, some  
4 states started to regulate some nonroad sources in their attempts  
5 to meet the NAAQSs. EMA, 88 F.3d at 1080. In 1990, Congress  
6 amended the CAA to define and regulate nonroad sources. Pub. L.  
7 No. 101-549, § 222(b), 104 Stat. at 2502 (codified at CAA §  
8 209(e), 42 U.S.C. 7543(e)).

9 D. PMSA's Pending Motion

10 Plaintiff seeks injunctive relief preventing the  
11 enforcement of the regulations, as well a declaration that the  
12 regulations are unconstitutional and contrary to federal law.  
13 (Id. at ¶¶ 20-21.) Plaintiff's complaint contained four claims  
14 for relief: 1) preemption by Title II of the CAA, 42 U.S.C. §§  
15 7521 et seq.; 2) preemption by the Submerged Lands Act, 43 U.S.C.  
16 §§ 1301 et seq.; 3) preemption by the Ports and Waterways Safety  
17 Act, 46 U.S.C. §§ 3701 et seq.; and 4) violation of the Commerce  
18 Clause of the United States Constitution, Article I, Section 8,  
19 clause 3. (Compl.)

20 On May 7, 2007, plaintiff filed this motion for summary  
21 judgment on its first and second claims for relief. On June 4,  
22 2007, the parties stipulated to the filing of plaintiff's first  
23 amended complaint ("FAC"). (Stipulation Order (Docket No. 54)  
24 4.) The FAC contains only two claims for relief: 1) preemption  
25 by Title II of the CAA and 2) preemption by the Submerged Lands  
26 Act. (FAC.) Plaintiff moves for summary judgment on both of  
27 these claims. Because, for the reasons discussed in detail  
28 below, the court finds that the challenged regulations are

1 preempted by Title II of the CAA, the court need not decide the  
2 question of whether the Federal Submerged Lands Act also preempts  
3 California from enforcing the regulations beyond three nautical  
4 miles from the baseline.<sup>7</sup>

5 II. Discussion

6 A. Legal Standards

7 1. Summary Judgment Standard

8 Summary judgment is proper "if the pleadings,  
9 depositions, answers to interrogatories, and admissions on file,  
10 together with the affidavits, if any, show that there is no  
11 genuine issue as to any material fact and that the moving party  
12 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
13 56(c). A material fact is one that could affect the outcome of

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14  
15 <sup>7</sup> In 1953, Congress passed the Submerged Lands Act to  
16 abrogate the Supreme Court's ruling in United States v.  
17 California, 332 U.S. 19 (1947), opinion supplemented by United  
18 States v. California, 332 U.S. 804 (1947) ("California I"), which  
19 held that California had no title or property interest to lands  
20 in the Pacific Ocean. United States v. California, 436 U.S. 32,  
21 37 (1977) ("California II"). The Act provided that:

22 (1) title to and ownership of the lands beneath  
23 navigable waters within the boundaries of the  
24 respective States, and the natural resources within  
25 such lands and waters, and (2) the right and power to  
26 manage, administer, lease, develop and use the said  
27 lands and natural resources all in accordance with  
28 applicable State law . . . are hereby[] vested in and  
assigned to the respective States . . . .  
43 U.S.C. § 1311(a). The Act also provided that "nothing in this  
subchapter . . . shall affect the use, development, improvement,  
or control by . . . the United States of said . . . waters for  
the purposes of navigation . . . ." 43 U.S.C. § 1311(d).

In 1947, the generally accepted international practice  
was for the adjacent nation to claim a three-mile belt of  
sovereignty from the baselines over the marginal sea. California  
I, 332 U.S. at 32-36. In 1988, President Reagan extended the  
territorial limits of the United States to 12 nautical miles from  
the baselines. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27,  
1988). In 1994, President Clinton extended the "contiguous zone"  
of the United States to 24 nautical miles from the baselines.  
Proclamation No. 7219, 64 Fed. Reg. 48701 (Aug. 2, 1999).

1 the suit, and a genuine issue is one that could permit a  
2 reasonable jury to enter a verdict in the non-moving party's  
3 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
4 (1986). The party moving for summary judgment bears the initial  
5 burden of establishing the absence of a genuine issue of material  
6 fact and can satisfy this burden by presenting evidence that  
7 negates an essential element of the non-moving party's case.  
8 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

9 Alternatively, the movant can demonstrate that the non-moving  
10 party cannot provide evidence to support an essential element  
11 upon which it will bear the burden of proof at trial. Id.

12           Once the moving party meets its initial burden, the  
13 non-moving party must "go beyond the pleadings and by her own  
14 affidavits, or by the 'depositions, answers to interrogatories,  
15 and admissions on file,' designate 'specific facts showing that  
16 there is a genuine issue for trial.'" Id. at 324 (quoting Fed.  
17 R. Civ. P. 56(e)). The non-movant "may not rest upon . . . mere  
18 allegations or denials of the adverse party's pleading . . . ."  
19 Fed. R. Civ. P. 56(e); Valandingham v. Bojorquez, 866 F.2d 1135,  
20 1137 (9th Cir. 1989). However, any inferences drawn from the  
21 underlying facts must be viewed in a light most favorable to the  
22 party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v.  
23 Zenith Radio Corp., 475 U.S. 574, 587 (1986). Additionally, the  
24 court must not engage in credibility determinations or weigh the  
25 evidence, for these are jury functions. Anderson, 477 U.S. at  
26 255.

27           The plaintiff movant "must establish beyond  
28 peradventure all of the essential elements of the claim or

1 defense to warrant judgment in his favor." Fontenot v. Upjohn  
2 Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original);  
3 see also Arnett v. Myers, 281 F.3d 552, 561 (6th Cir. 2002) ("a  
4 substantially higher hurdle must be surpassed, particularly where  
5 . . . the moving party bears the ultimate burden of persuasion .  
6 . . at trial").

## 7 2. Preemption

8 Under the Supremacy Clause of the Constitution,  
9 Congress has the power to pass legislation that preempts state  
10 law. See U.S. Const. art. VI, cl. 2; Crosby v. Nat'l Foreign  
11 Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle  
12 of the Constitution is that Congress has the power to preempt  
13 state law."). Preemption may be either express or implied.  
14 Express preemption may be found where Congress has explicitly  
15 stated "the extent to which its enactments preempt state law."  
16 English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) ("Pre-emption  
17 is fundamentally a question of congressional intent, and when  
18 Congress has made its intent known through explicit statutory  
19 language, the courts' task is an easy one.") (internal citation  
20 omitted)). State law is impliedly preempted where obligations  
21 imposed by federal statute "reveal a purpose to preclude state  
22 authority." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230  
23 (1947).

24 In determining the scope of an express preemption  
25 provision, the court is guided by two presumptions. Medtronic v.  
26 Lohr, 518 U.S. 470, 485 (1996). First, the court presumes that  
27 "the historic police powers of the States were not to be  
28 superseded by the Federal Act unless that was the clear and

1 manifest purpose of Congress.'" Id. (quoting Rice, 331 U.S. at  
2 230). Second, "[t]he purpose of Congress is the ultimate  
3 touchstone' in every preemption case." Id. (quoting Retail  
4 Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)). Congressional  
5 intent is "primarily discerned from the language of the pre-  
6 emption statute and the 'statutory framework' surrounding it."  
7 Id. (citation omitted).

8 In the case of implied preemption, state law is also  
9 preempted when it "stands as an obstacle to the accomplishment  
10 and execution of the full purposes and objectives of Congress."  
11 Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987). To the  
12 extent a state law interferes with the manner in which Congress  
13 intended the federal law to operate, the state law is preempted  
14 even where the state and federal laws share common goals. Gade  
15 v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 103 (1992).

16 B. Preemption under CAA Title II

17 1. Scope of Nonroad Source Preemption

18 Plaintiff argues, in its first claim for relief, that  
19 the regulations are preempted by Title II of the CAA. CAA §  
20 209(e) (2) (A) provides:

21 In the case of any nonroad vehicles or engines other  
22 than those referred to in subparagraph (A) or (B) of  
23 paragraph (1), the Administrator shall, after notice  
24 and opportunity for public hearing, authorize  
25 California to adopt and enforce standards and other  
26 requirements relating to the control of emissions from  
27 such vehicles or engines if California determines that  
28 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

1 conditions, or  
2 (iii) California standards and accompanying  
3 enforcement procedures are not consistent with  
4 this section.

5 42 U.S.C. § 7543(e) (2) (A). The parties agree that auxiliary  
6 diesel and diesel electric engines of ocean-going vessels are  
7 nonroad engines not governed by CAA § 209(e) (1).<sup>8</sup>

8 Unlike CAA § 209(e) (1), CAA § 209(e) (2) does not  
9 expressly preempt any state regulation. EMA, 88 F.3d at 1087.  
10 However, in the leading case addressing this issue, the D.C.  
11 Circuit held that CAA § 209(e) (2) implies preemption. EMA, 88  
12 F.3d at 1087. In a well reasoned, 2-1 decision, the EMA court  
13 determined that the scope of this implied preemption provision  
14 applied to both new and non-new equipment and vehicles. Id. at  
15 1087-93. Thus, according to the majority, the implied preemption  
16 under CAA § 209(e) (2) for nonroad vehicles and engines is broader  
17 than the express preemption of road vehicles and engines under  
18 CAA § 209(a)--the latter applying only to new sources. See CAA §  
19 209(a); 42 U.S.C. § 7543(a).

20 The EMA court divided solely over whether the implied  
21 preemption provision in CAA § 209(e) (2) applied to non-new

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22 <sup>8</sup> CAA § 209(e) (1) provides:

23 No State or any political subdivision thereof shall  
24 adopt or attempt to enforce any standard or other  
25 requirement relating to the control of emissions from  
26 either of the following new nonroad engines or nonroad  
27 vehicles subject to regulation under this Act--

28 (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) shall not apply for purposes of this  
paragraph.

42 U.S.C. § 7543(e) (1).

1 nonroad sources.<sup>9</sup> EMA, 88 F.3d 1087-93; Id. at 1099-1105 (Tatel,  
2 J., dissenting). The EPA originally interpreted CAA §  
3 209(e) (2)'s implied preemption to not reach non-new nonroad  
4 sources at all, so that the states retained their historic  
5 authority to set emission standards for these sources. 59 Fed.  
6 Reg. 36,969, 36,973-74 (1994).<sup>10</sup>

7 The EMA majority overturned the EPA's interpretation  
8 and held that the implied preemption of CAA § 209(e) (2) covers  
9 both new and non-new nonroad vehicles and engines for several  
10 reasons. EMA, 88 F.3d 1087-93. First, the EPA's review of  
11 proposed California emission standards under CAA § 209(e) (2) is  
12 not rendered nugatory by the fact that there is no federal  
13 emission standard with which to compare it because CAA §  
14 209(e) (2) (A) also requires that the EPA review proposed  
15 California emission standards to ascertain whether California

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16  
17 <sup>9</sup> If the implied preemption of § 209(e) (2) applied only  
18 to new nonroad sources, plaintiff's preemption argument would  
19 fail since the engines of PMSA's members' vessels are non-new  
20 nonroad sources under the relevant statute. NRDC argues that the  
21 court should apply the rationale of Judge Tatel's dissent in EMA.  
22 (NRDC Opp'n 6 n.9.) Generally, courts in one circuit are not  
23 bound by rulings in another circuit. See, e.g., Hart v.  
24 Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001); Newton v.  
25 Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994). The court would be  
26 within its discretion to apply either the EMA majority's or  
27 dissent's legal rule.

28 <sup>10</sup> Judge Tatel disagreed with the majority's approach to  
ascertaining Congressional intent under Chevron step one--the  
weighing of the plain meaning of the statute--because "virtually  
all other evidence" in the statutory record points to the  
opposite conclusion. EMA, 88 F.3d at 1100 (Tatel, J.,  
dissenting) (citing Chevron, 467 U.S. at 837). Judge Tatel  
concluded that Congress made a drafting error in CAA § 209(e) (2)  
by inadvertently leaving out the word "new" in the phrase "any  
nonroad vehicles or engines" and that the EPA's original  
interpretation so finding should not have been disturbed. Id. at  
1105.

1 needs to adopt the regulation to meet compelling and  
2 extraordinary conditions. EMA, 88 F.3d at 1089-90. Second, the  
3 "regulatory gap" cited by Judge Tatel in dissent is "illusory"  
4 because each state can still adopt its own in-use regulations.  
5 Id. at 1090-91. The EMA court unanimously upheld the EPA's  
6 interpretation that in-use regulations are neither standards nor  
7 other requirements relating to the control of emissions so that  
8 CAA § 209(e) did not preempt states from adopting them. Id. at  
9 1093-94. Third, the EMA majority found that the absence of  
10 legislative explanation cut against the EPA and Judge Tatel's  
11 position: "[e]ven if the final product might strike us as  
12 unexpected given the versions passed by each House, the court  
13 could not make the leap from such an impression to the certainty  
14 that such a result was unintentional." Id. at 1091. Indeed, the  
15 competing interests inherent in such a complicated piece of  
16 legislation "are simply too complex and multifarious to rule out  
17 the possibility that the conference settled on the result  
18 described by the statutory text." Id.

19 This court adopts the EMA majority and finds that CAA §  
20 209(e) (2) preemption covers both new and non-new nonroad vehicles  
21 and engines. This court's conclusion is bolstered by the passage  
22 of time since the EMA decision without Congressional action. The  
23 D.C. Circuit decided EMA over ten years ago. Had the EMA court  
24 incorrectly gauged Congressional intent, Congress has had more  
25 than enough opportunity to amend the CAA. Accordingly,  
26 California cannot promulgate any "standards or other requirements  
27 relating to emissions" for nonroad engines unless approved by the  
28 EPA. CAA § 209(e) (2) (A); 42 U.S.C. § 7543(e) (2) (A).

1           2.    Classification of the Regulations as Emission  
2                    Standards or In-Use Requirements

3           Plaintiff argues that the California regulations  
4 establish emission standards. Defendants contend that the  
5 regulations are not emission standards but rather are in-use  
6 requirements, which the CAA did not intend to preempt. The  
7 question turns on the meaning of the phrase "standard relating to  
8 the control of emissions" in CAA § 209(e) (2).

9                   a.    Definitions

10                           i.   Standards

11           "Statutory construction must begin with the language  
12 employed by Congress and the assumption that the ordinary meaning  
13 of that language accurately expresses the legislative purpose."  
14 Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194  
15 (1985). In Engine Manufacturers Association v. South Coast Air  
16 Quality Management District, 541 U.S. 246 (2004) ("SCAQMD"), the  
17 Supreme Court interpreted the meaning of the phrase "standard  
18 relating to the control of emissions" in CAA § 209(a), which is  
19 the preemption provision for motor vehicles and engines. CAA §  
20 209(e) (2) contains this exact phrase. The SCAQMD court partially  
21 invalidated SCAQMD's Fleet Rules, which extensively regulated the  
22 types of vehicles that fleet operators must purchase or lease  
23 when adding or replacing fleet vehicles. SCAQMD, 541 U.S. at  
24 258-59.

25           The district court, which the Ninth Circuit summarily  
26 affirmed, 309 F.3d 550 (9th Cir. 2002), had upheld SCAQMD's Fleet  
27 Rules in their entirety because they regulated only the purchase  
28 of vehicles that were otherwise certified for sale in California

1 and thus were not standards within the meaning of CAA § 209(a).  
2 158 F. Supp. 2d 1107, 1118-19 (C.D. Cal. 2001) ("Where a state  
3 regulation does not compel manufacturers to meet a new emissions  
4 limit, but rather affects the purchase of vehicles, as the Fleet  
5 Rules do, that regulation is not a standard." Id. at 1118.)

6 The Supreme Court reversed, declining to read the  
7 purchase/sale distinction into CAA § 209(a), because "[a]  
8 command, accompanied by sanctions, that certain purchasers may  
9 buy only vehicles with particular emission characteristics is as  
10 much an 'attempt to enforce' a 'standard' as a command,  
11 accompanied by sanctions, that a certain percentage of a  
12 manufacturer's sales volume must consist of such vehicles."

13 SCAQMD, 541 U.S. at 255. Thus, the SCAQMD court defined  
14 "standard" as that which "'is established by authority, custom,  
15 or general consent, as a model or example; criterion; test." Id.  
16 at 252-53 (quoting Webster's Second New International Dictionary  
17 2455 (1945)). The SCAQMD court found that the purchase criteria  
18 of SCAQMD's Fleet rules were "standards" because "[t]o meet them  
19 the vehicle or engine must not emit more than a certain amount of  
20 a given pollutant, must be equipped with a certain type of  
21 pollution-control device, or must have some other design feature  
22 related to the control of emissions." Id. at 253.

23 The SCAQMD court further noted that this interpretation  
24 conformed to the use of "standard" throughout CAA Title II "to  
25 denote requirements such as numerical emission levels with which  
26 vehicles or engines must comply, e.g., 42 U.S.C. §  
27 7521(a)(3)(B)(ii), or emission-control technology with which they  
28 must be equipped, e.g., § 7521(a)(6)." Id. In MEMA, the D.C.

1 Circuit also interpreted "standard" in the CAA § 209(a) context  
2 to mean quantitative levels of emissions. 627 F.2d at 1112-13  
3 ("The Senate Report on the Air Quality Act of 1967, discussing  
4 the preemption provision, mentions 'standards' for hydrocarbons,  
5 nitrogen oxides, and carbon monoxide in obvious reference to the  
6 numerical limitations on those pollutants." (citing S. Rep. No.  
7 403, 90th Cong., 1st Sess. 32 (1967))).

8 ii. In-use Requirements

9 The EMA court upheld the EPA's interpretation that a  
10 state could regulate the "use, operation, or movement of  
11 registered or licensed vehicles" under CAA § 209(e)(2), thus  
12 extending CAA § 209(d) to nonroad sources.<sup>11</sup> EMA, 88 F.3d at  
13 1093-94. Although the EMA court found neither the EPA's nor the  
14 EMA's proposed statutory interpretation entirely convincing, the  
15 EMA court deferred to the EPA since it "could reasonably conclude  
16 that CAA § 213(d) incorporated § 209(d) into the nonroad engine  
17 regime, in which case the specific command of § 209(d) would  
18 limit the general [but broadly preemptive] language of § 209(e)."  
19 EMA, 88 F.3d at 1094. Examples of in-use regulations permissible  
20 under CAA § 209(d) include carpool lanes, restrictions on car use  
21 in downtown areas, and programs to control extended idling of  
22 vehicles, which are expressly intended to control emissions. Id.

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24 <sup>11</sup> CAA § 209(d) provides:  
25 Control, regulation, or restrictions on registered or  
26 licensed motor vehicles. Nothing in this part [CAA  
27 Title II] shall preclude or deny to any State or  
28 political subdivision thereof the right otherwise to  
control, regulate, or restrict the use, operation, or  
movement of registered or licensed motor vehicles.  
42 U.S.C. § 7543(d).

1 (citing CAA § 108(f), 42 U.S.C. § 7408(f) (requiring  
2 administrator to make available to state and local authorities  
3 information relating to such strategies)).

4 This court follows the EMA court and defers to the  
5 EPA's interpretation pursuant to Chevron. Chevron, 467 U.S. 837,  
6 844 (1984) ("We have long recognized that considerable weight  
7 should be accorded to an executive department's construction of a  
8 statutory scheme it is entrusted to administer, and the principle  
9 of deference to administrative interpretations.").

10 b. Application to the Challenged Regulations

11 The court must decide the difficult question of whether  
12 the challenged regulations are in-use requirements or standards.  
13 For the reasons discussed below, the court concludes that the  
14 regulations are not in-use requirements, but are standards  
15 relating to the control of emissions. The court also concludes  
16 that the presumption against preemption is not applicable to this  
17 situation nor would the presumption's applicability affect the  
18 court's conclusion.

19 i. The Regulations are Not In-Use  
20 Requirements

21 Defendants argue that the challenged regulations are  
22 in-use requirements, specifically fuel quality specifications.  
23 The EMA majority cited with approval Allway Taxi, Inc. v. City of  
24 New York, 340 F. Supp. 1120 (S.D.N.Y. 1972), aff'd, 468 F.2d 624  
25 (2d Cir. 1972). Id. at 1089-90. In Allway Taxi, city  
26 regulations that only minimally interfered with interstate  
27 commerce were not preempted since they were "directed primarily  
28 to intrastate activities and the burden of compliance would be on

1 individual owners and not on manufacturers and distributors.”

2 340 F. Supp. at 1124.

3 In contrast, the challenged regulations directly affect  
4 international commerce, a position confirmed by the EPA.

5 Specifically, the EPA’s regulation of ocean going vessels

6 coincided with similar action of the International Marine

7 Organization (IMO). Bluewater Network v. EPA, 372 F.3d 404, 407

8 (D.C. Cir. 2004). In 1997, the IMO formally adopted Annex VI to

9 the International Convention on the Prevention of Pollution from

10 Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto

11 (MARPOL), which prescribes a NOx emissions limit for certain

12 diesel engines. Id. Annex VI has recently been ratified by the

13 requisite number of IMO member countries and has taken affect.

14 Id. The EPA set its regulations at same level as Annex VI. In

15 light of the fact that the regulations do not require the use of

16 low sulfur fuels, 12 C.C.R. § 2299.1(g)(1)(A), the significant

17 international ramifications of the regulations make it difficult

18 for the court to conclude that they are permissible local in-use

19 requirements. Accordingly, the court concludes that the

20 regulations are not in-use requirements.

21 ii. The Regulations are Standards

22 The court’s conclusion that the regulations are not in-  
23 use requirements does not automatically require the court to

24 conclude that the regulations are standards. As discussed above,

25 standards include “requirements such as numerical emission levels

26 with which vehicles or engines must comply, e.g., 42 U.S.C. §

27 7521(a)(3)(B)(ii).” SCAQMD, 541 U.S. at 253.

1 The California regulations provide:

2 [N]o person subject to this section shall operate any  
3 auxiliary diesel engine, while the vessel is operating  
4 in any of the Regulated California Waters, which emits  
5 levels of diesel PM, NOx, or SOx in exceedance of the  
6 emission rates of those pollutants that would result  
7 had the engine used the following fuels:

8 (A) Beginning January 1, 2007:

9 1. marine gas oil, as defined in subsection  
10 (d); or

11 2. marine diesel oil, as defined in  
12 subsection (d), with a sulfur content of no  
13 more than 0.5 percent by weight;

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

17 13 C.C.R. § 2299.1(e). These regulations require that engines  
18 emit no more pollutants than if the engines had used specified  
19 fuels. Because marine gas oil normally contains less than 5,000  
20 ppm (the equivalent of 0.5 percent by weight) the regulations do  
21 not specify its sulfur level. (Milkey Decl. ¶ 21.) However,  
22 since marine diesel oil may contain more than 5,000 ppm of  
23 sulfur, the regulations specify that emissions must not exceed  
24 the amount that would occur if the vessel used marine diesel with  
25 a sulfur content of 5,000 ppm.

26 CARB drafted the regulations such that a vehicle is  
27 presumed to be in compliance if it is using the specified fuels.

28 12 C.C.R. § 2299.1(e)(1)(C). Subsection (g) provides that:

alternative emission control strategies can be  
implemented in lieu of meeting the requirements of  
subsection (e)(1), provided the alternative strategies  
result in emissions of diesel PM, NOx, and SOx from the  
auxiliary diesel engines that are no greater than the  
emissions that would have occurred under subsection  
(e)(1), over the applicable compliance period.

12 C.C.R. § 2299.1(g)(1)(A). However, the regulations do not  
require the use of these fuels. Subsection (g) of the  
regulations specifically allows alternative compliance plans.

1 Thus, the regulations require a limitation on emissions in  
2 accordance with 13 C.C.R. § 2299.1(e), but give vessel owners  
3 various mechanisms to comply with the emissions limitation.  
4 Accordingly, the regulations, on their face, impose standards  
5 relating to the control of emissions, and thus are preempted by  
6 CAA § 209(e)(2). Defendants, individually and collectively,  
7 raise several arguments why the court should not classify the  
8 regulations as standards--none of which the court finds  
9 convincing.

10 Regulations that merely govern fuel quality  
11 characteristics are permissible under CAA § 211, which allows  
12 California to regulate motor vehicle fuels without an EPA waiver.  
13 42 U.S.C. § 7545(c)(4)(B). However, regardless of the  
14 applicability of this provision to nonroad sources, defendants'  
15 contentions that almost every affected vessel has switched to  
16 marine gas oil or qualified marine diesel oil so that the  
17 regulations would be allowed under CAA § 211 confuses standards  
18 with the means of complying with those standards. See Adamo  
19 Wrecking Co. v. United States, 434 U.S. 275 (1978) (asbestos  
20 regulation that specified procedures to be followed in connection  
21 with building demolitions did not by its terms limit emissions;  
22 consequentially, it was not an emission standard but a work  
23 practice standard). Any emissions standard imposed is separate  
24 and apart from means of compliance and requires EPA authorization  
25 regardless of how vessel owners choose to comply. Since the  
26 challenged regulations impose emission standards, CAA § 211 does  
27 not save them from preemption.

28 It is not necessary for regulations to set "numerical

1 emission levels" to be preempted. Cackette argues that because  
2 different vessel engines may be in compliance even though those  
3 engines emit different levels of pollutants, the regulations do  
4 not set "numerical emission levels." (Cackette's Opp'n 18.)  
5 However, this reading of SCAQMD elides the "such as" language  
6 from the SCAQMD court's opinion in which they wrote that standard  
7 was used throughout Title II of the CAA "to denote requirements  
8 such as numerical emissions levels with which vehicles or engines  
9 must comply." SCAQMD, 541 U.S. at 253. Indeed, the SCAQMD court  
10 cited the dictionary definition of standard, which included  
11 "criteria." Id. at 252-53. To meet the criteria referred to in  
12 CAA § 209(a), "the vehicle or engine must not emit more than a  
13 certain amount of a given pollutant." Id. at 253. Justice  
14 Scalia, for the SCAQMD majority, wrote "[t]hat a standard is a  
15 standard even when not enforced through manufacturer-directed  
16 regulation can be seen in Congress's use of the term in another  
17 portion of the CAA." Id. at 254 (discussing the fact that CAA §  
18 246 specifically required state-adopted and federal-approved  
19 restrictions on the purchase of fleet vehicles to meet clean-air  
20 standards) (further citations omitted). The court agrees with  
21 plaintiff that standards do not require a strict, identical  
22 numerical test, but that numerical reductions required of  
23 specific engines set "standards" for that particular engine.

24 Nor is the court convinced by Cackette's argument that  
25 the mere fact that the regulations require a numerical reduction  
26 in emissions does not mean that they are emission standards.  
27 (Cackette Opp'n 20-22.) In 2001, the EPA found the Texas ground  
28 support equipment ("GSE") rule requiring the reduction of NOx

1 emission by ninety percent was not a preempted emissions  
2 standard. 66 Fed. Reg. 16,432, 16,433 (Mar. 26, 2001) ("The fact  
3 that the level of required reductions is quantified and is  
4 calculated based on the level of emissions generated by the GSE  
5 fleet in-use in a prior year does not change the conclusion that  
6 assigning a general emissions reductions obligation to a fleet  
7 operator does not amount to an emissions standard on non-road  
8 equipment.") However, unlike the Texas GSE's generalized  
9 criteria, which are unrelated to the emissions rates or  
10 characteristics of particular engines, the challenged regulations  
11 adopt quantifiable maximum levels of emissions for each engine  
12 based on the emission rates and characteristics of each  
13 individual engine.<sup>12</sup> The court does not find this argument  
14 persuasive.

15 It is not a prerequisite for classification as a  
16 standard that nonroad regulations affect manufacturers. NRDC  
17 argues that classifying the regulations as standards ignores the  
18 crucial distinction between preempted standards that place  
19 burdens on manufacturers and legally permissible requirements  
20 imposed on the operators of nonroad vehicles. (NRDC Opp'n 13.)

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21  
22 <sup>12</sup> Cackette notes that the EPA also declined to preempt  
23 the Texas GSE regulations because the fleet operator had several  
24 alternatives to show compliance with the reductions requirement.  
25 "The alternative to obtain reductions from the GSE fleet itself  
26 does not mandate a specific emissions level that the equipment  
27 must achieve but instead provides the fleet operators flexibility  
28 in how they obtain the reductions, including allowing  
restrictions on use and operation of the equipment." 66 Fed.  
Reg. 16,432, 16,433 (Mar. 26, 2001). The challenged regulations  
again are different in that they relate to each individual  
engine. Further, the Texas GSE requirements conform to Allway  
Taxi's requirement that they affect primarily intrastate  
commerce, which is facially different from the challenged  
regulations. See Allway Taxi, 340 F. Supp. at 1124.

1 Plaintiff does not demonstrate that the regulations would have  
2 any effect on the manufacturers, which was of great importance to  
3 the SCAQMD court. SCAQMD, 241 U.S. at 255-56. However, the  
4 SCAQMD court's analysis that regulations must affect  
5 manufacturers to be standards is inapplicable here in light of  
6 the court's determination that CAA § 209(e)(2) preempts both new  
7 and non-new nonroad vehicles and engines. SCAQMD interprets CAA  
8 § 209(a), which while very similar in its language, only preempts  
9 new road vehicles and engines. EMA, 88 F.3d at 1079. The SCAQMD  
10 court's concern that regulations have effects on manufacturers in  
11 order to be preempted is understandable given the more limited  
12 preemptive effect of CAA § 209(a). Since CAA § 209(e)(2)  
13 preempts both new and non-new nonroad vehicles and engines,  
14 regulations need not have direct effects on manufacturers to be  
15 preempted standards.

16 Nor does the EMA decision dictate a different result.  
17 The EMA court does suggest that to be classified as standards,  
18 regulations must relate-back to manufacturers. EMA, 88 F.3d  
19 1089-90. However, the EMA court's discussion was in the context  
20 of CAA § 209(e)(1). Id. CAA § 209(e)(1), like CAA § 209(a),  
21 only preempts standards of specified new sources (engines used in  
22 construction or farm equipment or vehicles smaller than 175  
23 horsepower and locomotive engines). 42 U.S.C. § 7543(e)(1).  
24 Again, CAA § 209(e)(2) preempts California from setting emission  
25 standards without EPA approval for both new and non-new nonroad  
26 sources. 42 U.S.C. § 7543(e)(2). Accordingly, the regulations  
27 do not need to "relate back" to the manufacturers or  
28 significantly affect them to be considered emission standards.

1                   iii. Presumption Against Preemption Does Not  
2                                   Apply

3                   The presumption against preemption does not change the  
4 court's conclusion that the challenged regulations are standards  
5 relating to the control of emissions. "[B]ecause the States are  
6 independent sovereigns in our federal system, we have long  
7 presumed that Congress does not cavalierly pre-empt state-law  
8 causes of action." Medtronic, 518 U.S. at 485. In preemption  
9 cases, and particularly in those in which Congress has  
10 "legislated . . . in a field which the States have traditionally  
11 occupied," the Supreme Court counsels that courts should "start  
12 with the assumption that the historic police powers of the States  
13 were not to be superseded by the Federal Act unless that was the  
14 clear and manifest purpose of Congress." Rice, 331 U.S. at 230.

15                   Defendants cite Huron Portland Cement Company v. City  
16 of Detroit, 362 U.S. 440, 442 (1960), for the proposition that  
17 because emissions control is a historic police power and the CAA  
18 gives primary responsibility for reducing air pollution to the  
19 states, the presumption should apply. However, in 1967, just two  
20 years after Congress first authorized federal emission  
21 regulations, and subsequent to the Supreme Court's decision in  
22 Huron Portland Cement, Congress preempted states from adopting  
23 emission standards on road sources. EMA, 88 F.3d at 1079.  
24 Additionally, the regulation of motor sources has been primarily  
25 a federal project, unlike regulation of pollution from stationary  
26 sources. See, e.g., EMA, 1078-1082; MVMA, 17 F.3d at 524-27;  
27 MEMA, 627 F.2d at 1101-03, 1108-11. More importantly, the  
28 challenged regulations affect the field of international maritime

1 commerce, which has historically been within the purview of the  
2 federal rather than the state government. United States V.  
3 Locke, 529 U.S. 89, 108 (2000). In Locke, the Supreme Court  
4 observed that maritime commerce is “an area where the federal  
5 interest has been manifest since the beginning of our Republic  
6 and is now well established.” 529 U.S. at 99. Indeed, during  
7 the debates on the ratification of the Constitution, the  
8 Federalist Papers touted the authority of Congress to regulate  
9 interstate navigation without intervention from separate states  
10 that would result in difficulties conducting foreign affairs, as a  
11 primary reason for adopting the Constitution. See Federalist  
12 Nos. 4, 6, and 22.

13           The presumption does not apply where “there has been a  
14 history of significant federal presence.” Id. Even so, this  
15 question is immaterial given the court’s conclusion that CAA §  
16 209(e) (2) (A) preempts any non-EPA approved state standards  
17 controlling emissions from auxiliary diesel engines. See SCAQMD,  
18 541 U.S. at 257-58 (presumption against preemption not addressed  
19 in determining certain state fleet rules were preempted by CAA §  
20 209(a) and criticizing dissent; dissent began analysis with the  
21 presumption against preemption).

### 22 III. Conclusion

23           For the foregoing reasons, the regulations are  
24 standards and are therefore preempted by CAA § 209(e) (2). The  
25 regulations are not in-use requirements. Because the regulations  
26 set numerical requirements for the reduction of emissions  
27 relating to particular emissions rather than a fleet as a whole,  
28 the regulations are “standards relating to the control of


1 emissions." Unlike CAA § 209(a) or CAA § 209(e)(1), standards in  
2 CAA § 209(e)(2) do not have to "relate back" to manufacturers.  
3 Finally, the presumption against preemption does not save  
4 California's regulations. Accordingly, the court will grant  
5 plaintiff's motion for summary judgment on their first claim for  
6 relief and enjoin defendants from enforcing the regulations.

7 IT IS THEREFORE ORDERED that:

8 (1) plaintiff's motion for summary judgment on its  
9 first claim for relief be, and the same hereby is, GRANTED; and

10 (2) defendants be, and they hereby are, PERMANENTLY  
11 ENJOINED from enforcing 13 C.C.R. § 2299.1 and 17 C.C.R. § 93118.  
12 Should defendants receive authorization from the EPA, pursuant to  
13 CAA § 209(e)(2)(A), they may move this court to dissolve this  
14 injunction.

15 DATED: August 30, 2007

16 

17 WILLIAM B. SHUBB  
18 UNITED STATES DISTRICT JUDGE  
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