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I. SUMMARY

Historically, local governments have exercised “police powers” to protect public health and safety, including regulation of air pollution. The City of Los Angeles has been a long-time leader in seeking to control air pollution. Beginning in the 1960’s, federal and state air quality legislation preempted certain local control over emissions from on-road and nonroad sources. Local controls over emissions from vessels raise the potential for conflict with federal law, in instances where Congress has determined there is a need for national uniformity, and international treaties. But the City of Los Angeles and its Harbor Department, as trustee owner and operator of the Port of Los Angeles, still retains certain “proprietary powers” to control emissions generated by operations within the Port, although the range of these proprietary powers has yet to be fully defined by the courts. The courts have played a very active role in determining the authority of local, regional, state and federal governmental bodies to regulate emissions in this complex field.

II. DISCUSSION

A. TRADITIONAL MUNICIPAL POLICE POWERS

The City of Los Angeles has broad police powers to adopt laws and regulations.1 Pursuant to the Los Angeles City Charter, the Board of Harbor Commissioners of the City’s Harbor Department exercises the City’s police powers in the Port of Los Angeles, sometimes subject to City Council approval.2

The power to adopt appropriate air quality requirements is one of the police powers of local government.3 In 1960, upholding the enforcement of the City of Detroit’s smoke prohibitions against interstate ships, the U.S. Supreme Court stated:

Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.4

1. Los Angeles City Charter §101 provides that the City “shall have all powers possible for a charter city to have under the constitution and laws of this state . . . .” Cal. Constitution, article XI, § 7 states that cities and counties have the power to “make and enforce . . . all local, police, sanitary, and other ordinances not in conflict with general laws.”

2. City Charter §652(a) provides that the Board has the “power and duty” to: “Make and enforce all necessary rules and regulations governing the maintenance, operation and use of the Harbor District . . . .” Pursuant to City Charter §653(a), the “rules and regulations of general application” adopted by the Board must be approved by the City Council.

Los Angeles has been a leader in air pollution control for at least 90 years. The City’s regulation of smoke from brickyards was upheld as a valid regulation in an historic case decided by the United States Supreme Court in 1915. In 1945, the City of Los Angeles began the first air pollution control program aimed at mitigating photochemical “smog,” when it established the Bureau of Smoke Control in its public health department.

**B. CALIFORNIA STATE REGULATION OF AIR QUALITY**

In 1947, California state legislation was enacted creating county air pollution control districts, beginning the move towards regional, state, and federal regulation of air quality. The creation of the California Air Resources Board (ARB) in 1967, was followed by the adoption of significant revisions to California’s air pollution control laws in 1975 and 1988. The state’s authority to regulate air pollution in California is currently divided between the ARB and the local and regional air pollution control districts, including the South Coast Air Quality Management District (SCAQMD) which has specified jurisdiction over the South Coast Air Basin, including the City of Los Angeles.

Under California law “local and regional authorities have the primary responsibility for control of air pollution from all sources, other than emissions from motor vehicles....” Cities are included within the definition of “local and regional authorities.” The control of emissions from on-road and “off-road” or nonroad motor vehicles, with certain exceptions, is the responsibility of ARB.

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7. In 1947, the state Air Pollution Control Act was enacted, authorizing the creation of an Air Pollution Control District in every California county. Prohibitions upon visible smoke were the first air pollution rules, followed by bans on backyard burning of trash. See ARB website: http://www.arb.ca.gov/html/brochure/history.htm
9. The term “local or regional authority” means the governing body of any city, country or district. Health & Safety Code §39037. “‘District’ means an air pollution control district or air quality management district created or continued in existence pursuant to provisions of Part 3 (commencing with Section 40000).” Health & Safety Code §39025.
10. Under California law “off-road” sources has the same meaning as “nonroad” sources under federal law. This memorandum will generally use the term “nonroad.”
Health & Safety Code §40449(a) explicitly provides that the creation of the SCAQMD has not preempted city police powers to regulate air pollution. Therefore, California law does not preclude the City of Los Angeles from adopting an ordinance or rule regulating emissions sources, other than certain regulation of motor vehicles, that are not in conflict with SCAQMD rules. Whether the City has jurisdiction over trains and ships under California law (which are separately classified as “off-road” or nonroad sources, not as “motor vehicles”) is discussed in the respective discussions of those topics, below.

C. FEDERAL PREEMPTION DOCTRINE

The federal preemption doctrine arises under the Supremacy Clause, Article VI, Clause 2 of the United States Constitution, which provides, in part, that "[t]his Constitution, and the Laws of the United States...shall be the supreme law of the Land; and the Judges of every State shall be bound thereby ...."

There are three bases on which a finding of federal preemption can be made. Congress often expressly addresses in a statute the extent to which it intends for federal legislation to preempt state law. This scenario is typically referred to as "express preemption." In addition to express preemption, courts recognize two types of implied federal preemption. In the absence of explicit statutory preemption language, when Congress legislates over a subject matter having common federal and state interests, the federal legislation will most likely be found to supersede inconsistent provisions in any state or local legislation attempting to regulate the same field. State law may also be preempted when it attempts to regulate in a field in which Congress has clearly indicated an intent to be the sole authority. This is often designated as "field preemption." State law may also be preempted if it actually conflicts with federal law to such an extent that it is either impossible for a member of the regulated community to comply with both sets of laws, or where compliance with the requirements of the state law would frustrate the full purposes and objectives of Congress in passing the federal law. This is often called "conflict preemption."

The U.S. Supreme Court has held that any analysis involving claims that a state's exercise of its police power violates the Supremacy Clause should start "... with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear

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12. Health & Safety Code §40449(a) provides “no provision of this chapter is a limitation of the power of any city or county included, in whole or in part, within the South Coast District to adopt any ordinance with respect to air pollution control which is stricter than the rules and regulations adopted by the South Coast District board and not in conflict therewith.”


and manifest purpose of Congress."\textsuperscript{15} The Supreme Court has also held that there is no presumption against preemption of state law "when the state regulates in an area where there has been a history of significant federal presence."\textsuperscript{16} However, the Ninth Circuit Court of Appeals has applied the presumption against preemption to the CAA, holding that because the control of air pollution falls under the historic police powers of the states, the authority of the states to regulate in this area should be assumed not to have been preempted unless Congress clearly and manifestly indicates such an intention.\textsuperscript{17}

In analyzing a federal preemption claim, it is of primary importance to determine the congressional intent behind the federal regulatory scheme through a review of any available direct or indirect evidence. Even where federal and state legislation appear to have the same overriding purpose, preemption may be found if the state statute significantly interferes with the "methods by which the federal statute was designed to reach that goal."\textsuperscript{18}

**D. CLEAN AIR ACT PREEMPTION OF CERTAIN LOCAL POWERS**

Beginning in the late 1960's, certain local air quality regulatory powers over mobile pollution sources began to be preempted by amendments to the federal CAA. Through the formation of the United States Environmental Protection Agency (EPA) in 1970, and the passage of major amendments to the federal Clean Air Act (CAA) in 1970, 1977 and 1990, Congress provided the EPA with the responsibility for establishing national emission standards for new mobile sources of air pollution as well as standards of performance for certain categories of new stationary sources.

Section 101(a)(3) of the CAA states that “air pollution control at its source is the primary responsibility of States and local governments....” The California Attorney General\textsuperscript{19} has summarized the CAA’s preemption provisions as follows:

\begin{quote}
[W]e note that the federal act contains the following provision: "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce ... any requirement respecting
\end{quote}

\begin{itemize}
\item \textsuperscript{15} Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978) (quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).
\item \textsuperscript{16} U.S. v. Locke, 529 U.S. 89,107 (2000).
\item \textsuperscript{17} Exxon Mobil Corp. v. EPA, 217 F.3d 1246, 1255 (9th Cir. 2000).
\item \textsuperscript{18} Id.
\end{itemize}
control or abatement of air pollution ...." (42 U.S.C. §7416)\(^{20}\) It also states that "nothing in [the federal act's provisions concerning motor vehicle emission standards] shall preclude or deny to any State or 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)).\(^{21}\)

As discussed below, however, the CAA in §209(a) further provides, in part:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicles engines subject to this part.

Other provisions of §209 explicitly preempt certain other controls, and certain state and local regulation of ships and locomotives may also be preempted. Section 209 also allows a potential waiver for California, as discussed below. In addition, as discussed in §II.F below, it may be possible for the Port acting as a proprietor to take certain actions to reduce mobile source emissions.

1. **On-Road Vehicular Emissions Standards and Regulations**

   a. **Emissions Standards**

In 1965, Congress amended the federal CAA to authorize the federal government (later EPA) to adopt emission standards for new on-road motor vehicles,\(^{22}\) and, in 1967, Congress amended the CAA to preempt states and their political subdivisions from adopting and enforcing any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.\(^{23}\)

The CAA allows California to obtain a waiver to set its own vehicular emissions standards\(^{24}\) and other states may “opt in” to the California standards.\(^{25}\) The ARB has successfully requested and

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20. CAA §116, 42 U.S.C. §7416, provides in full: “Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.”

21. CAA §209(d) is 42 U.S.C. §7543(d).


obtained many waivers of federal preemption for on-road California emission standards. The Administrator of EPA must grant California a waiver, unless he or she finds that the specific conditions set forth in the CAA §209(b) exist.

In 2004, the U.S. Supreme Court in *Engine Manufacturers’ Association v. SCAQMD* (*EMA v. SCAQMD*), found that SCAQMD’s attempt to impose fleet rules fell within the scope of preemption under §209(a) as enforcement or adoption of an “emissions standard.” Most recently, however, on remand the District Court in *EMA v. SCAQMD* held that the SCAQMD’s fleet rules “as applied to state and local government actors, fall within the market participant doctrine and are therefore outside the scope of §209 [of the Clean Air Act].”

### b. In-Use and Idling Regulations

The CAA does not preempt state and local authorities from regulating the operation of motor vehicles through certain “in-use” requirements. Section 209(d) provides:

> Nothing in this part shall preclude or deny to any state or political subdivision thereof the right otherwise to control, regulate or restrict the use, operation, or movement of registered or licensed motor vehicles.

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27. CAA §209(b), 42 U.S.C. §7543(b). The section, as amended, provides in relevant part that the ARB must determine that the adopted state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards and that no waiver shall be granted if the Administrator finds that—

   (A) the determination of California is arbitrary and capricious,
   (B) California does not need the adopted standards to meet compelling and extraordinary conditions, or
   (C) The adopted standards and accompanying enforcement procedures are not consistent with section 202(a) of the CAA.

The phrase “consistent with section 202(a)” has been interpreted by EPA to mean that the adopted state standards and procedures are technically feasible, giving appropriate consideration to the cost of compliance within the time provided for compliance. The Administrator will also consider whether federal and state procedures impose inconsistent certification requirements (that is, whether certification can be accomplished with one test vehicle in the course of the same test. See, *California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision* 61 FR 53371 (October 11, 1996).


29. *EMA v. SCAQMD*, U.S.D.C. No. 00-09065 (C. Dist. CA), at 23. The EMA is likely to appeal this decision to the Ninth Circuit. The Central District’s decision and the market participant exception is discussed in more detail in §II.F.2 of this memorandum, below.

Thus, while the California Legislature designates ARB as the air pollution control agency for all purposes set forth in federal law, and specifically grants ARB primary authority over the regulation of motor vehicles, public entities such as cities and ports are not precluded by the CAA from placing certain in-use requirements on trucks that service the port. Thus, the City of Los Angeles is not precluded by the CAA from regulating trucks at the Port to reduce idling.

Recently the California Attorney General opined that a city may “enact an ordinance restricting vehicle engine idling for the purpose of controlling or mitigating vehicles emissions.” The Attorney General found that Health & Safety §40000 did not give ARB exclusive state authority over idling. The opinion cited Heath & Safety Code §40717(h), which allows a city to adopt transportation control measures more stringent than those of the district if they are otherwise authorized by law, as well as Health & Safety Code §41509, which provides that the air pollution provisions do not limit the power of a local agency to regulate or abate nuisances. The Attorney General concluded that the police power provides the requisite authority for the City to adopt an anti-idling ordinance. This theory could be used to implement measure HDV 19 through a Port-wide rule or City ordinance.

State law already requires marine terminals to operate in a manner that does not cause the engines on trucks to idle or queue for more than 30 minutes while waiting to enter the gate into the marine terminal. As with federal preemption, discussed above, a state statute can preempt local regulation when the local regulation “duplicates, contradicts or enters an area fully occupied by general law…..” Health & Safety Code §40720 contains several exceptions, and on its face, would not conflict with or preempt a local regulation that limits idling within the terminal. However, the city ordinance would have to be crafted so it would not conflict with §40720.

33. On the other hand, the CAA does not grant additional local powers to regulate air quality irrespective of state preemption. See Southeastern Oakland County Recovery Authority v. City of Madison Heights, 5 F 3rd 166, 168-169 (6th Cir. 1993) (holding that the CAA did not prevent application of a Michigan state law preempting local siting restriction on trash-to-energy plant: “The CAA does not allow local ordinances to bypass an express limitation placed on local governments by a state.”).
35. 2004 Cal. AG LEXIS 24, p. 10.
38. Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993).
39. SB 761 (Lowenthal), currently pending in the legislature, would establish a turn time limit within terminals and reduce the exemptions in §40720.
A city ordinance also may be preempted by state law if it enters a field which the legislature has fully occupied, either expressly or by implication.\textsuperscript{40} It does not appear that §40720, or the CARB rule limiting heavy duty truck idling (which does not apply to queuing or certain other idling situations and which expressly provides that it is not in conflict with local idling control measures that are equal to or more stringent than the adopted regulation) fully occupies the entire field of regulating vehicle idling so as to preclude local action.\textsuperscript{41}

c. On-Road Fuel Requirements

Section 211 of the CAA requires that fuel and fuel additives for on road sources be registered with the EPA,\textsuperscript{42} and grants the EPA authority to prohibit particular fuel/additives from being manufactured or sold.\textsuperscript{43} Further, §211(c)(4) expressly preempts states and political subdivisions from imposing a control or prohibition on motor vehicle fuels and fuel additives “for purposes of motor vehicle emissions control” under certain circumstances.\textsuperscript{44} Once EPA makes a finding that no control (of a motor vehicle fuel or fuel additive characteristic or component) is necessary or if EPA has established a control or prohibition of such characteristic or component, then preemption applies under §211(c)(4)(A). However, the State of California is not subject to preemption under §211(c)(4)(A), and other states may adopt or enforce a motor vehicle fuel specification that would otherwise be preempted if EPA makes a finding of necessity under the terms of §211(c)(4)(C). If EPA has made neither the finding cited above nor established a control or prohibition for a motor vehicle fuel or fuel additive characteristic or component, then a state or local agency is not preempted under the CAA from establishing a control or prohibition for that motor vehicle fuel or fuel additive characteristic or component. Lastly, a state or local agency may establish a control or prohibition for a characteristic or component of a motor vehicle fuel or fuel additive that would otherwise be preempted under CAA §211 if the control or prohibition is established for purposes other than for motor vehicle emission control. See CAA §211(c)(4)(A).

2. Nonroad Emission Standards

a. Emissions Standards

\textsuperscript{40} Preemption by implication may be found where “(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the “locality.” Sherwin-Williams Co., \textit{supra}, 4 Cal. 4\textsuperscript{th} at 898 (citation omitted).

\textsuperscript{41} Title 13, CCR §2485.

\textsuperscript{42} 42 U.S.C. §7545 (a)-(b)

\textsuperscript{43} \textit{Id.} at §7545(c).

\textsuperscript{44} \textit{Id.} At §7545(c)(4)(A).
In 1990, the CAA was amended to authorize EPA to adopt emission standards and other requirements related to the control of emissions from nonroad sources.\textsuperscript{45} Under the CAA, nonroad vehicles and engines include cargo handling equipment, harbor craft, ships and locomotives.\textsuperscript{46} Issues unique to ships and locomotives are discussed in later sections, below.

Congress established a two-tiered preemption prohibiting states and their subdivisions from adopting emission standards and other requirements related to the control of emissions from certain nonroad sources.\textsuperscript{47} Specifically, under §209(e)(1), states and their political subdivisions, including California, are preempted from adopting and enforcing emissions standards for new nonroad engines under 175 horsepower used in farm and construction and for new locomotives and locomotive engines.\textsuperscript{48}

Further, under §209(e)(2), states are “implicitly” preempted from adopting emission standards and other requirements for all other nonroad vehicles and equipment not expressly preempted under §209(e)(1).\textsuperscript{49} This implied preemption provision has been interpreted to apply to both new and used equipment and vehicles.\textsuperscript{50} However, similar to the motor vehicle regime, California may seek authorization from EPA to adopt and enforce its own nonroad emissions standards and other requirements (other than for those sources that are expressly preempted under §209(e)(1)).\textsuperscript{51} Further, as with the waiver for motor vehicles, the Administrator must grant California’s request for authorization, unless the Administrator makes specific findings that the criteria for denying a waiver have been met.\textsuperscript{52} California has requested and received authorization to adopt its own emission standards and regulations for several nonroad regulations.\textsuperscript{53}

\begin{itemize}
  \item \textsuperscript{45} 42 U.S.C. §7547.
  \item \textsuperscript{46} CARB proposes to adopt cargo handling equipment regulations in November 2005. \textit{ARB, Planned Measures Affecting Off-Road Cargo Handling Equipment and Locomotives} (draft October 27, 2004).
  \item \textsuperscript{47} 42 U.S.C. §7543(e).
  \item \textsuperscript{48} 42 U.S.C. §7543(e)(1).
  \item \textsuperscript{49} 42 U.S.C. §7543(e)(2).
  \item \textsuperscript{50} \textit{EMA v. EPA}, 88 F.3d. 1075 (D.C. Cir. 1996). Further, the court in \textit{EMA v. EPA} also held that in terms of the emissions “standards and other requirements” that states are preempted from adopting, “other requirements” refers only to ancillary enforcement mechanisms such as certificates and inspections, as in the motor vehicle preemption regime. \textit{See id.} at 1093-1094.
  \item \textsuperscript{51} 42 U.S.C. §7543(e)(2).
  \item \textsuperscript{52} \textit{Id.} The criteria for denying an authorization request are similar to those for denying a motor vehicle waiver under 42 U.S.C. §7543(b).
  \item \textsuperscript{53} EPA granted California its first nonroad authorization for the Utility and Lawn and Garden Regulation in July 1995 (60 FR 37440). Since then ARB has also received authorizations to adopt its Offroad Heavy-Duty Diesel Engines over 175hp Regulation (60 Fed. Reg. 48981[September 21, 1995]), Offroad Recreational Vehicles (61 Fed. Reg. 69003 [December 31, 1996]), and Small Offroad Engine Durability Requirements (68 Fed. Reg. 65702
\end{itemize}
b. **In-Use and Idling Regulations**

Certain state and local in-use requirements for nonroad vehicles and equipment are not preempted under the CAA.\(^{54}\) Indeed, all jurisdictions, including cities and ports, may implement measures such as mass-emission limits, hours of use, fuel specification standards, and permitting of sources.\(^{55}\) However, EPA has taken the position that retrofit requirements for nonroad sources are not permissible in-use requirements, but rather preempted emissions control standards.\(^{56}\) California law gives ARB jurisdiction over nonroad emission sources, but, with certain exceptions (e.g. districts are prohibited from regulating portable equipment registered in the California Portable Equipment Registration Program; restrictions placed on districts with regard to regulating locomotives\(^{57}\) the regional authorities continue to have authority over nonvehicular sources, to the extent not preempted by federal law.\(^{58}\)

SCAQMD and NRDC believe that under state law, local authorities including cities and counties may establish in-use and idling requirements stricter than those set by law or by ARB for “nonvehicular” (nonroad) sources,\(^{59}\) such as locomotives, marine vessels, and certain types of cargo handling equipment, to the extent not preempted under federal law.\(^{60}\) Later enactments clearly confer regulatory authority over locomotives and other mobile sources on ARB.\(^{61}\) SCAQMD and NRDC further believe that the air districts and cities and counties have concurrent authority with ARB over nonroad engines and vehicles because they are nonvehicular

\[^{54}\] See Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts, 59 F.R.31306 (June 17, 1994); Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 F.R. 36969 (July 20, 1994); and EMA v. EPA, 88 F.3d 1075.


\[^{56}\] Id.

\[^{57}\] Health & Safety Code §41753, §40702.

\[^{58}\] See Health & Safety Code §40000.

\[^{59}\] Health & Safety Code §39002.

\[^{60}\] Vehicle Code §415, §670.

\[^{61}\] See, e.g., Health & Safety Code §43018(d)(2), §43013(b).
sources under state law. The railroads (hereafter “Rail”) believe that air districts and cities and counties have no authority under California or federal law over locomotives.

c. Nonroad Fuel Requirements

Section 211 of the CAA grants EPA the authority to regulate the manufacture or sale of nonroad fuel and fuel additives. In contrast to motor vehicle fuels and fuel additives, CAA §211(c)(4)(A) does not preempt state or local controls or prohibitions related to specifications or components of nonroad fuels or fuel additives. At the same time, a state or local control that regulates both motor vehicle fuel and nonroad fuel is preempted to the extent that the state or local control respects a characteristic or component of motor vehicle fuel or fuel additive regulated by EPA under §211(c)(1). For the purposes of CAA §209, EPA characterizes sulfur limits on fuel used by nonroad sources as a permissible (i.e., non-preempted) in-use requirement.

3. Locomotives

Locomotives are classified as nonroad vehicles under the CAA, and, as stated, all states are expressly preempted from adopting and enforcing emission standards and other requirements related to emissions control for new locomotives. Under its final rule for locomotives and locomotive engines, EPA has crafted very broad preemption. In contrast to all other rulemakings for on-road motor vehicles and nonroad vehicles and equipment, “new” has been defined to include not only factory-new locomotives, but also remanufactured locomotives and locomotive engines. Additionally, for purposes of preemption, the useful life period for locomotives and engines has been defined to be 133 percent of the locomotive’s and engine’s useful life.

Legal Authority

5-11

Section 5
However, as discussed above, SCAQMD and NRDC believe that certain “in use” restrictions such as fuel sulfur content limits, daily mass emissions limits, and operational restrictions may not be preempted. Rail believes, however, such restrictions are either standards or “other requirements” that are preempted.

California law gives ARB jurisdiction for establishing emission standards and regulations for locomotives.\(^70\) Additionally, the state legislature prohibits local air districts from adopting any order, rule or regulation that specifies the design of equipment, type of construction, or particular method to be used in reducing the release of emissions from locomotives.\(^71\) ARB has adopted rules effective January 1, 2007 that require the use of low sulfur diesel fuel in intrastate locomotives.\(^72\)

Additionally, ARB has entered into a Memorandum of Understanding with the Union Pacific Railroad and Burlington Northern Santa Fe Railroad that will require fleet average emissions for locomotives operating in the SCAQMD.\(^73\) By 2010 the fleet average shall not exceed the federal Tier 2 NOx emission standards. This will result in accelerated replacement of higher emitting locomotives from the SCAQMD.

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bars litigation concerning this aspect of EPA’s current regulations and that this issue involves speculation about future changes to EPA regulations during the possible lengthy life of the NNI plan.

70. Health & Safety Code §43013(b).


73. *Memorandum of Mutual Understandings and Agreements South Coast Locomotive Fleet Average Emissions Program*, July 2, 1998.
4. **Ships**

   a. **Existing State and Local Regulation of Ships**

   The federal air pollution statutes in effect prior to the CAA were held not to preempt certain local vessel regulations, including prohibitions on visible smoke.\(^{74}\) SCAQMD has set limits on visible smoke from vessels (among other sources) where violators are subject to criminal prosecution.\(^{75}\) The state of Alaska has used aggressive enforcement of visible smoke prohibitions (made part of the Alaska SIP) to encourage cruise ships to electrify while at dock and to use cleaner fuels.\(^{76}\)

   b. **Clean Air Act Regulation of Ships**

   Marine vessels are not specifically included in the CAA's definition of either "nonroad engine" or "nonroad vehicle," but legislative history purportedly establishes that Congress intended for them to be treated as such, and the EPA has consistently done so.\(^{77}\) EPA has issued regulations limiting NOx emissions from "Category 3" marine diesel engines on U.S.-flagged vessels.

   i. **Foreign Flag Issues**

   In 2003, EPA decided to defer the question of whether or not the CAA provides the Agency with the authority to establish emissions standards for engines on foreign-flagged marine vessels, but decided even if the Agency had such authority, it would not exercise such discretion (i.e., to establish standards for foreign-flagged marine vessels) at the present time.\(^{78}\) EPA deferred the question of legal authority or, alternatively, states that it exercised its discretion not to extend emissions standards to foreign-flagged vessels on the grounds that such deferment or exercise of

\(^{74}\) In *Huron Portland Cement Co. v. City of Detroit* 362 U.S. 440, 442 (1960), the U.S. Supreme Court upheld local smoke prohibitions against a preemption claim. Although the case was decided prior to enactment of the Clean Air Act, the Court’s analysis remains sound. The Department of Justice reply brief in the Intertanko litigation, at p. 14, concedes that the Clean Air Act “expressly provides a role for states in establishing certain anti-pollution rules that apply to vessels” citing 42 U.S.C. §7511(b)(f). See: http://www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1701.mer.rep.pdf

\(^{75}\) SCAQMD Rule 401. See also, Cruise Ship Environmental Task Force, *Report to the Legislature: Regulation of Large Passenger Vessels in California* (August 2003) 34.


\(^{77}\) The National Association of Attorneys General, *Floating Cities, Urban Problems: A Report by the National Association of Attorneys General Cruise Ship Workgroup* (2002) at p. 29 finds that “cruise ships would most likely be mobile sources categorized as ‘nonroad vehicles’ powered by ‘nonroad engines’ and would thus be governed by regulations implemented under 42 U.S.C. §7547.” (Footnotes omitted.)

discretion may help to facilitate the adoption of more stringent consensus international standards.  

EPA has committed to complete an additional rulemaking to consider the establishment of a more stringent set of emissions standards (“tier 2”) for marine diesel engines with per-cylinder displacement at or above 30 liters or more (“category 3”) no later than April 27, 2007 and, as part of that future rulemaking, to consider whether to apply such standards to foreign-flagged vessels. In deferring the question of legal authority, EPA concluded that the emissions effects of not applying the emission standards to foreign-flagged vessels would be minimal because EPA expected that foreign vessels would comply with the MARPOL Annex VI standards whether or not they are also subject to regulatory standards set forth for U.S.-flagged vessels in 40 CFR part 94. The D.C. Circuit upheld EPA’s decision to defer the question of legal authority to establish emissions standards for foreign-flagged marine vessels. Though not yet ratified by the U.S. Senate, the MARPOL Annex VI standards went into effect on May 19, 2005.

Previously, when EPA first established emissions standards for new marine diesel engines, the Agency had not applied the emission standards to engines on foreign-flagged vessels based on its conclusion that such engines that are installed on vessels that come into the United States temporarily are not considered imported under the U.S. customs laws and thus are not considered “new” for the purposes of EPA’s authority under §213 of the CAA to establish emission standards for nonroad engines. EPA based its interpretation on an extension of the CAA definitions of “new motor vehicle” and “new motor vehicle engine” (see CAA §216(3)) to the term “new nonroad engine” for which the CAA itself provides no specific definition, but has since agreed to re-consider the issue (by April 2007) in recognition of the ambiguity of the term “new nonroad engine” under the CAA and in light of the various considerations that distinguish marine applications from the on-road vehicle context.

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79. Id.

80. See Id. and 40 CFR §94.8(a)(2)(ii).

81. Annex VI sets a global limit of 4.5% sulfur content of fuels for marine vessels, with provision for a 1.5% limit in “SOx Emission Control Areas,” and limits on NOx emissions. See IMO website - http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#30


Certain commentators have suggested that EPA does have jurisdiction over foreign-flagged vessels\textsuperscript{85} and that emissions reductions beyond the MARPOL Annex VI requirements are needed.\textsuperscript{86}

\section*{ii. Preemption of Ship Emissions Standards}

As noted in §II.D.2 above, ship engines are classified as nonroad engines under the CAA. Therefore, as discussed in §II.D.2, state and local governments are preempted from adopting or enforcing “any emissions standard or other requirement relating to the control of emissions” from nonroad sources, including ships.\textsuperscript{87} As discussed below, state and local governments may adopt certain regulations regarding the use and operation of marine vessels, to the extent not preempted by other federal laws. California may seek from EPA a waiver from CAA preemption to adopt and enforce emissions standards and other requirements applicable to marine vessels, as discussed below in §II.F.2.c.

\section*{iii. California Law on Ship Regulations}

California law gives ARB the authority to regulate marine vessels to the extent permitted by federal law.\textsuperscript{88} ARB has not yet adopted emissions standards for large marine vessels, but has announced a potential rulemaking.\textsuperscript{89} ARB’s regulatory authority over ships in California is not exclusive, however because ocean going vessels are not motor vehicles.\textsuperscript{90} Ocean going vessels are under the jurisdiction of the districts and cities and counties to the extent not preempted.\textsuperscript{91} The California Air Resources Board was also granted authority to regulate marine vessels by Health & Safety Code §43013(b), as amended in 1988. However, even after the enactment of


\textsuperscript{87} CAA §209(e).

\textsuperscript{88} California Health & Safety Code §43013(b).

\textsuperscript{89} ARB, \textit{Planned Measures for Commercial Ships and Harbor Craft} (draft October 27, 2004).

\textsuperscript{90} Ocean-going ships are not motor vehicles. California law defines “motor vehicle” as “a vehicle that is self-propelled.” Vehicle Code §415(a). A “vehicle” is “a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.” Vehicle Code §670. Because they do not operate on the highway, ocean going vessels are not “vehicles.”

\textsuperscript{91} Health & Safety Code §40000.
this statute, the districts retain concurrent authority to regulate nonvehicular sources, including ships.\textsuperscript{92}

\textbf{iv. In-Use Ship Regulations}

EPA regulations for the control of emissions from new and in-use nonroad compression engines provide an exception to the general rule of federal preemption in those instances where a state regulates the use and operation of existing nonroad engines.\textsuperscript{93} This interpretation was upheld by a federal appellate court in \textit{EMA v. U.S. EPA}, 88 F.3d 1075, 1093-94 (D.C. Cir. 1996). The Part 89 regulations further provide that hours of usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines are examples of state in-use regulations that the EPA believes would not be preempted under the CAA. However, in the EPA's opinion, states would be precluded from adopting regulations that require the retrofit of used nonroad engines unless a waiver of §209 preemption is granted by the Agency.\textsuperscript{94}

There is some debate over the extent of the “in-use” ship exception to preemption. A report of the National Association of Attorneys General suggests that states may impose “in-use” restrictions upon vessels, including limits on the sulfur content of marine diesel fuel and ship operational limitations.\textsuperscript{95} But the report finds “there remains a question” whether states have been preempted, by a pervasive federal regulatory scheme, from imposing equipment requirements on vessels, such as sulfur “scrubbers” or engine modifications for NOx reduction.\textsuperscript{96}

Given that marine vessel engines fall within the CAA's definition of nonroad engines, they should be subject to similar treatment with respect to the authority of states to adopt use and operation requirements, potentially including limits on the sulfur content of fuels in marine engines. However, PMSA believes such a position needs to be considered in light of 40 C.F.R. §89.1(b)(4), which provides that Part 89 regulations do not apply to marine engines regulated under 40 C.F.R. Part 94, which covers emission standards for Category 3 marine diesel engines on domestic vessels. PMSA believes it is unclear whether the types of in-use requirements authorized by the EPA for those categories of nonroad engines regulated under Part 89 would also be held to extend to marine diesel engines on ocean-going vessels, for which the need for uniform national standards is arguably a much higher priority. EPA views the Agency’s interpretation set forth in appendix A of subpart A to part 89 as applicable to all nonroad engines, including locomotive and marine engines. PMSA believes, to the extent Part 89 applies here,\textsuperscript{96}

\begin{itemize}
  \item[92.] Manaster & Selmi, \textit{California Environmental Law and Land Use Practice}, §41.06(2).
  \item[93.] 40 C.F.R. Part 89.
  \item[94.] See 40 C.F.R. Part 89, Appendix A to Subpart A
  \item[96.] \textit{Id.} at 31, n. 179.
\end{itemize}
any emission control measures requiring the retrofit of existing engines on such vessels falls within §209 preemption.

SCAQMD and NRDC believe that operational restrictions on ships, as well as fuel requirements, are clearly not preempted by the Federal CAA. Therefore, the City of Los Angeles would not need either EPA or CARB approval to adopt an ordinance regulating the operation or fuel usage of marine vessels. Similarly, SCAQMD and NRDC believe the City could adopt an ordinance requiring mass emission caps for ship operations.97

5. **Stationary Source Emissions Controls Are Not Preempted**

Although establishment of certain mobile source emission standards have been preempted by state and federal law, the CAA and related California state air quality laws have not disturbed the traditional power of cities and counties to regulate non-mobile stationary sources of emissions. Local regulation of stationary sources is explicitly permitted so long as such regulations are at least as stringent as those adopted by state or regional air quality agencies.98 Health & Safety Code §39002 provides that “local and regional authorities may establish stricter standards than those set by law or by the state board for non-vehicular sources.”99 Thus, the Port may adopt rules or regulations controlling emissions of stationary sources so long as they are at least as stringent as similar requirements imposed under any other federal or state laws or regulations. However, there are few stationary sources of emissions within the Port.

E. **OTHER POTENTIAL LIMITATIONS UPON MUNICIPAL POWERS**

1. **The Shipping Act of 1984**

As a marine terminal operator, the Port is obligated to comply with the Shipping Act of 1984, a federal statute implemented and regulated by the Federal Maritime Commission.100 Section 10(d)(1)101 of the Shipping Act requires the Port to establish “just and reasonable” regulations and practices relating or connected with receiving, handling, storing or delivering property. Section 10(d)(4) states: "No marine terminal operator may give any undue or unreasonable preference or advantage" or impose "any undue or unreasonable prejudice or disadvantage" with respect to any person.

97. 40 C.F.R. Part 89, subpart A, App. A.

98. Western Oil and Gas Association v. Monterey Bay Unified Air Pollution Control District, 49 Cal.3d 408 (1989) (“The board’s control measure is a minimum standard for regulation by districts throughout the state.”)

99. See also, Health & Safety Code §40449(a) and §40402(g); People ex rel. Deukmejian v. County of Mendocino, (1984) 36 Cal. 3d 476; Legislative Analyst Report: “Diesel Emissions” to the San Francisco Board of Supervisors (August 14, 2001) text at note 56.


Generally speaking, the Shipping Act of 1984 requires the Port to treat all of its tenants and customers with equal consideration. Under §10(d)(1), any control measure to implement the NNI policy, including any action taken through the Port's tariffs or leases, must be "just and reasonable." Control measures implemented through tariffs and leases may not create an unreasonable preference or advantage in favor of one Port customer or lessee over another. Likewise, tariffs and leases may not unreasonably prejudice or impose an unreasonable disadvantage on any customer or lessee.

2. **The Commerce Clause**

   a. **In General**

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce with foreign nations and among the states, and limits State power to “erect barriers against interstate trade.” This affirmative grant of power in the Commerce Clause has been interpreted to limit state and local governments from interfering with interstate or foreign commerce. These implicit constitutional prohibitions have come to be known as the “dormant Commerce Clause” and the “dormant Foreign Commerce Clause,” respectively. To determine whether a regulation violates the dormant Commerce Clause or the dormant Foreign Commerce Clause, the courts apply different levels of scrutiny depending on whether the regulation discriminates against interstate or foreign commerce, or whether the regulation’s effect on interstate or foreign commerce is only “incidental” to an otherwise legitimate regulatory purpose. Finally, the courts have made a more extensive inquiry into all regulations that burden foreign commerce.

Under the dormant Commerce Clause, facially discriminatory state or local laws that discriminate against interstate commerce in favor of intra-state commerce are invalid unless the law serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means. However, nondiscriminatory regulations that create only an “incidental” burden on interstate commerce are valid “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” As stated by the Supreme Court, “(t)he Commerce Clause significantly limits the ability of states and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a state does not needlessly obstruct interstate trade or attempt

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105. *Id.* at 138. In *Maine v. Taylor* the Supreme Court upheld a facially discriminatory statute serving to protect the state’s fisheries where the purpose could not be served as well by available nondiscriminatory means.

to ‘place itself in a position of economic isolation’ (citation omitted), it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”

b. Regulations Discriminating Against Interstate or Foreign Commerce.

If a state or local regulation affirmatively discriminates either on its face or in practical effect against interstate or foreign commerce, “the burden falls on the State [or local government] to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.”

"Discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” Similarly, a regulation discriminates against foreign commerce when it prefers domestic commerce over foreign commerce. Such discriminatory regulations are “virtually per se invalid” under the dormant Commerce Clause and the dormant Foreign Commerce Clause. Rail and PMSA believe that some NNI measures under consideration may discriminate on their face against out-of-state or foreign commerce. Whether any of the measures in practice results in a preference for in-state operations or favors domestic commerce over foreign commerce are fact-based questions that merit further consideration. To the extent that a measure favors domestic commerce, SCAQMD and NRDC believe that the local air pollution problems create a legitimate local purpose that cannot be served by less discriminatory means. Rail and PMSA do not concur.

The Supreme Court has also stated that where Congress has authorized a state to regulate, “any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.”

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110. Kraft General Foods, 505 U.S. at 79.


scope of a future federal authorization (see §II.F.2.c, below) would be immune from Commerce Clause challenge.

c. Regulations Having an Incidental Effect on Interstate or Foreign Commerce.

A different and less demanding test applies in judging the validity of state or local regulation that does not discriminate on its face against out-of-state or foreign business, but nevertheless has some incidental effect on it.

i. Non-discriminatory Regulations Having an Incidental Effect on Interstate Commerce

If a regulation’s effect on interstate commerce are only incidental, it will be upheld under the dormant Commerce Clause unless the burden imposed on interstate commerce is clearly excessive in relation to the local benefits.¹¹³ Courts have upheld certain environmental restrictions against Commerce Clause challenges. Before the adoption of the Clean Air Act, the Supreme Court upheld a city ordinance prohibiting visible smoke emissions from boilers of ships engaged in interstate commerce, where the ordinance did not discriminate against interstate commerce and the goal of the regulation was to reduce air pollution.¹¹⁴ The Supreme Court has also upheld a state law prohibiting use of plastic nonreturnable milk containers, finding that the incidental burden imposed on interstate commerce was not clearly excessive “in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems.”¹¹⁵ More recently, the Ninth Circuit upheld a facially neutral municipal ordinance limiting the noise level of a local airport and limiting the number of jet flights out of the airport.¹¹⁶ In these cases the courts found that the burdens of the statute on interstate commerce did not outweigh the benefits to the locality. In particular, the Ninth Circuit held: “[T]he [facially neutral] ordinance would violate the commerce clause only if the particular means chosen to achieve its goals were irrational, arbitrary or unrelated to its goals.”¹¹⁷

Most recently, however, the Ninth Circuit determined that a California Public Utility Commission order requiring railroads operating in the state to develop performance-based train make-up standards would place an undue burden on interstate commerce.¹¹⁸ Reasoning that any rule regarding the make-up of a train would have “extra-territorial effects in a number of different states” and could create a “patchwork regulatory scheme,” the court concluded that

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¹¹⁷. *Id.* at 984.

“[u]nder Supreme Court precedent, such extra-territorial burden is constitutionally infirm.”

The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by “simply invoking the convenient apologetics of the police power ....”

Although the Court recognized in those cases that a local actor may have legitimate health and safety reasons for such regulation, it found that the purported safety benefit was unsupported by the record and the adverse impact on interstate commerce outweighed the local state interest.

Rail and PMSA believe that the full range of burdens reaching beyond the footprint of the Port’s facilities and into the realm of interstate commerce by means of many of the proposed NNI control measures will be high. Furthermore, Rail and PMSA believe if other port operators or other facilities in the stream of commerce adopt similar measures, it will create a “patchwork regulatory scheme,” making compliance difficult if not impossible. Thus, the burden on the free flow of interstate commerce associated with many of the measures will be significant. Rail and PMSA believe, at this time, without the benefit of factual bases on which the benefits and burdens of each of the measures may properly be evaluated, it is not possible to assess which of the proposed NNI control measures will be able to withstand Dormant Commerce Clause scrutiny.

SCAQMD and NRDC believe that the NNI measures would withstand a challenge under the Dormant Commerce Clause because the health and environmental benefits of the measures would be substantial and would likely be found to outweigh any burdens imposed on interstate commerce.


121. See also CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 659-63 (E.D. Mich. 2001) (striking down state law regulating rail operations at road intersections as invalid under the Commerce Clause) aff’d on other grounds, 283 F.3d 812 (6th Cir. 2002).

122. EPA has stated: “State emissions controls that are not preempted by the Clean Air Act may violate the Commerce Clause of the U.S. Constitution by imposing an undue burden on interstate commerce.” 63 F.R. at 18994 (April 16, 1998).
The NNI measures are being evaluated and quantified separately and concurrently by the Financial Working Group.

ii. Non-discriminatory Regulations Having an Incidental Effect on Foreign Commerce

A more extensive constitutional inquiry is required of courts analyzing the validity of a state regulation that burdens commerce with foreign nations.\(^{123}\) Because it is crucial to the efficient execution of the nation’s foreign policy that “the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments,”\(^{124}\) any regulation that frustrates the ability of the Federal Government to do so is invalid under the dormant Foreign Commerce Clause.\(^{125}\) This inquiry is a fact-dependent one. The Supreme Court has upheld certain measures affecting foreign commerce against challenges based on the one-voice doctrine.\(^{126}\) Thus, whether any of the measures frustrates the ability of the federal government to speak with one voice (for example, by interfering with the goals or implementation of international treaties or conventions) merits further consideration.

3. Statutes and Agreements Governing Railroads

a. ICC Termination Act

State and local railroad regulation have been preempted to a significant extent. In the ICC Termination Act of 1995 (ICCTA), 49 USC §§10101-11908, Congress created the Surface Transportation Board (STB), a new regulatory agency within the US Department of Transportation, and broadened the express preemption provision of the former Interstate Commerce Act. As amended by the ICCTA, §10501(b) now provides:

The jurisdiction of the Board over – (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under federal and state law.

\(^{123}\) Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446 (1979); South-Central Timber Development Inc. v. Wunnike, 467 U.S. 82, 100 (1984).

\(^{124}\) South-Central Timber, 467 U.S. at 100.

\(^{125}\) Japan Line, 441 U.S. at 446.

Thus, §10501(b) makes the STB’s jurisdiction over rail transportation “exclusive.” Rail notes that the courts and the STB have held that preemption extends to all rail transportation, regardless of whether the STB directly regulates the particular operation at issue. Moreover, “transportation” is defined broadly to include “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.”

As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than this statutory provision. The courts and the STB have read §10501(b) expansively to preempt state or local actions that would put state or local authorities in a position to interfere with construction or operation of rail facilities. Thus, courts have held that certain state and local zoning, environmental, noise, nuisance, land use, building permit, demolition, and condemnation laws and regulations are preempted insofar as they could interfere with railroad construction or operations. These cases

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128. 49 U.S.C. §10102(9).


130. In addition to the express language of §10501, the long history of federal regulation of railroads provides further support for an expansive reading of the statute. See, e.g., City of Auburn, 154 F.3d at 1029. See also United States v. Locke, 529 U.S. 89, 107 (2000) (no presumption against preemption of state law “when the State regulates in an area where there has been a history of significant federal presence”); CSX Transp., Inc. v. Williams, __ F.3d __, 2005 WL 1023044, *6 (case for federal preemption of local law seeking to regulate hazardous materials transportation particularly strong in light of long-standing federal regulation of nation’s rail system); but see Florida East Coast Railway v. City of West Palm Beach, 266 F.3d 1324, 1329 (11th Cir. 2001)(noting that in enacting a zoning ordinance, the City was “acting under the traditionally local police power of zoning and health and safety regulation” instead of regulating in the area of railroad regulations -- an area with significant federal presence).

131. See, e.g., Green Mountain R.R. Corp. v. State of Vermont, 404 F.3d 638, 641-45 (2d Cir. 2005) (state environmental permitting of transload facility in rail yard preempted); Friberg v. Kansas City S. Ry., 267 F.3d 439, 443 (5th Cir. 2001) (state statute restricting trains from blocking intersections preempted); City of Auburn, 154 F.3d at 1029-31 (state and local environmental and land use regulation of rail facilities and operations preempted); Dakota, Minn. & Eastern R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (S. D. 2002) (revisions to state’s eminent domain law preempted where they added new burdensome qualifying requirements to railroad eminent domain power), aff’d on other grounds, 362 F.3d 512 (8th Cir. 2004); Wisc. Central Ltd. V.
do not expressly address whether potential exceptions to preemption under the market participant or municipal-proprietor doctrines may apply, as discussed below in §II.F.2.

The STB is an independent decisional body that courts have stated is “uniquely qualified to determine whether state law . . . should be preempted” under the ICCTA. 132 The STB decisions are reviewable by the federal circuit courts of appeal. The STB too has read §10501(b) broadly to preempt local permitting or regulatory requirements that could unduly interfere with a railroad’s construction or operating plans.133

Even with this expansive reading of the preemptive scope of the ICCTA, the courts and the STB have determined that “not all state and local regulations are preempted.”134 “[F]ederal courts recognize that the [ICC] Termination Act preempts most pre-construction permit requirements imposed by states and localities.”135 “State and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce.”136 However, other requirements, such as “[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit

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133. See, e.g., North San Diego County Transit Dev. Bd. – Petition for Declaratory Order, STB Fin. Dkt. No. 34111, 2002 WL 1924265 (served Aug. 21, 2002) (California Coastal Commission regulation of construction of rail siding preempted); Town of Ayer, 2001 WL 458685, *5-7 (determining that state and local permitting, environmental review, and noisome trade ordinance were preempted; also determining that the Safe Drinking Water Act and the Clean Water Act were used as a “pretext” to halt the construction of an automobile unloading facility); Borough of Riverdale – Petition for Declaratory Order – The New York, Susquehanna & W. Ry., STB Fin. Dkt. No. 33466, 1999 WL 715272 (served Sept. 10, 1999) (local zoning concerning railroad’s construction and operation of transload facility preempted).

134. Green Mountain, 404 F. 3d at 643-44 (“what is preempted is the permitting process itself, not the length or outcome of that process in particular cases”).

135. Id. at 642.

136. Id. (quoting Town of Ayer, 2001 WL 458685 at *5).
requirements would seem to withstand preemption.” In determining whether a state or local requirement is preempted under §10501(b), courts and the STB have looked into whether that requirement could interfere with interstate rail operations, and found preemption where there such interference could result.

Rail notes that most of the cases that have upheld state or local regulations against an ICCTA preemption challenge have done so on the ground that the activities involved are not integral to the provision of rail transportation services. Rail believes that, insofar as the NNI measures address activities that are integral to the provision of rail transportation services, they will raise ICCTA preemption issues. Rail believes that if a measure is regarded as a regulatory permitting or pre-clearance requirement, it will be held preempted by the ICCTA. Rail believes that a measure may be upheld only if it is regarded as a generally applicable, non-discriminatory regulatory requirement, and will not interfere with rail operations. SCAQMD and NRDC note that the STB has made clear “that state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.”

137. Id. at 643 (citing Village of Ridgefield Park, 750 A.2d at 54. See also State of Oklahoma v. Burlington Northern & Santa Fe Railway Co., 2001 Ok. Civ. App. 55, 24 P.3d 368 (2000) (holding that administrative law judge’s decision requiring railroad to repair fence separating railroad right-of-way from landowner’s property is not preempted under the ICCTA, because it has no impact on railroad’s operations); Town of Ayer, 2001 WL 458685 at *7 (local agency may impose reasonable and nondiscriminatory environmental measures which do not unduly burden interstate commerce or unduly restrict the railroad from conducting its operations); Borough of Riverdale, 1999 WL 715272 at (certain environmental and land use regulations would be subject to a “fact-bound” analysis of whether a particular restriction interferes with railroad operations and interstate commerce).

138. See, e.g., Green Mountain, 404 F.3d at 644-45; Friberg, 267 F.3d at 443; City of Auburn, 154 F.3d at 1030-31; City of Marshfield, 160 F. Supp.2d at 1014; CSX Transp., Inc. – Petition for Declaratory Order, STB Fin. Dkt. No. 34662, 2005 WL 584026, slip op. at 8 (served March 14, 2005); Jones v. Union Pacific R.R., 79 Cal. App. 4th 1053, 1060 (2000).

139. See, e.g., Florida East Coast Ry. v. City of West Palm Beach, 266 F.3d 1324, 1332-37 (11th Cir. 2001) (operation of aggregate business by non-railroad company on railroad property is not rail “transportation”); Native Village of Eklutna v. Alaska R.R. Corp., 87 P.3d 41, 57 (Alaska 2004) (railroad’s operation of a gravel quarry not integrally related to rail operations); In re Appeal of Vermont Railway, 171 Vt. 496, 769 A.2d 648, 654-55 (2000) (local regulatory constraints on truck operations do not interfere with railroad operations); State of Oklahoma v. Burlington Northern and Santa Fe Ry., 24 P.3d 368, 371-372 (Ok. 2000) (local order that railroad repair three-tenths of mile of fence does not have any impact on railroad’s interstate operations); Jones v. Union Pacific R.R., 79 Cal. App. 4th 1053, 1060-61 (Cal. 2000) (where plaintiff alleged horn blowing and idling locomotives served no transportation purpose, but was done solely to harass plaintiff homeowners, triable issue existed regarding whether railroad’s activity was integrally related to its operations); Town of Milford, MA – Petition for Declaratory Order, STB Fin. Dkt. No. 34444, 2004 WL 1802301, slip op. at 2-4 (served Aug. 12, 2004) (operation of steel fabrication business by non-railroad on railroad property is not rail “transportation”); Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, STB Fin. Dkt. No. 34192 (Sub-No. 1), 2003 WL 21952136, slip. op. at 5-7 (operation of transload facility by non-railroad, not under the auspices of a railroad, not rail “transportation”).

140. Borough of Riverdale Petition for Declaratory Order re The New York Susquehanna and Western Railway Corporation, supra at p. 4.
SCAQMD and NRDC believe that to the extent certain NNI measures are classified as health and safety regulations, they would not be subject to preemption under the ICCTA, as long as the factual inquiry shows that the regulations do not unduly interfere with interstate rail operations. SCAQMD and NRDC believe that none of the ICCTA cases cited by Rail deal with the situation where the rail facility is located upon state land held in trust by a port, such as the Port of Los Angeles. Therefore, SCAQMD and NRDC believe that it is unlikely that the ICCTA would be found to preempt the Port's permitting authority or regulatory authority over Port-owned property, should approval be sought for a rail facility or operations. SCAQMD and NRDC believe that the Port could avoid preemption under the ICCTA (or violation of the Commerce Clause) through application of the market participant or municipal proprietor exceptions discussed in §II.F.2, below.  

Rail believes that there is no doubt under the case law that rail operations both inside and outside the Port are an integral part of the interstate rail network, and that the NNI control measures being proposed with respect to rail are likely to be found to interfere with those operations in violation of the ICCTA. Rail notes that courts have specifically held under the ICCTA that the fact that a state or locality controls land or easements used or required for railroad operations does not entitle the state or locality to use its control to impose regulatory conditions on interstate rail operations. More generally, courts have held that states and localities cannot escape federal preemption by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate commerce. 

b. Legal Issues Relating to South Coast MOU

Locomotives operating throughout the South Coast Air Basin (SCAB) --- including rail yards --- are subject to the requirements of Memorandum of Mutual Understandings and Agreements -- South Coast Locomotive Fleet Average Emissions Program, dated as of July 2, 1998, between CARB, UPRR and BNSF (MOU). The MOU requires the entire locomotive fleet, including all line-haul, local and switch locomotives, operated by UPRR and BNSF line-haul locomotive fleet in the South Coast Air Basin to achieve a 5.5 g/bhp-hr NOx fleet average by 2010.

141. SCAQMD and NRDC believe that the cases cited by Rail below for the proposition that “states and localities cannot escape federal preemption by using their proprietary or contractual control of property” are not instructive on either the scope of ICCTA’s preemption provisions or the application of the market participant or municipal proprietor exceptions under the present facts. Such cases were not decided under ICCTA, but rather the dormant Commerce Clause or ERISA. Further, the cases are factually distinguishable, see §II.F.2, below, and thus, do not preclude application of either exception by the Port to implement the NNI measures. SCAQMD and NRDC note that neither the market participant nor the municipal proprietor exceptions have been rejected or applied in the context of the rail provisions of the ICCTA.


143. See, e.g., Western Oil and Gas Assoc. v. Cory, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (state’s proprietary control of tidelands did not permit it to use its leasing activities to escape Commerce Clause scrutiny); Western State Bldg. & Trade Council v. Spellman, 684 F.2d 627, 631 (9th Cir. 1982) (state’s proprietary control of waste disposal site did not permit it to impose regulatory constraints on interstate commerce); Air Transport Assoc. of America v. City of San Francisco, 992 F.Supp. 1149, 1163-64, 1179-80 (N.D. CA 1998) (city’s proprietary control of airport did not permit it to impose contractual conditions on airlines that conflicted with dormant Commerce Clause and ERISA).
The South Coast MOU has remained in effect without amendment or modification since 1998. This legal contract remains in full force and effect now and will remain in effect, subject to the termination clause discussed below.

The MOU provides for termination “in the event that the State of California or any political subdivision thereof takes any action to establish (i) locomotive emission standards; (ii) any mandatory locomotive fleet average emissions standard; or (iii) any requirement applicable to locomotives or locomotive engines and within the scope of the preemption established in the Final EPA National Locomotive Rule.” Accordingly, action to adopt any measures in the NNI plan that fall within one of these categories could lead to termination of the MOU and loss of the emissions reductions that would otherwise occur under the MOU.

Measure R7 (Ultra-Low Emission Switcher and Line Haul Locomotives: Class 1) and R10 (Idling Controls for Switcher and Line Haul Locomotives) set performance based "Emissions Standards" that would apply to new locomotives. Adoption of these measures, if adopted as regulations, constitute “action to establish . . . locomotive emission standards” and thus could jeopardize the MOU, unless an exception to preemption applies, as discussed below.

Measures R9 (ARB Diesel Fuel for Class 1 Railroad Locomotives) and R11 (Efficiency Improvements on In-Use Class 1 Rail Equipment), could set performance based "Emissions Standards" that would apply to new locomotives, in which case adoption of these measures, if adopted as regulations, would constitute “action to establish . . . locomotive emission standards” and thus could jeopardize the MOU, unless an exception to preemption applies, as discussed below. A critical issue is whether they would impose “in use” requirements that are permissible under §209(e). To the extent R9 and R11 do not “affect how a manufacturer designs or produces new . . . locomotives or locomotive engines,” they would not be preempted.

SCAQMD and NRDC believe that Measure R9, as a sulfur limit in fuel burned in nonroad engines," falls within the traditional category of "in use" requirements not falling within the scope of preemption," unless such measures require design modifications to the locomotive’s engine. If the railroads decide to make equipment modifications as a method of compliance with this measure – but where the modifications are not necessary to use the cleaner fuel – then SCAQMD and NRDC believe that this measure would not fall within the scope of preemption. Rail believes that, as currently proposed, R9 involves retrofits and other design changes to locomotives, including requirements involving the addition of auxiliary fuel tanks, and therefore that it is preempted under the EPA Rule and its adoption would jeopardize the MOU.

Whether measure R11 constitutes an “emissions standard” subject to the termination clause is likewise related to whether the efficiency improvements can be achieved without modification of the engine or by application of controls (e.g., by increased lubrication or other adjustments). To the extent the improvements would require modification of the engine or other locomotive

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144. SCAQMD and NRDC believe that R10 could be revised to avoid preemption by not requiring equipment modifications. Rail believes revisions will require additional review by the NNI Task Force, including technical, financial and legal review.
modifications, then this measure would fall within the scope of EPA’s preemptsing regulations. However, modification of the rail cars (for example, to reduce friction) would not fall within the §209(e) preemption, which only covers modifications to the locomotive and locomotive engine. Therefore, to the extent efficiency improvements can be made without modification of the locomotive engine or locomotive (such as by modification of the rail cars), this measure would not fall within the scope of CAA preemption.\textsuperscript{145}

Rail believes that R11 would establish an equipment standard because the efficiency improvements would include application of emissions reductions technology. The railroads note that there are inherent connections between engine efficiency and engine design (which make diesel electric locomotives among the most efficient and lowest emitting transportation power trains) as well as inherent connections between engines and the fuels they are designed to consume. Thus, the railroads believe that measures R9 and R11 would be preempted and their adoption would jeopardize the MOU.

To the extent that measures R7, R9, R10 or R11 establish requirements that could trigger the MOU’s termination clause, SCAQMD and NRDC believe the Port could reasonably argue that it could implement the measures as a market participant or municipal-proprietor, without triggering the termination clause of the MOU because such implementation would not establish a regulation or a “standard,” but rather consist of proprietary actions by the Port. For example, SCAQMD and NRDC believe that as the port negotiates a lease for a railroad yard on port property, it arguably could require that the locomotives calling on the yard meet a cleaner standard and install idling controls.

Rail notes that the MOU does not contain any exception for governmental action, and they believe that therefore the market participant and municipal proprietor exceptions would not apply, and such action could lead to termination of the MOU. Rail also believes that Port adoption of R7, R9, R10 or R11 thus creates a material risk that the entire South Coast will lose the benefits of the South Coast MOU without any certainty that those measures will survive challenge or provide compensating emissions reductions.

\textsuperscript{145} In addition, SCAQMD and NRDC believe that EPA’s regulations, to the extent they purport to absolutely preempts controls on engines that are not "new" as that term is used in the Clean Air Act in describing "new motor vehicles"(42 U.S.C. sec. 7550(3)), are in conflict with the Clean Air Act's provision that the absolute preemption applies only to "new" locomotives or engines, and that EPA should accordingly interpret or revise its regulations to correct this deficiency at its earliest opportunity. The railroads believe EPA’s regulations are consistent with the Clean Air Act and Congress’ intent to provide an absolute preemption for locomotives. The railroads also note that the statute of limitations in Clean Air Act §307(b) bars litigation concerning this aspect of EPA’s current regulations and that this issue involves speculation about future changes to EPA regulations during the possible lengthy life of the NNI plan.
4. **Statutes and Agreements Governing Vessels**

a. **U.S. Coast Guard Regulations.**

Certain of the proposed emission control measures applicable to ocean-going vessels may be subject to preemption if they require vessel modifications or alterations in operating practices that are in conflict with rules or regulations adopted by the U. S. Coast Guard under authority of the Port and Waterways Safety Act ("PWSA"), or 46 U.S.C. §3306 ("§3306") which governs the regulation and inspection of vessels.

The PWSA was enacted in 1972 in response to the *Torrey Canyon* oil spill, and “contains two Titles . . . designed to insure vessel safety and the protection of the navigable waters, their resources, and shore areas from tanker cargo spillage.” Under Title I, the Coast Guard is authorized to “construct operate, maintain improve, or expand vessel traffic services, consisting of measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment.” Title II applies to tanker vessels and requires the Coast Guard to issue safety-related regulations "for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tankers carrying dangerous cargo.

The U.S. Supreme Court addressed the preemptive impact of certain Coast Guard vessel safety requirements issued pursuant to the PWSA in both *Ray, et al. v. Atlantic Richfield Co., et al.*, 435 U.S. 151 (1978) and *U.S. v. Locke*, 529 U.S. 89 (2000). In evaluating potentially conflicting requirements imposed upon tankers under authority of Washington State law, the Court began its analysis by concluding that the general assumption against preemption is not triggered in this area, which Congress has determined requires national uniformity and where the "federal interest has been manifest."

Based on the *Locke* and *Ray* decisions, NNI control measures that require tankers to install additional onboard equipment or modify existing equipment, in conflict with Coast Guard standards promulgated under Title II (for which the Court has held that federal law prevails), would be vulnerable to legal challenge under the PWSA.

Section 3306 applies to all vessels subject to Coast Guard Inspection and requires the Coast Guard to issue safety-related regulations "for the design, construction, alteration, repair, and operation of those vessels, including superstructures, hulls, fillings, equipment, appliances, propulsion machinery, auxiliary machinery, boilers, unfired pressure vessels, piping, electric installations, and accommodations for passengers and crew, sailing school instructors, and

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146. See 33 U.S.C. §§1221-1232 (Title I); 46 U.S.C. §§3701-3718 (Title II).


149. 46 U.S.C. §3703(a).

sailing school students." Equipment and material subject to regulation under §3306 "may not
be used on any vessel without prior approval of the Secretary." Under §3306, the Coast
Guard exercises similar jurisdiction over non-tank vessels as that provided for under the PWSA
regarding tank vessels.

The U.S. Supreme Court has, however, acknowledged that, under statutes intended to insure the
safety of vessels, a role remains for state and local regulation of "local ports and waters under
appropriate circumstances." Appropriate circumstances may include efforts derived from a
state’s residual powers to abate air pollution to protect public health and the environment. A
control measure that requires modifications to a vessel or a vessel's operating practices must not
conflict with Coast Guard requirements.

PMSA believes, based on applicable U.S. Supreme Court precedent, the outcome of any
potential challenge to an NNI control measure directed at ocean-going vessels may depend, in
large part, on the extent to which the particular measure encroaches upon the Coast Guard's
regulatory authority under either Titles I or II of the PWSA. With respect to matters covered
under Title II, the Court has held that Congress intended to subject the field to uniform federal
regulation. Accordingly, "only the Federal Government may regulate the 'design, construction,
alteration, repair, maintenance, operation, equipping, personnel qualification, and manning' of
tanker vessels." Locke, 529 U.S. at 110-111. On the other hand, the Court has held that Title I
authorizes a state "to regulate its ports and waterways, so long as the regulation is based on 'the
peculiarities of local waters that call for special precautionary measures.'" Locke, 529 U.S. at
109 (quoting from Ray, 435 U.S. at 171). The measure must also not conflict with any
regulations promulgated by the Coast Guard, or with an express determination by the Coast
Guard that no regulations concerning the particular subject matter are necessary. Locke, 529
U.S. at 109-110; Ray, 435 U.S. at 171-172, 178. Accordingly, NNI control measures directed at
ocean-going vessels that can survive a field preemption claim under Title II may be allowed
under Title I to the extent they "do not affect vessel operations outside the [port's] jurisdiction, do
not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden
on the vessel's operation" within those areas subject to the port's jurisdiction. Locke, 529 U.S. at
112.

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152. 46 U.S.C. §3306(b)(1).
154. See Ray, 435 U.S. at 165 (distinguishing regulations that fall within the preemptive scope of the PWSA from the
smoke stack opacity ordinance in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); see also
Grand Canyon Dories, Inc. v. Idaho Outfitters and Guides Bd., 709 F.2d 1250, 1254 (9th Cir. 1983) (holding that
a local licensing requirement for all commercial raft outfitters and guides was not preempted by the Federal Boat
However, SCAQMD and NRDC do not believe that the preemptive scope of Title II is as broad as portrayed above. In its analysis of the scope of Title II’s preemptive reach, the Ray opinion relied upon its prior decision in Huron Portland Cement Co. v. Detroit, stating that it did “not question in the slightest the prior cases holding that enrolled and registered vessels must conform to reasonable, nondiscriminatory conservation and environmental protection measures imposed by a State.” In Huron, a local rule imposing criminal penalties for failing to comply with a local smoke abatement code was not preempted by federal maritime laws even though “structural alterations would be required in order to insure compliance with the Code.” The Huron Court held that “there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action.” The lack of overlap derived from the fact that “the thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation...[while] the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community.” Accordingly, SCAQMD and NRDC believe that the NNI control measures, like the local ordinance in Huron, could withstand a federal preemption challenge. Moreover, even PMSA acknowledges above that federal preemption under Title II is limited to “regulation” concerning the “design, construction, alteration...” of “tanker vessels.” Accordingly, Title II does not limit the Port’s ability to impose air quality measures in its proprietary capacity such as in a lease condition applicable to tanker and all other ocean-going vessels.

155. In addition, SCAQMD and NRDC disagree with PMSA’s interpretation of Locke as providing for broad preemption under Title I. The statement in Locke quoted by PMSA is taken out of context. The entire quote reads: “Local rules not preempted under Title II of the PWSA pose a minimal risk of innocent noncompliance, do not affect vessel operations outside the jurisdiction, do not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden on the vessel’s operation within the local jurisdiction itself.” This statement was made in the context of explaining why the Court in Ray upheld state rules requiring a tug escort for certain vessels and why local pilot rules for registered vessels have historically been upheld, and the Court was not opining on the breadth of Title I preemption generally. Indeed, under the broader reading of this language urged by PMSA, the regulation in Huron would not pass muster, but obviously the Court was not intending to overturn that holding.


157. Huron, 362 U.S. at 441, 446 (emphasis added).

158. Id. at 446.

159. Id. at 445.
b. Offshore Geographical Jurisdictional Limitations

Certain proposed control measures seek to reduce emissions from marine vessels, including foreign flag marine vessels, heading to or from the Port. Such measures raise the issue of the offshore geographical jurisdiction of the Port to adopt and enforce measures to control air emissions and vessel operations beyond the Port's physical boundaries.

PMSA notes that in 1947, the U.S. Supreme Court held that the United States, rather than the individual coastal states, had "paramount rights in and power over" those submerged lands and overlying waters located within three miles of the coast. *United States v. California*, 332 U.S. 19 (1947). Largely in response to that decision, Congress adopted the Submerged Lands Act in 1953, which granted the State of California and other coastal states ownership of all submerged lands extending out three nautical miles from their respective coastlines. 43 U.S.C. §1301, *et seq.* Pursuant to the Outer Continental Shelf Lands Act, adopted in that same year, Congress declared that all submerged lands located seaward and outside of those submerged lands that had been granted to the states (commonly referred to as Outer Continental Shelf Lands) would remain subject to the jurisdiction of the United States. 43 U.S.C. §1331, *et seq.*

The Secretary of the Department of Interior was subsequently delegated with the responsibility for establishing rules and regulations governing the leasing of lands on the Outer Continental Shelf, as well as for the "enforcement of safety, environmental, and conservation law and regulations" with respect to activities conducted thereon. 43 U.S.C. §1334(a). In *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979), the Ninth Circuit Court of Appeals, in a case involving offshore oil drilling, held that the Outer Continental Shelf Lands Act provided the Department of Interior with exclusive authority to regulate air quality on the Outer Continental Shelf, based in large part on its conclusion that providing "simultaneous jurisdiction" to the Environmental Protection Agency would be contrary to congressional intent. *Id.* at 1193-1194. Efforts by the State of California and the County of Santa Barbara to assert regulatory authority over air pollution sources associated with offshore oil platforms located on the Outer Continental Shelf, but immediately outside of the three-mile limit, have also been invalidated based on the conclusion that state and local entities lacked jurisdiction to regulate such sources in federal waters. *California v. Exxon Corp.*, No. 78-2849 RMT (GX) (C.D.Cal. 1978).

PMSA notes that in its 1990 Amendments to the federal Clean Air Act, Congress mandated that the EPA establish requirements for the control of emissions from sources - including equipment, activities, or facilities - located on the Outer Continental Shelf. 42 U.S.C. §7627. In 1992, the EPA adopted regulations implementing this requirement, which are currently codified at 40 C.F.R. Part 55. In 1994, the Administrator of EPA Region IX delegated to the SCAQMD authority to implement its Part 55 Outer Continental Shelf Program within 25 miles of the California coastline. *See* 59 Fed. Reg. 36065 (July 15, 1994). This delegation was limited to the regulation of air emissions tied to Outer Continental Shelf sources, and did not extend to the regulation of ocean-going vessels traveling through this area on their way to a U.S. port.
The SCAQMD and NRDC believe that SCAQMD or the Port/City of Los Angeles may potentially seek to support efforts to regulate offshore emissions from ocean-going vessels under the traditional police power authority accorded state and local governments. However, PMSA believes that such measures may constitute an impermissible regulation of extraterritorial conduct. PMSA notes that there exists established precedent that states and localities do not possess the authority to regulate activities beyond their territorial boundaries, even if such conduct may adversely impact the health and welfare of their citizens. Bigelow v. Virginia, 421 U.S. 809, 822-825 (1975); see, e.g., Huntington v. Attrill, 146 U.S. 657, 669 (1892) (holding that "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States"). Further, PMSA notes that Article XI, §7 of the California Constitution only confers on cities the power to make and enforce within their jurisdictional limits any local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Cal. Const., Art. XI, §7; see also Suter v. City of Lafayette, 57 Cal.App.4th 1109, 1118 (1997).

PMSA notes that, as set forth above, Congress only granted the State of California ownership of those submerged lands located within three nautical miles of the coastline under the Submerged Lands Act. Perhaps in recognition of this limited ownership grant, the California Legislature has chosen to define coastal waters, at least under the Water Code, by reference to this three-mile limitation. Cal. Water Code §13181. Further, in recently-adopted legislation addressing emissions from cruise ships, the Legislature limited its regulation of onboard incineration to operations within three miles of the California coast, and then only in a manner consistent with federal law. Cal. Health and Safety Code §39632. PMSA believes that the Port/City of Los Angeles possesses no direct regulatory authority outside their territorial boundaries, absent evidence that either governmental entity has received an express grant from the State providing it with ownership of, or authority to control activities occurring on, submerged lands located within three nautical miles of its coastal boundary.

SCAQMD and NRDC note that, despite the three geographical mile limit on California's territory, courts have held that in limited situations states may assert regulatory jurisdiction beyond that limit. For example, states may apply their pilotage requirements 30 or more miles from the coast. Gillis v. State of Louisiana, 294 F.3d 755, 761 (5th Cir. 2002) (33 miles). Wilson v. McNamee, 102 U.S. 572, 573-74 (1881) (about 50 miles). The Whistler, 13 F. 295, 296 (D.Or. 1882) (about 30 miles). The Gillis court held that 43 U.S.C. §1312, part of the Submerged Lands Act, addresses only who retains title to submerged land, not the regulation of the waters above. Gillis, supra, 294 F.3d at 761.

SCAQMD and NRDC note that there is also a series of cases holding that states may regulate extraterritorial activities, such as fishing on the high seas adjacent to their coasts either by residents of that state or residents of other states when there is a sufficient nexus with the state in question. For example, in Jacobson v. Maryland Racing Commission, 261 Md. 180 (1971) the Court of Appeals held that a nonresident had become a "racing citizen" of that state such that he could be punished for sale of a horse in violation of a Maryland claim-racing law although the sale occurred in another state. Alaska applied the same principle to nonresidents crabbing on the high seas in violation of Alaska law, noting the contacts with the state and services supplied. State of Alaska v. Bundrant, 546 P.2d 530 (1976). The court cited the "general proposition that
acts done outside a jurisdiction which produce detrimental effects inside it justify a state in
punishing he who caused the harm as if he had been present at the place of its effect." State of
Alaska v. Bundrant, supra, at 555; see also, State of Alaska v. Sieminski, 556 P.2d 929 (1976) at
933 (holding that the state may regulate outside its territorial jurisdiction against persons having
a certain minimum relationship or nexus with the state, which nexus "can be satisfied in any
number of ways"). These cases rely in part on Skiriotes v. Florida, 313 U.S. 69 (1941) at 77, in
which the U.S. Supreme Court held that a state may govern the conduct of its citizens upon the
high seas with respect to matters in which the state has a legitimate interest and where there is no
conflict with acts of Congress. See also, Felton v. Hodges, 374 F.2d 337 (1967)(holding Florida
may regulate commercial fishing beyond the seaward boundary of the state). Finally, there is a
principle derived from the so-called "landing law cases," where courts have upheld states
assertion of jurisdiction once a vessel has landed over conduct that occurred beyond the
territorial confined of a state, if that regulation facilitates conservation of a state resource. State
of Alaska v. Sieminski, supra, 556 P.2d at 931.

SCAQMD and NRDC contend that all of these principles appear applicable to the NNI
measures. At the least, the SCAQMD and NRDC believe operators of vessels that make more
than occasional visits to the port and make use of port services could be held to be "shipping
citizens" of the state for purposes of regulating certain aspects of their conduct beyond the
territorial limits of the state. For example, fuel requirements and vessel speed limitations would
appear to be analogous to the rules which governed the location of fishing and type of fishing
gear which were upheld in the above cases. It is likely that numerous vessel operators would
have sufficient nexus with the port to be subject to its regulation. At a minimum, the
SCAQMD and NRDC believe that ships owned by on-shore facilities, as well as those owned by
companies making more than occasional visits, would have sufficient nexus. The situation at the
port fits within the principle that a state may regulate conduct occurring beyond its borders
where the conduct results in detrimental effects (i.e., air pollution) within the state. SCAQMD
and NRDC believe it is also possible that the port could adopt requirements having effect beyond
the territorial jurisdiction of the state under the market participant or municipal proprietor
theories, and as conditions of entry to the Port.

PMSA believes that the SCAQMD and NRDC are misplaced in their reliance on selected
pilotage and fishing regulation decisions to support the proposition that the port may have the
authority to regulate emissions from activities occurring well outside of California's traditional
three-mile limit. First, such a result would directly conflict with those federal statutes referenced
above, which provide the federal Department of Interior and the EPA with the express authority
to adopt environmental regulations covering activities conducted on the Outer Continental Shelf
(expressly including the authority to control air emissions), and those cases which have upheld
efforts by the federal government to assert this authority beyond the three-mile limit reserved to
the states. Contrary to the position offered by the SCAQMD and NRDC, the PMSA believes
that the U.S. Supreme Court has clearly articulated a general rule that ownership of submerged

160. Although the above cases dealt with the state laws or regulations rather than local ordinances, the SCAQMD and
NRDC believe that the same principles of nexus would apply to allow the port to regulate visiting vessels.

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lands is presumed to include the right to regulate activities on water overlying these lands. See *U.S. v. State of Alaska*, 521 U.S. 1, 5 (1997).

PMSA further believes that those decisions cited by the SCAQMD and NRDC reflect the special treatment afforded state efforts to regulate in the noted areas (at least as of the dates of the decisions), and accordingly have limited general applicability to the situation at hand. First, in two of the pilotage decisions referenced by the SCAQMD and NRDC, the courts highlighted the fact that this was an area of law in which Congress indicated its intent not to limit, or otherwise disturb, the regulatory powers of the states. *Gillis*, 294 F.3d at 761-762; *Wilson*, 102 U.S. at 574-575. PMSA believes that Congress has shown no such deference with respect to federal environmental regulation of activities in U.S. waters.

PMSA also believes cases cited by the SCAQMD and NRDC as authorizing states to regulate fishing beyond the three-mile limit also appear to reflect a special interest in, or need by the state to regulate, the particular resource at issue. For example, in *State of Alaska v. Bundrant*, 546 P.2d 530 (1976), the court noted that while crab initially developed within the State of Alaska's three-mile limit, they subsequently migrated outside this area into deeper water. Were the State of Alaska prohibited from adopting crabbing regulations covering activities outside of its three-mile limit, the court reasoned that it would be "totally unable to protect and preserve what are functionally its fisheries resources." *Id.* at 551; see e.g., *Felton*, 374 F.2d at 339. Many of the fishing regulation decisions also appear to have involved conduct by citizens or residents of the state in question, and not to have presented implications on foreign commerce and international law. *Skiriotes*, 313 U.S. at 72-73. In fact, in the *State of Alaska* decision, the State confirmed that the regulations at issue were not being, and would not be, applied to foreign nationals. *State of Alaska*, 546 P.2d at 540.

PMSA notes that many of the fishing regulation decisions cited by SCAQMD and NRDC appear to have been based, at least in part, on the fact that Congress had not adopted conflicting federal legislation. Shortly after the issuance of the last of the referenced decisions, Congress passed the Fishery Conservation and Management Act of 1976, now known as the Magnuson-Stevens Fishery Conservation and Management Act. See, 16 U.S.C. §1801, et seq. As part of this federal statute, Congress has asserted, subject to limited exceptions, exclusive federal authority over fishery management activities in the 200-mile exclusive economic zone. Accordingly, it is possible that each of the fishing regulation decisions cited by SCAQMD and NRDC has been effectively superseded by federal law.

SCAQMD notes that it has an existing Rule 1142 regulating loading, lightering, ballasting, and housekeeping events which applies in South Coast Waters, defined as a subset of California Coastal Waters as defined in 17 C.C.R. §70500(b)(1). Under this definition, California Coastal Waters extend anywhere from 27 miles to as much as 90 miles from the coast. This definition was originally adopted as part of Appendix A to the ARB Staff Report, "Status Report Regarding Adoption by Local Air Pollution Control Districts of Rules for the Control of Emissions from Lightering Operations" ARB Agenda Item 78-4-1 (February 23, 1978), and it is SCAQMD's understanding that ARB intended for local district regulation to extend to the limit of the defined "California Coastal Waters."
PMSA acknowledges that the definitions for the terms "South Coast Waters" found in SCAQMD Rule 1142 and "California Coastal Waters" contained in 17 C.C.R. §70500(b)(1) appear to be based on a definition originally developed by staff at the California Air Resources Board in the late 1970s or early 1980s. This definition was purportedly adopted based upon the results of modeling conducted by ARB meteorologists which indicated that emissions from sources located as far out to sea as the maximum referenced offshore distance could result in onshore impacts. Industry representatives repeatedly challenged the basis for the ARB's offshore impacts determination. They also disputed the conclusion that the State of California has the authority to regulate activities occurring beyond the three-mile limit, even if such impacts could be documented. PMSA believes these challenges are still valid, and is unaware of any court having upheld the authority of the Air Resources Board or the SCAQMD to regulate activities occurring up to 90 miles offshore of the Southern California coastline.

SCAQMD believes that, the reasoning of the courts described earlier allowing regulation of activities within and beyond state waters would apply equally to foreign nationals. Further, the courts have applied U.S. law to foreign-flagged vessels. See e.g. Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923), Strathearn S.S. Co. v. Dillion, 252 U.S. 348 (1919). In Patterson v. Bark Eudora, 190 U.S. 169, 178 (1902), the U.S. Supreme Court held that conditions may be imposed on a vessel’s permission to enter domestic ports: “... the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose.”

SCAQMD and NRDC believe that modern international law reaffirms the principle of conditions on permission to enter the port. The United Nations Convention on the Law of the Sea, Article 211, Paragraph 3 recognizes the right of coastal states to establish “requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports....” Moreover, Article 21 of the U.N. Convention on Law of the Sea specifies that coastal states may adopt regulations applicable to foreign vessels in territorial seas for the preservation of the environment and control of pollution. While paragraph 2 of that article limits such regulations from applying to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards, this limitation “does not affect the right of the coastal state to establish and enforce its own requirements for port entry....” Message of President Clinton Transmitting U.N.C.L.O.S. to the Senate, October 7 1994, p.16. SCAQMD and NRDC believe that the Port of Los Angeles will be able to use this theory, and the other authorities described above, to establish pollution control requirements as conditions applicable to foreign-flagged vessels on permission to enter the Port. PMSA notes that messages of the President do not have force and effect of law and that any control requirements must be consistent with any limitations imposed by applicable federal and state laws and constitutions.


5. **Equal Protection Issues**

Some of the control measures of the NNI Task Force are proposed for gradual implementation, as mitigation measures in connection with lease renewals, construction projects, etc., at the time new or amended leases or new projects are proposed, instead of across-the-board application of the measure to all Port facilities at the same time through a general Port rule. Such a policy of gradual implementation can be expected to eventually reach most terminals and other port facilities, but not necessarily all. During the time there is a differential application of environmental requirements, Port tenants and others subject to more stringent restrictions may claim that it is unfair to impose requirements differentially and assert a Port obligation to compensate them for such differential costs, because of a competitive disadvantage; a claim that might also arise under the Shipping Act. Case law indicates that such differential application normally would not support an equal protection claim, at least so long as there is some rational basis for the Port’s action (absent intentional improper singling out of a particular tenant).  

However, over time differential costs could become substantial especially where some facilities never have the control measure imposed because lease amendments and new construction projects are never sought. Port tenants could be expected to assert that the Port should consider these differential costs during the mandatory compensation adjustment negotiations required every five years under Los Angeles City Charter §607(b). In addition to concerns about the legal impact of competitive disadvantages between various Port facilities within the Port of Los Angeles, there is also a policy concern that could be raised with respect to the problem of competitive disadvantages between the Port of Los Angeles and other Southern California and West Coast ports, should only the Port of Los Angeles institute control measures. However, this is generally a policy issue and may not raise legal issues. This policy issue should be carefully considered in recommending whether the Port should act alone or whether it would be more beneficial to adopt region-wide or statewide rules.

**F. THE PORT’S POWERS TO ACT TO REDUCE EMISSIONS**

1. **The Range of Possible Port Actions**

The Port can take a variety of actions to improve air quality at the Port, subject to the legal constraints discussed above. First, the Port can take (and has taken) environmentally progressive direct actions such as the purchase of its own clean fleet vehicles, including electrified and natural gas vehicles.

Second, the Port can work with Port tenants and others to carry out voluntary and incentive-based voluntary air quality programs, such as the Vessel Speed Reduction Program, the Diesel Oxidation Catalyst (DOC) Program to install DCs on yard equipment at Port terminals and the Gateway Cities Program (to which the Port already has contributed substantial monies) to subsidize the purchase of clean new trucks and take older dirtier trucks out of service.

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Third, as a landlord (holding Port lands in trust for the state of California), the Port, again subject to the legal constraints including federal preemption, the Shipping Act, ICCTA and the Commerce Clause, and certain other legal constraints may be able to include certain environmental requirements and restrictions in Port leases, permits, and other Port project approvals.  

Fourth, subject to the legal constraints noted above, the Port may be able to charge differential fees to encourage reductions of emissions, as suggested in a number of the control measures recommended by the Task Force. The report of the National Association of Attorneys General suggests that ports might provide a fees discount for ships that meet targets for reduced sulfur and NOx emissions, but does not provide an analysis of the port’s legal authority to do so. California case law holds that municipalities can allow certain reductions or exceptions from taxes and fees where there is a rational basis.

Fifth, the Board of Harbor Commissioners can establish environmental policies by adopting Board resolutions, such as the recent policy requiring cleaner yard tractors at the time terminal leases are approved or renewed. Subject to City Council approval, the Board also may be able to adopt certain mandatory environmental requirements of general application through amendment of the Port’s tariff, such as a requirement that ships calling on the Port use lower sulfur fuel, so long as they do not conflict with the CAA, the Commerce Clause, the Shipping Act or other preemptive federal or state law.

164. The California Environmental Quality Act requires that the Port exercise its powers to mitigate significant environmental impacts through all available feasible mitigation measures when approving Port projects. See Public Resources Code §21000(d) (“The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.”), §21001(b) (It is the policy of the state to: “Take all action necessary to provide the people of this state with clean air . . . “), and §21002.1(b) (“Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”).


167. Board of Harbor Commissioners Resolution No. 6164.
2. Port Proprietary Powers May Avoid Conflicts with Federal Law

Certain proprietary powers have been recognized as potentially avoiding a preemptive effect: the “market participant exception” and the “municipal-proprietor exception” to preemption. Rail and PMSA believe that the “market participant” doctrine and the “municipal proprietor” exception, discussed below, are different names for the same doctrine. SCAQMD and NRDC believe that these are two distinct doctrines discussed by two different lines of cases, as discussed below.

a. Market Participant

As discussed below, when acting in a proprietary fashion, local actors have sometimes been permitted to take actions that would otherwise be preempted by federal laws. A local actor’s ability to take such actions has been referred to as the “market participant,” exception.

The market participant exception first arose in the context of the U.S. Supreme Court’s Dormant Commerce Clause jurisprudence. Subsequently, the exception has been applied outside the context of the Dormant Commerce Clause as an exception to other federal statutes. For example, in Building and Construction Trades Council v. Associated Builders and Contractors (referred to hereinafter as “Boston Harbor”), the Court applied the market participant exception to find that certain local action was not preempted by the National Labor Relations Act (“NLRA”). Rail notes that although the U.S. Supreme Court’s decision in Boston Harbor expanded the market participant doctrine outside the context of the Dormant Commerce Clause, the Court did not hold that market participant applied as an exception to each and every preemptive federal statute.

The U.S. Court of Appeals for the Ninth Circuit, as well as other federal circuit and district courts, have addressed the application of the market participant exception to various federal preemptive statutes. These courts have taken a case by case approach to determining whether application of the market participant exception in the context of a particular statute is both consistent with Congressional intent and the purpose of the particular statute. Although the U.S. Supreme Court has only considered the application of market participant as an exception to one statute, the NLRA in Boston Harbor, the Ninth Circuit and other circuit and district courts have applied market participant as an exception to other preemptive federal statutes.

168. See Tocher v. City of Santa Ana, 219 F.3d 1040, 1049-50 (9th Cir. 2000)(finding city’s discretion in procuring towing services protected by municipal proprietor exception). The court in Tocher noted that the municipal proprietor exception has also been called “market participant.” Id.


171. See e.g., Tocher, 219 F.3d at 1050 (examining the language and purpose of the preemptive statute at issue in deciding whether the market participant exception applies).

172. See e.g., Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2nd Cir. 2002)(applying exception to Telecommunications Act to uphold lease agreement between school district and private party); Tocher, 219 F.3d 1040 (applying exception to Federal Administrative Authorization Act, as amended by ICCTA, with respect to motor vehicle provisions, to uphold city ordinance); Associated General Contractors v.
In applying the market participant exception, courts have considered two principal issues:

i. **Does the Particular Statute at Issue Allow for a Market Participant Exception?**

In determining whether POLA may avoid federal preemption in implementing NNI control measures via the market participant exception, a threshold question exists concerning whether the federal statutes which may preempt those control measures, as previously discussed in this memorandum, also allow for a market participant exception. Under the statute by statute analysis adopted by the Ninth Circuit, a court will look to the Congressional intent and purpose behind each such statute to determine whether the market participant exception applies. The parties disagree as to application of the market participant doctrine to the Clean Air Act, ICCTA, and other statutes discussed in this memorandum, and will set forth their separate positions on this issue below.

Rail and PMSA believe that the broad preemptive language in certain federal statutes such as ICCTA and the Clean Air Act, as previously discussed in this memorandum, belie the argument that Congress intended to leave room for a market participant exception in those statutes. The courts have observed that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than that found in ICCTA.\(^\text{173}\) Furthermore, the purpose of both ICCTA and the Clean Air Act in creating a uniform regime of federal regulation of trains and air quality would be impeded by the existence of a market participant exception in these contexts.

With respect to the CAA, NRDC notes that on May 6, 2005, the U.S. District Court for the Central District of California held that the SCAQMD’s fleet rules\(^\text{174}\) “as applied to state and local government actors, fall within the market participant doctrine and are therefore outside the scope of §209 [of the Clean Air Act].”\(^\text{175}\) The District Court acknowledged that, while “Congress is free to preempt state proprietary actions if it so wishes . . . [i]t was not the ‘clear and manifest purpose of Congress’ to preempt state proprietary actions under Section 209,”\(^\text{176}\) and thus, the market participant doctrine applied to that section.\(^\text{177}\) The U.S. Supreme Court had previously

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\(^\text{174}\) EMA v. SCAQMD, U.S.D.C. No. 00-09065 (C.D. Cal. 2005) at 23.

\(^\text{175}\) EMA v. SCAQMD, U.S.D.C. No. 00-09065 (C.D. Cal. 2005) at 10.

\(^\text{176}\) EMA v. SCAQMD, U.S.D.C No. 00-09065 (C. Dist. CA), at 9, 10 (citing Exxon Mobil Corp. v. U.S. EPA, 217 F.3d 1246, 1255 (9th Cir. 2000) for the proposition that the Supreme Court is highly deferential to state law in areas traditionally regulated by the states, and that “[a]ir pollution prevention falls under the broad police powers of the states”).

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*Legal Authority 5-40 Section 5*
determined in this case that the fleet rules were preempted under §209 of the Clean Air Act.\textsuperscript{178} Rail and PMSA note that the District Court did not reach the question whether the market participant doctrine provided an exception to CAA preemption with respect to private fleet operators. Rail and PMSA believe that the Supreme Court’s opinion forecloses the application of any market participant exception under the CAA to private fleets and note that most of the proposed NNI control measures involve private fleets. SCAQMD and NRDC believe that the Supreme Court merely determined that the fleet rules were emissions standards within the scope of CAA preemption.\textsuperscript{179} It remanded the case to the District Court to determine whether the public or private rules “can be characterized as internal state purchase decisions” exempt from preemption.\textsuperscript{180}

As to the ICCTA, SCAQMD and NRDC believe that the preemptive force of the ICCTA’s rail provisions are not limitless,\textsuperscript{181} and that ICCTA preemption extends only to “regulation of railroads.”\textsuperscript{182} They believe that although the ICCTA rail preemption provision is broad, the statutory language and legislative history do not evince a clear intent by Congress to preempt state or local proprietary conduct. Further, SCAQMD and NRDC believe that a court could apply the market participant exception to the ICCTA’s rail provisions, just as it has to numerous

\textsuperscript{177} Id. at 6-11.\textsuperscript{178} See \textit{EMA v. SCAQMD}, 541 U.S. 246 (2004).\textsuperscript{179} Rail and PMSA note, however, that SCAQMD and NRDC themselves addressed the private fleet question in their brief to the District Court on remand, and conceded: “Defendants [i.e., SCAQMD and NRDC] agree that applications of the Fleet Rules involving federal and purely private fleets that have no contractual or other connection to the government are \textit{not internal state purchase decisions}.” Opposition of SCAQMD and NRDC to Plaintiffs’ Motion for Order Implementing Supreme Court’s Decision, filed October 25, 2004, at 2 (emphasis added). Rail and PMSA also note that the District Court also stated that “the Fleet rules as they pertain to state and local governments are narrow enough in scope that they do not constitute broad social regulation” (slip op. at 15) and “even if the Fleet Rules would not be proprietary if applied to the federal government or private actors, they are still proprietary when applied to state and local governments (slip op. at 20). SCAQMD and NRDC believe that Rail and PMSA’s reference to private fleets “that have no contractual or other connection with the government” is wholly irrelevant because it is precisely \textit{because of such} connections with the government (the Port) that the market participant exception applies to many NNI measures. SCAQMD and NRDC note that many proposed NNI measures are applicable to sources such as port tenants that have leases or other contractual connections to the government, whether direct or indirect. SCAQMD and NRDC believe that such connections place those measures squarely within the scope of the market participant exemption. This is in sharp contrast to the “purely private fleets that have no contractual or other connection to the government” that were considered in the Fleet Rule litigation, such as contracts between private schools and private bus contractors, where there was no contract with any governmental entity, and thus the market participant exception would not apply.\textsuperscript{180} Id. at 259.\textsuperscript{181} See \textit{City of Creede, Co--Petition for Declaratory Order}, STB Finance Docket No. 34376 (May 3, 2005), 2005 WL 1024483 at *5 (“While the section 10501(b) preemption is broad and far-reaching, there are, of course, limits.”)\textsuperscript{182} H.R. Conf. Rep. No. 104-422, at 95 (1995), reprinted in 1995 U.S.C.C.A.N. at 807 (emphasis added).
other statutes, as noted in footnote 172, above. Moreover, courts have already applied the exception to the motor vehicle provisions of the ICCTA.\textsuperscript{183}

Rail believes that, as uniformly interpreted by the courts and STB, the statutory language and legislative history of the ICCTA evince a clear intent by Congress to preempt any kind of state or local requirement that interferes with rail operations. As the courts have repeatedly observed, “[i]t is difficult to imagine a broader intent to preempt state regulatory authority over railroad operations.”\textsuperscript{184} Rail notes that the courts and the STB have specifically rejected the suggestion that the ICCTA preempts only traditional “economic regulation” of railroads.\textsuperscript{185} Moreover, the courts have expressly distinguished the limited “price, route, or service” ICCTA preemption provision applicable to motor carrier operations from the expansive “exclusive” federal jurisdiction preemption provision applicable to rail operations.\textsuperscript{186}

ii. \textbf{Is the Local Authority Acting as a “Market Participant” or as a “Regulator”?}

Assuming that the applicable preemptive federal statute allows for a market participant exception, the next step of the analysis requires a court to examine the nature of the proposed action to determine if it is truly proprietary in nature or regulatory. The U.S. Supreme Court has alternately inquired “whether the challenged program constituted direct state participation in the market,”\textsuperscript{187} thus falling under the umbrella of the exception, or whether the local actor has imposed conditions via contract “that have a substantial regulatory effect outside of [the market in which the local actor is a participant],”\textsuperscript{188} thereby losing the shield of market participant.

In \textit{Boston Harbor}, the Supreme Court applied the market participant exception in the context of federal preemption under the NLRA. The Court upheld the Massachusetts Water Resources Authority’s (“MWRA”) bid specification requiring each successful bidder to abide by the terms of a project labor agreement. The non-union plaintiffs in the case argued that the agreement, which dictated labor conditions between two private parties – the contractors and their

\textsuperscript{183} Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999); Tocher, 219 F.3d at 1048-49.


\textsuperscript{185} See, e.g., Green Mountain, 404 F.3d at 644-45; Friberg v. Kansas City., 267 F.3d 439, 443 (5th Cir. 2001); City of Auburn, 154 F.3d at 1030-31; Wisc. Central Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1014 (W.D. Wisc. 2000); CSX Transp., Inc. – Petition for Declaratory Order, STB Fin. Dkt. No. 34662, 2005 WL 584026, slip op. at 8 (served March 14, 2005).

\textsuperscript{186} See, e.g., Green Mountain R.R., Corp. v. Vermont, 404 F.3d 638, 645 (2d Cir. 2005).

\textsuperscript{187} White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 208 (1983)(applying market participant exception to mayor’s executive order requiring the workforce for city construction projects to be at least half city residents).

\textsuperscript{188} South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 97-98 (1984)(refusing to apply market participant exception to Alaska’s contractual requirement that surplus timber purchased from the state be processed within Alaska).
employees – interfered with the collective bargaining process and thus was preempted by the NLRA. The Court disagreed, holding that the MWRA was acting as a “proprietor” rather than a “regulator,” and stated:

To the extent that a private purchaser may choose a contractor based upon that contractor’s willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a labor project agreement. In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.\(^\text{189}\)

By contrast, in \textit{South-Central Timber Development, Inc. v. Wunicke}, the Supreme Court refused to apply the market participant exception to permit the state of Alaska to insert a provision in its contracts for the sale of state-owned timber that would require the purchaser to process the timber within the state of Alaska. The Court expressly rejected the proposition that the State of Alaska had unfettered discretion to choose the terms on which it would contract with private parties.\(^\text{190}\) The Court stated:

\begin{quote}
The market-participant doctrine permits a State to influence ‘a discrete, identifiable class of economic activity in which [it] is a major participant.’ Contrary to the State’s contention, the doctrine is not \textit{carte blanche} to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity...Unless the ‘market’ is relatively narrowly defined, the doctrine [market-participant] has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce...\(^\text{191}\)
\end{quote}

While the LWG reached agreement on the general outlines of the market participant exception, its members hold different views as to the breadth of the exception and its applicability to specific NNI control measures. In the following sections, certain members will discuss their respective positions regarding application of the market participant exception to the NNI control measures.

\begin{flushright}
\begin{tabular}{l}
\textbf{189.} 507 U.S. at 231-232. \\
\textbf{190.} 467 U.S. at 95-96. \\
\textbf{191.} \textit{Id.} at 97-98 (citation omitted).
\end{tabular}
\end{flushright}
SCAQMD and NRDC Position:

SCAQMD and NRDC believe that the Port’s implementation of the NNI control measures through its leases, contracts, permits, or a port-wide rule could be characterized as proprietary conduct that is exempt from federal preemption under the market participant exception. As outlined above, Supreme Court jurisprudence indicates that the essential inquiry in determining if the exception applies is whether the government action is “proprietary” in nature as opposed to “regulatory.”

In advancing this inquiry, the Supreme Court has expressly acknowledged that “[w]hen a State owns and manages property . . . it must interact with private participants in the market place,” and in so doing, it is not subject to preemption simply because it acts within an otherwise preempted area. In fact, courts have found government actions to be proprietary under the market participant exception in situations where it dictates contract terms related to the management of its property. For example, as discussed above, in *Boston Harbor*, the Supreme Court permitted a state agency, under the market participant exception, to require a labor agreement as a condition for bids on a public construction project. Additionally, in *Sprint Spectrum L.P. v. Mills*, the Second Circuit applied the market participant exception to permit a school district to impose certain lease conditions on a telecommunications company that leased space on the roof of a high school to construct a cell tower. The lease condition limited the amount of radio frequency emissions that could be emitted from the tower to levels 13,000 times below the federal maximum based on health and safety concerns. Holding that the lease condition was not preempted under the Telecommunications Act, the court found that the school district acted as any private landowner might act, and imposed lease conditions that any private property owner would be free to demand. The Ninth Circuit has also acknowledged that where the government has “merely proposed the terms of contracts, and entered into those contracts”, it acts as a proprietor, not a regulator, and that government rules that guide the

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192. See *e.g.*, *Boston Harbor*, 507 US at 227-33.
194. See id. at 233.
196. See id. at 408, 410-11.
197. See id. at 412.
198. Id. at 421.
199. See *Associated General Contractors of America*, 159 F.3d at 1184.
formation of contracts to which the government is a party is the “classic example” of the
government acting as a market participant.200

SCAQMD and NRDC believe that the Port’s setting of requirements through its leases and other
contractual arrangements is the archetypal example of the exercise of the Port’s proprietary
powers, similar to the Massachusetts government setting labor contract requirements in Boston
Harbor and the school district setting radio frequency limits in its leases in Sprint Spectrum.201

Further, the purpose of the NNI measures -- to protect public health and safety, and the
environment -- is an acceptable proprietary motive. In Hughes v. Alexandria Scrap, the U.S.
Supreme Court found that the protection of the environment was a “commendable” as well as
“legitimate” proprietary motive, and upheld Maryland’s statutory scheme for ridding the state of
old inoperable automobiles under the market participant exception.202 The Central District in
EMA v. SCAQMD similarly noted that private actors make take the environment into
consideration when making proprietary decisions, stating: “Private actors may consider more
than cost or availability in making procurement decisions.”203 Further, as noted above, in Sprint
Spectrum, the court applied the market participant exception to uphold a lease condition aimed at
protecting the health and safety of school children.204 Thus, below, Rail and PMSA give far too
much weight to the Fifth Circuit’s decision in Cardinal Towing & Auto Repair v. City of Bedford
when implying that “efficient performance” is the only acceptable proprietary motive. Moreover,
even if the Fifth Circuit’s opinion were controlling, the environmental purpose of the
NNI Measures is tied to the Port’s economic interests given its obligation to mitigate under
CEQA and its duty not to harm the surrounding public.205

200. See Tocher, 219 F.3d at 1049.

201. See Boston Harbor, 507 U.S. 218; Sprint Spectrum L.P., 283 F.3d 404. A number of circuit court cases also
support the Port’s imposition of the NNI measures through its leases or contracts. See e.g., Babler Bros., Inc. v.
Roberts, 995 F.2d 911 (9th Cir. 1993) (upholding Oregon statute that required contractors to pay their employees
overtime wages on public projects); Building and Construction Trades Department, AFL-CIO v. Allbaugh, 295
F.3d 28, 39 (D.C. 2002) (upholding federal Executive Order proscribing the prohibiting or requiring of project
labor agreements in federally-funded construction projects); Associated General Contractors of America, 159
F.3d 1187 (upholding state agency’s bid specification for certain public projects, which required bidders to agree
to the terms of project labor agreements).


203. EMA v. SCAQMD, U.S.D.C No. 00-09065 (C. Dist. CA), at 14; see also id. at 16 (environmental motive, alone,
“is not sufficient to remove the Fleet Rules from the purview of the market participant exception”).

204. Sprint Spectrum L.P., 283 F.3d at 410.

205. Rail and PMSA argue below that the market participant exception should not apply here because the port has
powers that a private party does not, such as the ability to impose the NNI measures. However, the Port’s power,
as a landlord, to require conditions in its leases or contracts is no different than the powers any other lessor or
contracting party might exercise. Further, Rail and PMSA’s position misconstrues the market participant
exception, the essence of which is to allow the government to act through its contracts precisely in situations
where it has powers that private persons do not. Thus, to argue that the exception should not apply to the port
Additionally, implementing the NNI control measures under, for example, a blanket port-wide rule applicable to all tenants, would not transform the measures into “regulations.” In Building and Construction Trades Department, AFL-CIO v. Allbaugh, 295 F.3d 28, 39 (D.C. 2002), the court specifically rejected the notion that government action is necessarily regulatory when it acts through blanket rules, rather than ad hoc contracting decisions. In that case, the court upheld a federal Executive Order under the market participant exception, even though it took the form of a “blanket, across-the-board” rule prohibiting all federal agencies and all entities receiving federal assistance for a construction project from prohibiting or requiring bidders or contractors to enter into project labor agreements. Moreover, the Ninth Circuit in Big Country Foods, Inc. v. Board of Education and Babler Brothers v. Roberts has also upheld state statutes having wide application under the market participant exception. Accordingly, given the “form” of proprietary actions upheld by the courts, Rail and PMSA’s characterization (below) of the NNI measures as a “sweeping set of control measures” (even if accurate), does not preclude application of the market participant exception.

Further, South-Central Timber Development, Inc. and Washington State Blvd. & Constr. Trades Council v. Spellman, which Rail and PMSA cite below, are distinguishable. In those cases, the court refused to uphold certain state actions under the market participant exception because the government attempted to influence a market in which the state was not a participant. Here, the Port arguably participates in a market that is much larger in scope than the state’s market in those cases. For example, the Port’s “market” would include the setting of conditions on a terminal lease that require the use of cleaner ships, yard equipment, and other environmental requirements for the facility as a lease term. Additionally, the NNI measures could be tailored because it has powers that typical persons do not would eviscerate the doctrine, and be contrary to multiple court rulings, including Engine Manufacturers (SCAQMD unique authority to adopt Fleet Rules), Alexandria Scrap Corp. (government unique authority to develop car scrap program); and Big Country Foods (school district unique authority to control provision of school lunches).

206. See Allbaugh, 295 F.3d at 35-36 (stating: “there is simply ‘no logical justification’” for holding that an executive order establishing a consistent contracting practice should be treated differently than individual contracting decisions, so long as both concerned the government acting as a market participant).

207. See Big Country Foods, Inc., 952 F.2d at 1179 (upholding Alaska statute requiring all schools to grant a bidding preference to Alaska milk harvesters who sold milk to the schools); Babler Bros., Inc., 995 F.2d 911 (upholding Oregon labor statute that applied to the state, as well as to counties, school districts, and municipalities); see also Tocher, 219 F.3d 1040 (upholding city ordinance authorizing chief of police to establish rotational tow list); EMA v. SCAQMD, U.S.D.C No. 00-09065 (C. Dist. CA) (upholding local air district “fleet rules,” which were in the form of regulations).

208. See South-Central Timber Development, Inc., 467 U.S. at 98 (finding that while the state was a participant in the timber-selling market, the statute at issue regulated the timber-processing market); Spellman, 684 F.2d at 631 (finding that the state statute denied entry of waste at the state’s borders, rather than at the site the state operated as a market participant).
to ensure that they do not have a substantial regulatory effect outside of the market in which the Port participates.  

Below, Rail and PMSA also rely on *Western Oil and Gas Association v. Cory*, 726 F.3d 1340 (9th Cir. 1984), aff’d by equally divided Court, 471 U.S. 81 (1985) and *Shell Oil Company v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987) for the proposition that the market participant exception may have no application in the context of restrictions placed on the use of state or municipally owned lands that are channels of interstate commerce. These cases, however, are expressly limited to narrow circumstances not applicable to the NNI measures.

The court in *Cory* precluded application of the market participant exception to state regulations governing the computation of rent for leased tide and submerged lands used for the placement and operation of oil pipelines.  

The court reached its holding based on the location of plaintiffs’ facilities, which gave the state a “monopoly” over the sites used by plaintiffs, and provided plaintiffs with “no choice” with whom to do business: “The permanency of plaintiffs’ facilities does not permit them to ‘shop around.’ There is no other competitor to which they can go for the rental of the required strip of California coastline.”  

Here, it is not the case that the companies impacted by the NNI measures have “no choice” but to do business with the Port of Los Angeles, or that the Port has a monopoly over the channels of interstate commerce in which port operations could occur. Rather, shipping interests, for example, are free to choose from many ports in California and across the country, thus putting the Port of Los Angeles in the same position as other private landlords. Further, the *Cory* decision has since been limited to

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209. Additionally, *Spellman*, as well as *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989), which is also cited by Rail and PMSA below, are also distinguishable to the extent that the NNI measures do not establish civil or criminal penalties. See *Spellman*, 684 F.2d at 631 (statute established civil and criminal penalties); *Hydrostorage*, 891 F.2d at 730 (statute amounted to regulation because it required the state agency to monitor and enforce civil penalties for violations of the statute). Also, the *Spellman* court’s statement that the statute was based on public safety rather than economic considerations cannot be considered dispositive to the court’s holding that the market participant exception did not apply given the Supreme Court’s decision in *Alexandria Scrap.*, discussed above. See *Alexandria Scrap.*, 426 U.S. at 809; see also *Sprint Spectrum L.P.*, 283 F.3d at 410; *EMA v. SCAQMD*), at 14, 16 (environmental motive, alone, “is not sufficient to remove the Fleet Rules from the purview of the market participant exception”).

210. See 726 F.2d at 1342-43.

211. Id., at 1343.

212. Rail and PMSA also cite to the Northern District of California’s decision in *Air Transportation Assoc. of American v. City of San Francisco*, 992 F.Supp 1149 (N.D. Cal. 1998) (“ATA”) for the proposition that in ATA, the City’s monopoly position allowed it to exert significantly greater economic power than a typical consumer and thus the market participant exception did not apply. However, the district court examined whether the government action at issue had a greater impact than an ordinary consumer only after concluding that the city did not act with a proprietary motive, but rather to reduce discrimination against persons with domestic partners. See *id.* at 1179-80. Here, as stated above, the Port does not have a monopoly and its proprietary motives are supported by case law. Further, it is important to note that significant applications of the ordinance in ATA (which prohibited the city from contracting with companies whose provision of employee benefits discriminated against employees with domestic partners) were upheld—including where work was performed by a contractor for the City anywhere within the United States. See *id.* at 1157, 1165, 1179 (“There is no question that the City is acting as a market participant when it implements the Ordinance: when the City enters into contracts that are subject to the Ordinance, it is directly participating in the marketplace by purchasing services or leasing property”).
situations dealing with the rates charged for the leasing of a subsurface pipeline easement on undeveloped land.\textsuperscript{213}

Rail and PMSA’s reliance on \textit{Shell Oil} is similarly unpersuasive. In that case, the court held that the City of Santa Monica’s setting of franchise fees within a franchise agreement for a subsurface easement did not discriminate against interstate commerce, and that pipeline safety standards imposed within that agreement were not preempted by federal law.\textsuperscript{214} As part of its decision, the court discussed the application of the market participant exception under the dormant commerce clause, and made it abundantly clear that its discussion was limited to the facts of that case—namely that Santa Monica’s conduct, “the setting of franchise fees for easements under public streets,” placed it outside the scope of the exception.\textsuperscript{215} \textit{Shell Oil} does not more broadly preclude the application of the market participant exception whenever a government entity dictates a contract term that relates to public land that is a channel of interstate commerce. Indeed, aside from the court’s limiting statements on this issue, its discussion of the municipal-proprietor exception solidifies this conclusion. In determining whether Santa Monica acted in a proprietary or regulatory capacity when imposing safety standards in its franchise agreement, the court made no mention whatsoever of its earlier discussion regarding the holding of subsurface street easements in its sovereign capacity, and instead framed the dispositive inquiry as “whether Santa Monica was attempting to regulate third-party relations in the market...”\textsuperscript{216} If holding a channel of interstate commerce in a sovereign capacity were determinative of regulatory conduct \textit{outside of the realm of setting franchise fees for the use of public land}, the court would have certainly mentioned it.

\textit{Cory} and \textit{Shell Oil} illustrate that imposing fees for the use of subsurface lands could allow a state or its subdivision to allocate its rights to use publicly held transportation corridors in a manner that discriminates against interstate commerce.\textsuperscript{217} Indeed, the setting of such fees raises

\begin{itemize}
\item \textsuperscript{213} In \textit{Alamo Rent-A-Car, Inc. v. City of Palm Springs}, 955 F.2d 30, 31 (9th Cir. 1992), the court made clear that \textit{Cory} should not be applied to improved public lands, such as airports: “In \textit{Cory}, we struck down regulations for computing rent on the basis of the volume of oil passing through private pipelines on state land. There, however, ‘the lands leased to plaintiffs [were] unimproved and . . . no services or facilities [were] provided by the State in conjunction with the lease.’” \textit{Id.} at 31. Because court found that the airport’s charges were reasonable under the Commerce Clause, it did not need to decide whether the market participant exception applied.
\item \textsuperscript{214} See 830 F.2d 1052.
\item \textsuperscript{215} See \textit{id.} at 1058 (“Our holding that Santa Monica is not a market participant means only that in deciding whether, or on what terms, to grant a franchise for the use of public streets the city may not burden interstate commerce in a manner that violates the dormant commerce clause”); \textit{see also id.} at 1058 fn. 5 (after noting that its holding was limited, the court reiterated: “We believe, however, that Santa Monica has not engaged in ‘marketplace conduct’ within the meaning of the market participant exception and that the city’s action with respect to transportation corridors is ‘the kind of action with which the Commerce Clause is concerned. . . We observe that this case involves only substreet easements controlled by the City in its sovereign capacity”).
\item \textsuperscript{216} \textit{Id.} at 1063 (ultimately concluding that the court need not determine whether the municipal-proprietor exception applied because federal law did not preempt the franchise agreement’s safety standards).
\item \textsuperscript{217} See e.g. \textit{id.} at 1157.
\end{itemize}
heightened concerns that the rates charged may be “disguised revenue raising measures” that do not compensate the state for the actual use of its land.\textsuperscript{218} By contrast, the imposition of NNI measures are directly related to the use (and misuse) of the Port’s land and exist to compensate for the polluting activities conducted on that land.

Accordingly, Cory and Shell are limited to a narrow set of facts, and thus, do not limit the application of the market participant exception here. In fact, to conclude otherwise would be contrary to the Supreme Court’s decision several years later (1993) in \textit{Boston Harbor}, where the state of Massachusetts acted as a market participant in requiring contractors that cleaned-up Boston Harbor—which the state presumably held in its sovereign capacity—to enter labor agreements.\textsuperscript{219}

\textbf{Rail and PMSA Position:}

The Port of Los Angeles is a unique resource – “one of the world’s largest trade gateways”\textsuperscript{220} – and is located on state land held in trust and operated by the Port. While there is no doubt that the Port may enter into reasonable leases and contractual arrangements for use of the property it manages, there is equally no doubt, as the Supreme Court made clear in \textit{South-Central Timber Development}, that the market participant doctrine does not give the Port “\textit{carte blanche} to impose any conditions that [the Port] has the economic power to dictate” and does not “validate any requirement merely because [the Port] imposes it upon someone with whom it is in contractual privity.”\textsuperscript{221} The Ninth Circuit has emphasized that contractual provisions related to the use of publicly-owned lands are subject to particularly close scrutiny. In \textit{Western Oil and Gas Association v. Cory},\textsuperscript{222} the court considered regulations promulgated by the California State Lands Commission regarding the computation of rent for the leasing of state-owned tidelands and submerged lands. California argued that its leasehold activities fell outside the limitation of the Dormant Commerce Clause because such activities constituted proprietary action and were thus shielded by the market participant exception.\textsuperscript{223} The Ninth Circuit disagreed and refused to apply the market participant exception, stating:

\begin{quote}
The State owns and controls tidelands and submerged lands in its sovereign capacity. Although some of the lands are in the possession of local State entities or private interests, this does not mean that California becomes one of many competitors. The permanency of plaintiffs’ facilities does not permit them to
\end{quote}

\begin{itemize}
\item \textsuperscript{218} See \textit{e.g.}, \textit{Cory}, 726 F.2d at 1345, 1344.
\item \textsuperscript{219} See 507 U.S. 218.
\item \textsuperscript{220} See \texttt{www.portoflosangeles.org}, “The Port of Los Angeles: An Economic Powerhouse.”
\item \textsuperscript{221} See \textit{South-Central Timber Development}, 467 U.S. at 97.
\item \textsuperscript{222} 726 F.2d 1340 (9th Cir. 1984).
\item \textsuperscript{223} \textit{Id.} at 1342-1343.
\end{itemize}
“shop around.” There is no other competitor to which they can go for the rental of the required strip of California coastline...This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce. We therefore reject the State’s contention that its leasing activities are not subject to Commerce Clause scrutiny.\textsuperscript{224}

Although the Ninth Circuit has adopted a special standard for reviewing cases involving public lands, it has also rejected application of the market participant exception in other contexts as well.\textsuperscript{225} Rail believes that read collectively the market participant cases stand for the proposition that a local government actor cannot be acting as a market participant unless the local actor seeks to advance its own discrete economic interests. In \textit{Tocher} and \textit{Cardinal Towing}, the Ninth and Fifth Circuits affirmed this reading of the exception. The courts made clear that the proposed local action must have the narrow goal of insuring “efficient performance” in local contractual relations and not a broader social policy aim in order to be sheltered by the market participant exception.\textsuperscript{226} The “market participant” exception analysis seeks “to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.”

Therefore, POLA may not adopt a sweeping set of control measures through its contracts and leases in order to implement broad social policy regarding air quality under the guise of the market participant exception. Rail believes, more specifically, that a sweeping set of control measures requiring alterations to their locomotive fleets and fuel supplies, as a condition to picking up and dropping off interstate commerce, implemented through the Port’s contracts and leases has more than an incidental impact, well beyond the contract or lease, and also indicates an intent to implement a general social policy, not the advancement of a particular economic interest of the Port. PMSA has the same concerns with respect to many of the proposed OGV measures.

\textsuperscript{224} \textit{Id.} at 1343 (citations omitted). Similarly, in \textit{Shell Oil Company v. City of Santa Monica}, 830 F.2d 1052 (9th Cir. 1987), the Ninth Circuit rejected the City of Santa Monica’s contention that its franchise fee requirements for the use of subsurface easements for an oil pipeline was sheltered by the market participant exception. The court held that “…like \textit{Cory}, this case involves lands held in a sovereign capacity that are recognized transportation corridors for commerce.” \textit{Id.} at 1057.


\textsuperscript{226} \textit{See Tocher}, 219 F.3d at 1049; \textit{Cardinal Towing}, 180 F.3d at 694). \textit{See also Cardinal Towing}, 180 F.3d at 693. The Ninth Circuit in \textit{Tocher} extensively discussed and relied upon the Fifth Circuit’s analysis in \textit{Cardinal Towing}. 219 F.3d at 1049-50.
SCAQMD and NRDC claim that this position misconstrues the market participant doctrine, the essence of which NRDC says is to allow the government to act through its contracts precisely in situations where it has powers that private persons do not. NRDC states that to argue the doctrine should not apply to the port because it has powers that typical persons do not would eviscerate the doctrine, and be contrary to multiple court rulings -- namely *Engine Manufacturers*, *Alexandria Scrap Corp.*, and *Big Country Foods* -- which NRDC claims turn on the government’s “unique authority” to develop the programs at issue.

As a threshold matter, PMSA and Rail believe the SCAQMD’s and NRDC’s proposed interpretation of the doctrine runs directly counter to the United State’s Supreme Court’s admonition in *South-Central Timber Development* that “[u]nless the ‘market’ is relatively narrowly defined, the doctrine [market participant] has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce ....”

Furthermore, PMSA and Rail do not believe the cases cited by SCAQMD and NRDC support their proposition. *Alexandria Scrap Corp.* and *Big Country Foods* are cases turning on the question of whether a state may favor its own residents when it *expend its own monies* to promote the destruction of automobile hulks or purchase milk for their schools.

Even assuming *Engine Manufacturers*, which is likely to be appealed, was correctly decided, it stands at most for the proposition that a subdivision of the state may choose to spend its procurement dollars on the good or the services that best meet its needs.

None of these cases suggest that a state or locality may use its contractual control over state-owned port facilities that are vital to interstate and foreign commerce to impose regulatory conditions that would otherwise be preempted by federal law. In fact, the Ninth Circuit, in yet again rejecting application of the market participant doctrine, stated in *Washington State Blvd. & Constr. Trades Council v. Spellman*:

Further, 383 fails to qualify under either the market participant or quarantine theory exceptions to the Commerce Clause. The State’s contention that it is a “market participant,” thereby placing the initiative beyond the reach of the

227. 467 U.S. at 97-98.

228. For that reason, NRDC’s reliance on dicta in *Alexandria Scrap* regarding “commendable” and “legitimate” purposes related to the environment is misplaced. The Court’s reasoning in *Alexandria Scrap* is based on a state actor’s authority to make certain purchasing decisions using state funds without running afoul of the Dormant Commerce Clause. The Court does not state or imply that the market participant exception is in any way broader in scope, or that federal preemption doctrines apply with any less force, when local environmental matters are at issue.

229. The Ninth Circuit has repeatedly rejected the market participant doctrine where the effect of the contractual conditions was regulatory rather than proprietary in nature. See *Hydrostorage, Inc. v. Northern Ca. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989), cert. denied, 112 L. Ed. 2d 46, 111 S. Ct. 79 (1990); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), cert. denied, 487 U.S. 1235, 101 L. Ed. 2d 934, 108 S. Ct. 2901 (1988); *Western Oil & Gas Ass’n v. Cory*, 726 F. 1340 (9th Cir. 1984), aff’d, 471 U.S. 81, 85 L. Ed. 2d 61, 105 S. Ct. 1859 (1985); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913, 103 S. Ct. 1891, 77 L. Ed. 2d 282 (1983); [684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913, (1983)
Commerce Clause, is unconvincing. The State argues that 383 is a proprietary measure enacted to limit the state’s participation in the waste disposal market. Whether or not the State is a proprietor of the Richland site, the initiative is cast in state regulatory rather than in proprietary terms. The measure is based on [omitted] public safety rather than on economic considerations. The measure denies entry of waste at the state’s borders rather than at the site the State is operating as a market participant.230

Rail and PMSA submit that the justification for the market participant exception is that fairness requires that local authorities, when engaged in proprietary behavior, must stand on equal footing with other private businesses.231 The proposed NNI control measures are not typical of the behavior of similar private businesses who, in similar circumstances, would have no legal capacity to curtail emissions associated with the movement of consumer goods into and out of the United States and through multiple political subdivisions of the State of California and the individual states comprising the United States. Therefore, evenhandedness does not require POLA to enact the NNI control measures in order to compete with similarly situation parties in a similar market. The justification for the market participant exception is simply not integral to the development or promulgation of the NNI control measures.

In addition, under the Ninth Circuit’s reasoning in Cory and Shell Oil Company, the market participant exception is extremely limited, if at all existent, in the context of restrictions placed on the use of state or municipally owned lands which are channels of interstate commerce.232 Because of the unique concern that POLA may interfere with the free flow of interstate commerce by imposing contractual conditions affecting the leasing and use of port administered state lands, the market participant exception should not apply.

Rail and PMSA would emphasize as well that the U.S. Supreme Court has held in South-Central Timber Development that a State may not impose conditions that have a substantial regulatory effect outside of the particular market in which it is a participant. Imposition of the NNI control measures will extend well beyond the footprint of any Port facility, well beyond the limited proprietary market in which the Port participates, and well into the stream of commerce. Thus, the Port is foreclosed from invoking the shield of market participant.

230. 684 F.2d 627 (9th Cir. 1982) cert denied, 461 U.S. 913.

231. See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) n.3 (stating that “Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.”).

232. It has been suggested that there may be some inconsistency between Cory and Shell Oil Company, on the one hand, and Alamo Rent-A-Car, Inc. v. City of Palm Springs, 942 F.2d 629 (9th Cir. 1991), on the other hand. There is no inconsistency. The market participant exception was not invoked or implicated in Alamo Rent-A-Car. The issue was simply whether the airport fee at issue passed muster under the dormant Commerce Clause. The court found that it did.
Further, PMSA and Rail also note that in *Air Transport Association of America v. City of San Francisco*, the district court found that the market participant exception to the dormant Commerce Clause did not apply insofar as the municipal requirement at issue (that contractors provide equal employee benefits to spouses and domestic partners) could have a regulatory affect on airline companies’ out-of-State activities. The District Court also found no market participant exception to ERISA’s express preemption clause in light of the City’s “monopoly position” at the airport which allowed it to exert significantly-greater economic power in airport-related transaction than a typical consumer. PMSA and Rail believe many of the factors relied upon by the district court in invalidating the San Francisco ordinance as applied to airport operators would apply equally to the NNI control measures and their impacts on Port operators or lessees.

In fact, the district court’s analysis in *Air Transport Association* underscores what is wrong with NRDC’s claim that any Port actions to set requirements like the proposed NNI control measures through leases and contractual arrangements are “archetypal” examples of the exercise of the Port’s proprietary powers, similar to a state agency setting labor contract requirements in *Boston Harbor* or the school district setting radio frequency limits in a lease in *Sprint Spectrum*. As the district court pointed out in *Air Transport Association*:  

> In Boston Harbor, the Court held that States and local governments, when they are directly participating in the marketplace, are not free to take any action that a private party could take in that role. . . . When States pursue policy objectives, even in the marketplace, they play a characteristically governmental role and are more powerful than private parties, the Court observed. *Id.* [507 U.S. at 229] Therefore, where federal law bars State regulation in a certain field, States may not pursue their policy goals in that field either through generally-applicable legislation or through proprietary actions.

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234. *Id.* at 1163-64.
235. *Id.* at 1179-1180.
236. *Id.* at 1178.
The district court emphasized that the only reason that the Supreme Court upheld the contractual conditions at issue there was that “[t]he Court concluded that the agency had ‘no interest in setting policy’ when it imposed those conditions.”

Since the City in *Air Transport Association* “had policy goals in mind” and wielded more economic power at the Airport than the ordinary consumer, the district court held under *Boston Harbor* that the market participant exception did not shield the City’s contractual requirements from federal preemption.238

PMSA and Rail believe that there is no serious question that the entire NNI initiative is policy-driven, and that the Port would necessarily have policy goals in mind in setting any lease or contractual requirements that included the proposed NNI measures. Further, PMSA and Rail believe that there is no question that the Port wields tremendous economic power as a result of its monopoly control of the Port. Thus, if direct regulation of activities in the Port would be preempted by federal law, the Port cannot invoke the market participant exception to impose by contract requirements that could not be imposed by state or local law or regulation. The broad reading of the exception advocated by the NRDC would allow the exception to swallow the general rule of preemption and result in a patchwork of impermissible and unworkable local regulation.

The district court’s analysis in *Air Transport Association* also points up the fallacy in NRDC’s heavy reliance on the Second Circuit’s decision in *Sprint Spectrum*. In that case, the Second Circuit found that the market participant exception applied to the “plainly proprietary” and “nonregulatory” safety condition that School District imposed regarding the placement of a single cellular communications tower on a single high school building.239 Citing *Cardinal Towing* and *Boston Harbor*, the Second Circuit held that this was a case where the “government interaction [ ] with the market [is] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a
regulatory impulse can safely be ruled out.” The Second Circuit emphasized that this was a case in which the cell phone company could escape the lease condition by locating its tower on another property owner’s building. There was no evidence that the School District had either the ability or the motivation to attempt to impose any kind of cell tower policy or to affect what the cell phone company could do generally in the market. As the district court emphasized in *Air Transport Association*, in a situation in which a local authority “wields no more power than an ordinary consumer,” it has more contractual leeway. But where, as with the proposed NNI control measures, the Port has enormous economic leverage, and the proposal is that it use its leverage to require major operational changes that would otherwise be preempted by federal law, it cannot invoke the market participant exception to do by contract what it could not do by direct regulation.

No court has adjudicated the extent to which the proprietary powers of a port may allow imposition of air quality measure that might otherwise be preempted. The case law on the market participant exception suggests, however, that if the proposed NNI control measures would otherwise be preempted by federal law, the Port could not avoid that preemption by using lease conditions and other contractual measures to implement the NNI policy. Accordingly, it would be imprudent for the Port to rely on the market participant exception as the legal basis for Port adoption of the NNI plan.

**b. Municipal-Proprietor**

The second possible exception to preemption, the municipal-proprietor exception, has been recognized in the airport noise regulation arena. In *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 (1973), the U.S. Supreme Court struck down, as preempted by federal law, a noise curfew for the then privately operated Burbank Airport that had been adopted by the Burbank City Council. The Court held that federal law gave sole jurisdiction over airport noise to the FAA and the federal EPA. However, in footnote 14, the Court also made it clear that it was not addressing the situation where an airport was owned by the municipality that was seeking to impose the noise restriction, because in that situation the municipality possessed proprietary powers. Footnote 14 states, in full:

The letter from the Secretary of Transportation also expressed the view that “the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be

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240. *Id.* at 420 (citing *Cardinal Towing*, 180 F.3d at 693).
241. *Id.* at 421.
242. *Id.* at 420-421.
created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis added.) This portion as well was quoted with approval in the Senate Report. Ibid.

Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor. 245

Pursuant to footnote 14 of the Burbank v. Lockheed opinion and the extensive line of cases elaborating on the municipal-proprietor exception, “it is generally accepted that airport proprietors may exercise their proprietary powers to control noise by promulgating noise abatement and curfew regulations, provided that such regulations are fair, reasonable, non-discriminatory, and do not unduly affect the free flow of interstate commerce.” 246 For example, the Ninth Circuit came to the conclusion that airport proprietors should have the power to "enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the City’s human environment." 247 However, to date, the municipal-proprietor exception as described above has only been applied in the context of municipal airport noise regulation.

245. 411 U.S. at 635, n. 14 (italics in original).


247. Alaska Airlines v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991) (italics added), quoting Santa Monica Airport Association v. City of Santa Monica, 659 F.2d 100, 104, n.5 (9th Cir. 1981). See also, Clay Lacy Aviation v. City of Los Angeles, 2001 U.S. Dist. LEXIS 15673 (C.D. Cal. 2001) Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (D. Fla., 2001) (ban on Stage 2 jets upheld; good overview of noise preemption cases); Nat'l Helicopter Corp. v. City of New York, 137 F.3d 81 (2d Cir. 1998); City and County of San Francisco v. FAA, 942 F.2d 1391 (9th Cir. 1991); and Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J., 727 F.2d 246, 248 (2d Cir. 1984).
The Port could argue that the municipal-proprietor exception might apply to municipally owned seaports, upon a showing of the public benefits resulting from a reduction of port-related air emissions or reduction in any potential port liability or liability of emissions generators within the port. If overall South Coast Air Basin emissions are not reduced to comply with CAA standards the Port and other state and local governmental agencies face severe sanctions, including loss of federal funding for transportation infrastructure serving the Port under CAA §179. The U.S. Supreme Court in *Burbank* recognized the existence of a municipality's proprietary powers, which may not be preempted, even though the statute before the court did not mention such powers. Such powers have since been expressly recognized by statute in the field of airport regulation.\(^{248}\) However, the Port could argue that a municipality's proprietary powers are not dependent upon express statutory language, and may be recognized by the courts from an analysis of the relevant law and facts.

NRDC and SCAQMD believe that seaports and airports are analogous for purposes of the municipal-proprietor exception to preemption. They further believe that if applications of the NNI control measures were found to be preempted, a court would find that the same concerns from the airport noise line of cases allow for the municipal-proprietor exception in the context of seaports reducing emissions. Accordingly, they believe that the court would find that the measures serve to both limit potential tort liability of the seaport and “enhance the quality of the City’s human environment.”\(^ {249}\)

PMSA and Rail also do not believe that the “municipal proprietor” exception in connection with airport noise cases provides any more or different shield against preemption than the “market participant” exception. See *Tocher*, 219 F.3d at 1049 (equating “municipal proprietor” and “market participant” exceptions). As discussed below, the entire line of airport noise cases arose out of a single footnote in a Supreme Court decision, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n. 14 (1973), in which it declined to address the issue whether, as the proprietor of an airport, a state or local authority could impose noise curfews. The courts later found in the cases listed below that under the Federal Aviation Act Congress did not intend to preempt a municipal airport proprietor’s right to enact noise ordinances. See, e.g., *Santa Monica Airport Assoc. v. City of Santa Monica*, 659 F.2d 100, 103-104 (1981). All of the cases addressing the airport noise question do so in the unique context of the FAA and the “peculiarities and special features of the regulatory scheme in question.” *Burbank*, 411 U.S. at 638.

\(^{248}\) See 49 U.S.C. §41713(b)(3)

\(^{249}\) *Alaska Airlines v. City of Long Beach*, 951 F.2d at 982
Finally, Rail and PMSA believe that the municipal-proprietor exception has narrow applicability and does not apply to municipally operated seaports, particularly those served by interstate railroads. They further believe that no federal regulatory scheme, similar to the statutory scheme interpreted in airport noise line of cases, exists that would allow municipally owned seaports to enforce emission controls. Moreover, much of the property upon which the Port operates is State property and does not belong to the City. Accordingly, they believe that the municipal–proprietor variation of the market participant doctrine is unlikely to shield NNI control measures that interfere with interstate rail and marine vessel operations.

c. Authorization/Waiver for the Port to Avoid Preemption

Where the Port’s regulatory powers are unclear, in addition to asserting proprietary defenses to preemption, the Port alternatively or additionally could submit the NNI measures to ARB for adoption and submittal to EPA for authorization pursuant to Clean Air Act §209. The CAA allows California to obtain a waiver to set its own vehicular emissions standards and other states may “opt in” to the California standards. As stated above, the ARB has successfully requested and obtained many waivers of federal preemption for on-road California emission standards. The Administrator of EPA must grant California a waiver, unless he or she finds that the specific conditions set forth in the CAA §209(b) exist. Similar to the motor vehicle regime, California may seek authorization from EPA to adopt and enforce its own nonroad

250. City of Burbank, 411 U.S. at 638 (“Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question.”).

251. 49 U.S.C §41713. The preemption provision of subsection (b) provides: (b) Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart... (3) This subsection does not limit a State, or political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights. 49 U.S.C. § 41713.

252. 42 U.S.C. 7543(b).


254. Id. The section, as amended, provides in relevant part that California must determine that the adopted state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards and that no waiver shall be granted if the Administrator finds that: The determination of California is arbitrary and capricious, California does not need the adopted standards to meet compelling and extraordinary conditions, or The adopted standards and accompanying enforcement procedures are not consistent with section 202(a) of the CAA. Consistent with section 202(a) has been interpreted by EPA to mean that the adopted state standards and procedures are technically feasible, giving appropriate consideration to the cost of compliance within the time provided for compliance. The Administrator will also consider whether federal and state procedures impose inconsistent certification requirements (that is, whether certification can be accomplished with one test vehicle in the course of the same test. (See California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision 61 FR 53371 (October 11, 1996).
emissions standards and other requirements (other than for those sources that are expressly preempted under §209(e)(1)). Further, as with the waiver for motor vehicles, the Administrator must grant California’s request for authorization, unless the Administrator makes specific findings that the criteria for denying a waiver have been met.

In its express terms, the Clean Air Act provides for EPA to grant a waiver or authorization only to California. State law provides that ARB is designated the air pollution control agency for all purposes set forth in federal law. Cal. Health & Safety Code §39602. This raises the question of whether a local government such as the City of Los Angeles, which has been granted authority under state law to regulate nonvehicular sources (H & S Code §40000) including nonroad engines and vehicles, may be granted authorization from EPA to adopt emission standards for nonroad engines and vehicles. Recently in connection with the South Coast Air Quality Management District’s Fleet Rules, EPA has taken the position that a local rule must be adopted and submitted by the ARB before it may be granted a waiver of preemption under the provision for new motor vehicles. §209(b), 42 U.S.C. §7543(b). Although the issue is far from settled, in light of recent discussions with EPA, ARB understands that under CAA §209(e)(2) the City or Port may propose, or could adopt, standards for nonroad engines but to be effective such standards would need to be submitted to ARB for adoption, making of the necessary findings, and subsequent submittal to and authorization by EPA. A local jurisdiction could also petition ARB to adopt emission standards and other requirements related to the control of emissions at the Port of Los Angeles.

III. ANALYSIS OF NNI CONTROL MEASURES.

Below, the LWG analyzes certain “Proposed” and “Additional” NNI control measures for ocean-going vessels, harbor craft, cargo handling equipment, rail, and heavy-duty diesel vehicles.

The LWG has not analyzed any “Adopted” control measures because such measures have been or will be implemented. The LWG also has not analyzed any EPA or ARB “Proposed” NNI control measure because such measures are being developed by EPA or ARB.

Further, the LWG has not analyzed control measures consisting of voluntary incentive-based programs because the LWG does not believe that legal barriers exist that would prevent the Port from spending money on voluntary incentive programs, as long as the funds are spent in a nondiscriminatory manner.

Moreover, to the extent that certain NNI control measures require the Port to act in the event that a control measure does not result in the predicted emissions reductions, such backstop measures identified by the Port would need to be analyzed pursuant to the same legal principles discussed in the legal memorandum, at the time such measures are identified.

255. 42 U.S.C. §7543(e)(2).
256. Id. The criteria for denying an authorization request are similar to those for denying a motor vehicle waiver under 42 U.S.C. §7543(b).
The legal issues mentioned in each of the analyses below are discussed in greater detail in the main body of the LWG memo, in the following sections:

- Clean Air Act - §II.D.
- Authorization/Waiver - §II.F.2.c.
- The Shipping Act - §II.E.1.
- U.S. Coast Guard Marine Safety Rules - §II.E.4.a.
- Commerce Clause - §II.E.2.
- Exceptions to Preemption - §II.F.2.
- Equal Protection - §II.E.5.
The Legal Working Group has prepared the following analysis of the NNI measures proposed for adoption by the Port.

**OGV6: Reroute Cleanest Ships**

This control measure would require shipping lines to re-route the cleanest ships (those meeting or exceeding IMO emission limits) to the Port of Los Angeles. Lease agreements or a port-wide rule would be the implementation mechanisms. The targeted participation rates are graduated, culminating in 100% participation for container and cruise ship terminals by 2012 and for all others by 2015.

**A. Clean Air Act.**

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as OGV. EPA’s nonroad engine rule expressly provides that states are not precluded under the Clean Air Act from regulating the use and operation of nonroad engines. 40 C.F.R. Part 89, Subpart A, App. A. While Part 89 states that it does not apply to ships regulated under 40 C.F.R. Part 94, an argument can be made that operational restrictions on ships are not preempted by the Clean Air Act.

SCAQMD and NRDC believe that, based upon IMO vessel penetration data showing that cleaner ships are currently available and will be available to meet the requirements of this measure, OGV6 would likely be characterized as an “in use” requirement, and not an “emissions standard,” because modifications to the ship engines would not be required to comply with this measure.

PMSA believes that there is little to no evidence that foreign flag vessel operators have the flexibility to re-route vessels in such a manner, or that the Port can enforce such requirements beyond its jurisdiction. SCAQMD and NRDC disagree.

**B. Waiver or Authorization.**

On the basis that this measure is not preempted by the Clean Air Act, waiver of preemption or authorization from EPA would not be necessary.

**C. The Shipping Act of 1984.**

Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.
PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge.

D. United States Coast Guard Jurisdiction.

Since this measure does not require any physical modifications to the ship, it does not appear to conflict with any Coast Guard standards. The LWG is not currently aware of any conflict with any Coast Guard operational requirements.

E. Commerce Clause.

Given that this measure applies equally to in-state and out-of-state and foreign OGVs, it would not appear to be facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA and Rail believe it will not.

F. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements OGV6 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption and restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

G. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
OGV7: Low Emission Main Propulsion Engines

This measure will require the application of EPA’s “Blue Sky Series” emission levels for Category 3 marine engines, which are about 80% below IMO standards for NOx. Implementation is scheduled for 2025. The measure calls for the Port to fund demonstration projects for retrofit and add-on control technology. The measure suggests a terminal-specific approach, with exceptions for non-repeat callers, etc.

A. Clean Air Act.

This section discusses whether OGV7 falls within the scope of preemption under the CAA. If any component of OGV7 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section E sets forth exemptions to federal preemption.

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as OGV. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preemted. This measure appears to fall within the scope of §209(e).

B. Waiver or Authorization.

If any component of OGV7 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

D. United States Coast Guard Jurisdiction.

In order to determine preemption under this Act, the Port would need to determine whether a requirement that ships meet optional “Blue Sky Series” emission standards conflicts with Coast Guard standards.

E. Commerce Clause.

Given that this measure applies equally to in-state and out-of state and foreign OGVs, it is not facially discriminatory. The key inquiry, therefore, would be whether this measure
would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe the Port will likely have a reasonable position that this measure will pass this test and PMSA and Rail believe it will likely not.

F. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements OGV7 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

G. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
OGV9: Main Engine Fuel Improvement Program

OGV9 proposes modifications to an existing, voluntary program intended to subsidize a shift from the use of bunker fuel to 1.5% sulfur content residual fuel oil in both the auxiliary and main propulsion engines of ocean-going vessels calling on the Port of Los Angeles, beginning 40 nm from the California coast. It also proposes that a multi-port study be commissioned on the use of 0.2% or lower sulfur content residual fuel oil in both the main and auxiliary engines of these vessels. To the extent a Sulfur Emission Control Area ("SECA") is not implemented pursuant to OGV-10, or if the initial voluntary, incentive-based program does not obtain the intended participation rates (from 15% in 2006 to 100% in 2010), this program could become mandatory.

A. Clean Air Act.

This section discusses whether OGV9 falls within the scope of preemption under the CAA. If any component of OGV9 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section F sets forth exemptions to federal preemption.

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as OGV. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preempted. However, EPA recognizes an exception to preemption for the use and operation of existing nonroad engines, including usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines.

SCAQMD and NRDC believe that OGV9, as a “sulfur limit in fuel burned in nonroad engines,” falls within the traditional category of such “in use” requirements not falling within the scope of preemption. PMSA notes that OGV9 does not address whether existing auxiliary and main engines are capable of burning 1.5% distillate without the installation of additional onboard equipment or engine modifications. SCAQMD and NRDC believe that lower sulfur fuel can be used in the engine without modification, so this measure would not be preempted.

B. Waiver or Authorization.

If any component of OGV9 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all marine vessels. To the extent that the measure is initially implemented by applying to some and not other terminals or shipping lines, however, the Port would need to show that its approach is “just and reasonable” and does
not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA believes that to the extent the Port implements OGV9 on a terminal-by-terminal basis, it would cause significant disparate impacts between terminals and operators and would be vulnerable to legal challenge.

**D. United States Coast Guard Jurisdiction.**

PMSA believes that onboard modifications may be required in order for any category of ocean-going vessel to burn 1.5% distillate as proposed in OGV9, while SCAQMD and NRDC believe that such modifications will not be necessary. PMSA also points out that it is unknown whether vessels would be required to alter their practices when entering, or operating within, the Port in order to make any fuel switches mandated by this measure. OGV9 could be subject to legal challenge to the extent vessel owners or operators attempting to comply therewith are forced into conflict with regulations or guidelines developed by the U.S. Coast Guard.

**E. Commerce Clause.**

Given that this measure applies equally to in-state and out-of-state and foreign OGVs, it does not appear to be facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” PMSA believes, to the extent 1.5% distillate is readily available in the U.S. but not in jurisdictions outside of the United States, OGV-9 could be held to have the practical effect of discriminating against, foreign commerce. SCAQMD and NRDC believe that, given the likely availability of lower sulfur fuel inside and outside the U.S., especially in light of the European Union mandate that .1% fuel be used in EU ports starting in 2010, this measure would not violate the Commerce Clause because, as applied, the measure would have similar impacts on in and out-of-state and foreign OGVs, and, in addition, the Port could support this measure based on the need for emissions controls to protect public health.

PMSA does not believe it is a foregone conclusion that the proposed measure would not put an unacceptable burden on interstate commerce by potentially excluding vessel calls at the Port. PMSA also believes that there exists insufficient information to assume the availability of 1.5% distillate to foreign flagged vessels simply based on the EU mandate. The large majority of vessels calling on California ports are not calling on European ports.

**F. Exceptions to Preemption.**

SCAQMD and NRDC believe that if the Port implements OGV9 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.
PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

G. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
OGV11: Expanded Auxiliary Engine Fuel Improvement Program

Based on the results of the multi-port study proposed under OGV9, OGV11 is intended to "focus on shifting auxiliary engines to utilization of fuels of 0.2% or lower sulfur content." If OGV8 is not adopted in its present form, or if the initial voluntary, incentive-based program does not obtain the intended rates of participation (from 25% in 2006 to 100% in 2008), OGV11 would become a mandatory program.

A. Clean Air Act.

This section discusses whether OGV11 falls within the scope of preemption under the Clean Air Act ("CAA"). If any component of OGV11 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section E sets forth exemptions to federal preemption.

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as OGV. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preemption. However, EPA recognizes an exception to preemption for the use and operation of existing nonroad engines, including usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines. SCAQMD and NRDC believe that OGV11, as a “sulfur limit in fuel burned in nonroad engines,” falls within the traditional category of such “in use” requirements not falling within the scope of preemption.

If modifications prove necessary for any category of regulated vessel to be able to comply with OGV11, PMSA believes such measures could cease to be classified as in-use regulations, and instead be deemed subject to federal preemption claims – either as de facto "emission standards" under Section 209 or on the theory that they conflict with federal requirements in an area that Congress has determined requires national uniformity.

PMSA also believes the Port lacks jurisdiction to dictate operations of vessels out to sea, and that OGV11 would be subject to legal challenge on that basis. SCAQMD and NRDC disagree.

B. Waiver or Authorization.

If any component of OGV11 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.

Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge. SCAQMD and NRDC disagree.

D. United States Coast Guard Jurisdiction.

PMSA believes that it is unclear whether onboard modifications would be required in order for some ocean-going vessels to burn 0.2% distillate in their auxiliary engines as proposed in OGV11. PMSA also believes that it is unknown whether vessels would be required to alter their practices when entering, or operating within, the Port in order to make any fuel switches mandated by this measure. SCAQMD and NRDC believe that modifications to the engine will likely not be necessary, nor will other changes need to be made that conflict with safety-related coast guard rules. OGV-11 could be subject to legal challenge to the extent vessel owners or operators attempting to comply therewith are forced into conflict with safety-related regulations or guidelines developed by the U.S. Coast Guard.

E. Commerce Clause.

To the extent this measure applies equally to in-state and out-of-state and foreign OGVs, it is not facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.”

PMSA believes that given that MARPOL Annex VI appears to only provide for a 1.5% sulfur fuel content for marine vessels operating within those jurisdictions officially designated as Sulfur Emission Control Areas, it appears possible that 0.2% distillate may not be readily available to many foreign-flagged vessels. If it were the case that .2% distillate fuel were available in the U.S. but not outside the U.S., OGV11 could be held to have the practical effect of discriminating against, foreign commerce.

However, SCAQMD and NRDC believe that .2% distillate fuel will likely be available outside of the U.S. to satisfy this measure because fuel providers are starting to make the cleaner sulfur fuel available in advance of the requirement of the European Union that ships calling on EU ports use .1% distillate fuel while at berth. SCAQMD and NRDC therefore believe that this measure would not violate the Commerce Clause because, as applied, the measure would have similar impacts on in and out-of-state and foreign commerce.
OGVs, and, in addition, the Port could support this measure based on the need for emissions controls to protect public health.

PMSA believes insufficient information presently exists to assume the availability of 0.2% distillate to foreign flagged vessels based on the EU, or otherwise. The large majority of vessels calling on California ports do not call on European ports.

F. Exceptions to Preemption and Commerce Clause

SCAQMD and NRDC believe that if the Port implements OGV11 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

G. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
OGV12: Expanded Main Engine Fuel Improvement Program

Based on the results of the multi-port study proposed under OGV9, OGV12 is intended to "focus on shifting ship main engines to utilization of fuels containing 0.2% or lower sulfur content." OGV12 would initially be a voluntary, incentive-based program. However, if the intended rates of participation are not achieved (from 15% in 2008 to 90% in 2012), OGV12 would become mandatory.

A. Clean Air Act.

This section discusses whether OGV12 falls within the scope of preemption under the CAA. If any component of OGV12 is subject to the preemption provisions of the CAA, Section B addresses California's authority to obtain a waiver from EPA to implement the measure, and Section E sets forth exemptions to federal preemption.

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as OGV. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preempted. However, EPA recognizes an exception to preemption for the use and operation of existing nonroad engines, including usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines. SCAQMD and NRDC believe that OGV11, as a “sulfur limit in fuel burned in nonroad engines,” falls within the traditional category of such “in use” requirements not falling within the scope of preemption. If significant modifications prove necessary for any category of regulated vessel to be able to comply with OGV12, PMSA believes such measures could cease to be classified as in-use regulations, and instead be deemed subject to federal preemption claims – either as de facto "emission standards" under Section 209 or on the theory that they conflict with federal requirements in an area that Congress has determined requires national uniformity.

B. Waiver or Authorization.

If any component of this measure is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause...
“unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge; NRDC and SCAQMD disagree.

D. United States Coast Guard Jurisdiction.

As set forth above, PMSA believes that some type of onboard modifications would likely be required in order for ocean-going vessels to burn 0.2% distillate in their main propulsion engines for any appreciable duration. It is unclear whether these vessels would be required to alter their practices when entering, or operating within, the Port in order to comply with OGV12. SCAQMD and NRDC believe that modifications to the engine will likely not be necessary, nor will other changes need to be made that conflict with safety related coast guard rules. To the extent vessel owners or operators attempting to fulfill their obligations thereunder are forced into conflict with safety-related regulations or guidelines developed by the U.S. Coast Guard OGV-12 could be subject to legal challenge.

E. Commerce Clause.

To the extent this measure applies equally to in-state and out-of state and foreign OGVs, would not appear to be facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.”

PMSA believes that given that MARPOL Annex VI appears to only provide for a 1.5% sulfur fuel content for marine vessels operating within those jurisdictions officially designated as Sulfur Emission Control Areas, it appears possible that 0.2% distillate may not be readily available to many foreign-flagged vessels. If it were the case that .2% distillate fuel were available in the U.S. but not outside the U.S., OGV11 could be held to have the practical effect of discriminating against, foreign commerce.

However, SCAQMD and NRDC believe that .2% distillate fuel will likely be available outside of the U.S. to satisfy this measure because fuel providers are starting to make the cleaner sulfur fuel available in advance of the requirement of the European Union that ships calling on EU ports use .1% distillate fuel while at berth, SCAQMD and NRDC therefore believe that this measure likely would not violate the Commerce Clause because, as applied, the measure would have similar impacts on in and out-of-state and foreign OGVs, and, in addition, the Port could support this measure based on the need for emissions controls to protect public health.

PMSA believes insufficient information exists to assume availability of .2% distillate to foreign flagged vessels based on the EU mandate, or otherwise. The large majority of vessels calling on California ports do not call on European ports.
F. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements OGV12 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

G. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
**GV14: Retrofit/Repower Requirements for Infrequent Callers**

This control measure would require for infrequent callers that their on-board auxiliary engines operated during unloading and loading operations to be retrofitted or repowered in order to achieve at least a 50% reduction target from their baseline emissions. The measure would require 50% of infrequent caller OGV to meet these requirements by 2010 and 100% by 2015.

**A. Clean Air Act.**

This section discusses whether OGV14 falls within the scope of preemption under the CAA. If OGV14 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section F sets forth exemptions to federal preemption.

This measure appears to fall within the scope of preemption by requiring a numerical percentage reduction in emissions from used nonroad vehicles.

**B. Waiver or Authorization.**

If any component of OGV14 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.

**C. The Shipping Act of 1984.**

Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge. NRDC and SCAQMD disagree.

**D. United States Coast Guard Jurisdiction.**

In order to determine possible preemption, the Port would need to determine whether a requirement that OGVs be retrofitted or repowered to reduce emissions conflicts with Coast Guard standards. PMSA and Rail believe that any Port effort that requires modifications to the vessel is vulnerable to legal challenge.
E. Commerce Clause.

Given that this measure applies equally to in-state and out-of-state and foreign OGVs, it is not facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA and Rail believe it will not.

F. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements this control measure in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

G. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
OGV15: Expanded VSR Program

This control measure would make the current voluntary speed reduction program (VSR) mandatory if participation goals are not being achieved, and extends the distance from which the ship speeds are reduced to 12 knots from 20 to 40 nautical miles from Point Fermin.

A. Clean Air Act.

To the extent such a mandatory speed reduction requirement is within EPA jurisdiction, it would fall within the category of “in use” requirements, and therefore under EPA’s regulation, 40 C.F.R. Pt. 89, Subpt. A, App. A, it would not be preempted. PMSA and Rail do not believe that any attempt by the Port to regulate vessel operations while in transit up to 40 miles away is within the jurisdiction of the Port/City, SCAQMD or ARB. SCAQMD and NRDC disagree.


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge. SCAQMD and NRDC disagree.

C. United States Coast Guard Jurisdiction

The Port and shipping lines are currently implementing a voluntary VSR program. To date there has been no showing that requiring implementation of the same program, but on a mandatory basis and for a longer distance, would conflict with Coast Guard standards under Title II or CFR, Title 46, especially given the lack of any apparent conflict with the current program. PMSA notes that speed reductions by certain vessels and not others in shipping lanes could result in safety concerns.

D. Commerce Clause.

To the extent this measure applies equally to in-state and out-of state and foreign OGV, it is not facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” As applied, the measure would appear to have similar impacts on in and out-of-state and foreign OGVs.
E. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
OGV16: Expanded AMP

This control measure would require that all terminals with leases with the Port of Los Angeles require AMP on a specified percentage of ship calls under a specified schedule.

A. Clean Air Act.

This section discusses whether OGV16 falls within the scope of preemption under the CAA. If any component of OGV16 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section E sets forth exemptions to federal preemption.

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as OGV. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preempted.

SCAQMD and NRDC believe the port could argue that requiring ships to plug in to electric power at shore is an “in use” requirement, and not an emissions standard, and that therefore the measure would not be preempted under EPA regulations, 40 C.F.R. Pt. 89, Subpt. A, App. A. PMSA and Rail believe that the in use requirement would not apply because modifications to ocean going vessels would be required and therefore the Port would be preempted from enforcing OGV16.

B. Waiver or Authorization.

If any component of OGV16 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge, NRDC and SCAQMD disagree.

D. United States Coast Guard Jurisdiction.

In order to determine preemption, the Port would need to determine whether a requirement that AMP be installed conflicts with Coast Guard regulations. SCAQMD
and NRDC believe that given that the Port has required installation of AMP on vessels operated by China Shipping, this does not seem to be a problem.

PMSA believes that the retrofitting of vessels to allow the use of on-shore facilities is vessel specific and some vessels are not so designed, and this requirement could limit the number and types of vessels calling at the Port. Moreover, PMSA believes that any Port action requiring modifications to vessels could be preempted.

**E. Commerce Clause.**

Given that this measure applies equally to in-state and out-of state and foreign OGVs, it would not appear to be facially discriminatory. The key inquiry, therefore, would be whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA and Rail believe it will not.

**F. Exceptions to Preemption and Commerce Clause.**

SCAQMD and NRDC believe that if the Port implements OGV16 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

**G. Equal Protection Clause.**

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
**HC7: Emulsified Fuels**

This control measure requires, pursuant to a specified phase-in schedule, that certain HC use emulsified fuel while operating within District water boundaries. HC7 does not require any physical modifications to HC, and calls for the Port of Los Angeles to conduct a demonstration project on the applicability of emulsified fuel to ensure effectiveness.

**A. Clean Air Act.**

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as HC. However, public entities are free to regulate the “use and operation of nonroad engines,” such as regulations placing “sulfur limits on fuel . . . once the engine is no longer new.” Accordingly, the Port can regulate the type of fuel used by HC under this measure.\(^\text{257}\)

**B. Waiver or Authorization.**

Because this measure is not preempted by the Clean Air Act, waiver of preemption or authorization from EPA would not be necessary.

**C. The Shipping Act of 1984.**

Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. However, HC7 will be implemented gradually, instead of across-the-board to all Port facilities at the same time.\(^\text{258}\) During the period that this measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

**D. Commerce Clause.**

It is not clear whether there is a Commerce Clause issue with this measure. If this measure imposes requirements on out-of-state HC, such requirements could implicate the Commerce Clause, as is discussed with respect to other measures.

**E. Equal Protection Clause.**

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on

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\(^{257}\) However, this control measure may still be subject to preemption under Section 209, if it requires HC engine modifications.

\(^{258}\) The measure calls for 80% of HC, other than assist tugs and line-haul tugs, to use emulsified fuels in 2006. The 80% participation rate would then apply to line-haul tugs beginning in 2008. The measure does not specify how the 80% participation requirements will be implemented amongst various Port tenants.
some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application but other interests may disagree.
HC10: Retrofit Existing Harbor Craft

This control measure requires the retrofit of existing harbor craft propulsion and auxiliary engines with new add-on control systems such as DPFs, DPFs in combination with lean NOx catalysts, DOCs, or SCR. This measure will not be implemented until 2007, at the earliest, in order to allow technology manufacturers to achieve verification from ARB for these retrofit devices.

A. Clean Air Act.

This section discusses whether HC10 falls within the scope of preemption under the CAA. If any component of HC10 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section E sets forth exemptions to federal preemption.

Section 209(e)(2) of the Clean Air Act (“CAA”) preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as HC. EPA has asserted that regulations requiring the retrofit of nonroad sources are preempted. Accordingly, based on EPA’s statement, HC10 may fall within the scope of preemption under Section 209(e)(2).

B. Waiver or Authorization.

If any component of HC10 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals.

D. Commerce Clause.

It is not clear whether there is a Commerce Clause issue with this measure. If this measure imposes requirements on out-of-state HC, such requirements could implicate the Commerce Clause, as is discussed with respect to other measures.

E. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements HC10 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions. Others in the LWG believe that these exceptions do not apply here.
F. **Equal Protection Clause.**

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application but other interests may disagree.
CHE8: Enhanced CHE Modernization

This control measure requires CHE (other than yard tractors) to use alternative fuel, on-road engines, Tier 3 and 4 nonroad engines, and retrofit devices. This control measure places requirements on both new purchases and the replacement or retrofit of existing equipment.

A. Clean Air Act.

This section discusses whether CHE8 falls within the scope of preemption under the Clean Air Act (“CAA”). If any component of CHE8 is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure, and Section E sets forth exemptions to federal preemption.

Section 209(e)(2) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new and used nonroad sources, such as CHE. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preempted.


CHE8 requires that certain new purchases of CHE, and a certain percentage of existing CHE, be replaced with equipment that run on alternative fuels. The U.S. Supreme Court has held that mandatory purchase requirements for alternative fuel vehicles may fall within the preemption provision for motor vehicles under Section 209(a) of the CAA. Thus, by analogy, it is possible that CHE8 may be subject to the preemption provision under Section 209(e)(2).

2. On-Road and Nonroad Engine Standard Requirement.

If the alternative fuel requirement is not feasible, CHE8 requires that new purchases of CHE, and a certain percentage of existing CHE, be replaced with equipment that meets certain on-road engine standards, or if infeasible, a specified nonroad engine standard. Regulations requiring CHE to meet particular engine standards (on or nonroad) will likely fall within the scope of preemption under Section 209(e)(2).

3. Retrofit Requirement.

CHE8 also requires that particular equipment utilize the highest level ARB-verified ECS available. As stated, EPA has taken the position that retrofit requirements for nonroad sources are preempted. Accordingly, based on EPA’s statement, CHE8’s retrofit requirement may fall within the scope of preemption under Section 209(e)(2).
B. Waiver or Authorization.

If any component of CHE8 is found to fall within the scope of preemption under Section 209(e), a waiver or authorization may be sought by the State from EPA to implement the measure.\textsuperscript{259}


Upon full implementation, this measure will treat all shipping lines and terminals equally by imposing the same requirements on all lines and terminals. To the extent that the measure is initially implemented by applying to some and not other terminals, however, the Port would need to show that its approach is “just and reasonable” and does not cause “unreasonable prejudice or disadvantage” to one shipping line and/or terminal as compared to others.

PMSA and Rail believe that to the extent it is implemented on a terminal-by-terminal basis, this measure could have a disparate impact on cost of operations and would be vulnerable to legal challenge.

D. Commerce Clause.

As written, implementation of CHE8 would not readily appear to create an unreasonable burden on interstate commerce.

E. Exceptions to Preemption.

SCAQMD and NRDC believe that if the Port implements CHE8 in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.

F. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that

\textsuperscript{259} ARB is currently developing a statewide regulation (CHE 9) that is similar to CHE 8. Measure CHE 8 states that if CHE 8 achieves less emissions benefits than CHE 9, it will be superseded. However, if CHE 9 is not fully implemented or does not achieve at least the emissions reductions shown for CHE 8, then CHE 8 will remain in place.
the court could find there is a rational basis for the differential application and PMSA and Rail disagree.
R7: Ultra-Low Emission Switcher and Line Haul Locomotives: Class 1

This control measure requires deployment of ultra-low emission locomotives by Class 1 freight railroads for out-of-Port switching and in-Port and out-of-Port line haul operations. The first phase would apply to Port-related switcher locomotives only, and the second phase would apply to all line haul locomotives handling Port-related traffic, including all locomotives on trains entering and departing the SCAB that carry Port-related traffic. It is contemplated that a dedicated locomotive fleet for the national fleet operating in the SCAB would likely be required for the line haul locomotives. Additionally, NOx reductions achieved under this measure could not be used to meet the railroads' commitment under the South Coast MOU. Monitoring/reporting would be required.

A. Clean Air Act.

This section discusses whether this measure falls within the scope of preemption under the CAA. If any component of this measure is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure under the CAA, Section D addresses the impact of the adoption or attempt to enforce measure R7 on the South Coast MOU, Sections C, E and F address preemption under the Commerce Clause, LBIA and ICCTA and Section G sets forth exceptions to federal preemption.

Section 209(e)(1) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new locomotives and new locomotive engines. In its Final National Locomotive Rule, EPA has crafted a very broad preemption in which EPA has defined "new" to include not only factory-new locomotives, but also remanufactured locomotives and locomotive engines. EPA also expanded the scope of preemption to cover a period equivalent in length to 133 percent of the useful life at which the locomotive or engine is manufactured or remanufactured.

Regulations setting engine standards for new locomotives and new locomotive engines fall within the scope of preemption under Section 209(e)(1). Whether a waiver or exception to preemption could apply is discussed below.

B. Waiver or Authorization.

If any component of this measure is found to fall within the scope of preemption under Section 209(e), SCAQMD and NRDC believe that a waiver or authorization may be sought by the State from EPA to implement the measure. However, waiver or authorization under the Clean Air Act would be possible only for non-new locomotives. Given the broad scope of EPA’s preemption regulation, very few locomotives would be eligible for authorization for California regulation under the EPA’s regulation. Rail believes that a waiver would not be available for measure R7.
C. Commerce Clause.

Unless the measure was viewed as a per se violation of the Commerce Clause that discriminates against interstate commerce and is not narrowly tailored to achieve a legitimate local purpose, the courts would determine whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA and Rail believe it will not.

D. Impact on South Coast MOU.

The proposed locomotive emissions standards in measure R7 are within the scope of preemption established by EPA and provide grounds for termination of the South Coast MOU, unless an exception would apply. This would result in a loss of substantial emissions reductions that would otherwise occur within the SCAB under the MOU. However, SCAQMD and NRDC believe that requirements imposed by the Port acting as a market participant or under the municipal proprietor exception would not trigger the MOU’s termination clause. Rail notes that the MOU does not contain any exception for governmental action, and they believe that therefore the market participant and municipal proprietor exceptions would not apply, and such action could lead to termination of the MOU.

E. Locomotive Boiler Inspection Act.

Rail notes that if the measure required a redesign of locomotives, it could implicate the Locomotive Boiler Inspection Act (recodified at 49 U.S.C. 20701-20703), see Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 613 (1926).

F. ICC Termination Act (ICCTA).

Rail states that any attempt by the Port to impose the emissions standards for locomotives in this measure as a condition on its permitting of future railroad projects at the Port would be subject to challenge under the ICCTA in the courts or before the Surface Transportation Board. Rail further states that insofar as compliance with those standards was regarded as a permitting or preclearance requirement, it would likely be held preempted as a matter of law. If a factual inquiry were called for, the question would be whether such standards for locomotives would interfere with the railroads’ interstate operations.

G. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements this measure in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.
PMSA and Rail note that Courts have not determined whether or to what extent the “market participant” and “municipal proprietor” concepts apply under the ICCTA or the Locomotive Boiler Inspection Act. SCAQMD and NRDC believe that a court would find the exceptions applicable to these statutes, while PMSA and Rail believe that a court would not.

PMSA and Rail also believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.
R9: ARB Diesel Fuel for Class 1 Railroad Locomotives

This control measure requires that, by the end of 2007, all locomotives operated by Class 1 railroads which service the Port must meet the low sulfur fuel requirements that were adopted by the Air Resources Board for intrastate locomotives and harbor craft, commonly known as ARB diesel fuel. NOx reductions achieved under this measure could not be used to meet the railroads' commitment under the South Coast MOU. Monitoring/reporting would be required.

A. Clean Air Act.

This section discusses whether this measure falls within the scope of preemption under the CAA. If any component of this measure is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure under the CAA, Section D addresses the impact of the adoption or attempt to enforce measure R9 on the South Coast MOU, Sections C, E and F address preemption under the Commerce Clause, LBIA and ICCTA, and Section G sets forth exceptions to federal preemption.

Section 209(e)(1) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new locomotives and new locomotive engines. In its Final National Locomotive Rule, EPA has crafted a very broad preemption in which EPA has defined "new" to include not only factory-new locomotives, but also remanufactured locomotives and locomotive engines. EPA also expanded the scope of preemption to cover a period equivalent in length to 133 percent of the useful life at which the locomotive or engine is manufactured or remanufactured. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preemptsed. Rail notes that state controls that are not explicitly preempted would also be preempted if they violate federal anti-tampering rules. 63 FR 18994. However, EPA recognizes an exception to preemption for the use and operation of existing nonroad engines, including usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines.

It is acknowledged that measure R9 will result in "potentially significant operational, logistical and equipment changes, including but not limited to, draining of tanks, installation of separate tanks or baffling of tanks." The railroads believe that, as currently proposed, R9 involves retrofits and other design changes to locomotives, including requirements involving the addition of auxiliary fuel tanks, and therefore that it would be preempted. SCAMD and NRDC believe that R9 is not preempted because it is an acceptable in-use fuel requirement and can be implemented in a manner so as to avoid affecting the design of the locomotive.

B. Waiver or Authorization.

If this measure is not preempted because it is a fuel measure as provided in EPA’s nonroad engine rule, it would not require a waiver. If any component of this measure is found to fall within the scope of preemption under Section 209(e), SCAQMD and NRDC
believe that a waiver or authorization may be sought by the State from EPA to implement
the measure. If waiver is required, it would not be available for new locomotives or new
locomotive engines, which under EPA’s regulation includes remanufactured locomotives
and locomotive engines and locomotive and locomotive engines within 133% of their
useful life. Rail believes that a waiver would not be available for measure R9.

C. Commerce Clause.

Unless the measure was viewed as a per se violation of the Commerce Clause that
discriminates against interstate commerce and is not narrowly tailored to achieve a
legitimate local purpose, the courts would determine whether this measure would create a
burden on interstate commerce that is “clearly excessive in relation to the putative local
benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA
and Rail believe it will not.

D. Impact on South Coast MOU.

Rail believes that because this measure establishes an emissions standard or other
requirement, it could lead to the termination of the South Coast MOU and the loss of
emissions reductions that would otherwise occur under the MOU. SCAQMD and NRDC
believe that this measure is an “in use” requirement and would not require design
modifications to the locomotive engines, and thus does not fall within the scope of
preemption, and would not trigger the termination clause of the MOU. Rail believes this
measure involves retrofit and design changes to locomotives and, even if it did not, any
“in-use” emissions requirement would trigger the termination clause.

SCAQMD and NRDC also believe that requirements imposed by the Port acting as a
market participant or under the municipal proprietor exception would not trigger the
MOU’s termination clause. Rail notes that the MOU does not contain any exception for
governmental action, and they believe that therefore the market participant and municipal
proprietor exceptions would not apply, and such action could lead to termination of the
MOU.

E. Locomotive Boiler Inspection Act.

Rail notes that if the measure required a redesign of locomotives, it could implicate the
Locomotive Boiler Inspection Act (recodified at 49 U.S.C. 20701-20703), see Napier v.
Atlantic Coast Line Railroad, 272 U.S. 605, 613 (1926).

F. ICC Termination Act (ICCTA).

Rail states that any attempt by the Port to impose the emissions standards for locomotives
in this measure as a condition on its permitting of future railroad projects at the Port
would be subject to challenge under the ICCTA in the courts or before the Surface
Transportation Board. Rail further states that insofar as compliance with those standards
was regarded as a permitting or preclearance requirement, it would likely be held
preempted as a matter of law. If a factual inquiry were called for, the question would be
whether such standards for locomotives would interfere with the railroads’ interstate operations.

G. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements this measure in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail note that Courts have not determined whether or to what extent the “market participant” and “municipal proprietor” concepts apply under the ICCTA or the Locomotive Boiler Inspection Act. SCAQMD and NRDC believe that a court would find the exceptions applicable to these statutes, while PMSA and Rail believe that a court would not.

PMSA and Rail also believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.
R10: Idling Controls for Switcher and Line Haul Locomotives

This control measure requires the installation of tamper proof idling control devices on all switcher and line haul locomotives serving the Port by the end of 2006. NOx reductions achieved under this measure could not be used to meet the railroads' commitment under the South Coast MOU. Monitoring/reporting would be required.

A. Clean Air Act.

This section discusses whether this measure falls within the scope of preemption under the CAA. If any component of this measure is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure under the CAA, Section D addresses the impact of the adoption or attempt to enforce measure R10 on the South Coast MOU, Sections C, E and F address preemption under the Commerce Clause, LBIA and ICCTA, and Section G sets forth exceptions to federal preemption.

Section 209(e)(1) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new locomotives and new locomotive engines. In its Final National Locomotive Rule, EPA has crafted a very broad preemption in which EPA has defined "new" to include not only factory-new locomotives, but also remanufactured locomotives and locomotive engines. EPA also expanded the scope of preemption to cover a period equivalent in length to 133 percent of the useful life at which the locomotive or engine is manufactured or remanufactured EPA has also asserted that regulations requiring the retrofit of nonroad sources are preempted. Rail notes that state controls that are not explicitly preempted would also be preempted if they violate federal anti-tampering rules. 63 FR 18994. However, EPA recognizes an exception to preemption for the use and operation of existing nonroad engines, including usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines.

Rail believes that the proposed locomotive requirements in measure R10 are within the scope of preemption established by EPA. SCAQMD and NRDC believe that if the requirements are preempted, an exception would apply.

B. Waiver or Authorization.

If any component of this measure is found to fall within the scope of preemption under Section 209(e), SCAQMD and NRDC believe that a waiver or authorization may be sought by the State from EPA to implement the measure. If waiver is required, it would

260 SCAQMD and NRC believe that R10 could be revised to avoid preemption and termination of the MOU by not requiring equipment modifications. Rail believes revisions will require additional review by the NNI Task Force, including technical, financial and legal review.
not be available for new locomotives or new locomotive engines, which under EPA’s regulation, Rail notes, includes remanufactured engines and engines within 133% of their useful life. Rail believes that a waiver would not be available for measure R10.

C. Commerce Clause.

Unless the measure was viewed as a per se violation of the Commerce Clause that discriminates against interstate commerce and is not narrowly tailored to achieve a legitimate local purpose, the courts would determine whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA and Rail believe it will not.

D. Impact on South Coast MOU.

The proposed locomotive requirements in measure R10, as drafted, are within the scope of preemption established by EPA and provide grounds for termination of the South Coast MOU, unless an exception would apply. This would result in a loss of substantial emissions reductions that would otherwise occur within the SCAB under the MOU. However, SCAQMD and NRDC believe that requirements imposed by the Port acting as a market participant or under the municipal proprietor exception would not trigger the MOU’s termination clause. Rail notes that the MOU does not contain any exception for governmental action, and they believe that therefore the market participant and municipal proprietor exceptions would not apply, and such action could lead to termination of the MOU.

E. Locomotive Boiler Inspection Act.

Rail notes that if the measure required a redesign of locomotives, it could implicate the Locomotive Boiler Inspection Act (recodified at 49 U.S.C. 20701-20703), see Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 613 (1926).

F. ICC Termination Act (ICCTA)

Rail states that any attempt by the Port to impose the emissions standards for locomotives in this measure as a condition on its permitting of future railroad projects at the Port would be subject to challenge under the ICCTA in the courts or before the Surface Transportation Board. Rail further states that insofar as compliance with those standards was regarded as a permitting or preclearance requirement, it would likely be held preempted as a matter of law. If a factual inquiry were called for, the question would be whether such standards for locomotives would interfere with the railroads’ interstate operations.

G. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements this measure in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal
preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail note that Courts have not determined whether or to what extent the “market participant” and “municipal proprietor” concepts apply under the ICCTA or the Locomotive Boiler Inspection Act. SCAQMD and NRDC believe that a court would find the exceptions applicable to these statutes, while PMSA and Rail believe that a court would not.

PMSA and Rail also believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.
R11: Operating Efficiencies or Improvements on In-Use Class 1 Rail Equipment

This control measure requires Class 1 railroads to implement efficiency improvements on in-use locomotives and railcars starting in 2005. Such efficiency improvements must result in a minimum of 1-2% per year emission reduction improvement, averaged over any three consecutive year period. NOx reductions achieved under this measure could not be used to meet the railroads' commitment under the South Coast MOU. Monitoring/reporting would be required.

A. Clean Air Act.

This section discusses whether this measure falls within the scope of preemption under the CAA. If any component of this measure is subject to the preemption provisions of the CAA, Section B addresses California’s authority to obtain a waiver from EPA to implement the measure under the CAA, Section D addresses the impact of the adoption or attempt to enforce measure R11 on the South Coast MOU, Section C, E and F address preemption under the Commerce Clause, LBIA and ICCTA, and Section G sets forth exceptions to federal preemption.

Section 209(e)(1) of the CAA preempts state and local governments from adopting or enforcing standards and other requirements relating to the control of emissions from new locomotives and new locomotive engines. In its Final National Locomotive Rule, EPA has crafted a very broad preemption in which EPA has defined "new" to include not only factory-new locomotives, but also remanufactured locomotives and locomotive engines. EPA also expanded the scope of preemption to cover a period equivalent in length to 133 percent of the useful life at which the locomotive or engine is manufactured or remanufactured. EPA has also asserted that regulations requiring the retrofit of nonroad sources are preempted. Rail notes that state controls that are not explicitly preempted would also be preempted if they violate federal anti-tampering rules. 63 FR 18994. However, EPA recognizes an exception to preemption for the use and operation of existing nonroad engines, including usage, daily mass emission limits, and sulfur limits in fuel burned in nonroad engines.

SCAMD and NRDC believe that R11 is not preempted because it could be implemented through operational improvements such as changes in lubrication, which are acceptable requirements governing the “use and operation” of nonroad vehicles and, to the extent they involve changes to the railcars, do not affect the locomotives. However, to the extent this measure would change the way locomotives or locomotive engines are manufactured, it would fall within the scope of EPA’s preemption regulation. Rail believes that R11 would establish an equipment standard because the efficiency improvements would include application of emissions reductions technology. Rail notes that there are inherent connections between engine efficiency and engine design (which make diesel electric locomotives among the most efficient and lowest emitting transportation power trains) as well as inherent connections between engines and the fuels they are designed to consume. Thus, Rail believes that R11 would be preempted.
B. Waiver or Authorization.

To the extent this measure could be implemented without affecting locomotive design, SCAQMD and NRDC believe that a waiver would not be necessary. If any component of this measure is found to fall within the scope of preemption under Section 209(e), SCAQMD and NRDC believe that a waiver or authorization may be sought by the State from EPA to implement the measure. If waiver is required, it would not be available for new locomotives or new locomotive engines, which under EPA’s regulation includes remanufactured locomotives and locomotive engines and locomotive and locomotive engines within 133% of their useful life. Rail believes that a waiver would not be available for measure R11.

C. Commerce Clause.

Unless the measure was viewed as a per se violation of the Commerce Clause that discriminates against interstate commerce and is not narrowly tailored to achieve a legitimate local purpose, the courts would determine whether this measure would create a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” SCAQMD and NRDC believe this measure should pass this test and PMSA and Rail believe it will not.

D. Impact on South Coast MOU.

Rail believes that because this measure establishes an emissions standard or other requirement, it could lead to the termination of the South Coast MOU and the loss of emissions reductions that would otherwise occur under the MOU. SCAQMD and NRDC believe that this measure is an “in use” requirement and would not require design modifications to the locomotive engines, and thus does not fall within the scope of preemption, and would not trigger the termination clause of the MOU. Rail believes this measure involves retrofit and design changes to locomotives and, even if it did not, any “in-use” emissions requirement would trigger the termination clause.

SCAQMD and NRDC also believe that requirements imposed by the Port acting as a market participant or under the municipal proprietor exception would not trigger the MOU’s termination clause. Rail notes that the MOU does not contain any exception for governmental action, and they believe that therefore the market participant and municipal proprietor exceptions would not apply, and such action could lead to termination of the MOU.

E. Locomotive Boiler Inspection Act and Safety Appliance Act.

Rail notes that if the measure required a redesign of locomotives, it could implicate the Locomotive Boiler Inspection Act (recodified at 49 U.S.C. 20701-20703), see Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 613 (1926). Rail notes further that if the measure required a change to the design or use of rail car equipment, it could implicate the Safety Appliance Act (49 U.S.C. 20301 et seq.), see Union Pacific Railroad Company v. California Public Utilities Commission, 346 F.3d 851, 869-70 (9th Cir. 2003).
F. ICC Termination Act (ICCTA).

Rail states that any attempt by the Port to impose the emissions standards for locomotives in this measure as a condition on its permitting of future railroad projects at the Port would be subject to challenge under the ICCTA in the courts or before the Surface Transportation Board. Rail further states that insofar as compliance with those standards was regarded as a permitting or preclearance requirement, it would likely be held preempted as a matter of law. If a factual inquiry were called for, the question would be whether such standards for locomotives would interfere with the railroads’ interstate operations.

G. Exceptions to Preemption and Commerce Clause.

SCAQMD and NRDC believe that if the Port implements this measure in its contract awards, lease and permit approvals, or as a port-wide rule, it may avoid federal preemption and restrictions under the Commerce Clause under the “market participant” or the “municipal proprietor” exceptions.

PMSA and Rail note that Courts have not determined whether or to what extent the “market participant” and “municipal proprietor” concepts apply under the ICCTA or the Locomotive Boiler Inspection Act. SCAQMD and NRDC believe that a court would find the exceptions applicable to these statutes, while PMSA and Rail believe that a court would not.

PMSA and Rail also believe that the market participant and municipal proprietor exception to preemption is not applicable to private fleets under the CAA. Moreover, PMSA and Rail note the courts have held that states and localities cannot escape federal preemption or restrictions under the Commerce Clause by using their proprietary or contractual control of property to attempt to impose regulatory conditions on interstate or foreign commerce.
**HDV19: Idling Reduction Measures**

This control measure calls for “unspecified control measures would reduce emissions from heavy-duty vehicles by reducing idling times. Development of a standard for terminal turn-time may be appropriate.”

**A. Clean Air Act**

There is no preemption under the Clean Air Act for state and local regulation of the use and operation of motor vehicles. Clean Air Act §209(a), 42 U.S.C. §7543(d) provides: “Nothing in this part shall preclude or deny to any state or political subdivision thereof the right otherwise to control, regulate or restrict the use, operation or movement of registered or licensed motor vehicles.” Therefore, the Clean Air Act does not preempt idling regulations.

**B. Analysis of HDV19 under State Law**

While ordinarily state law gives authority over motor vehicles to the Air Resources Board, the California Attorney General has recently ruled that a local government may enact an ordinance restricting vehicle engine idling. There is also an existing state law that requires marine terminals to operate in a manner that does not cause trucks to idle or queue for more than 30 minutes while waiting to enter the terminal. This law does not appear to occupy the field of vehicle idling, but the Port would need to draft any truck idling measure in a way that does not render it impossible to comply with both measures. There is also an ARB truck idling rule, but it specifically allows local governments to adopt more stringent local rules.

PMSA doesn't believe there is clear authority for the Port to adopt idling requirements for on-road vehicles within the Port.

**C. Commerce Clause.**

Given that this measure applies equally to in-state and out-of-state or foreign trucks, it is not facially discriminatory. The key inquiry, therefore, would be whether this measure creates a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” It does not appear that an idling regulation would have an overly burdensome effect on foreign or interstate commerce.

**D. Exemptions to Preemption and Commerce Clause.**

Exceptions to preemption such as the market participant and municipal proprietor doctrines should not be necessary since there does not appear to be any applicable preemption or violation of the Commerce Clause.
E. Equal Protection Clause.

Once fully implemented, this measure would apply equally to all terminals. However, if the measure is implemented in a manner that imposes more stringent requirements on some terminals as compared to others during the implementation period, the terminals could raise an argument that these more stringent requirements constitute unequal treatment or a competitive disadvantage. However, SCAQMD and NRDC believe that the court could find there is a rational basis for the differential application and PMSA and Rail disagree.