

1 BILL LOCKYER
 Attorney General of the State of California
 2 MARY HACKENBRACHT
 Senior Assistant Attorney General
 3 LINDA BERG, State Bar No. 194667
 Deputy Attorney General
 4 NICHOLAS STERN, State Bar No. 148308
 Deputy Attorney General
 5 1300 I Street, Suite 125
 P.O. Box 944255
 6 Sacramento, CA 94244-2550
 Telephone: (916) 323-3840
 7 Fax: (916) 327-2319
 Email: Nicholas.Stern@doj.ca.gov
 8 Attorneys for Defendant, Catherine E. Witherspoon

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11 SACRAMENTO DIVISION

<p>12</p> <p>13 PACIFIC MERCHANT SHIP ASSOCIATION,</p> <p>14 Plaintiff,</p> <p>15 v.</p> <p>16 CATHERINE E. WITHERSPOON,</p> <p>17 Defendant.</p>

2:06-CV-02791-DFL-KJM

**ANSWER TO COMPLAINT
 FOR INJUNCTIVE AND
 DECLARATORY RELIEF**

Judge: The Honorable
 David F. Levi

18

19 Defendant Catherine E. Witherspoon hereby answers the Complaint. All factual
 20 allegations not expressly admitted below are denied.

21 **I.**

22 **PRELIMINARY STATEMENT**

23 1. To the extent that a response is necessary to the first sentence of Paragraph
 24 Defendant admits that Plaintiff asks the Court to enjoin the adoption and enforcement of section
 25 2299.1 of Title 13 and section 93118 of Title 17 of the California Code of Regulations and to
 26 declare the regulations unconstitutional and contrary to federal law. Defendant admits the
 27 second sentence of the Complaint. The third through fifth sentences of Paragraph 1 purport to
 28 represent the regulations at issue, which speak for themselves and provide the best evidence of

1 their contents; the summary provided by these sentences is incomplete or otherwise inaccurate.
2 To the extent that a response is deemed necessary, Defendant denies the allegations in the third
3 through fifth sentences of Paragraph

4 2. Defendant denies the allegations in Paragraph 2.

5 3. Defendant is without sufficient information to form a belief as to the truth of the
6 allegations contained in the first sentence of Paragraph 3, and on that basis denies the allegations
7 contained therein. Defendant denies the allegations in the second sentence of Paragraph 3.

8 4. To the extent that a response is necessary to Paragraph 4, Defendant admits that
9 Plaintiff seeks injunctive and declaratory relief. Defendant otherwise denies the allegations in
10 this paragraph.

11 **II.**

12 **JURISDICTION**

13 5. No response is necessary to Paragraph 5.

14 **III.**

15 **VENUE**

16 6. Defendant admits the allegations in Paragraph 6.

17 **IV.**

18 **THE PARTIES**

19 7. Defendant is without sufficient information to form a belief as to the truth of the
20 allegations contained in Paragraph 7, and on that basis denies the allegations contained therein.

21 8. Defendant admits the allegations in Paragraph 8.

22 **V.**

23 **FIRST CLAIM FOR RELIEF**

24 9. In response to Paragraph 9, Defendant incorporates by reference its responses to
25 Paragraphs 1 through 8.

26 10. Defendant admits the allegations in Paragraph 10.

27 11. Defendant denies the allegations in the first sentence of Paragraph 11. Defendant
28 admits the remaining allegations in Paragraph 11.

1 12. Defendant admits the allegations in Paragraph 12.

2 13. Paragraph 13 purports to represent subsection (e) of the regulations at issue, which
3 speak for themselves and provide the best evidence of their contents; the summary provided by
4 this paragraph is incomplete or otherwise inaccurate. To the extent that a response is deemed
5 necessary, Defendant denies the allegations in Paragraph 13.

6 14. Defendant denies the allegations in Paragraph 14.

7 15. Paragraph 15 purports to represent subsection (f) of the regulations at issue, which
8 speaks for itself and provides the best evidence of its contents; the summary provided by this
9 paragraph is incomplete or otherwise inaccurate. To the extent that a response is deemed
10 necessary, Defendant denies the allegations in Paragraph 15.

11 16. Paragraph 16 purports to represent section 213 of the Clean Air Act and the EPA's
12 adoption of standards for certain marine vessels that are published in 68 FR 9746. This statute
13 and regulation speak for themselves and provide the best evidence of their contents; the
14 summary provided by this paragraph is incomplete or otherwise inaccurate. To the extent that a
15 response is deemed necessary, Defendant denies the allegations in Paragraph 16.

16 17. Defendant denies the allegations in Paragraph 17.

17 18. Defendant admits the allegations in the first sentence of Paragraph 18. Defendant
18 denies the allegations in the second sentence of Paragraph 18.

19 19. Defendant denies the allegations in Paragraph 19.

20 20. Defendant denies the allegations in Paragraph 20.

21 21. Defendant denies the allegations in Paragraph 21.

22 22. Defendant denies the allegations in Paragraph 22.

23 23. Defendant denies the allegations in Paragraph 23.

24 **VI.**

25 **SECOND CLAIM FOR RELIEF**

26 24. In response to Paragraph 24, Defendant incorporates by reference its responses to
27 Paragraphs 1 through 8 and 10 through 15.

28 25. Defendant denies the allegations in Paragraph 25.

1 26. To the extent that a response to Paragraph 26 is deemed necessary, Defendant admits
2 that Plaintiff has accurately quoted 43 U.S.C. § 1314(a).

3 27. Paragraph 27 purports to represent the Presidential Proclamations 5928 and 7219,
4 which speak for themselves and provide the best evidence of their contents; the summary
5 provided by this paragraph is incomplete or otherwise inaccurate. To the extent that a response
6 is deemed necessary, Defendant denies the allegations in Paragraph 27.

7 28. Defendant denies the allegations in Paragraph 28.

8 29. Defendant denies the allegations in Paragraph 29.

9 30. Defendant denies the allegations in Paragraph 30.

10 **VII.**

11 **THIRD CLAIM FOR RELIEF**

12 **[For Declaratory And Injunctive Relief Based On**
13 **Preemption By the Ports And Waterways Safety Act,**
14 **46 U.S.C. §§ 3701 et seq.]**

15 31. In response to Paragraph 31, Defendant incorporates by reference its responses to
16 Paragraphs 1 through 8 and 10 through 15.

17 32. Paragraph 32 purports to represent 46 U.S.C. § 3703(a), which section speaks for itself
18 and provides the best evidence of its contents; the summary provided by this paragraph is
19 incomplete or otherwise inaccurate. To the extent to which a response is deemed necessary,
20 Defendant denies the allegations in Paragraph 32.

21 33. The allegations in the first two sentences of Paragraph 33 purporting to characterize
22 Title II of PWSA and to quote 46 C.F.R. § 58.01(a)(1), and 58.01(a)(4) are legal argument to
23 which no response is required; these sections speak for themselves and provide the best evidence
24 of their contents, and the summaries contained in this Paragraph are incomplete or otherwise
25 inaccurate. The allegations in the last sentence of Paragraph 33 purporting to characterize the
26 ARB regulations are legal argument to which no response is required; the regulations speak for
27 themselves and are the best evidence of their own contents, and the characterization contained in
28 Paragraph 33 is incomplete or otherwise inaccurate. To the extent that a response is deemed
29 necessary, Defendant denies the allegations in Paragraph 33.

1 34. Responding to Paragraph 34, Defendant denies the allegations in the first sentence of
2 Paragraph 34, purporting to characterize California Code of Regulations, title 13, section 2299.1
3 and title 17, section 93118; these sections speak for themselves and provide the best evidence of
4 their on contents and the characterization of these sections is complete and otherwise inaccurate.
5 The allegations in the second sentence of paragraph 34, purporting to characterize federal
6 regulations generally, are legal argument to which no response is required, and the federal
7 regulations themselves are the best evidence of their own contents. To a degree that a response
8 to these allegations is deemed necessary, Defendant denies these allegations. Responding to the
9 last sentence of Paragraph 34, Defendant admits that 46 C.F.R. § 35.07-10(B)(5) states “Fuel oil
10 data. Upon receipt of fuel oil on board to be used as fuel. See §§ 35.25-10” but, except as so
11 expressly admitted, denies the allegations in that sentence.

12 35. Responding to Paragraph 35, Defendant admits that 46 C.F.R. § 35.25.10(b) states:
13 “(b) It shall be the duty of the chief engineer to make an entry in the log of each supply of fuel
14 oil received on board, stating the quantity received, the name of the vendor, the name of the oil
15 producer, and the flashpoint (Pensky-Martens Closed Cup Method, ASTM D 93) (incorporated
16 by reference, see §§ 35-01- 3) for which it is certified by the producer.” Except as so expressly
17 admitted, Defendant denies the allegations in Paragraph 35.

18 36. Defendants denies each and every allegation in Paragraphs 36 and 37.
19

20 VIII.

21 **FOURTH CLAIM FOR RELIEF** 22 **[For Declaratory And Injunctive Relief Based On The** **Commerce Clause of the United States Constitution]**

23 37. In response to Paragraph 38, Defendant incorporates by reference its responses to
24 Paragraphs 1 through 8, 10 through 21 and 23 through 38.

25 38. Defendant admits the allegations in Paragraph 39 of Plaintiff’s complaint.

26 39. Defendant denies each and every allegation in Paragraphs 40, 41 and 42 of Plaintiff’s
27 complaint.

28 **FIRST AFFIRMATIVE DEFENSE**

1 40. Plaintiff, an association, lacks standing to assert the claims in the Complaint on behalf
2 of its members.

3 **SECOND AFFIRMATIVE DEFENSE**

4 41. Plaintiff's members are necessary or indispensable parties to this action.

5
6 WHEREFORE, Defendant prays as follows:

- 7 1. That Plaintiff take nothing by reason of its Complaint;
8 2. That judgment be rendered in favor of Defendant;
9 3. The Court enter a declaration that the regulations at issue do not violate federal law
10 under any of the theories asserted in the Complaint;
11 4. That Defendant be awarded costs of suit incurred in defense of this action; and
12 5. For such other relief as the Court deems proper.

13 Dated: January 2, 2007

14
15 **BILL LOCKYER**
16 Attorney General of the State of California
17 **LINDA BERG**
18 Deputy Attorney General

19 /s/ Nicholas Stern

20 **NICHOLAS STERN**
21 Deputy Attorney General
22 Attorneys for Defendant

23 30201978.wpd
24 SA2006304038
25
26
27
28