

US Supreme Court Rejects PMSA's Challenge to California's Vessel Fuel Rule

By Craig H. Allen

n June 25, 2012, the US Supreme Court denied the petition for certiorari in the ongoing litigation between the Pacific Maritime Shipping Association (PMSA) and the California Air Resources Board (CARB) over the CARB vessel fuel rule for ocean-going vessels. The Supreme Court's decision in PMSA v. Goldstene (Executive Officer, California Air Resources Board) came just 32 days after the US Solicitor General filed the Department of Justice's legal brief on May 25th. The DOJ brief rejected the position of the US Maritime Law Association, which has long championed the principle of uniformity in maritime law, and instead urged the Supreme Court to deny PMSA's petition for review of the Ninth Circuit decision in favor of CARB. Veteran court watchers know that in predicting how the Supreme Court will respond to maritime federalism challenges against state and local regulations the position taken by the federal government is often crucial. In this case it was likely dispositive.

As it turned out, the same week DOJ filed its brief with the Supreme Court Hillary Clinton, the Secretary of State, was across the street testifying before the Senate Foreign Relations Committee in support of a comprehensive treaty-based global maritime legal system (the 1982 Law of the Sea Convention) and defending it against allegations that it would erode US sovereignty. It seems ironic that the Administration's senior diplomat was touting the benefits of a global maritime treaty regime before the US Senate while the Administration's senior lawyer was urging the Supreme Court to deny review of a state agency's fuel standards for international shipping that undermine the global treaty regime approach to reducing vessel source air emissions.

The Case: PMSA v. Goldstene

In trying to understand the importance of the PMSA challenge to CARB's vessel fuel rule it is easy to get lost in the various technical details in the CARB fuel standards, the default MARPOL Annex VI fuel standards, the more stringent standards applicable in the North American Emission Control Area (ECA), the Marine Pollution Prevention Act of 2008, which implements MARPOL Annex VI, and the effective dates for each vessel fuel standard. Adding to the confusion is the fact that this is the second challenge to CARB's vessel air emission control rules by the PMSA. The first one resulted in the Ninth Circuit striking down CARB's "marine vessel rule" in 2008 on the ground the rule was preempted by the federal Clean Air Act. The second challenge is directed at CARB's vessel fuel rule. The CARB vessel fuel rule, like the two MARPOL schemes, seeks to reduce, among other pollutants, sulfur oxide (SOx) emissions from specified sea-going vessels, mostly by requiring those vessels to use fuels with lower sulfur content.

The following table briefly summarizes the default global standard for vessel fuel sulfur content limitations under MARPOL Annex VI, the stricter standard for the MARPOL Emission Control Area (ECA) for waters 200 miles seaward of most of North America and the CARB fuel requirements for ocean-going vessels (per CARB Marine Notice 2012-1, July 2, 2012).

The key takeaway, and the crux of the present case, is that as part of a comprehensive effort to restore air quality in one of the most polluted airsheds in the country California has rejected the existing standards set by the agreement entered into by the US government at the IMO regarding the sulfur content of marine vessel fuels and has instead set a more stringent standard for vessels calling on California ports. California applies that standard to vessels calling at its ports while operating within 24 miles of the state's coast - 21 miles beyond the outer limit of the state's waters.

As some who have been watching the case have already noted, if the individual states are free, as a result of this decision, to regulate shipping to the outer limit of the 24 mile US contiguous zone, as California now does, why not to the 200 mile outer limit of the exclusive economic zone, or even beyond that, so long as the regulations are drafted as "conditions of entry" or justified by "effects" within the state – both of which have been offered in support of California's power to regulate vessels while outside its waters?

The DOJ Brief to the Supreme Court

In its 2011 decision against PMSA, the Ninth Circuit announced its belief that the regulatory scheme at issue in this second case against CARB "pushes a state's legal authority to its very limits." The court did not, however,

	APPLICABILITY	2012	2014	2015
MARPOL ANNEX VI	Global (except ECAs)	3.5%	3.5%	3.5%
MARPOL NA ECA	W/N 200 Miles of NA	1.0%	1.0%	0.1%
CARB VFR	W/N 24 Miles of Cal.	0.5%	0.1%	0.1%

articulate the rule that defined those limits. The DOJ brief doesn't do much better. In fact, despite the theoretical concept of a "unitary executive," the brief appears to argue against itself in some places, signaling to some observers that not all federal agencies agreed with the ultimate decision to recommend against Supreme Court review and that the federal government might take a more assertive position in the case if and when the PMSA challenge is more fully developed in the lower courts.

The DOJ brief drafters acknowledged that the California rule raises "important and difficult questions about the scope of a State's power to regulate seagoing vessels" and criticized the lower court for giving "insufficient weight to the federal government's primary responsibility for matters bearing on maritime commerce" and for improperly applying a presumption against preemption, pointing out that the Supreme Court has already ruled that "in matters bearing on maritime commerce there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."

Although the brief went on to highlight that questions remain as to whether a state is constitutionally barred from implementing regulations that apply extraterritorially, it ultimately concluded that the PMSA challenge was not, at this time, an appropriate case for deciding such questions, in light of its procedural posture. In fact, the brief argued that granting review "at this juncture" would actually prevent the Court from later considering "important dimensions of the underlying controversy."

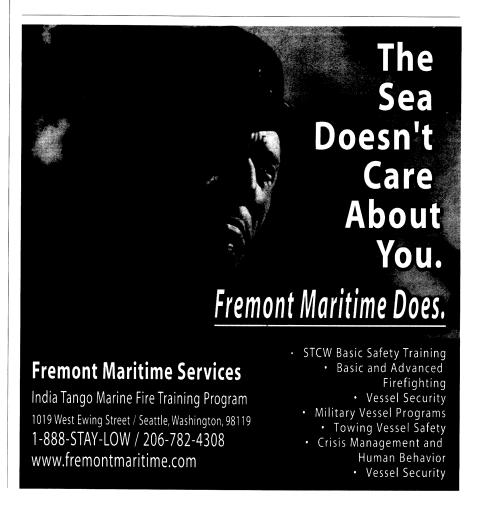
Strangely absent from the DOJ brief is any discussion of whether the US government agrees with the assertion that individual state and local governments can exercise the power normally accorded to nation-states under international law to impose conditions for entry into the nation's ports and internal waters. Congress expressly addressed "conditions for entry into ports in the United States" in the Ports

and Waterways Safety Act (33 USC. §§ 1228, 1232(e)). It should be noted here that, while it's true that when the US Senate gave its advice and consent to ratification of Annex VI it attached an "understanding" that nothing in the treaty precludes a party to Annex VI from imposing more stringent standards as a "condition of entry" into US ports and internal waters, the Senate did not suggest that the treaty - which is the Law of the Land under Article VI of the Constitution - also permits state or local governments in the US to do so. Nor does it suggest that Congress intended to relax its historical solicitude for international law limits on the nation's jurisdiction. Congress' solicitude is evident in a section of the Act to Prevent Pollution from Ships, which implements the MARPOL Convention in the US, where Congress directed that any action taken under APPS "shall be taken in accordance with international

law (33 USC. § 1912).

Additionally, DOJ failed to directly question the possible source of a state's power to declare a zone of "Regulated California Waters" extending 24 miles seaward, in which the state will regulate ocean shipping activities, particularly in light of the fact that the presidential proclamations extending the US territorial sea from 3 to 12 miles in 1988 and extending the US contiguous from 12 to 24 miles in 1999 were both careful to disclaim any intent to extend or otherwise alter existing state law or jurisdiction.

The DOJ brief also did not question the argument that states have the power to regulate shipping activities outside their territory to the extent that those extraterritorial activities produce "effects" in the state's territory. That assertion is highly problematic as a matter of international law. While customary international



law does recognize what is generally referred to as "objective territoriality" as a valid basis for a nation-state to prescribe laws governing conduct outside its territory if that conduct produces effects in its territory, under the 1982 LOS Convention, jurisdiction is strictly limited by "zone." The coastal nation's jurisdiction over foreign vessels varies according to which zone (territorial sea, contiguous zone, EEZ or high seas) the vessel is in. The coastal nation cannot "supplement" its zonal jurisdiction by claiming that activities outside the zone have an "effect" in its territory. Were the rule otherwise, effects-based jurisdiction would quickly swallow the LOS Convention's zonal approach to jurisdiction. In addition, even if effects-based jurisdiction was proper as a matter of international law, it is not at all clear whether, as a matter of US law, state and local governments may invoke the "effects" theory to regulate international and interstate shipping activities beyond their waters.

Although the DOJ brief reveals a possible internal schism among the involved federal agencies, the final recommendation is a predictable consequence of the tone set by the President's May 20, 2009 memorandum to all federal executive branch agencies, which plainly discourages agencies from taking a position advocating preemption of the states. It also appears to be consistent with the Administration's National Ocean Policy and its adoption of a bottom-up coastal and marine spatial planning process involving federal, state and tribal governments in planning on an ecosystem-based approach, where the relevant large marine ecosystems often extend up to 200 miles seaward.

DOJ's Shot Across California's Bow

While recommending against review at this time, the DOJ brief did fire a shot across California's bow, expressing the federal government's belief that after January 2015, when the MARPOL phased-in fuel standard overtakes the existing California standard, California "will not second-guess

the efficacy of the federal standard expressly adopted through MARPOL and implemented through APPS." There are, in fact, numerous representations, or perhaps assumptions, that the dispute will be mooted in 2015, when the MARPOL fuel standard for the North American Emission Control Area comes up to the present CARB vessel fuel standard. CARB's reply brief, for example, flatly avers that the CARB vessel fuel rules will "sunset" in 2015.

Several factors suggest a cautious approach to relying on those representations, however. First, the CARB Executive Officer apparently will have discretion regarding any decision on whether the MARPOL fuel standards are equivalent to CARB's vessel fuel rule. The Ninth Circuit noted this, observing that the sunset provision provides for termination of the vessel fuel rule when "CARB's Executive Officer makes a finding that the federal government has adopted and is enforcing requirements that will achieve equivalent emission reductions." Second, California law requires a comprehensive review of the CARB plan every 3 years, so even within existing laws CARB might decide to adopt a stricter standard. Finally, the California legislature remains free to enact new and more stringent air pollution laws for vessels and might feel compelled to do so if the existing measures fail to bring the region's air quality within acceptable limits.

Conclusion

No one doubts that diesel engine emissions pose a serious threat to human health and marine and coastal ecosystems, particularly in Southern California. Opinions differ, however, on whether solutions for the shipping industry should be global, regional, national or local. By ratifying Annex VI and then seeking IMO approval for the more stringent protections afforded by the Emission Control Area regime, the federal government has adopted a combination of global and regional standards for controlling air emissions from oceangoing vessels. As a consequence, when vessels enter the 200 mile wide North America ECA, they may be required to switch to fuel having a lower sulfur content than the fuel that meets the default Annex VI standard.

In its 2000 decision in United States v. Locke, the US Supreme Court cited a note verbally filed with the US State Department by Denmark (and echoed by several other US trading partners) before unanimously ruling against the state of Washington and its oil pollution regulations. The Danish protest asserted that "differing regimes in different parts of the US would create uncertainty and confusion. This would set an unwelcome precedent for other Federally-administered countries." 529 US at 98. In Locke, the Court declined to permit such an unwelcome precedent to stand.

The fate of the PMSA challenge after it is sent back to the federal courts in California is not clear. What is clear is that if California is permitted to prescribe and enforce its own standards, a container ship on a voyage from the Western Pacific to Los Angeles or Long Beach might find that it may have to manage the storage of three different fuels: one that meets the global MARPOL Annex VI standard (which can be used on the high seas), a second that meets the stricter ECA standard when it comes within 200 miles of North America and a third that meets the even stricter CARB standard when it comes within 24 miles of the California coast. Admittedly, the vessel operator could choose to only buy and burn fuel that meets the strictest standards applicable throughout its voyage (and thereby also avoid those risky fuelswitchovers), but the cost of doing so would be considerable. EMM

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