The Limited Power of States to Regulate Nonroad Mobile Sources Under the Clean Air Act

Johanna L. Wise Sullivan
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Abstract: The federal Clean Air Act (CAA) requires the State of California to obtain Environmental Protection Agency (EPA) permission in order to adopt “standards and other requirements relating to the control of emissions,” but expressly preempts all other states from adopting such regulations. Beginning January 1, 2007, California—which suffers the most severe air pollution in the country—will require all ships operating within twenty-four miles of the coast to limit emissions from auxiliary engines to levels that would be reached by using a certain low-sulfur fuel. If California’s new regulation falls within the CAA definition of “standards and other requirements,” it is invalid without EPA authorization. Courts have generally found that “in-use” regulations, which are applied to the operation of motor vehicles and ocean vessels, are not covered by the preemption provisions of the CAA. However, a closer examination of differences between the CAA’s treatment of motor vehicles and nonroad vehicles, along with a recent Supreme Court decision interpreting the definition of “standard,” indicates that California’s regulation is preempted unless EPA grants authorization.

Introduction

On December 8, 2005, the California Air Resources Board (CARB) adopted a regulation that could significantly reduce the emission of pollutants by the numerous ships visiting the State’s ports while engaged in international commerce.¹ The regulation will require all ships, foreign- and U.S.-flagged, to limit emissions from auxiliary engines to the levels that would be achieved by the use of a certain low-sulfur fuel when operating within twenty-four miles of the California

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coastline. While California is demonstrably in need of such measures to remedy its severe air pollution, the regulation pushes the limits of federalism.

Air pollution regulation in the United States has always been a joint effort between the federal and state governments. For the most part, states have considerable freedom in determining how they will meet the federal air quality standards. However, under the federal Clean Air Act (CAA), elements of mobile source air pollution regulation are primarily the responsibility of the federal government, and states are preempted from applying certain regulations to mobile sources. California is provided an exception: the CAA waives it from preemption under certain circumstances and with Environmental Protection Agency (EPA) authorization. California’s waiver recognizes that the state has been a leader in finding creative solutions to air pollution control.

The CAA provisions dealing with pollution from nonroad mobile sources, such as ships, establish a preemption structure that is inconsistent with the analogous provisions for motor vehicles. This Note examines the role of states, and particularly California, in the regulation of nonroad mobile sources under the CAA, and concludes that CARB’s new regulation is preempted by the CAA unless CARB obtains

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3 See Clean Air Act § 209(e), 42 U.S.C. § 7543(e) (2000). To enhance clarity, the text of this Note will refer to Clean Air Act (CAA) section numbers in the text, as opposed to their codified section numbers in the United States Code. However, the footnotes will refer to the codified section numbers in the Code; see also Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1087–95 (D.C. Cir. 1996); Associated Press, Los Angeles Has the Worst Air Pollution in the United States, Government Says, ENVTL. NEWS NETWORK, Nov. 15, 2005, http://www.enn.com/today.html?id=9255 (last visited Dec. 30, 2006) [hereinafter L.A. Air Pollution]. See generally NO NET INCREASE TASK FORCE, REPORT TO MAYOR HAHN AND COUNCILWOMAN HAHN BY THE NO NET INCREASE TASK FORCE: LEGAL WORKING GROUP MEMORANDUM (2005), available at www.portoflosangeles.org/DOC/REPORT_NNI_FINAL.pdf [hereinafter No Net Increase] (discussing state authority to regulate air pollution sources).

4 Engine Mfrs. Ass’n, 88 F.3d at 1078; NO NET INCREASE, supra note 3, at 5–4.

5 Engine Mfrs. Ass’n, 88 F.3d at 1078–79.

6 42 U.S.C. § 7543; Engine Mfrs. Ass’n, 88 F.3d at 1079.

7 42 U.S.C. § 7543; Engine Mfrs. Ass’n, 88 F.3d at 1079.

8 Engine Mfrs. Ass’n, 88 F.3d at 1079 (quoting Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979)).

authorization from EPA.\textsuperscript{10} However, by slightly altering the regulation, CARB may be able to avoid preemption and enforce emissions restrictions without EPA authorization.\textsuperscript{11}

Part I provides an overview of the trade activity occurring at California’s ports, as well as the pollution it causes. Part II details the EPA’s efforts to regulate air pollution from nonroad sources under the CAA. Part III describes the statutory role of states in regulating air pollution from mobile sources, the scope of preemption under the CAA, and several cases concerning states’ authority. Finally, Part IV reviews the analysis for determining the CAA’s preemptive effect on a particular regulation, applies the analysis to California’s regulation, and suggests an alteration which could allow California to avoid preemption.

I. Overview: California’s Ports & Pollution

A. International Trade and Economic Impact

California is home to the busiest ports in the nation.\textsuperscript{12} Large volumes of international goods enter the United States through the Ports of Los Angeles, Long Beach, and Oakland, which are the first, second, and fourth busiest ports in the country, respectively.\textsuperscript{13} From the ports, imports are distributed by truck and rail all over California and the U.S.\textsuperscript{14}

The quantity of goods imported through California’s ports is increasing rapidly.\textsuperscript{15} In 2004, 1900 ships visited California’s ports, eighty-seven percent of which were foreign vessels.\textsuperscript{16} Estimates show

\textsuperscript{10} See 42 U.S.C. § 7543(e). \\
\textsuperscript{12} CAL. ENVTL. PROT. AGENCY AIR RES. BD., DRAFT EMISSION REDUCTION PLAN FOR PORTS AND INTERNATIONAL GOODS MOVEMENT IN CALIFORNIA, at II-8 (2005) (on file with author) [hereinafter DRAFT EMISSION REDUCTION PLAN]. \\
\textsuperscript{13}Id. at II-6; Port of Oakland: Facts & Figures, http://www.portofoakland.com/mari
time/factfig.asp (last visited Dec. 30, 2006). The majority of international trade conducted through California ports is with East Asian countries, including China, Japan, Singapore. The Port of Long Beach: Overview, http://www.polb.com/about/overview/default.asp (last visited Dec. 30, 2006) [hereinafter Port of Long Beach: Overview]. \\
\textsuperscript{14} DRAFT EMISSION REDUCTION PLAN, supra note 12, at II-1. \\
\textsuperscript{15} Id. at II-2. For example, the container traffic at the Port of Oakland doubled between 1990 and 2004, and the number of containers at the Ports of Los Angeles and Long Beach increased by forty percent from 2000 to 2004. Id. \\
\textsuperscript{16} Id. at III-6. This number does not include the number of port visits by individual ships, many of which make numerous trans-ocean trips annually. The Ports of Los Angeles and Oakland report significantly higher numbers for the number of annual cargo vessel arrivals, with 2646 and 1902 arrivals respectively. See The Port of Los Angeles: Frequently Asked Questions (FAQs), http://www.portoflosangeles.org/about_faq.htm#14 (last visited Dec. 30,
that freight volumes will more than double in the Los Angeles region over the next twenty years.\textsuperscript{17}

This trade through California’s ports is essential to the health of the state’s economy.\textsuperscript{18} The Port of Los Angeles alone generates $1.4 billion in state and local tax revenue annually,\textsuperscript{19} while the Ports of Los Angeles and Long Beach together account for approximately $5.4 billion annually in United States Customs revenues.\textsuperscript{20} Additionally, the Port of Los Angeles provides 16,360 jobs directly, and the movement of goods through the ports ultimately supplies a total of 259,000 jobs in the region, approximately one in twenty-nine jobs.\textsuperscript{21} The growth of the ports continually creates more jobs within the state, many with significant opportunities for advancement.\textsuperscript{22}

B. \textit{Impact of Port Activities on Air Quality}

The international trade activities conducted at California’s ports and throughout the state also contribute significantly to California’s severe air pollution problem.\textsuperscript{23} The Los Angeles region has the worst air pollution in the country.\textsuperscript{24} The activities at the adjacent Ports of Los Angeles and Long Beach, the two busiest container ports in the country, emit large amounts of diesel particulate matter (PM), nitrogen oxides (NOx), and sulfur oxides (SOx), pollutants which are associated with asthma, cancer, and other health problems.\textsuperscript{25} Currently,
the emissions of these pollutants attributable to the ports cause an estimated 750 premature deaths each year.26

Every stage of the goods movement process creates air pollution.27 The ships that carry the goods use “high emitting [diesel] bunker fuel,” which emits pollutants both during transit and through power generation when berthed in the harbor.28 Once in the harbor, smaller boats such as tugboats support the large ocean vessels; cargo handling equipment such as cranes unload the ships; and trucks and locomotives transport the goods from the ports to other locations in California and the rest of the country.29 Each of these uses—harbor craft, cargo handling equipment, trucks, and locomotives—uses diesel fuel that emits PM, NOx, and SOx into the air.30

As of 2001, ships were responsible for forty-three percent of the PM, twenty-three percent of the NOx, and ninety-two percent of the SOx emitted by the goods movement industry in California.31 Estimates show that by the year 2020, ships will be the greatest contributor of PM, NOx, and SOx emissions attributable to the goods movement industry in California.32 This predicted proportional increase is due in part to new engine standards and fuel requirements that are expected to reduce emissions from trucks, locomotives, harbor craft, and cargo handling equipment.33 At the same time, trade volume is expected to continue to increase, thus increasing the emissions of the now-unregulated ships.34

While their emissions rates are greater, ships create proportionately smaller health effects than land sources such as trucks, locomotives, and cargo handling equipment because pollutants disperse as they move farther from their source.35 Pollutants emitted from ships over the ocean travel further, and are therefore less concentrated when they reach a community, than pollutants emitted over land.36 Nonetheless, ships provide large amounts of pollutants that contribute

which are associated with adverse health effects ranging from asthma to conditions causing premature death. Id. at I-2, II-2.

26 Id. at I-2.
27 Id. at ES-4 to ES-6.
28 Id. at ES-4, II-1.
29 Id. at II-1.
30 Id. at II-4, tbl.II-1.
31 Draft Emission Reduction Plan, supra note 12, at II-5, fig.II-3.
32 Id. at II-9, fig.II-7.
33 Id. at II-4.
34 Id. at II-4, II-7.
35 Id. at II-2.
36 Id.
to the air pollution problem, and unless addressed, it will only worsen as the trade volumes continue to increase over the coming decades.\textsuperscript{37}

C. California’s Response to Port-Related Air Pollution

Partially in response to the state’s severe air pollution, the California Environmental Protection Agency (CalEPA) and Business, Transportation, and Housing Agency have initiated a Goods Movement Action Plan (GMAP).\textsuperscript{38} A main goal of GMAP is to improve air quality and protect public health by reducing the amount of pollution caused by the goods movement industry in California.\textsuperscript{39}

Pursuant to GMAP, on December 8, 2005, the California Air Resources Board (CARB) adopted a regulation for the purpose of “reduc[ing] emissions of diesel PM, NOx, and SOx from . . . engines operated on ocean-going vessels” in coastal waters.\textsuperscript{40} The regulation will apply to:

any person who owns, operates, charters, rents, or leases an ocean-going vessel, including foreign-flagged vessels, within any of the Regulated California Waters, which include all California inland waters . . . and all waters . . . within 24 nautical miles, inclusive, of the California baseline, including but not limited to, the Territorial Sea, the Contiguous Zone, and any California port, roadstead, or terminal facility.\textsuperscript{41}

Effective January 1, 2007,\textsuperscript{42} the regulation will limit emission levels of PM, NOx, and SOx from the auxiliary engines of large ocean-
going vessels. Specifically, the regulation requires that vessels’ auxiliary engines do not emit PM, NOx, or SOx in excess of what would result from the use of “marine gas oil [or] marine diesel oil . . . with a sulfur content of no more than 0.5 percent by weight.” Compliance with the regulation will be presumed when the vessel does in fact use the specified fuels.

II. Federal Marine Environmental Regulation: The Clean Air Act

A. Statutory Background and Structure

Under the CAA, the federal government assumes primary responsibility for regulating mobile sources of air pollution. Prior to the CAA Amendments of 1990, nonroad sources, such as ocean vessels, were not federally regulated, although some states did regulate them. In 1990, Congress expanded the scope of federal regulation and added nonroad sources to the list of air pollution sources subject to regulation by EPA under the CAA. EPA’s regulatory power, however, is limited to emission standards on new nonroad engines and vehicles.

The CAA does not require the owners or operators of nonroad diesel vehicles to use emission-controlling engines or low-polluting fuel. Rather, the CAA applies the requirements at the production
level, both to new nonroad engines and vehicles and to the manufacturers of fuel.\textsuperscript{52} This approach presumably results in their use by the vehicle operators.\textsuperscript{53}

B. \textit{Section 213: New Nonroad Engines and Vehicles}

In section 213 of the CAA, Congress mandated that EPA promulgate regulations setting emissions standards for new nonroad engines and vehicles, including ocean vessels.\textsuperscript{54} Specifically, EPA has the authority to set emissions standards for NO\textsubscript{x}, carbon monoxide, and volatile organic compounds which are known to cause adverse health effects.\textsuperscript{55} The standards must “achieve the greatest degree of emission reduction achievable through the application of technology . . . which . . . will be available” to the manufacturers of the engines while taking cost and safety into account.\textsuperscript{56}

1. EPA’s Regulations

Pursuant to this authority, EPA has promulgated emissions standards and control programs for new nonroad engines and vehicles, including marine vessels.\textsuperscript{57} EPA has interpreted the definition of “new” to mean “show-room new . . . an engine or vehicle [i]s no longer new once it has left the retail showroom.”\textsuperscript{58} Thus, EPA applies the regulations to the vehicles during production, or at their original sale, but not to the use of the vehicles by their ultimate purchasers.\textsuperscript{59}

\textsuperscript{52} \textit{Id.} An important difference between the fuel provisions and the engine/vehicle provisions of the CAA is that the fuel requirements apply to specific people involved in the fuel business who must comply, while the engine/vehicle provisions apply specifically to the engines and vehicles. \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.} § 7547.

\textsuperscript{55} \textit{Id.} § 7547(a).

\textsuperscript{56} 42 U.S.C. § 7547(a)(3). Specifically, Congress requires EPA to adopt standards which shall “achieve the greatest degree of emission reduction achievable through the application of technology . . . available for the engines or vehicles to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.” \textit{Id.}

\textsuperscript{57} 40 C.F.R. §§ 89, 94 (2005).

\textsuperscript{58} \textit{Engine Mfrs. Ass’n v. EPA}, 88 F.3d 1075, 1084 (D.C. Cir. 1996).

\textsuperscript{59} \textit{Id.} The Engine Manufacturers Association challenged this definition of “new,” arguing instead to define “new” as engines “not in existence on the effective date of the 1990 amendments” to the CAA. However, the D.C. Circuit Court rejected this definition in favor of the EPA’s definition, which is consistent with the regulations applying to motor vehicles. \textit{Id.} at 1084–87. For a further discussion of \textit{Engine Mfrs. Ass’n}, see infra Part III.C.
The ocean vessels that are subject to California’s new regulation, and of concern to this Note, are Category 3 marine diesel engines, defined by EPA as “very large marine engines used primarily for propulsion power on ocean-going vessels such as container ships, tankers, bulk carriers, and cruise ships.” EPA adopted two-tiered standards for regulating emissions from Category 3 engines. The Tier 1 standards, which were effective January 1, 2004, require new marine diesel engines to use technology that limits NOx emissions to the international standards set by the International Maritime Organization in MARPOL Annex VI. Tier 1 regulations do not apply to foreign-flag marine vessels. In fact, EPA specifically decided not to apply regulations to foreign vessels in U.S. waters, because it interpreted the CAA as not authorizing it. Even without foreign regulation, however, EPA estimates that the Tier 1 standards will reduce the NOx emissions of Category 3 engines by twenty percent by the year 2030. EPA noted that the standards of Annex VI adopted in Tier 1 have generally been followed by manufacturers since 2000, and thus immediate compliance can be reasonably expected.

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61 Bluewater Network, 372 F.3d at 408.

62 Id.; Environmental Protection Agency, EPA420-12-03-004, Final Regulatory Support Document: Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder 1-1 to 1-2 (2003), available at http://www.epa.gov/otaq/regs/nonroad/marine/ci/r03004.pdf [hereinafter Support Document]; see 40 C.F.R. § 94. Annex VI, the most recent international agreement of the International Convention for the Prevention of Pollution from Ships, set limits on emissions of SOx and NOx from ship exhausts and set a 4.5% cap on the allowable sulfur content of diesel fuel used by ships. International Maritime Organization, Prevention of Air Pollution From Ships, http://www.imo.org/home.asp (Follow “Marine Environment” hyperlink; then follow “Air Pollution” hyperlink) (last visited Dec. 30, 2006) [hereinafter IMO, Prevention]. The U.S. Senate has not yet ratified the treaty, but it became effective on May 14, 2005. U.S. Department of State, Ocean Treaties, Sept. 29, 2005, available at http://www.state.gov/g/oes/rls/rm/54128.htm [hereinafter Ocean Treaties]; IMO, Prevention, supra. The issue of whether MARPOL VI affects California’s authority to enforce its new regulation is beyond the scope of this Note.

63 See 40 C.F.R. §§ 89.1(a), 94.1(b)(2).

64 Id.; Clay J. Garside, Comment, Forcing the American People to Take the Hard NOx: The Failure to Regulate Foreign Vessels Under the Clean Air Act as Abuse of Discretion, 79 Tul. L. Rev. 779, 796–98 (2005).

65 Bluewater Network, 372 F.3d at 408 (quoting Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. at 9746, 9757, 9762).

66 Id. at 410.
Meanwhile, EPA is considering more stringent standards for Tier 2, which will go into effect no later than April 27, 2007. EPA is also considering whether the CAA authorizes EPA to regulate foreign vessels, and if so, whether to begin such regulation.

2. EPA’s Responsibilities as Defined in Bluewater Network v. EPA

In Bluewater Network v. EPA, an environmental group challenged EPA’s decision to defer regulation of engines on foreign vessels. Bluewater argued that the CAA requires EPA to adopt emissions standards for foreign vessels, but the D.C. Circuit Court disagreed. During the rulemaking process, EPA had found that delaying regulation of foreign vessels would not make any significant difference, because foreign vessels were already expected to comply with MARPOL Annex VI standards regardless of what EPA did. Furthermore, the language of the CAA did not clearly require EPA to apply regulations to foreign vessels. Accordingly, the court found that EPA’s decision to postpone regulations of foreign vessels adequately fulfilled its responsibilities under the statute.

Despite the U.S. Senate’s refusal to ratify MARPOL Annex VI, the emissions standards promulgated by EPA are equivalent to those of Annex VI. Thus, while the U.S. is not a party to the treaty, it has chosen to apply the same standards as the majority of the international community with which the U.S. conducts trade.

C. Section 211: Fuel Requirements

In section 211 of the CAA, Congress authorized EPA to regulate fuel and fuel additives—including fuel used by nonroad engines and vehicles—in order to decrease the adverse health and environmental

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67 Id. at 408, 410 (quoting Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. at 9746, 9757, 9762).
69 372 F.3d at 412.
70 Id.
71 Id. at 413.
72 Id. at 412.
73 Id. at 413.
74 See Ocean Treaties, supra note 62.
75 See Garside, supra note 64, at 788.
effects of fuel. Specifically, EPA may impose requirements on manufacturers and processors of fuel prior to the sale or introduction of the fuel into commerce.

Congress also set sulfur content limits for motor vehicle diesel fuel, by prohibiting the “manufacture, [sale], supply, offer for sale or supply, dispense, transport, or introduction into commerce” of any motor vehicle fuel containing greater than 0.05% sulfur by weight. Additionally, EPA had authority to require importers to segregate diesel fuel not intended for use in motor vehicles from motor vehicle diesel fuel. However, Congress did not set sulfur content requirements for nonroad diesel fuel like that used in large ocean vessels, but instead gave EPA discretion to make that determination.

Accordingly, EPA established allowable levels of sulfur in diesel fuels used by marine engines that will reduce their PM and SOx emissions. These regulations are applicable to refiners of diesel fuel used by nonroad, locomotive, and marine engines. EPA will implement the limit in three phases, the first phase effective June 1, 2007, with lower levels of sulfur allowed in each succeeding phase.

III. STATE POWER TO REGULATE EMISSIONS FROM MOBILE SOURCES

A. Motor Vehicle Regulation

Under the CAA, the “States and the Federal Government [are] partners in the struggle against air pollution,” although California has broader power than other states. Since Congress enacted the CAA, a primary role of the states has been the regulation of stationary

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78 Id. § 7545(a).
79 Id. § 7545(i).
80 Id. § 7545(i)(2).
81 Id. § 7545(i).
82 Envtl. Prot. Agency, EPA420-R-04-007, Final Regulatory Analysis: Control of Emissions from Nonroad Diesel Engines ES-5 (2004), available at http://www.epa.gov/nonroad-diesel/2004fr/420r04007a.pdf [hereinafter Final Regulatory Analysis]. The sulfur in diesel fuel impairs the emission control devices on the engines, so an additional benefit of using low-sulfur fuel is that it “will enable advanced high efficiency emission control technology to be applied to nonroad engines” that will achieve even greater emission reductions than merely the use of the fuel itself. Id.
83 Id.
84 Id. at ES-5 to ES-6.
sources of air pollution, such as factories. However, the regulation of mobile sources of air pollution, such as motor vehicles, is left primarily to the federal government. Congress eventually adopted section 209(a) of the CAA, which expressly preempts states from regulating new motor vehicles. There were two rationales for preemption: First, state regulation of motor vehicles would complicate enforcement due to the frequency with which motor vehicles move across state boundaries; and second, different regulations in each state would create tremendous difficulty for automobile manufacturers and would severely obstruct interstate commerce.

Despite the potential problems with state regulation of new motor vehicles, Congress acknowledged that California already led the country in regulating automotive pollution. Congress granted California an exemption from preemption under section 209(a), and thereby allowed California to continue its regulation of emissions from new motor vehicles. In the 1977 Amendments of the CAA, Congress permitted states to choose between the California regulations and the federal regulations.

Additionally, Congress explicitly preserved the power of states to regulate motor vehicles in certain ways. Section 209(d) provides “[n]othing 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.” This provision has generally been interpreted as maintaining state power to regulate pollution from motor vehicles once they are no longer new; for instance, through in-use regulations such as carpool lanes and other incentive programs.

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86 Engine Mfrs. Ass’n, 88 F.3d at 1078–79; see 42 U.S.C. § 7475.
87 Engine Mfrs. Ass’n, 88 F.3d at 1079.
88 42 U.S.C. § 7543(a); Engine Mfrs. Ass’n, 88 F.3d at 1079. The text of section 209(a) provides, “[n]o State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.” 42 U.S.C. § 7543(a).
90 Engine Mfrs. Ass’n, 88 F.3d at 1079.
91 42 U.S.C. § 7543(b) (1); Engine Mfrs. Ass’n, 88 F.3d at 1079–80.
92 42 U.S.C. § 7507; Engine Mfrs. Ass’n, 88 F.3d at 1080.
93 42 U.S.C. § 7543(d).
94 Id.
95 Engine Mfrs. Ass’n, 88 F.3d at 1094.
B. State Regulatory Power of Nonroad Engines

In the Clean Air Act Amendments of 1990, Congress mandated EPA regulation of nonroad engines and vehicles. To some extent, it replicated the state-federal regulatory regime of motor vehicles. First, the statute explicitly prohibits any state from setting emissions standards relating to new locomotive engines and to new engines in construction and farm equipment that are less than 175 horsepower. Next, section 209(e) explicitly preempts states from adopting their own emission standards for other nonroad engines and vehicles, except for California, which may avoid federal preemption of “standards and other requirements relating to the control of emissions from [nonroad] vehicles or engines” under certain circumstances.

Specifically, section 209(e)(2) provides: “In the case of any nonroad vehicles or engines other than [new locomotive engines and smaller engines in farm or construction equipment], the [EPA] Administrator shall . . . authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines . . . .” EPA may authorize California’s “standards and other requirements” only if “California determines that [its] standards will be at least as protective of the public health and welfare as the applicable Federal standards.” Furthermore, EPA must deny authorization if it finds that California’s standards are unnecessary, or if the standards and enforcement procedures are inconsistent with the rest of section 209.

Every other state may adopt California’s “standards relating to the control of emissions from nonroad vehicles or engines.” Congress

97 See id.
98 42 U.S.C. § 7543(e)(1). These types of engines are not at issue in this Note.
99 Id. § 7543. California’s preemption waiver in this section is different from its exemption for motor vehicle regulations in section 209(b)(1) because it does not specifically use the word “new” to describe the nonroad vehicles that California may regulate. See id.; supra notes 89–92 and accompanying text.
100 42 U.S.C. § 7543(e)(2). Ocean vessels and their engines fall within the meaning of “nonroad vehicles” under the statute. See id. The CAA defines nonroad engine as “an internal combustion engine that is not used in a motor vehicle” and nonroad vehicle as one that “is powered by a nonroad engine and is not a motor vehicle.” Id. § 7550.
101 Id. § 7543(e)(2)(A).
102 Id.
103 Id. § 7543(e)(2)(B) (emphasis added) (“Any state other than California . . . may adopt and enforce . . . standards relating to the control of emissions from nonroad vehi-
did not allow for other states to adopt California’s “other requirements” relating to control of emissions from nonroad vehicles.104

Unlike other related parts of the CAA, section 209(e) does not use the word “new” to describe the nonroad engines that California may regulate with EPA authorization.105 Instead, the word “any” describes the nonroad engines that California may regulate.106 In contrast, EPA specifically has the authority to regulate emissions of only new nonroad sources.107 Additionally, the corresponding portion of section 209, which provides waiver from federal preemption for motor vehicle emissions regulations, specifically applies to “standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines.”108

C. Engine Manufacturers Ass’n v. EPA and Implied Preemption

One case has interpreted the breadth of state power to regulate emissions of nonroad engines and vehicles under CAA section 209(e).109 Engine Manufacturers Ass’n v. EPA examined two main issues: (1) which nonroad engines and vehicles states may regulate; and (2) what types of regulations states may enforce.110 In Engine Manufacturers Ass’n, the Engine Manufacturers Association (EMA) challenged several aspects of EPA’s interpretation of the scope of implied preemption under section 209(e).111 Two of these aspects are relevant to this Note: (1) whether section 209(e) preempts states from regulating non-new engines and vehicles; and (2) whether in-use regulations are “other requirements” under section 209(e) and are therefore implicitly preempted.112

The parties agreed that the structure of section 209(e) implied preemption.113 As the D.C. Circuit Court explained:

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104 Id.
105 Id. §§ 7543(a), (b), (e), 7547; see Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1090–92 (D.C. Cir. 1996).
106 42 U.S.C. § 7543(e)(2)(A) (“In the case of any nonroad vehicles or engines other than those referred to in [section 209(e)(1)] . . . .”) (emphasis added)).
107 Id. §§ 7543(e)(2)(A), 7547(a)(3).
108 Id. § 7543(a) (emphasis added).
109 See Engine Mfrs. Ass’n, 88 F.3d 1075.
110 Id. at 1087–94.
111 Id. at 1082–94.
112 Id. at 1078.
113 Id. at 1087. Courts may find that a federal law implicitly preempts a state law when “the federal statute’s structure and purpose, or nonspecific statutory language, reveal clear, but implicit, preemptive intent.” 81A C.J.S. States § 51 (2005).
Obviously, if no state regulation were preempted, California would have no need to seek authorization for its regulations, and other states would not need to opt in to the California rules. Thus, the California authorization provision assumes the existence of a category of sources that are subject to preemption. In other words, states must be preempted from adopting any regulation for which California could receive authorization.\textsuperscript{114}

However, the parties disagreed over which nonroad engines and vehicles, and which types of regulations, were covered by the preemptive provisions of the statute.\textsuperscript{115}

1. Nonroad Vehicles States Can Regulate

Specifically, EMA argued that the implied preemption of section 209(e) was not limited to new nonroad engines as EPA had decided.\textsuperscript{116} Instead, EMA contended that the statute’s preemption covered state regulation of any nonroad engines and vehicles—new and non-new—other than the locomotive, construction, and farm engines covered in section 209(e)(1).\textsuperscript{117} EMA’s argument relied on the “plain statement” of the statute.\textsuperscript{118} The language of the statute itself—the absence of the word “new” from section 209(e)(2), and the presence of the word “any” to modify the nonroad engines and vehicles for which California may seek authorization to regulate\textsuperscript{119}—indicates that the preemption is not limited to “new” nonroad engines and vehicles.\textsuperscript{120}

EPA argued, however, that the word “new” should be read into section 209(e)(2) in order to avoid a discrepancy in the authorization regime.\textsuperscript{121} Because EPA is only authorized to regulate new nonroad engines and vehicles, there would be no applicable federal standards to compare to California’s regulations of non-new, nonroad sources in the authorization process as required by section 209(e)(2).\textsuperscript{122} Therefore, EPA argued, “the statute does not provide any basis for the EPA to determine whether to authorize a proposed California regula-

\textsuperscript{114}Engine Mfrs. Ass’n, 88 F.3d at 1087–88 (citations omitted).

\textsuperscript{115}Id. at 1087.

\textsuperscript{116}Id.

\textsuperscript{117}Id.; see supra note 98 and accompanying text.

\textsuperscript{118}Engine Mfrs. Ass’n, 88 F.3d at 1088.

\textsuperscript{119}See supra notes 105–108 and accompanying text.

\textsuperscript{120}Engine Mfrs. Ass’n, 88 F.3d at 1088.

\textsuperscript{121}Id. at 1088–89.

\textsuperscript{122}Id. at 1089. See supra note 101 and accompanying text.
tion.” Furthermore, EPA argued, Congress could not have intended to leave a regulatory gap by preempting states from regulating non-new engines and vehicles that EPA cannot regulate itself.\textsuperscript{124}

After finding nothing helpful in the legislative history, the D.C. Circuit Court found EMA’s literal reading of the statute—that state regulation of both new and non-new engines and vehicles was pre-empted—to be correct.\textsuperscript{125} The absence of the word “new” in section 209(e)(2) is not insignificant, and therefore EPA’s interpretation that states were only preempted from regulating “new” nonroad sources was erroneous.\textsuperscript{126} Section 209(e)(2), the court found, preempts states from regulating both new and non-new sources, and requires California to obtain authorization for regulation of such sources.\textsuperscript{127}

The court reasoned that despite the seemingly odd structure of the statute, the word “new” cannot be read into the statute without evidence that Congress intended such a reading of the statute.\textsuperscript{128} EPA’s contention that the odd result demonstrated that Congress simply could not have intended the statute to be read literally was unconvincing and inappropriate without any support from the legislative history or elsewhere.\textsuperscript{129} Instead, the court declared, “[i]t is . . . conceivable that Congress meant to require California to come to the EPA before regulating sources not within the EPA’s own regulatory authority.”\textsuperscript{130}

Additionally, the court did not agree that the “regulatory gap” referred to by EPA required a nonliteral reading of the statute, because all nonroad sources were subject to regulation under the statute.\textsuperscript{131} Specifically, the court found, “the statute does not [actually] exempt any class of nonroad sources from regulation,” and thus any gap is insignificant.\textsuperscript{132}

\textsuperscript{123} Engine Mfrs. Ass’n, 88 F.3d at 1089.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 1090–92.
\textsuperscript{126} Id. at 1090.
\textsuperscript{127} See id. at 1090–91.
\textsuperscript{128} Id. at 1092.
\textsuperscript{129} Engine Mfrs. Ass’n, 88 F.3d at 1092–93 (“Essentially, the EPA concludes that the conferees inadvertently left out the word new in § 209(e)(2), and the EPA is, in fact, adhering to what was intended. Without a showing that the text is demonstrably at odds with Congressional intent, much less that the regulatory scheme is unworkable or absurd, however, the court must take Congress at its word.”).
\textsuperscript{130} Id. at 1090.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
2. Types of Regulations States Can Enforce

Next, EMA challenged EPA’s interpretation of what types of regulations states are permitted to adopt.133 EPA had decided that states’ in-use regulations134 are not preempted under section 209(e)(2) because they are “neither standards [nor] other requirements relating to the control of emissions.”135 EMA challenged this decision on the grounds that in-use regulations aimed at reducing emissions are in fact “other requirements relating to the control of emissions” that states are preempted from adopting and enforcing.136 Thus, EMA argued that states are only permitted to make in-use regulations that are unrelated to emissions control.137

Instead of independently analyzing the language of the statute, the court deferred to EPA’s interpretation, and noted EMA’s failure to offer a satisfying alternative interpretation.138 EPA contended that the “other requirements” that states are preempted from adopting under section 209(e) are only “certification, inspection, or approval” requirements which relate to the control of emissions.139 EPA pointed out that in other parts of section 209, the words “require” and “requirement” referred to “certification, inspection, or approval” relating to emissions.140 EPA accordingly argued, and the court accepted, that the word “requirements” in section 209(e)(2) must also refer to certification, inspection, or approval requirements, and not to in-use requirements, consistent with the rest of section 209.141

133 Id. at 1093.
134 Id. at 1094. In-use regulations are applied to the actual use of the engine or vehicle, such as carpool lanes and idling restrictions. See id.
136 Engine Mfrs. Ass’n, 88 F.3d at 1093; see 42 U.S.C. § 7543(e)(2). The court noted that EMA did not challenge EPA’s previously approved interpretation of “standard” to mean “quantitative levels of emissions.” Engine Mfrs. Ass’n, 88 F.3d at 1093 (citing Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1112–13 (D.C. Cir. 1979)).
137 Engine Mfrs. Ass’n, 88 F.3d at 1094.
138 See id. at 1093–94.
139 Id. at 1093.
140 Id.; see 42 U.S.C. § 7543.
141 Engine Mfrs. Ass’n, 88 F.3d at 1093. EMA argued that the absence of the words “certification, inspection, or approval” indicated Congress’s intent to assign a different meaning to “requirement” in section 209(e)(2). Id. The court replied that EMA’s argument did not take into account that section 209(e)(2)(B) gives states the power only to adopt California’s “standards,” not California’s “other requirements.” Id. Without further reasoning, the court concluded that “[t]hough the text does not compel the EPA’s interpretation, it does not forbid it either.” Id.
Once it determined the meaning of “requirements” in section 209(e), the court also found that section 209(d) preserves the states’ rights to enforce in-use regulations of nonroad engines and vehicles.\textsuperscript{142} 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.”\textsuperscript{143} Under the motor vehicle regulatory scheme, this provision ensures that states have been allowed to adopt in-use regulations, such as “carpool lanes . . . and programs that control extended idling of vehicles.”\textsuperscript{144}

The court also examined how section 209(d) operates in conjunction with section 213(d), attempting to discern the effect of section 209(d) on the regulation of nonroad vehicles and engines.\textsuperscript{145} Section 213(d) states, “[t]he standards under this section shall be subject to [section 209] of this title.”\textsuperscript{146} The court did not formulate its own interpretation of what this cross-reference means.\textsuperscript{147} Again, the court simply deferred to EPA’s interpretation, noting EMA’s “fail[ure] to offer any coherent alternative.”\textsuperscript{148}

EPA argued that because section 209(d) was already in effect at the time that sections 213 and 209(e) were adopted, the reference in section 213\textsuperscript{149} to section 209 could reasonably be interpreted as adding nonroad vehicles to the end of the paragraph in section 209(d).\textsuperscript{150} EPA used this interpretation to support its position that section 209(d) preserves the rights of states to regulate the use of nonroad vehicles, in addition to motor vehicles.\textsuperscript{151}

Acknowledging the ambiguity of section 209(e) when read in conjunction with sections 209 and 213 of the CAA, the court adopted

\textsuperscript{142} Id. at 1093–94.
\textsuperscript{143} 42 U.S.C. § 7543(d).
\textsuperscript{144} Engine Mfrs. Ass’n, 88 F.3d at 1094.
\textsuperscript{145} Id. at 1093–94.
\textsuperscript{146} 42 U.S.C. § 7547(d); Engine Mfrs. Ass’n, 88 F.3d at 1094; see 42 U.S.C. § 7543.
\textsuperscript{147} See Engine Mfrs. Ass’n, 88 F.3d at 1094.
\textsuperscript{148} Id.
\textsuperscript{149} Section 213 of the CAA concerns only nonroad vehicles and engines. See supra Part II.B.
\textsuperscript{150} Engine Mfrs. Ass’n, 88 F.3d at 1093–94.
\textsuperscript{151} See 42 U.S.C. §§ 7543(d)–(e), 7547; Engine Mfrs. Ass’n, 88 F.3d at 1094. EPA’s interpretation amounted to a change in the text of section 209(d) to say the following: “Nothing in this part shall preclude or deny to any State or political division thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor or nonroad vehicles.” See 42 U.S.C. § 7543(d); Engine Mfrs. Ass’n, 88 F.3d at 1094.
EPA’s view that the statutory structure must preserve the states’ right to impose in-use regulations on nonroad vehicles.\footnote{Engine Mfrs. Ass’n, 88 F.3d at 1094.} After deciding that section 209(d) could be interpreted to include nonroad vehicles and engines, EPA and the court further supported their conclusion with comparison to the motor vehicle regulatory regime, which has always permitted states to adopt in-use regulations intended to control emissions, “such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles.”\footnote{Id.}

3. EPA’s Responding Regulations

In response to the D.C. Circuit’s decision, EPA changed its regulations promulgated pursuant to section 209(e).\footnote{Control of Air Pollution: Emissions Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts, 62 Fed. Reg. 67,733, 67,734 (Dec. 30, 1997) (to be codified at 40 C.F.R. pt. 85, 89); see 40 C.F.R. § 89 (2005).} First, EPA expressly adopted the court’s decision by clarifying that California is required to obtain EPA authorization to enforce all of its “adopted standards and other requirements relating to the control of emissions from nonroad vehicles or engines,” instead of only requiring EPA authorization for California’s regulation of new nonroad vehicles or engines.\footnote{62 Fed. Reg. at 67,735; see 40 C.F.R. § 85.1604.} Furthermore, EPA clarified its opinion that states are not “precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is no longer new.”\footnote{62 Fed. Reg. at 67,736; 40 C.F.R. § 89 subpt. A, app. A.} Thus, according to EPA, CAA section 209(e) does not require California to obtain authorization to enforce a regulation limiting the sulfur concentration of fuel used by large ocean vessels, because it is a regulation of their use and operation.\footnote{See 40 C.F.R. § 89 subpt. A, app. A; Proposed Regulation, supra note 2, at A-1.} The California Air Resources Board also takes this position in its statement of legal authority for adopting and enforcing the new regulation.\footnote{Cal. Env’tl. Prot. Agency Air Res. Bd., Staff Report: Initial Statement of Reasons for Proposed Rulemaking App. B: ARB’s Legal Authority B-12 (2005), available at http://www.arb.ca.gov/regact/marine2005/appb.pdf [hereinafter CARB’s Legal Authority].}
D. The Definition of Standards: Engine Manufacturers Ass’n v. South Coast Air Quality

The D.C. Circuit’s ruling that states are not preempted by section 209(e) from adopting in-use regulations for nonroad engines and vehicles is questionable in light of the Supreme Court’s more recent decision in Engine Manufacturers Ass’n v. South Coast Air Quality Management District.\textsuperscript{159} In South Coast Air Quality, EMA—once again the plaintiff—challenged regulations adopted by the South Coast Air Quality Management District (SCAQMD).\textsuperscript{160} The challenged regulations, collectively called the Fleet Rules, applied to the operators of fleets of motor vehicles, such as public transit vehicles, urban buses, street sweepers, waste collection vehicles, and taxicabs, among others.\textsuperscript{161} The Fleet Rules prescribed the types of vehicles that operators were permitted to purchase or lease for their fleets, requiring either that the vehicles were alternatively fueled,\textsuperscript{162} or that they meet certain emission specifications of the state.\textsuperscript{163}

EMA challenged the Fleet Rules on the grounds that they were prohibited by the motor vehicle preemption provisions of section 209.\textsuperscript{164} The District Court of California granted summary judgment in favor of the defendants, holding that the Fleet Rules were not “standards” within the meaning of section 209.\textsuperscript{165} Instead, the District Court reasoned, they only regulated the purchase of vehicles, distinguishable from the regulation of sales which mandate that manufacturers of engines and vehicles meet certain emissions requirements.\textsuperscript{166}

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\textsuperscript{159} See 541 U.S. 246 (2004).
\textsuperscript{160} Id. at 249. The South Coast Air Quality Management District is the California entity responsible for developing the Los Angeles basin’s comprehensive plan for reducing emissions and achieving state and federal ambient air quality standards. Id. (citing CAL. HEALTH & SAFETY CODE ANN. § 40402(e) (West 1996)).
\textsuperscript{161} Id.
\textsuperscript{162} Alternative-fuel vehicles are defined in various ways, but generally include those that are powered by something other than diesel fuel, such as liquefied natural gas, liquefied petroleum gas, methanol, electricity, or fuel cells. Id. at 249 n.1.
\textsuperscript{163} Id. at 249–50.
\textsuperscript{164} Id. at 251. Section 209(a) prohibits states from adopting “standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines.” Clean Air Act § 209(a), 42 U.S.C. § 7543(a) (2000).
\textsuperscript{165} S. Coast Air Quality, 541 U.S. at 251.
\textsuperscript{166} Id. at 251–52. “Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard.” Id. (quoting Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 158 F. Supp. 2d 1107, 1118 (C.D. Cal. 2001)).
\end{flushleft}
Justice Scalia, writing for the majority of eight,\textsuperscript{167} rejected the District Court’s reasoning.\textsuperscript{168} The Supreme Court held that equating the Fleet Rules with “standards” did not depend on whether they regulate the purchase or sale of vehicles, but rather depended on whether they fall within the definition of the word standard, “assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.”\textsuperscript{169}

Accordingly, the Court turned to the dictionary to determine the meaning of “standard.”\textsuperscript{170} Webster’s Dictionary defines standard as that which “is established by authority, custom, or general consent, as a model or example; criterion; test.”\textsuperscript{171} Thus, the Court found:

[t]he criteria referred to in § 209(a) relates to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of “standard” throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, or emission-control technology with which they must be equipped.\textsuperscript{172}

In addition, the Court explicitly rejected the argument that under the CAA, “standards” only include production mandates applicable to manufacturers.\textsuperscript{173} The Court explained that standards are altogether different from the method of their enforcement.\textsuperscript{174} “While standards target vehicles or engines, standard-enforcement efforts . . . can be directed to manufacturers or purchasers.”\textsuperscript{175} The CAA does not limit enforcement of emissions standards to the manufacturers of

\textsuperscript{167} Justice Souter was the lone dissenter. See \textit{id.} at 259 (Souter, J., dissenting).
\textsuperscript{168} \textit{id.} at 252 (majority opinion).
\textsuperscript{169} \textit{id.} (quoting Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).
\textsuperscript{170} \textit{id.} at 252–53.
\textsuperscript{171} \textit{S. Coast Air Quality}, 541 U.S. at 253–54 (quoting \textit{WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY} 2455 (1945)).
\textsuperscript{172} \textit{id.} at 253 (internal citations omitted).
\textsuperscript{173} \textit{id.}
\textsuperscript{174} \textit{id.}
\textsuperscript{175} \textit{id.} at 253.
vehicles, but rather allows also for standard enforcement against vehicle sellers and purchasers.\textsuperscript{176}

The Supreme Court ordered the trial court to consider several issues in light of its decision.\textsuperscript{177} The Court recognized that several issues had not been raised on appeal that could affect the overall result of the case.\textsuperscript{178} On remand, the District Court of Central California addressed the issues that had not been heard before the Supreme Court, and ultimately found that the Fleet Rules were not preempted by section 209.\textsuperscript{179} The court’s reasoning was unrelated to the Supreme Court’s definition of standard.\textsuperscript{180} Instead, the court found that the application of the Fleet Rules to state and local governments falls within the market participant doctrine, which provides that actions by a state which are proprietary, rather than regulatory, are not preempted by federal law unless Congress expressly preempts such proprietary conduct.\textsuperscript{181}

IV. Applying Section 209(e) to California’s New Regulation

A. Regulatory Structure Under Section 209(e)

Together, the Supreme Court’s decision in \textit{Engine Manufacturers Ass’n v. South Coast Air Quality Management District} and the D.C. Circuit Court’s decision in \textit{Engine Manufacturers Ass’n v. EPA} clarify that CAA sections 209(e) and 213 create a multi-part regulatory structure for nonroad vessels.\textsuperscript{182} While California and EPA share regulatory authority in a seemingly odd way, other states are wholly preempted from making any “standard or other requirement relating to the control of emissions” from nonroad vehicles.\textsuperscript{183}

When new nonroad vehicles and engines are the subject of the regulation, California and EPA share dual authority to adopt and enforce “standards and other requirements relating to the control of

\textsuperscript{176} \textit{Id.} at 254–55.

\textsuperscript{177} \textit{S. Coast Air Quality}, 541 U.S. at 258–59.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{See generally Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., No. CV00-09065FMC(BQRX), 2005 WL 1163437 (C.D. Cal. May 5, 2005)}.

\textsuperscript{180} \textit{See id.}

\textsuperscript{181} \textit{Id. at *4, *13.}

\textsuperscript{182} \textit{See Clean Air Act §§ 209(e), 213, 42 U.S.C. §§ 7543(e), 7547 (2000); Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt., 541 U.S. 246 (2004); Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075 (D.C. Cir. 1996)}.

\textsuperscript{183} 42 U.S.C. § 7543(e)(1); \textit{see Engine Mfrs. Ass’n}, 88 F.3d at 1090–92.
emissions.”\textsuperscript{184} However, California must obtain EPA authorization, and must fulfill the other statutory requirements of section 209(e) by showing that the state has a need for the regulations, and that they will be at least as protective of the public health as federal standards.\textsuperscript{185}

When non-new nonroad engines are the subject of the regulation, California has the sole authority to adopt and enforce “standards and other requirements relating to the control of emissions.”\textsuperscript{186} Again, however, California must obtain EPA authorization.\textsuperscript{187} While it does seem odd that Congress would structure a regulatory regime in this way—odd enough that EPA’s argument that Congress must have made a mistake in leaving out the word “new” is plausible—the statute, on its face, requires this reading.\textsuperscript{188}

Lastly, when the regulations are neither “standards [nor] other requirements relating to the control of emissions,” states are not preempted from adopting and enforcing regulations against any nonroad engines or vehicles.\textsuperscript{189} Similarly, California is not required to obtain EPA authorization for such regulations.\textsuperscript{190}

**B. Preemption Analysis Under Section 209(e)**

The first question when evaluating the preemptive effect of section 209(e) on a regulation is whether the regulation is a “standard or other requirement relating to the control of emissions.”\textsuperscript{191} If not, then the regulation is not preempted by the CAA.\textsuperscript{192} However, if the regulation is a standard or other requirement, then it is preempted for all states except California.\textsuperscript{193} California, however, must look at which vehicles it regulates; if it regulates vehicles covered by section 209(e) (1), then it is

\textsuperscript{184} See 42 U.S.C. § 7543(e) (2); Engine Mfrs. Ass’n, 88 F.3d at 1090.

\textsuperscript{185} 42 U.S.C. § 7543(e) (2).

\textsuperscript{186} Id.; see Engine Mfrs. Ass’n, 88 F.3d at 1090–92.

\textsuperscript{187} See 42 U.S.C. § 7543(e) (2); Engine Mfrs. Ass’n, 88 F.3d at 1091.

\textsuperscript{188} Engine Mfrs. Ass’n, 88 F.3d at 1092–93 (“Without a showing that the text is demonstrably at odds with Congressional intent, much less that the regulatory scheme is unworkable or absurd, however, the court must take Congress at its word.” (citation omitted in original)).

\textsuperscript{189} See 42 U.S.C. § 7543(e); Engine Mfrs. Ass’n, 88 F.3d at 1090; see also S. Coast Air Qual. 541 U.S. at 253.

\textsuperscript{190} See 42 U.S.C. § 7543(e) (2); Engine Mfrs. Ass’n, 88 F.3d at 1090.

\textsuperscript{191} See 42 U.S.C. § 7543(e) (2).

\textsuperscript{192} See supra notes 182–90 and accompanying text.

\textsuperscript{193} See 42 U.S.C. § 7543(e); Engine Mfrs. Ass’n, 88 F.3d at 1090.
preempted. If it regulates any other nonroad vehicle, then California must obtain authorization from EPA to avoid preemption.

1. The Definition of Standard: The Effect of *South Coast Air Quality* on the Scope of Section 209(e)’s Preemption

The Supreme Court’s decision in *Engine Manufacturers Ass’n v. South Coast Air Quality Management District* clarifies the preemption analysis to be applied under section 209(e). In its redefinition of “standard,” the Supreme Court effectively broadened the scope of state regulations preempted by the CAA. As a result, the D.C. Circuit Court’s decision in *Engine Manufacturers Ass’n v. EPA* regarding in-use regulations is highly questionable.

At the time of *Engine Manufacturers Ass’n v. EPA*, the D.C. Circuit Court had already approved EPA’s definition of standard to mean “quantitative levels of emissions,” and therefore summarily decided that in-use regulations were not standards. However, in *South Coast Air Quality*, the Supreme Court adopted a more expansive definition of standard—“a criteria relat[ing] to the emission characteristics of a vehicle or engine.” Consequently, now a court must examine whether a regulation sets a standard under this broader definition, and some in-use regulations may be standards under section 209(e), while others are not. Regulations are subject to a different scrutiny in determining whether they are “standards” that are preempted by CAA section 209(e).

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194 See 42 U.S.C. § 7543(e)(1); *Engine Mfrs. Ass’n*, 88 F.3d at 1090.
195 See 42 U.S.C. § 7543(e)(2); *Engine Mfrs. Ass’n*, 88 F.3d at 1090.
196 See 42 U.S.C. § 7543(e); *S. Coast Air Quality*, 541 U.S. at 252–54. Although the Supreme Court’s decision interpreted the word “standard” as used in CAA section 209(a), which covers only motor vehicles, the Court explicitly stated that its definition of “standard” is consistent throughout CAA Title II, which contains all of section 209. *S. Coast Air Quality*, 541 U.S. at 253 (“This interpretation is consistent with the use of ‘standard’ throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply or emission-control technology with which they must be equipped . . . .” (internal citations omitted)). In addition, sections 209(a) and 209(e) use the same language—“standards relating to the control of emissions”—further indicating that their meaning is the same. See 42 U.S.C. § 7543(a), (e).
197 See *S. Coast Air Quality*, 541 U.S. at 253.
198 See id. at 252–53; *Engine Mfrs. Ass’n*, 88 F.3d at 1093–94; see also supra Part III.C.2.
199 See *Engine Mfrs. Ass’n*, 88 F.3d at 1093–94.
200 *S. Coast Air Quality*, 541 U.S. at 252–53; *see Engine Mfrs. Ass’n*, 88 F.3d at 1093.
201 See 42 U.S.C. § 7543(e); *S. Coast Air Quality*, 541 U.S. at 252–53; *Engine Mfrs. Ass’n*, 88 F.3d at 1093.
202 See *S. Coast Air Quality*, 541 U.S. at 252–53; *Engine Mfrs. Ass’n*, 88 F.3d at 1093–94.
At the same time, the Supreme Court’s newly adopted definition of standard, while accurate according to the dictionary, is less precise than the previously accepted “quantitative level of emissions.”\textsuperscript{203} While the Supreme Court’s definition offers minimal guidance for what actually falls within it, the Court stated: “[In order to meet the standards,] the vehicle must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions.”\textsuperscript{204} At the very least, this list indicates that any regulation which falls within one of the stated categories is a standard.\textsuperscript{205} Furthermore, the language suggests that the given categories comprise an exhaustive list of the types of regulations that are “standards relating to the control of emissions” covered by the preemption provisions of section 209(e).\textsuperscript{206} The Court did not indicate that this list amounts to mere examples of what is a standard under section 209, but rather implied that this list encompasses a complete description of what is a “standard relating to the control of emissions.”\textsuperscript{207}

2. \textit{Engine Manufacturers Ass’n v. EPA} Incorrectly Found That In-Use Regulations of Nonroad Vehicles Are Not Preempted

EPA’s reasoning, which the court adopted in \textit{Engine Manufacturers Ass’n v. EPA}, for finding non-preemption of in-use regulations under section 209(e) was unmistakably flawed.\textsuperscript{208} EPA relied on a comparison with states’ accepted power to adopt in-use regulations intended to control emissions from motor vehicles.\textsuperscript{209} However, blindly applying the same preemption analysis to nonroad engines is erroneous because section 209(e) preempts a broader range of regulations for nonroad vehicles than section 209(a) does for motor vehicles.\textsuperscript{210}

Because section 209(a) only preempts states from adopting emissions standards for \textit{new} motor vehicles, in-use regulations of motor vehicles are, by definition, never preempted.\textsuperscript{211} By the time a motor vehicle is “in-use,” it is no longer new, and therefore not covered by

\textsuperscript{203} \textit{S. Coast Air Quality}, 541 U.S. 252–53; see \textit{Engine Mfrs. Ass’n}, 88 F.3d at 1093.
\textsuperscript{204} \textit{S. Coast Air Quality}, 541 U.S. at 253.
\textsuperscript{205} See id.
\textsuperscript{206} 42 U.S.C. § 7543; see \textit{S. Coast Air Quality}, 541 U.S. at 253.
\textsuperscript{207} 42 U.S.C. § 7543; see \textit{S. Coast Air Quality}, 541 U.S. at 253.
\textsuperscript{208} See \textit{88 F.3d} at 1093–94.
\textsuperscript{209} See supra note 135 and accompanying text.
\textsuperscript{210} See supra Parts III.C.1, III.D.
\textsuperscript{211} See 42 U.S.C. § 7543(a).
the express preemption of section 209(a).\textsuperscript{212} In contrast, section 209(e) preempts states from adopting emissions standards for both new and non-new nonroad vehicles.\textsuperscript{213} Therefore, using the shorthand term “in-use” to describe a regulation of a nonroad source does not address any relevant characteristic in the preemption analysis.\textsuperscript{214} Regardless of whether a vehicle is new, non-new, or in-use, the relevant question remains whether a state regulation is a “standard or other requirement relating to the control of emissions.”\textsuperscript{215}

C. CARB Must Obtain EPA Authorization for the New Regulation

1. California’s Regulation Is the Type Which Requires EPA Authorization

California must obtain EPA authorization to enforce its new regulation, because it is a “standard relating to the control of emissions.”\textsuperscript{216} The California Air Resources Board (CARB) maintains that EPA authorization is not required because the new rule is an in-use regulation, but this does not address the proper question of whether the regulation is a “standard” as defined by the Supreme Court in \textit{South Coast Air Quality}.\textsuperscript{217} The first question is whether California’s new regulation—which prohibits Category 3 engines from emitting levels of PM, NOx, or SOx higher than the rates achievable by use of certain fuels—imposes “standards . . . relating to the control of emissions from [nonroad] vehicles or engines.”\textsuperscript{218} If this question is answered in the affirmative, then California must obtain EPA authorization for the regulations.\textsuperscript{219}

The regulation is a standard if it sets “criteria . . . relat[ing] to the emission characteristics of a vehicle or engine . . . [such as a requirement that] a vehicle must not emit more than a certain amount of a

\textsuperscript{212} See \textit{id}.

\textsuperscript{213} See 42 U.S.C. § 7543(e); \textit{supra} Part III.C.1.

\textsuperscript{214} See 42 U.S.C. § 7543(e); \textit{Engine Mfrs. Ass’n}, 88 F.3d at 1090.

\textsuperscript{215} See 42 U.S.C. § 7543(e); \textit{S. Coast Air Quality}, 541 U.S. at 253; \textit{see also supra} Part IV.B.1.

\textsuperscript{216} See 42 U.S.C. § 7543(e) (2); \textit{S. Coast Air Quality}, 541 U.S. at 252–53. See generally \textit{Proposed Regulation}, \textit{supra} note 2.

\textsuperscript{217} See \textit{S. Coast Air Quality}, 541 U.S. at 252–53; CARB’s \textit{Legal Authority}, \textit{supra} note 158; \textit{supra} Part IV.B.

\textsuperscript{218} 42 U.S.C. § 7543(e); \textit{see S. Coast Air Quality}, 541 U.S. at 253; \textit{Proposed Regulation}, \textit{supra} note 2, at A-5 to A-6.

\textsuperscript{219} See 42 U.S.C. § 7543(e); \textit{Engine Mfrs. Ass’n}, 88 F.3d at 1090–92.
given pollutant.” California’s regulation is clearly covered by this first category of regulations that the Supreme Court identified as falling within the standards expressly preempted by section 209.

California’s regulation requires that vessels limit their emissions of PM, NOx, and SOx to the levels that would result from the use of marine gas oil or marine diesel oil with 0.5% sulfur content or less. In order to comply with the regulation, vessels “must not emit more than a certain amount of a given pollutant” and therefore the regulation falls within one of the specific categories listed by the Supreme Court as a standard relating to the control of emissions under section 209. The “certain amount” is the amount that would be emitted by the use of the specified low-sulfur fuels. The “given pollutants” are PM, NOx, and SOx. Thus, because it is a standard, section 209(e) requires California to obtain EPA authorization before enforcing the regulation.

It is crucial that California sets emission levels based on certain fuels rather than simply requiring certain fuels. Although the regulation itself does not explicitly set a specific number limit on the level of emissions from ships, it does set a specific level that is calculable for each individual ship, thereby setting a “certain amount” over which each ship is not permitted to emit. Under the rule, each ship owner or operator can determine its allowable “certain amount” by calculating what quantity of the pollutants the ship would emit if 0.5% sulfur fuel were used. The ship owner or operator can then decide either to use the specified fuel or to use a different technique to insure that the calculated “certain amount” of allowable pollutants is not exceeded.

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220 S. Coast Air Quality, 541 U.S. at 252–53.
221 See id.; Proposed Regulation, supra note 2, at A-5 to A-6.
222 Proposed Regulation, supra note 2, at A-5 to A-6.
223 S. Coast Air Quality, 541 U.S. at 253; see Proposed Regulation, supra note 2, at A-5 to A-6.
224 S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-6.
225 S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-6.
226 See Clean Air Act § 209(e), 42 U.S.C. § 7543(e) (2000); S. Coast Air Quality, 541 U.S. at 252–53.
228 S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.
229 See Proposed Regulation, supra note 2, at A-5 to A-6. It is likely that ships can be classified by engine type and size, and then the permissible “certain amount” for each class calculated. Although CARB does not provide such a classification with specific numbers in the regulation, it nonetheless sets a “certain amount” of pollutants which may not be exceeded. See generally id.
Thus, California does not evade qualification of the regulation as a “standard” simply by not providing actual numbers in its regulation, because the regulation still sets a knowable “certain amount” of emissions that ships may not exceed.

2. Regulations Applied to Ocean-Going Vessels Are Not Expressly Preempted by the CAA

California’s new regulation is not expressly preempted by section 209(e)(1), because the vessels it regulates are not farm or construction engines or equipment of less than 175 horsepower, or locomotives. Therefore, because the CAA authorizes California to regulate both new and non-new sources other than those covered by section 209(e)(1), California is not preempted by the CAA from regulating the ocean-going vessels which are the subject of the new regulation.

3. California Fulfills the Section 209(e) Requirements to Obtain EPA Authorization

California’s regulation fulfills the requirements for obtaining EPA authorization under section 209(e).

First, California’s regulation will be “at least as protective of the public health and welfare as the applicable Federal standards.” While EPA has not set any similar standards because it cannot regulate non-new vessels, the United States has recognized Annex VI as customary international law. Annex VI sets a worldwide cap on sulfur content in fuel at 4.5%, with designated areas requiring no more than 1.5% sulfur fuel. By basing emissions limits on 0.5% sulfur fuel, California’s regulation will be more protective than the international rule.

The second requirement for obtaining EPA authorization is that California needs standards that are different from the federal man-

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230 See S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.
231 See S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.
234 See 42 U.S.C. § 7543(e)(2); Proposed Regulation, supra note 2; supra Part I.B.
236 See supra note 62.
237 See id.
238 See id.; Proposed Regulation, supra note 2, at A-6.
date. The severity of California’s air pollution sufficiently demonstrates that the state needs stricter restrictions on diesel emissions. As discussed previously, California’s air pollution is the most severe in the country, and is responsible for numerous adverse health effects, including asthma and cancer. Furthermore, the new regulation is applied to large ocean vessels, which are the source of significant quantities of pollutants and are expected to emit increasingly greater amounts in the near future. Thus, California’s uniquely serious air pollution problem, and the contribution of ocean vessels to that problem, clearly illustrate California’s need for further controls such as the new regulation.

D. Possibilities for California to Regulate Without EPA Authorization

In *South Coast Air Quality*, the Supreme Court enumerated the “criteria” that qualifies as a standard under section 209: “To meet them the vehicle must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions.” California is likely not preempted by section 209(e) from adopting regulations which do not fall within one of the three enumerated categories without EPA authorization.

Accordingly, if California instead adopted a fuel-type regulation which required the use of a specific fuel—as EPA has decided is allowable—EPA authorization would not be required to avoid preemption under section 209(e), because a fuel-type requirement does not fall into any of the categories listed by the Supreme Court in *South Coast Air Quality*. Unlike the newly adopted regulation, a regulation which requires the use of a certain fuel by nonroad engines would not fall into the category of “standards” which prohibit emissions over a

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239 42 U.S.C. § 7543(e)(2).
240 *See id.; L.A. Air Pollution, supra note 3.*
241 *See supra* notes 23–26 and accompanying text.
242 *See supra* notes 31–34 and accompanying text.
243 *See 42 U.S.C. § 7543(e)(2)(A)(ii); supra Part I.B.*
244 541 U.S. at 252–53; *see supra* notes 204–07 and accompanying text.
245 *See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253; Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1090–92 (D.C. Cir. 1996).*
246 “EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as . . . sulfur limits on fuel . . . once the engine is no longer new.” 40 C.F.R. § 89 subpt. A, app. A (2005).
247 *See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.*
“certain amount of a given pollutant.”248 A simple fuel-type requirement is not equivalent to one which prohibits the engine or vehicle from emitting more than a certain amount of a pollutant, because a vehicle that achieves the same numerical emission rate by alternative means would still violate the fuel-type requirement.249

For example, suppose the California regulation simply required ships to use fuel with a maximum of 0.5% sulfur content.250 A ship that did not use the fuel, but instead used a device, such as a filter, to limit its emissions to a level lower than the rates achieved by using the prescribed fuel would still violate the regulation.251 Thus, this hypothetical regulation does not prohibit a vehicle from emitting more than a certain amount of pollutants, because compliance with the regulation would not be determined by a quantitative measure of the vehicle’s emissions, unlike California’s new regulation.252 In effect, this hypothetical—and narrower—regulation would achieve the same result as California’s actual regulation, which allows alternative means of compliance.253 However, by providing fewer options for compliance than the regulation California has actually adopted, California may avoid classification as a “standard,” and thereby avoid the EPA authorization process.254

Additionally, a fuel-type requirement does not fall within any of the other categories of “standards” listed by the Supreme Court, and therefore would not be preempted by section 209(e).255 A fuel-type requirement does not require engines or vehicles to “be equipped with a certain type of pollution-control device,” nor does it require “some other design feature related to the control of emissions.”256

The practical difference between the new California regulation and the one suggested without EPA authorization is minimal, but the difference is decisive in determining the preemptive effect of the complicated and seemingly odd structure of section 209.257 The slight

248 See S. Coast Air Quality, 541 U.S. at 253.
249 See id.; 40 C.F.R. § 89 subpt. A, app. A.
250 See Proposed Regulation, supra note 2, at A-5 to A-6.
251 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253.
252 See S. Coast Air Quality, 541 U.S. at 252–53; Proposed Regulation, supra note 2, at A-5 to A-6; supra notes 220–31 and accompanying text.
253 See Proposed Regulation, supra note 2, at A-5 to A-6.
254 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 252–53; Proposed Regulation, supra note 2, at A-5 to A-6.
255 See 42 U.S.C. § 7543(e)(2); S. Coast Air Quality, 541 U.S. at 253.
256 See S. Coast Air Quality, 541 U.S. at 253.
257 See id. at 252–53; Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1090–92 (D.C. Cir. 1996); Proposed Regulation, supra note 2, at A-5 to A-6; supra Part III.
difference between emissions limits based on the use of a certain fuel and requirements for use of that same fuel is enough to make the former fall within the definition of “standards relating to the control of emissions,” while the latter avoids such a classification. As a result, section 209(e) preempts California from adopting and enforcing the emission limit based on a fuel type unless it obtains EPA authorization, although California is most likely not preempted by section 209(e) from adopting a fuel-type requirement that achieves virtually the same result.

CONCLUSION

Section 209(e) of the CAA establishes federal preemption of state regulation of emissions from nonroad vehicles and engines that is much broader in scope than the preemption covering motor vehicles. Specifically, states are preempted from adopting “standards or other requirements relating to the control of emissions” from both new and non-new nonroad vehicles, whereas for motor vehicles, states are only preempted from regulating new engines and vehicles. California is provided an exception, and may avoid preemption if it obtains EPA authorization for its regulations that fall under the definition of “standards or other requirements relating to the control of emissions.” Consequently, the threshold question in a preemption analysis under section 209(e) is whether the state regulation is a “standard or other requirement relating to the control of emissions,” according to the definition adopted by the Supreme Court.

Section 209(e) preempts California’s new regulation unless California obtains EPA authorization, because it establishes a “standard relating to the control of emissions from nonroad vehicles.” California’s regulation qualifies as one of the types of regulations falling within the Supreme Court’s definition of “standard” under section 209 because it requires that the ocean vessels do “not emit more than a certain amount” of pollutants. Therefore, California must obtain EPA authorization in order to avoid preemption. However, California may be able to sidestep the EPA authorization requirement by adopting a slightly altered regulation. A California regulation requiring ships to use a specific low-sulfur fuel may not require EPA authorization because it does not fall within the defined categories of standards

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258 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.

259 See 42 U.S.C. § 7543(e); supra Part VLC.
under section 209. By adopting a regulation with this subtle difference, California may be able to avoid both preemption and the EPA authorization process, while taking sorely needed steps to reduce the state’s air pollution.