

## EMERGENT LEGAL ISSUES FOR THE MARITIME TRANSPORTATION SYSTEM

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CALIFORNIA MARITIME LEADERSHIP SYMPOSIUM  
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SACRAMENTO



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## PRESENTATION OBJECTIVES

- Review Current Regulatory Framework
- Discuss Some of the Legal and Regulatory Issues
- Review Recent Legal Challenges
  - Rail
  - Fleets
  - Marine
  - Criminal Enforcement

## REGULATORY FRAMEWORK

- Air Quality Regulation
- Climate Change Initiatives
- CEQA

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## AIR QUALITY REGULATION

- IMO – MARPOL Annex VI
- Federal Clean Air Act
  - EPA Sets and Revises NAAQS
  - States Adopt Plans to Meet NAAQS
    - States Have Primary Authority to Regulate Stationary Sources
    - EPA and California Have Primary Authority to Regulate Mobile Sources
- California
  - Local Air Districts Primarily Regulate Stationary Sources
  - CARB Adopts Mobile Source Strategy
  - Ports Adopt Air Quality Measures

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## CLIMATE CHANGE INITIATIVES

- IMO -MARPOL Annex VI
  - MEPC adopted mandatory measures to reduce GHGs from ships
- Global Warming Solutions Act (AB 32)
  - Reduce GHG emissions to 1990 levels by 2020
- Local Measures
  - CEQA Significance Thresholds

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## CEQA

- Requires Evaluation of Impacts on Environment
  - EIR Prepared where Impacts are Significant
- Requires Reduction of Significant Impacts
  - Employ Feasible Mitigation
- Increased Community Involvement

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## WHY THE FOCUS ON MARITIME TRANSPORTATION?

- Relative Contribution
  - As Stationary Source Emissions Decline, Percentage of Mobile Source Contributions Increases
- Upcoming NAAQS Deadlines
  - **PM2.5:** **2014** (annual standard)  
**2019** (24-hour standard)
  - **Ozone:** **2023** (80 ppb adopted 1997)  
**2030** Timeframe (75 ppb adopted 2008)
- Local Concerns Regarding Health Impacts

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## MULTIPLE LEVELS OF REGULATION – END RESULT?

- Increasingly Stringent Regulations for Mobile Sources
  - Marine Vessels
  - Onroad Vehicles
  - Cargo handling
  - Locomotives

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## LEGAL AND REGULATORY ISSUES

- Authority
- Technological Feasibility
- Overlapping/Conflicting Regulations
- Long term Predictability or Certainty
- Fairness/Equal Opportunity
- Criminal Enforcement

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## LEGAL CHALLENGES

- Some recent examples–
  - Fleet vehicle purchases (*EMA v SCAQMD*)
  - Vessel fuel sulfur (*PMSA v CARB, I & II*)
  - Locomotive idling, risk assessment (*AAR v SCAQMD*)
  - CEQA Compliance (*California Building Industry Assn v. BAAQMD*)

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## FLEET VEHICLES - EMA

- SCAQMD Adopted 6 Fleet Rules
  - Fleet of 15 or More to Only Purchase Clean Vehicles
- EMA Challenged
  - Rules Preempted by CAA §209
  - Set Standard
- Trial Court Found No Preemption
  - Rules Only Regulated Purchase of Vehicles
  - No Requirements on Vehicle Manufacturers
- Ninth Circuit Upheld Trial Court Decision

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## FLEET VEHICLES – EMA

- Supreme Court Granted Certiorari
  - No Distinction Between Purchase and Sales
  - Rules Set Standards Preempted by CAA §209(a)
- Remanded to Trial Court to Review Undecided Issues
- Currently Fleet Rules Apply to State and Local Public Entities

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## MARINE - PMSA I

- CARB Adopted Vessel Fuel Regulations in 2007
  - Limited emissions from auxiliary diesel engines within 24 nm of California Coast
  - Vessels must use low sulfur fuel or comply with the equivalent emission reductions
- PMSA Challenged
  - Regulations are preempted by Clean Air Act and Submerged Lands Act.
- USDC Found Preemption
  - Regulations were preempted by CAA §209(e) and issued an injunction against enforcement of the MVR.

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## MARINE - PMSA I

- CARB Appealed to 9<sup>th</sup> Circuit:
- The Key Issue:
  - whether the Regulations constituted “standards... relating to the control of emissions from ... [non-road] engines (preempted);
  - or were “in-use” requirements (not preempted)
- 9<sup>th</sup> Circuit Upheld District Court Decision
  - Regulations were “standards” because of the requirement to obtain equivalent emissions
- Deferred Ruling on the SLA Question as Moot.

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## MARINE - PMSA II

- CARB Revised and Adopted Vessel Fuel Rules
  - No alternative means of compliance
  - Applies out 24 nm (also 12 and 3 nm)
- PMSA Challenged
  - Regulations preempted on constitutional and federal statutory grounds so far as the rules apply outside 3 nm.
- USDC Upheld Regulations
  - applied a general presumption against preemption
  - Determined that the VFR were not preempted by the SLA
  - Applied an “effects test” permitting the state to go > 3 nm
  - Found that the CAA permits states to adopt their own fuel mandates.

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## MARINE: PMSA II

- PMSA Appealed to 9<sup>th</sup> Circuit
- 9<sup>th</sup> Circuit → Affirmed the USDC
  - Applied general presumption against preemption based on “historic presence of state law” in the area of air pollution
  - California may enact reasonable regulations to monitor and control extra territorial conduct substantially affecting its territory.”
  - Applied a balancing test re dormant Commerce Clause and general maritime law preemption (uniformity)

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## MARINE - PMSA II

- PMSA has appealed to US Supreme Court
- Petition for Certiorari was filed; and both sides have briefed the case.
- October 3, 2011 Supreme Ct asked US Solicitor General for the views of the US government (non-litigant)
- Anticipate US will file a brief before May 2012 in order to allow the S.Ct to rule on the petition before end of this term in June 2012.

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## RAIL - AAR

Association of American Railroads, *et. al.* v. SCAQMD

- SCAQMD enacted rules limiting emissions from idling trains. (2005/2006)
- AAR Challenged
  - Interstate Commerce Commission Termination Act '95 preempted the implementation of the District's rules
  - exclusive jurisdiction with STB.
- USDC
  - issued permanent injunction precluding the District from implementing or enforcing its idling restrictions. (2007)

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## RAIL - AAR

Association of American Railroads, *et. al.* v. SCAQMD

- SCAQMD Appealed to 9<sup>th</sup> Circuit
- 9<sup>th</sup> Circuit Affirmed (15 September 2010)
  - SCAQMD rules do not have the force of federal law;
  - Rules had force of state law because not submitted to CARB;
  - Nor by CARB to EPA as part of SIP
  - ICCTA preempts “all state laws that may reasonably be said to have the effect of managing or governing rail transportation.”

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## MARINE - CRIMINAL ENFORCEMENT



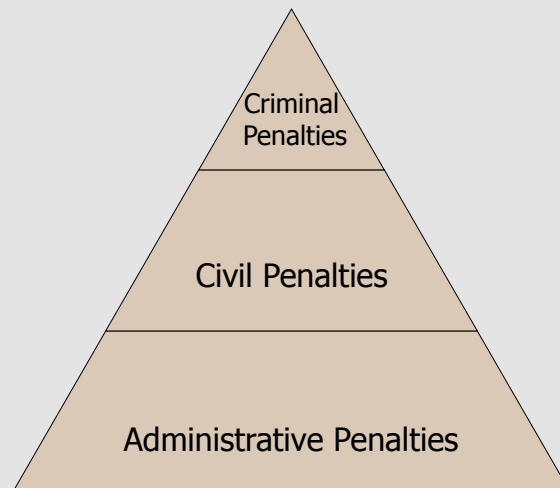
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## MARINE: CRIMINAL ENFORCEMENT

- City of LA filed a criminal misdemeanor complaint against the owners and operators of the refrigerated cargo vessel alleging violations of the Health and Safety Code sections ( SCAQMD Rules) for excessive smoke emissions.
- Historically, such violations were handled administratively and were settled for hundreds of dollars.

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## ENFORCEMENT PYRAMID



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## MARINE - CRIMINAL ENFORCEMENT

- SCAQMD Inspector's report stated that emissions were from two of the vessel's auxiliary engines
- Settlement/Plea discussions were unsuccessful
- Trial Court entertained pre-trial motion to dismiss based on CAA preemption argument by the Defendants

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## MARINE - CRIMINAL ENFORCEMENT

- Court issued 18 page written opinion finding that the local laws as applied to marine diesel engines:
  - "...there is little question but that the Health and Safety Code provisions at issue in this case would not survive a preemption challenge..."
  - "The statutes in issue in this case are clearly preempted and may not be enforced against the defendants under the Supremacy Clause of the United States Constitution. The case must be dismissed."

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## CONCLUSION

- More Stringent Regulations will be Adopted on Maritime Transportation
- Continuing Overlap in Regulations by Various Agencies
- More Interest by Community and Environmental Groups
- More Legal Challenges by All