

California Environmental Protection Agency



Air Resources Board

Final Statement of Reasons for Rulemaking

Including Summary of Comments and Agency Responses

**PUBLIC HEARING TO CONSIDER ADOPTION OF THE
AIRBORNE TOXIC CONTROL MEASURE AMENDMENTS LIMITING
ONBOARD INCINERATION ON CRUISE SHIPS AND OCEANGOING
SHIPS**

Public Hearing Date: November 16, 2006
Agenda Item No.: 06-10-4

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Environmental Protection Agency
AIR RESOURCES BOARD

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I. GENERAL

In this rulemaking, the Air Resources Board (ARB or Board) is adopting amendments to the Airborne Toxic Control Measure for Cruise Ship Onboard Incineration. The amendments, entitled Airborne Toxic Control Measure Limiting Onboard Incineration on Cruise Ships and Oceangoing Ships (amended ATCM, or ATCM), include the following primary elements:

- Prohibits onboard incineration for cruise ships and oceangoing ships within three nautical miles (nm) of the California coast, except when under the direction of the United States Coast Guard (U.S. Coast Guard);
- Requires cruise ship and oceangoing ship owners or operators to maintain specified records;
- Includes a provision for non-military vessels to allow ARB personnel access to, and review of, existing MARPOL Annex V incinerator records from 3 to 24 nm of the coast; and
- Incorporates by reference, the National Oceanic and Atmospheric Administration (NOAA) Nautical Charts and allows for future NOAA nautical chart changes.

The rulemaking was initiated by the September 29, 2006 publication of a notice for a November 16, 2006 public hearing to consider the amended ATCM. A Staff Report: Initial Statement of Reasons (Staff Report) was also made available for public review and comment starting September 29, 2006. The Staff Report, which is incorporated by reference herein, describes the rationale for the proposal. The text of the proposed amended title 17, California Code of Regulations (CCR) section 93119 was included as an Appendix to the Staff Report. These documents were also posted on the ARB's website for the rulemaking at <http://www.arb.ca.gov/regact/csoi06/csoi06.htm>.

This Final Statement of Reasons (FSOR) provides an update to the Staff Report.

A. Description of Board Action

On November 16, 2006, ARB conducted a public hearing to consider adoption of the amended ATCM. At the hearing, the Board adopted Resolution 06-38, in which it approved the adoption of the originally proposed amendments with suggested modifications discussed and presented at the hearing. In accordance with section 11346.8 of the Government Code, the Board directed the Executive Officer to incorporate the modifications into the proposed regulatory text and to make such modifications available for a supplemental comment period of at least 15 days. The Executive Officer was then directed either to adopt the regulation with such additional modifications as may be appropriate in light of the comments received, or to present the regulation to the Board for further consideration if warranted in light of the comments.

Written and oral comments were received on the proposed amendments to the ATCM during the September 29, 2006 to November 16, 2006 comment period and at the public hearing. Section II of this FSOR summarizes the written and oral comments received and provides ARB's responses to those comments.

B. Modifications to the Original Proposal

1. Availability of Modified Text.

In response to comments received during the 45-day comment period, at the hearing staff presented suggested modifications to the definitions, recordkeeping requirements, and reporting requirements in the regulation. The Board approved the modifications subject to a supplemental 15-day comment period. The modified text, with changes to the originally published text clearly indicated, and all other documentation relied upon in the regulatory action were made available for the supplemental 15-day comment period by issuance of a Notice of Public Availability of Modified Text (15-day Notice). The 15-day Notice, a copy of Resolution 06-38, and the document entitled "Proposed Modifications to the Proposed Regulation Order" were mailed on March 5, 2007, to all parties identified in section 44(a), title 1, CCR, and to other persons generally interested in the ARB's rulemaking concerning cruise ship and oceangoing ship onboard incineration. These documents were also posted on March 5, 2007, on ARB's Internet site. An email message announcing and linking to this posting was transmitted to the more than 1,400 parties that have subscribed to ARB's "crushp" and "shipincin" list servers (the cruise ship and oceangoing ship onboard incineration list servers, respectively). The comment period ended March 20, 2007.

No comments were received during the 15-day comment period, and the Executive Officer issued Executive Order R-07-010 adopting the amended ATCM with modifications as approved by the Board.

2. Modified Text.

The following is a summary of the modifications subject to the 15-day Notice and the reasons for making them.

a. Definitions

The definitions of “estuarine waters” and “Regulated California Waters” were deleted since reference to them has been deleted from the recordkeeping and reporting requirements as discussed below.

b. Recordkeeping Requirements

The recordkeeping requirement while operating in Regulated California Waters was deleted and replaced by the same recordkeeping requirements applicable only within three nautical miles of the California coast. These changes are designed to minimize duplication since similar records are already required under federal and international law.

The originally proposed recordkeeping requirements for military agencies was deleted since the U.S. Coast Guard has exempted the military from incinerator recordkeeping requirements.

c. Reporting Requirements

A requirement for oceangoing ship and cruise ship owners or operators to provide ARB or their delegates written records required under international and federal law for all incineration occurring within 24 nautical miles of the California coast has been added. These records must be provided at the time of an onboard inspection or upon written request, except for vessels owned or operated by a military agency. Specifically, these records are required under the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78). Regulation 9 of Annex V of MARPOL 73/78 contains the recordkeeping requirements for onboard incinerators. MARPOL 73/78 is implemented in the United States by the Act to Prevent Pollution from Ships (33 U.S.C. section 1901 *et seq.* and title 33, Code of Federal Regulations section 151). The U.S. Coast Guard is responsible for prescribing and enforcing regulations pursuant to MARPOL 73/78. The added requirement is necessary to make sure that the inspector is able to see records necessary to verify compliance with the regulation’s requirements.

3. Nonsubstantial or Solely Grammatical Modifications Made after the Close of the 15-Day Comment Period

In addition to the modifications described above, the following nonsubstantial or solely grammatical modifications were made after the close of the 15-day comment period:

- Section (e) Updates to NOAA Charts - The reference to the cruise ship incineration list serve has been deleted because ARB's cruise ship list serve has been eliminated with all parties transferred to the preexisting oceangoing ship onboard incineration list serve that has been referenced in the originally proposed amendments. In addition, the oceangoing ship onboard incineration website location was changed to the following URL address now maintained by ARB: <http://www.arb.ca.gov/ports/shipincin/shipincin.htm>
- Grammatical changes such as deleting extra spaces, deleting extra lines, and correcting the numbering of the definitions.
- Showing all subsection headings in italics in order for them to be printed in a distinctive font in Barclays California Code of Regulations.

C. Fiscal Impacts to School Districts and Local Agencies

The Board has determined that the adoption of the amended ATCM will not create costs or savings, as defined in Government Code section 11346.5(a)(6), to any state agency or in federal funding to the state, costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to part 7 (commencing with section 17500), Division 4, title 2 of the Government Code, or other nondiscretionary costs or savings to state or local agencies. In order to maintain statewide consistency with respect to foreign-flagged vessels, ARB will serve as the primary enforcement agency for this amended ATCM. Accordingly, adoption of this amended ATCM will neither create a mandate upon nor impose costs to local agencies (e.g., the local air pollution control and air quality management districts).

The Executive Officer has determined that this regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, or on representative private persons.

In accordance with Government Code section 11346.3, the Executive Officer has determined that this amended ATCM will not affect the creation or elimination of jobs within the State of California, the creation of new businesses and the elimination of existing businesses within the State of California, and the expansion of businesses currently doing business within the State of California.

In accordance with Government Code sections 11346.3(c) and 11346.5(a)(11), the Board has found that the reporting requirements in the regulations that apply to businesses are necessary for the health, safety, and welfare of the people of the State of California.

D. Consideration of Alternatives

Alternatives to this regulatory action were considered and discussed in the Staff Report, in accordance with Government Code section 11346.2. The Board has determined that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Board.

E. Differences between State and Federal Regulations

In accordance with Government Code section 11346.2(b)(5)(B), the Executive Officer has determined that the cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

1. *U.S. Coast Guard Regulations:* MARPOL 73/78 is implemented in the United States (U.S.) by the Act to Prevent Pollution from Ships (33 U.S.C. section 1901 *et seq.*). The U.S. Coast Guard is responsible for prescribing and enforcing regulations pursuant to MARPOL 73/78 in U.S. waters. The U.S. Coast Guard regulations implementing MARPOL 73/78 and the Act to Prevent Pollution from Ships are found at title 33, CFR, section 151. In particular, subsection 151.55 requires the master or person in charge of the ship to maintain written records of the date and time of incineration, the name of the port (if incineration was conducted at a port), the latitude and longitude of the location where incineration was conducted and the estimated distance of that location from shore, and the amount of garbage incinerated. The records must be prepared at the time of incineration, certified by the master or the person in charge of the ship, maintained on the ship for two years, and made available for inspection by the U.S. Coast Guard.

The ATCM expressly requires owners or operators of cruise ships or oceangoing ships subject to the requirements of the ATCM to record information while the incinerator is operating within three nautical miles of the California coast. While the U.S. Coast Guard regulations only require the records to be made available for inspection by the U.S. Coast Guard, the ATCM requires that the records be made available to ARB personnel or their delegates. Access to these records by ARB personnel or their delegates is necessary to adequately enforce the ATCM, to reduce emissions of toxic air contaminants (TACs), such as dioxins, furans, and toxic metals along the coast, and to reduce the potential for adverse health impacts to residents and offsite workers who live or work near ports and along the coast.

The records required by the ATCM are substantially similar to the records required by the U.S. Coast Guard regulations, with two exceptions. First, U.S. Coast Guard regulations require the signature of the officer in charge of the operation. However, the ATCM allows either the name or signature of the officer in charge of the operation. This difference, allowing the name or the signature, was incorporated into the ATCM at the request of the cruise ship industry during the 2005 rulemaking to consider the adoption

of the proposed ATCM for cruise ship onboard incineration. During workgroup discussions, the industry commented that allowing the name rather than the signature in the records facilitated electronic recordkeeping. Staff believes that providing this same flexibility to owners or operators of oceangoing vessels is warranted. Second, under U.S. Coast Guard policy, the U.S. Coast Guard may require an oceangoing ship owner or operator to incinerate while at port or within three nautical miles of the California coast in order to verify that the incinerator is operating properly. In these cases, the ATCM requires the oceangoing ship or cruise ship owner or operator to record the name, unit, and phone number of the U.S. Coast Guard personnel who directed that the incinerator be operated. While MARPOL and federal regulations do not require U.S. Coast Guard personnel information to be recorded, ARB staff believes that such information is necessary to properly enforce the ATCM.

2. *Animal and Plant Health Inspection Services Regulations:* U.S. Department of Agriculture, Animal, and Plant Health Inspection Service (APHIS) regulations require regulated garbage within the territorial waters or the territory of the U.S. to be destroyed by incineration to an ash or sterilization by cooking to an internal temperature of 212 degrees Fahrenheit for 30 minutes in order to prevent the introduction of foreign animal and plant disease and pests. Regulated garbage may also be ground and disposed of in an APHIS approved sewer system. Garbage on vessels that have not been outside the U.S. for the previous two years or have gone through an APHIS sanctioned “purging” process is not regulated. “Regulated garbage” is defined as garbage derived in whole or in part from fruits, vegetables, meats, or other plants or animal material, and other refuse associated with the material onboard including food scraps, table refuse, galley refuse, food wrappers or packing materials and other waste material from stores, food preparation areas, passenger or crews quarters, dining rooms and other areas. Most of the regulated garbage onboard cruise ships and oceangoing ships are subject to APHIS regulations.

While the APHIS regulations allow incineration of regulated garbage within the territorial waters (12 nautical miles of the coast), the ATCM expressly prohibits incineration within three nautical miles of the California coast. APHIS regulations do, however, provide alternative means of managing regulated garbage while the cruise ship or oceangoing ship is within three nautical miles of the California coast, i.e., sterilization or disposal in an APHIS approved sewer system. Cruise ship or oceangoing ship operators can also keep international regulated garbage in leakproof, covered containers during the time they are traveling within three nautical miles or while at port.

By prohibiting incineration within three nautical miles of the California coast, the potential for adverse health impacts will be reduced for residents and offsite workers who live or work near ports and along the coast. The ATCM is expected to reduce emissions from TACs, such as dioxins, furans, and toxic metals. Moreover, the benefit to human health, public safety, public welfare, and the environment as a result of the ATCM is anticipated to increase dramatically as the cruise ship and oceangoing ship industries in California are rapidly expanding.

Finally, Senate Bill 771 (SB 771) that was passed by the California Legislature and signed by the Governor in 2005 already prohibits oceangoing ships from conducting onboard incineration while operating within three miles of the California coast. The ATCM implements SB 771 and ensures that this law is adequately enforced.

II. SUMMARY OF COMMENTS AND AGENCY RESPONSES

A. Comments Received During the 45-day Public Comment Period and Board Hearing

The Board received written and oral comments during the 45-day public comment period provided for the amended ATCM and at the November 16, 2006 public hearing. A list of commenters is set forth below, identifying the date and form of all comments that were timely submitted. Following the list is a summary of each objection or recommendation made regarding the proposed action, together with an explanation of how the proposed action has been changed to accommodate the objection or recommendation, or the reasons for making no change.

<u>Abbreviation</u>	<u>Commenter</u>
PMSA	John McLaurin, John Berge Pacific Merchant Shipping Association Written Testimony: November 6, 2006
BWN	Teri Shore, Clean Vessels Campaign Director Bluewater Network Written Testimony: November 9, 2006
BWN2	Carl Schneebeck Bluewater Network Oral Testimony: November 16, 2006
NRDC	Diane Bailey Natural Resources Defense Council Written Testimony: November 9, 2006
UCS	Don Anair, Vehicles Engineer Union of Concerned Scientists Written testimony: November 9, 2006
DOD	Mary Kay Faryan United States Department of Defense Oral Testimony: November 16, 2006

1. Comment: The enabling statute states that the ban on operation of onboard incinerators should extend no further than the three mile jurisdictional limit of the

territorial waters of the state. (PMSA)

Agency response: The commenter misquotes Health and Safety Code (HSC) section 39632, which states, in pertinent part, “Commencing on January 1, 2005, a cruise ship, and commencing on January 1, 2006, an oceangoing ship, shall not conduct onboard incineration while operating within three miles of the California coast, to the extent allowed by federal law.” HSC section 39632 does not prohibit ARB from developing regulations which ban the operation of onboard incinerators beyond three miles of the California coast.

The commenter is also mistaken in suggesting that ARB proposed this regulation exclusively under the authority of HSC section 39632. ARB also proposed this regulation under the authority of HSC sections 39516, 39600, 39601, 39631, 39650, 39656, 39658, 39659, 39666, and 41510. Pursuant to these provisions, ARB may do such acts, which are necessary for the proper execution of its powers and duties (HSC section 39600), including adopting standards, rules, and regulations (HSC section 39601), developing airborne toxic control measures for toxic air contaminants (HSC sections 36958 and 39666), and take action necessary to establish, implement, and enforce programs for the regulation of hazardous air pollutants (HSC section 39659).

The commenter is also mistaken in suggesting that three miles is the jurisdictional limit of the state. In *Chevron USA, Inc. v. Hammond* (9th Cir., 1984) 726 F.2d. 483, the court analyzed Alaska’s deballasting statute and upheld Alaska’s regulatory scheme, which imposed requirements on vessels for the purpose of water pollution control similar to those which ARB is considering to control emissions of contaminants from incinerators onboard vessels.

It has long been settled that the state’s police power extends to objectives in furtherance of the public peace, safety, morals, health and welfare. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160.) In *Huron Portland Cement Co. v. City of Detroit, Mich.* (1960) 362 U.S. 440, 442, the court said:

“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.”

ARB has previously established, through extensive studies, that meteorological, atmospheric, and weather conditions exist such that emissions of air pollutants in California Coastal Waters (the zone off California’s coast, ranging from about 24 nm to 90 nm) are transported to the coastal communities and adversely affect the health, welfare, and safety of the people in those communities and the surrounding regions. Armed with this knowledge, ARB adopted regulations to

address transported air pollutants, including those emanating within California Coastal Waters (title 17, California Code of Regulations (CCR), sections 70500 and 70600 *et seq.*). The amended ATCM, which serves to reduce emissions of TACs such as arsenic, beryllium, cadmium, chromium, lead, mercury, nickel, dioxins, furans, polycyclic aromatic hydrocarbons, and hydrochloric acid, and to reduce the potential for adverse health impacts to residents and workers, is a valid exercise of the state's police power.

ARB is not alone in imposing requirements or prohibitions beyond three miles of California's coast. The California Legislature correctly exerted its authority beyond three nautical miles in enacting Fish and Game Code sections 8575, 8575.5, and 8576 (use of drift gill nets within 6, 10, 12, and 75 nautical miles) and 8664.8 (use of drift gill or trammel nets within 5 nautical miles), Harbors and Navigations Code section 445 (operation of vessel traffic service within 25 nautical miles), Public Resources Code sections 30230 (use of marine environment to sustain coastal waters [within 200 nautical miles]), 30231 (maintenance and restoration of coastal waters [200 nautical miles]), 30233 (diking, filling, or dredging of open coastal waters [200 nautical miles]), 30705 (disposal within, and transport of dredge spoils from 200 nautical miles), 71204 (cleaning ballast tanks beyond 200 nautical miles), 71204.2 and 71204.3 (exchanging ballast water beyond 200 nautical miles), 71211 (collecting data within 200 nautical miles), and 5096.650, 75060, and 75063 (funding for protection, restoration, access, and knowledge). The Legislature pronounced that "The fluid, dynamic nature of the ocean and the migration of many of its living resources beyond state and federal boundaries extend the ocean management interests of this state beyond the three-nautical-mile limit..." (Public Resources Code section 36001.) In addition, other state agencies impose requirements or prohibitions beyond three miles, e.g., the State Lands Commission (title 2, CCR sections 2139 [spills "in or on the ocean"], 2140 [equipment on off-shore drilling facilities to prevent spilling "in the ocean"], 2281 [discharge of ballast water into "waters that may impact the waters of the state"], 2284 [exchange ballast water within 50 nautical miles]) and Department of Fish and Game (title 14, CCR sections 818.02 [spill recovery capability within 6 nautical miles and containment and recovery of spills "that could reasonably be expected to impact the marine waters of California"], 851.5 and 851.8 [escort tugs at 8 nautical miles]), and 852.25 [transit, reporting, and fee requirements within 25 nautical miles].

Clearly, the Legislature recognized that "air pollution knows no political boundaries" (HSC section 39001). Therefore, as necessary, ARB may impose requirements on owners or operators of cruise ships or oceangoing ships beyond three miles of the California coast.

2. Comment: The definition of "Regulated California Waters" is irrelevant, unnecessary, confusing, and patently defective. (PMSA)

Agency response: For convenience and clarity, ARB has decided to delete reference to “Regulated California Waters,” and instead require, out to 24 nautical miles, access by ARB to records that are already required to be maintained under MARPOL, 33 U.S.C. section 1901 *et seq.*, and title 33, CFR section 151. The ARB has determined that access to records required pursuant to MARPOL and/or federal regulations and laws between 3 nm and 24 nm of the coast is necessary and sufficient for adequate enforcement of the regulation. In addition, this information is necessary to determine the amount of emissions between 3 and 24 nm, and therefore, the risk to workers and residents along the coast.

3. Comment: We support the ARB’s inclusion and definition of “California Regulated Waters” in the regulation. We believe the recordkeeping requirements out to 24 nautical miles and the specificity of the three mile boundary as defined using nautical charts for the National Oceanic and Atmospheric Administration are critical to the implementation of the incineration ban. (BWN, NRDC, UCS)

Agency response: See agency response to Comment 2.

4. Comment: Bluewater supports the proposed access to and review of MARPOL incineration records out to 24 nautical miles. (BWN2)

Agency response: See agency response to Comment 2.

5. Comment: CARB should consider placing a sunset on the California regulation when federal and international regulations provide equal or greater protection to the environment of the state. (PMSA)

Agency response: Currently federal and international regulations do not prohibit incineration within three nautical miles of the California coast. Therefore, until more stringent federal and international regulations are imposed it would be premature to consider a sunset on this regulation. In addition, there is much uncertainty related to environmental protection at the federal and international level. Therefore, California needs its own set of requirements for the protection of the environment and health of its citizens.

6. Comment: This regulation is preempted by 33 U.S.C. sections 1401 *et seq.* and 33 CFR section 151.69 *et seq.* (PMSA)

Agency response: Neither 33 U.S.C. section 1401 nor 33 CFR section 151.69 *et seq.* preempt this amended ATCM. 33 U.S.C. section 1401, by its express terms, relates to “dumping ... into ocean waters” and not incineration. Assuming *arguendo* that this provision is related to incineration, 33 U.S.C. section 1416(d)(1) provides, “Except as expressly provided in this subsection, nothing in this subchapter shall preclude or deny the right of any State to adopt

or enforce any requirements respecting dumping of materials into ocean waters within the jurisdiction of the State.” Similarly, 33 CFR sections 151.69 *et seq.* relate to discharge of garbage into the sea.

Federal law preempts state law if (1) Congress expressly so states, (2) Congress enacts comprehensive laws that leave no room for additional state regulation (implicit preemption), or (3) state law actually conflicts with federal law (actual conflict). (*Beveridge v. Lewis* (Ninth Cir. 1991) 939 F.2d 859, 862.) Under the ordinary rule of statutory construction, if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so “unmistakably clear in the language of the statute.” (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 65.)

Express Preemption:

In fields of traditional state regulation, the historic police powers of the States are not to be superseded by a Federal Act unless that was the clear and manifest purpose of Congress. (*Roach v. Mail Handlers Benefit Plan, supra*, 298 F.3d 847, 850.) The federal statutes in 33 USC sections 1401 *et seq.* and 33 CFR 151.69 *et seq.*, provide no clear intent of Congress to preempt state regulation of incinerators onboard cruise ships or oceangoing ships.

Implied Preemption:

In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation or where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." (*Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.* (1985) 471 U.S. 707, 713.)

In *Kelly v. State of Washington* (1937) 302 U.S. 1, owners and operators of motor driven tugs, which were used for intrastate, interstate, and/or foreign commerce challenged the validity of state statutes requiring inspection of the hull and machinery of the tugs by state authorities in order to ensure safety and determine seaworthiness. The Court examined several federal statutes and concluded that the federal statutes were limited and included no provision for the inspection of the hull and machinery of the motor-driven tugs.

“There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field ... is not forbidden or displaced... (T)he exercise by the state of its police power ... is superseded only where the repugnance of conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'” (*id* at

page 10.)

Implied preemption properly can be found only when the circumstances "clearly indicate" a legislative intent to preempt. (*American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239,1267.) The federal government, in 33 USC sections 1401 *et seq.* and 33 CFR 151.69 *et seq.* limited regulation to ocean dumping.

"It is the purpose of this Act to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States." (33 U.S.C.A. § 1401) (emphasis added)

Congress "circumscribe[d] its regulation and occup[ied] only a limited field" (*Kelly v. State of Washington, supra*, 302 U.S. 1, 10). In doing so, Congress left the field open for states to prohibit incineration onboard cruise ships and oceangoing ships within three miles of the California coast, except when required to be operated under the direction or supervision of the U.S. Coast Guard.

Nor can it be said that title 33, CFR section 151.69 *et seq.* impliedly preempts ARB's amended regulation. While title 33, CFR section 151.69 *et seq.* does prohibit the "disposal" of specified garbage from ships, it is not sufficiently comprehensive to exclude state regulation of incinerator activities. In fact, Annex VI to MARPOL 73/78 (shipboard incineration) is excluded from the purposes of title 33, CFR section 151 *et seq.*

"The purpose of this subpart is to implement the Act to Prevent Pollution from Ships, 1980, as amended (33 U.S.C. 1901-1911) and Annexes I, II and V of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), done at London on February 17, 1978. This subpart also implements the Antarctic Science, Tourism, and Conservation Act of 1996, and the Protocol on Environmental Protection to the Antarctic Treaty done at Madrid on October 4, 1991." (33 C.F.R. § 151.01)

Furthermore, ARB's ship regulations deal specifically with the control of toxic and smog-forming air pollution from ships, an area in which the federal government has only had a presence since 2004. And that federal presence came only as a result of a lawsuit filed by Bluewater Network, so it cannot be argued that Congress has long intended for the federal government to occupy the field of air

pollution control from ships. Indeed, the State, and in particular the local air pollution control districts and air quality management districts, have long regulated air pollution from ships. The control of air pollution is traditionally a local concern properly regulated under a state's police powers. (*Huron, supra* at 442).

Actual Conflict:

An actual conflict with federal law occurs when "it is impossible to comply with both state and federal law." (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 942.) The ARB's amended ATCM, which bans incineration onboard cruise ships and oceangoing ships within three nautical miles of the California coast, has no relationship to the ban on ocean dumping. Simply put, an owner or operator of a cruise ship or an oceangoing ship can comply with the federal ban on ocean dumping into the territorial sea of the United States or zone contiguous to the territorial sea of the United States (33 USC section 1411) and, simultaneously, comply the state ban on incineration within three miles (HSC 39632). Garbage within the territorial waters or the territory of the United States may be destroyed by "sterilization by cooking to an internal temperature of 212 degrees Fahrenheit for 30 minutes...(and) garbage may also be ground and disposed of in an APHIS approved sewer system." (Staff Report, pages iii and II-7.) "Oceangoing ship and cruise ship operators can also keep international regulated garbage in leakproof, covered containers during the time they are traveling within three nautical miles or while at port." (Staff Report, page VI-9.)

7. Comment: The amended regulation will protect public health in California's ports and coastal communities by reducing exposure to air toxics emitted during on-board incineration of solid wastes by oceangoing ships operating in State waters. (BWN, NRDC, UCS)

Agency Response: ARB agrees with this comment.

8. Comment: The ARB staff was thanked for working with the military on international legal issues, national legal issues, and state law issues. (DOD)

Agency response: No response is needed.

B. Comments Received during the 15-day Public Comment Period- Notice of Modified Text.

No written comments were received during the 15-day comment period.