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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,

Plaintiff,

v.

HILLARY RODHAM CLINTON, in her official capacity as United States Secretary of State, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, in her official capacity as Administrator, United States Environmental Protection Agency, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, JANET NAPOLITANO, in her official capacity as Secretary, United States Department of Homeland Security, UNITED STATES COAST GUARD, and ADMIRAL ROBERT J. PAPP, JR., in his official capacity as Commandant of the United States Coast Guard,

Defendants.

Case No. 3:12-cv-00142-SLG

(PROPOSED) BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

Cases

INTRODUCTION

The executive branch designated an emission control area off Alaska's coast, where expensive low-sulfur marine fuel must be used, without following the procedures under an international treaty for designating such areas, without following the procedures under the Constitution for making domestic law, and without following the procedures under the Administrative Procedures Act for promulgating regulations. By doing that, the executive branch violated federal law. The executive branch also violated the separation of powers doctrine and Treaty Clause, both of which prevent the executive from making domestic federal law without the involvement of Congress. It also deprived Alaskans and other interested persons of the opportunity to participate in the process and formally express their concerns about the negative economic impacts of the emission control area, and the inadequate scientific basis for extending it to Alaska.

The decision by the Environmental Protection Agency ("EPA") to begin enforcing the low-sulfur fuel requirements in the emission control area threatens to harm the State's proprietary interests and Alaska's citizens and economy. To prevent these harms, the Court should enjoin all Defendants from enforcing EPA's rule off the coast of Alaska.

STATEMENT OF FACTS

On August 1, 2012, EPA and the United States Coast Guard, a division of the Department of Homeland Security ("DHS"), began jointly enforcing a rule that requires the use of low-sulfur fuel in a North American Emission Control Area ("ECA"). 40 C.F.R. § 1043.60 (2010). The ECA extends 200 miles from the East and West coasts of the United States and Canada, the Southeast and Southcentral coasts of Alaska, and the coasts of Hawaii.[1] Marine vessels in the ECA are now required to use fuel with a sulfur content that does not exceed 10,000 parts per million. *Id.* In 2015, EPA is expected to require that ships in the ECA use fuel with a sulfur content that does not exceed 1,000 parts per million. (Second Amended Complaint ("SAC"), Ex. C at 16.)

Alaska's inclusion within the ECA was not mandated by statute. Nor was the ECA extended to Alaska pursuant to a rulemaking that allowed an opportunity for interested persons to comment. Rather, the extension of the ECA to Alaska was purportedly accomplished by the Secretary of State unilaterally accepting an amendment to Annex VI of the International Convention for the Prevention of Pollution from Ships ("MARPOL"), an international treaty to which the United States is a party.

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[1] *See Proposal to Designate an Emission Control Area for Nitrogen Oxides, Sulphur Oxides and Particulate Matter Submitted by the United States and Canada*, at 5 (April 2, 2009) ("ECA Proposal), available at http://www.epa.gov/nonroad/marine/ci/mepc-59-eca-proposal.pdf.

I. MARPOL

The International Maritime Organization ("IMO") first adopted the MARPOL Convention in 1973 to establish international standards governing marine pollution from ships. (SAC, Ex. A.) The IMO amended MARPOL with the Protocol of 1978. (SAC, Ex. B.) In 1980, two-thirds of the Senate approved the Protocol of 1978, making the United States a party to MARPOL. 126 Cong. Rec. S9263–72 (daily ed. July 2, 1980).

In 1997, the IMO adopted Annex VI to MARPOL. (SAC, Ex. C.) Two-thirds of the Senate approved Annex VI in April 2006. 152 Cong. Rec. S3400 (daily ed. Apr. 7, 2006). Among other things, Annex VI imposes limits on the sulfur content of fuel used by certain marine vessels in certain areas. (SAC, Ex. C at 16-17.) Under Regulation 14 of Annex VI, the sulfur content of fuel used on ships operating in ECAs cannot exceed 1.0% after July 1, 2010. (*Id.* at 17.) Regulation 14 describes the location of established ECAs, and contemplates that additional ECAs will be designated through amendments proposed by parties to Annex VI. (*Id.*) The version of Annex VI that the President and Senate approved did not include the North American ECA.

MARPOL is a non-self-executing treaty, which means it is not binding as domestic federal law until implemented by Congress. To allow the implementation of MARPOL, Congress passed the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901—1915 ("APPS") in 1980. APPS has been amended several times since, most recently in 2008 to allow for the implementation of Annex VI. Pub. L. 110-280; 122 Stat. 2611 (2008). Under APPS, EPA and DHS have joint authority to enforce the

provisions of Annex VI. 33 U.S.C. §§ 1903(a) & (b). APPS gives EPA the responsibility of prescribing any necessary or desired regulations to carry out the provisions of Regulation 14 of Annex VI. *Id.* § 1903(c)(2).

II. AMENDMENTS TO MARPOL

The procedure to amend MARPOL is set forth in Article 16 of the Protocol of 1973. (SAC, Ex. A at 12-14.) A proposed amendment to a MARPOL Annex must be submitted to the IMO by a party to MARPOL. (*Id.* at 12.) The proposed amendment is then circulated by the Secretary-General of the IMO to all members of the IMO and parties to MARPOL at least six months prior to voting on the amendment. (*Id.*) Amendments are adopted by a two-thirds majority vote of parties to MARPOL. (*Id.*) Once adopted, amendments must be communicated by the Secretary-General to all parties to MARPOL for acceptance. (*Id.*) An amendment "shall be deemed to have been accepted" after a period of not less than ten months after communication by the Secretary-General, unless within that period a certain number of parties object. (*Id.* at 13.) An amendment enters into force six months after acceptance for all parties except those that, before that date, "have made a declaration that they do not accept [the amendment] or a declaration ... that their express approval is necessary" before the amendment enters into force against that party. (*Id.* at 14.) In other words, even after an amendment to MARPOL is adopted and accepted, parties still have an additional six months to reject the application of the amendment to them.

APPS dictates how the United States will respond to proposed amendments to MARPOL. Under 33 U.S.C. § 1909(a), only the President, following advice and consent of the Senate, may accept amendments to MARPOL, "except as provided for in subsection (b)." Under subsection (b), a proposed amendment to Annex VI, received by the United States from the Secretary-General of the IMO pursuant to Article VI of MARPOL, "may be the subject of appropriate action on behalf of the U.S. by the Secretary of State following consultation with" either DHS or EPA. Under subsection (c), the Secretary of State is empowered to "make a declaration that the United States does not accept an amendment proposed pursuant to Article VI of the MARPOL Protocol."

III. CRITERIA FOR ESTABLISHING ECAs

When Annex VI was ratified by the Senate it did not include the North American ECA. Annex VI contemplates that additional ECAs will be designated by the IMO "in accordance with the criteria and procedures set forth in appendix III to this Annex." (SAC, Ex. C, at 16.) Under Appendix III, a proposal to designate an ECA may only be submitted by a party to Annex VI. (*Id.* at 30.) Appendix III provides that all such proposals "shall include" eight criteria, two of which are pertinent to this case:

> .4 an assessment that emissions from ships operating in the proposed area of application are contributing to ambient concentrations of air pollution or to adverse environmental impacts. Such assessment shall include a description of the impacts of the relevant emissions on human health and the environment, such as adverse impacts to terrestrial and aquatic ecosystems, areas of natural productivity, critical habitats, water quality, human health, and areas of cultural and scientific significance, if

applicable. The sources of relevant data including methodologies used shall be identified;

.5 relevant information, pertaining to the meteorological conditions in the proposed area of application, to the human populations and environmental areas at risk, in particular prevailing wind patterns, or to topographical, geological, oceanographic, morphological, or other conditions that contribute to ambient concentrations of air pollution or adverse environmental impacts.

(*Id.* at 30.)

Appendix III provides that the "geographical limits of an Emission Control Area will be based on the relevant criteria outlined above, including emissions and deposition from ships navigating in the proposed area, traffic patterns and density, and wind conditions." (*Id.* at 31.)

IV. THE ECA AMENDMENT

In January 2009, after Annex VI was accepted by the President and two-thirds of the Senate, but before the United States and Canada submitted the North American ECA proposal to the IMO, EPA issued a Regulatory Update entitled "Frequently Asked Questions about the Emission Control Area Application Process."[2] In the update, EPA revealed that, "[i]deally," it wanted to include Alaska in the ECA it was considering. (Regulatory Update at 5.) Yet, EPA acknowledged that to include Alaska it would "have to provide information that demonstrates a need for control, as specified in the criteria for

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[2] EPA's *Frequently Asked Questions about the Emission Control Area Application Process* (Jan. 2009) ("Regulatory Update") is available at http://www.epa.gov/nonroad/marine/ci/420f09001.pdf.

ECA designation." (*Id.*) EPA therefore admitted that, to include Alaska, the United States would have to comply with Appendix III to Annex VI. EPA further admitted that it did not have a sufficient scientific basis to include Alaska in the ECA. EPA said it was "challenging" to include Alaska "because, although our emissions modeling includes all 50 states, our air quality modeling does not extend beyond the 48 contiguous states." (*Id.*) Due to the lack of air quality modeling outside the Lower 48, EPA said "it will be necessary to find other ways to measure the health and environmental impacts of marine emissions on health and human welfare outside the continental United States." (*Id.*)

In April 2009, just three months after EPA said in its Regulatory Update that it lacked the science to support an ECA in Alaska, the United States and Canada jointly submitted a petition to the IMO proposing a North American ECA that extend to Alaska. The United States proposed including the waters off the Southeast and Southcentral Alaska coasts, but not the waters off the remainder of Alaska's coasts, because "[f]urther information must be gathered to properly assess these areas." (ECA Proposal at 6.) To demonstrate that the ECA was needed in areas outside Alaska to protect against increased ambient concentrations of air pollution or adverse environmental impacts, as required by Appendix III, the United States used a "state-of-the-art modeling technique[]" called the Community Multi-scale Air Quality model. (*Id.* at 14.) The model "simulated the multiple physical and chemical processes involved in the formation, transport, and deposition" of pollutants. (*Id.*) However, the model did not include Alaska. (*Id.* at 19.)

To demonstrate that the ECA was needed in Southeast and Southcentral Alaska, the United States opted for an extremely simplified approach instead of "state-of-the-art modeling." The support for extending the ECA to Alaska was as follows: the United States (1) estimated the amount of pollutants emitted by marine vessels in the ECA; (2) noted that most of the population of Alaska lives near the coast; and (3) claimed that winds "typically have an easterly component" near those populated areas. (*Id.* at 19, 47.) The proposal also stated that Canadian air quality modeling "suggests that there would be air quality improvements for Eastern Alaska along the Canadian border," without explaining why. (*Id.* at 19.) Based on that, the United States concluded that "it is reasonable to expect ships are contributing to ambient air concentrations of ozone and $PM_{2.5}$ in Hawaii and Alaska, even though our modeling does not allow us to quantify these effects." (*Id.*)

The only other "evidence" cited by the United States for extending the ECA to Southeast and Southcentral Alaska was a supposed connection between sulfur contamination of lichen on Mt. Roberts and the health of the Southern Alaska Peninsula Caribou Herd. (*Id.* at 34.) To support the claim that emissions from the proposed ECA were impacting lichen on Mt. Roberts, the proposal referred to a United States Forest Service study, entitled "Air Quality Bio-Monitoring with Lichens The Tongass National Forest" (the "Tongass Study"). (*Id*; *see also* Ex. 1.) That study noted that the "Mt Roberts's sampling sites [were] above the cruise ship docking area where ships use diesel power when in port," and concluded that emissions from docked cruise ships, along with

other "industrial and urban sources" in downtown Juneau, had probably contributed to contamination of lichen on Mt. Roberts. (Tongass Study at 320.) The study did not conclude that marine air emissions hundreds of miles (or even one mile) from the Juneau port were having an environmental impact. (*Id.*) In any event, there is no connection between lichen in Juneau and caribou, as the Southern Alaska Peninsula Caribou Herd lives about 1,000 miles away from Juneau, across the Gulf of Alaska.

The ECA proposal referred to a Technical Support Document ("TSD"),[3] which was published by EPA in April 2009 in support of the proposed ECA. (ECA Proposal at 14, 25.) The TSD repeated the same justification for extending the ECA to Alaska as was in the proposal—an estimate of the amount of pollutants emitted, recognition that many people in Alaska live near the coast, and a statement that winds typically blow west to east near these areas—with one significant addition: the TSD provided the breakdown for estimated pollutants emitted in nine geographic regions in the waters off the coast of the United States, including two areas identified as Alaska East and Alaska West. (TSD at 2-21.) The region identified as Alaska East included the waters off the coasts of Southeast and Southcentral Alaska that were included within the proposed ECA. (*Id.* at 2-3.) The region identified as Alaska West included the waters off the coasts of Western and Northern Alaska that were excluded from the ECA proposal. (*Id.* at 2-3.) The TSD indicated that, for 2002, 10,618 metric tons of sulfur dioxide (SO_2) were emitted in

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[3] Available at http://www.epa.gov/oms/regs/nonroad/marine/ci/420r09007.pdf.

Alaska East, while 34,786 metric tons of SO_2 were emitted in Alaska West. (*Id.* at 2-21.) The amounts of SO_2 emitted in 2002 in Alaska East were dwarfed by the amounts of SO_2 emitted in the East and West Coast portions of the ECA (145,024 metric tons of SO_2 in the East Coast region; and 75,738 metric tons of SO_2 in the combined North and South Pacific regions). (*Id.*)

In March 2010, the IMO voted to amend Annex VI to designate the North American ECA. Under the terms of MARPOL, that amendment was sent to each party to MARPOL for acceptance, and could only enter into force with respect to a party who failed to notify the IMO within the appropriate time period that the party's "express approval will be necessary before the amendment enters into force for it." (SAC, Ex. at 14.) Thus, only if the Secretary of State failed to reject the ECA amendment could the amendment enter into force with respect to the United States. The Secretary of State did not reject the ECA amendment within the time allowed. As a result, the ECA entered into force with respect to the United States on August 1, 2011 as a matter of international law. Under the terms of Annex VI, the requirement that ships use low-sulfur fuel in the ECA became effective one year later, on August 1, 2012.

V. EPA's RULEMAKING

On August 28, 2009, EPA published a Notice of Proposed Rulemaking ("NPRM") on its website, which included rules to implement the low-sulfur fuel requirement in the

not-yet-finally-approved ECA.[4] EPA established a one-month comment period. The NPRM noted that the U.S.-Canadian ECA proposal was pending with the IMO, and that the proposal included the waters off the Southeast and Southcentral Alaska coasts. *NPRM*, 74 Fed. Reg. 44442, 44446. The NPRM also acknowledged that the ECA proposal had to comply with the "criteria and procedures for ECA designation [] set out in Appendix III to MARPOL Annex VI," and listed a summary of those criteria. *Id.* at 44469. As the environmental justification for including Alaska in the ECA, the NPRM cited only the Juneau lichen study and the supposed link between lichen and the Southern Alaska Peninsula Caribou Herd. *Id.* at 44454.

Alaskan officials immediately expressed concerns over the NPRM's lack of scientific or environmental data, including any ambient air quality data, to justify including Alaska in the ECA. For example, Governor Sean Parnell, on behalf of the State, submitted a letter asking EPA to exclude Alaska from the ECA. (SAC, Ex. D.) He pointed out that the "best air quality data available for Southeast Alaska" "concluded the concentrations of measured air pollutants were appreciably below state and national air quality standards." (*Id.* at 1.) Governor Parnell also noted that "the federal register notice reflects a misunderstanding of Alaska's geography and ecosystems," as the notice relied on the Juneau lichen study to demonstrate potential damage to a caribou herd that

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[4] *See Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder*, 74 Fed. Reg. 44442 (Aug. 28, 2009).

lives "some 1,000 miles away, across the Gulf of Alaska (and outside the emission control area)." (*Id.* at 2.) Governor Parnell emphasized "the absence of any air quality modeling for Alaska [in the NPRM], and EPA's admission that demonstrating the need for a control area outside the contiguous 48 states will be challenging." (*Id.*) He also stressed the ECA's economic impact to Alaska, given that the State relies heavily on the shipping and cruise industries to deliver necessary commodities to its citizens and to sustain its vital tourism industry. (*Id.*) Similarly, U.S. Senator Lisa Murkowski submitted a letter noting the lack of Alaska-specific air quality data in the NPRM, and pointing out that the data EPA did rely on—the Juneau lichen study—rested on inaccurate assumptions. (SAC, Ex. E at 2.) Senator Murkowski asked EPA to delay implementing the low-sulfur fuel requirements in Alaska "until the agency has completed Alaska-specific air quality, health and environmental impact studies." (*Id.* at 4.) U.S. Senator Mark Begich also submitted a letter asking EPA to delay implementation of its rule "in Alaska until the appropriate science has been completed." (SAC, Ex. F at 1.) Other officials raised similar concerns.[5]

In December 2009, EPA responded to comments on its NPRM.[6] In response to the comments critical of the decision to extend the ECA to Alaska, EPA deferred to the

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[5] The full docket for EPA's rulemaking containing all the submitted comments is available at http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OAR-2007-0121.

[6] EPA's *Summary and Analysis of Comments: Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder* (Dec. 2009) ("Responses"), is available at http://www.epa.gov/nonroad/marine/ci/420r09015.pdf.

ECA proposal, saying comments critical of the geographic boundaries of the ECA were irrelevant because the proposal did "not [come] within the scope of this final rulemaking." (Responses at 21-22.) EPA's position was that it did not decide in the rulemaking to extend the ECA to Alaska, and that did not have the power to revisit that decision. (*Id.* at 22, 48, 81.) Still, EPA provided some minimal and confusing responses to the comments about the lack of scientific data showing a need for an ECA off the coast of Alaska. EPA admitted that its claimed connection between lichen in Juneau and the Southern Peninsula Caribou Herd was "misleading." (*Id.* at 116.)[7] But it drew a new misleading connection, arguing that the ECA was needed in Alaska in part because although Alaska "enjoys air quality that is generally cleaner than our National Ambient Air Quality Standards," in 2009 portions of the Fairbanks North Star Borough—a community hundreds of miles and at least one mountain range from the ECA—were designated nonattainment for $PM_{2.5}$. (*Id.* at 112.)

On April 30, 2010, shortly after the IMO amended Annex VI to designate the North American ECA, EPA published its Final Rule.[8] EPA identified APPS as the statutory basis for its rule to implement the ECA. *Final Rule*, 75 Fed. Reg. 22896,

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[7] EPA originally drew the connection between lichen and caribou from a document submitted by an employee of the Alaska Department of Environmental Conservation to EPA entitled "Statement in Support of EPA Considering Alaska as Part of a Marine Emission Control Area." (Responses at 116 n.27.) In that statement, the employee advocated including all of Alaska in an ECA. (*Id.*)

[8] *See Control of Emissions From New Marine Compression-Ignition Engines at or Above*, *30 Liters per Cylinder; Final Rule*, 75 Fed. Reg. 22896 (Apr. 30, 2010).

23013. Among other things, EPA's rule implemented Annex VI's low-sulfur fuel requirements in the ECA. *Id.* With respect to the geographic scope of the ECA, EPA contended that the ECA amendment was binding domestic federal law as a treaty amendment to Annex VI, so the ECA had to apply in Alaska. *Id.* at 22936. The requirement to use low-sulfur fuel in the ECA became effective on August 1, 2012.

VI. EFFECTS OF EPA'S RULE ON ALASKA

In December 2009, EPA published a Regulatory Impact Analysis in support of its rulemaking.[9] In that document, EPA admitted that the social costs of its new rule "are expected to be borne by the final consumers of goods transported by affected vessels in the form of slightly higher prices for those goods." (Impact at 7-2.) EPA estimated the costs of its rule for a hypothetical container ship operating between Singapore, Seattle, and Los Angeles/Long Beach, which would spend a small fraction of its journey in the ECA. (*Id.*) EPA stated that the costs of its "coordinated strategy on the markets for Category 3 marine diesel engines, ocean-going vessels, marine fuels, and international marine transportation services," which includes the "costs of complying with the emission and fuel sulfur controls for all ships operating in the area proposed by the U.S. Government to be designated as an Emission Control Area (ECA) under MARPOL Annex VI," on such a hypothetical container ship would lead to a "price increase of about

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[9] EPA's *Regulatory Impact Analysis: Control of Emissions of Air Pollution from Category 3 Marine Diesel Engines* (Dec. 2009) ("Impact") is available at http://www.epa.gov/nonroad/marine/ci/420r09019.pdf.

$18 per container (3 percent price increase), assuming the total increase in operating costs is passed on to the purchaser of marine transportation services." (*Id.*) EPA also admitted that oil tankers will be affected by the requirement to use low-sulfur fuel. (*Id.* at 7-6.) Similarly, in the December 2009 responses to comments on its proposed rule, EPA stated: "We recognize that an increase in fuel price would result in increases in shipping costs on goods and commodities to and from Alaska," and that "virtually all of the compliance costs will be borne by the users of marine transportation services in the form of higher prices." (Responses at 100.)

The State purchases hundreds of millions of dollars of goods per year to run State government. (Ex. 2, Jones Decl. ¶ 5.) A significant portion of these goods reach Alaska on large container marine vessels that travel through the ECA. (*Id.* ¶ 6.) Indeed, the Port of Anchorage estimates that 90% of all merchandise goods and commodities used by 85% of Alaskans enter the state through the Port. (Ex. 3, Wilson Decl. ¶ 3.) A substantial portion of these container ships travel from the West Coast of the United States, and therefore spend more time in the ECA where they must use expensive low-sulfur fuel than EPA's hypothetical container ship. (Jones Decl. ¶¶ 9-10.) EPA's rule will raise the cost of operating these vessels, and those costs will be passed on in the form of price increases for all Alaskan consumers, including the State. (*Id.* ¶ 11.)

Tankers that transport oil produced in Alaska to be sold on the West Coast of the United States must travel through the ECA and are subject to the new low-sulfur fuel requirement. (Impact at 7-6.) The cost of transporting oil to its sales point, including the

cost of tanker fuel, factors as a deduction in calculating both the royalty payments and the production taxes that oil producers owe the State. (Ex. 4, Tangeman Decl. ¶ 5.) By raising the costs of operating the oil tankers that export oil from the State, EPA's rule will decrease the royalty and production tax revenue that the State relies on. (*Id.* ¶¶ 5-10.) The Alaska Department of Revenue estimates that the EPA's rule will likely cost the State tens of millions of dollars in revenue per year. (*Id.* ¶ 10.) About 87% of the State's revenues come from royalties and taxes on oil production. (*Id.* ¶ 4.)

In addition to harming the State's proprietary interests, EPA's rule and the ECA designation will likely have significant and harmful effects on Alaska's economy and citizens. First, the ECA designation is likely to cause the cruise industry to cut back on business in Alaska. The ECA designation will have a disproportionate effect on the Alaska cruise industry because Alaska cruise ships spend all of their voyage within the ECA, as opposed to cruise ships in other places that spend only part of their time in an ECA. (Ex. 5, Binkley Decl. ¶ 8.) EPA's rule requiring the use of fuel with a sulfur content no greater than 1% in the ECA will increase the fuel costs for a typical Alaska cruise ship by about $4 million per vessel. (*Id.* ¶ 9.) In 2015, when Annex VI will require the use of fuel with a sulfur content no greater than .1% in the ECA, cruise ship costs will rise even more. (*Id.* ¶ 10.) Cruise ship companies expect to redeploy ships away from Alaska to other places as a direct result of the ECA designation and the expected requirement to use .1% sulfur fuel. (*Id.* ¶ 11.) Past measures that increased

costs for cruise ships have resulted in the redeployment of cruise ships away from Alaska. (*Id.* ¶ 12.)

The expected cutback on cruises to Alaska will hurt Alaska's economy. Alaska's second largest industry is tourism, and approximately 60% of Alaska tourists arrive on cruise ships. (*Id.* ¶ 3.) In 2010, tourism generated over 21,000 full-and part-time industry-related jobs and wages of approximately $850 million for Alaska workers. (*Id.*) In a one-year period between 2008 and 2009, the industry spent roughly $250 million on goods and services purchased from Alaska businesses. (*Id.*) The economies of many Alaska communities derive largely from the cruise industry. (Ex. 6, Marquardt Decl. ¶ 7.)

Second, EPA's rule will increase the costs of goods purchased by nearly all Alaskans. Alaska's local communities already pay high prices for essential goods as compared to prices in the Lower 48. (Marquardt Decl. ¶ 4.) The increase in costs caused by EPA's rule will be passed on to Alaskans, who often have no choice but to buy goods arriving by sea. (*Id.* ¶ 5.) In all of these ways, the ECA designation and EPA's rules will have significant and harmful effects on Alaska.

ARGUMENT

I. LEGAL STANDARD ON A MOTION FOR PRELIMINARY INJUNCTION

The Ninth Circuit applies a sliding-scale test for preliminary injunctions. Generally, a plaintiff is entitled to a preliminary injunction if he can establish four elements: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, [4] and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the sliding-scale test, a plaintiff can also obtain preliminary injunction if the plaintiff raises "serious questions going to the merits," the "balance of hardships tips sharply in the plaintiff's favor," and the plaintiff shows a likelihood of irreparable injury and that the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

II. THE SECRETARY OF STATE'S ACCEPTANCE OF AN ECA EXTENDING TO ALASKA VIOLATED APPS AND THE APA

Under APPS, the Secretary of State has limited authority to act on a proposed amendment to Annex VI. She must either take "appropriate action" on the proposed amendment, or reject the amendment. 33 U.S.C. §§ 1909(b) & (c). In this way, Congress ensured that only ECA amendments that comply with Appendix III would be accepted, for it cannot be "appropriate action" to accept an amendment that does not comply with the terms of the treaty. The proposal to extend the ECA to Alaska did not contain the environmental assessment or meteorological information required by Appendix III. By accepting that proposed amendment, the Secretary of State violated

APPS. The Secretary of State's ECA designation should be held unlawful and set aside.[10]

A. APPS Requires That ECAs Be Established Pursuant To The Procedures In Appendix III

When the Senate ratified Annex VI, it understood that an ECA might be established in the United States, but only consistent with Appendix III. For example, in Secretary of State Colin Powell's transmittal letter to the President recommending acceptance of Annex VI, he stated the "United States may seek the establishment of [ECAs] in certain areas pursuant to the procedures set out in Appendix III to Annex VI." S. TREATY DOC. NO. 108-7 at VI (2003).[11] Likewise, the report of the Senate Committee on Foreign Relations recommending ratification of Annex VI stated that the "executive branch has indicated that, upon ratification of Annex VI, the United States may seek the establishment of one or more [ECAs] in the United States pursuant to the procedures set out in Appendix III to Annex VI." S. EXEC. DOC. NO. 109-13 at 4

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[10] Because the Secretary of State's acceptance of the ECA amendment violated APPS, the court should hold unlawful and set aside the ECA designation under the APA as arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and in excess of statutory authority. 5 U.S.C. §§ 706(2)(A) & (C). The State can pursue its APPS claim in this court because it gave the Secretary of State 60 days' notice pursuant to APPS, *see* 33 U.S.C. § 1910(b)(1) & Ex. 7, and because this case concerns ports in Alaska, and also concerns ships in the portion of the ECA off the coast of Alaska, wherein the ships or owners or operators may be found, *see id.* §§ 1910(c)(1) & (3).

[11] Available at http://www.foreign.senate.gov/download/?id=1FBB4ED2-4C4A-4538-92A2-F63C8D089A1A.

(2006).[12] These sources show that the Senate approved Annex VI with the understanding that the executive branch would comply with Appendix III when seeking to establish an ECA for the United States. *See Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 861 (9th Cir. 2007) (using committee reports to discern Senate intent in ratifying a treaty).

This understanding gives meaning to the subsequent amendments to APPS that allow the Secretary of State to take "appropriate action" on proposed amendments to Annex VI and designate an ECA as a matter of international law. It is only by interpreting "appropriate action" to mean, in the context of a proposed ECA, a duty to ensure compliance with Appendix III, that effect can be given to the Senate's intention that ECAs be designated consistent with Appendix III. *Cf. United States v. Vetco Inc.*, 691 F.2d 1281, 1286 (9th Cir. 1981) ("A statute and a treaty are to be read to be consistent to the greatest possible extent."). The Secretary of State was obligated to ensure that a proposed ECA amendment complied with Appendix III. If it did not comply, the Secretary of State had to reject the amendment (or at least reject the part that was not in compliance).[13]

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[12] Available at http://www.foreign.senate.gov/download/?id=8BF0F325-4330-475B-B47D-4D5A9B694842.

[13] It would not be unprecedented for the United States to partially reject a proposed obligation from an international organization pursuant to a treaty. *See, e.g.*, *United States v. Decker*, 600 F.2d 733,739 (9th Cir. 1979) (holding that the United States acted consistent with its treaty obligations by partially rejecting regulations proposed by an international organization).

As in *Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth.*, 659 F.2d 168 (D.C. Cir. 1981), this court can and should enforce APPS's "appropriate action" requirement. In that case, the Senate had ratified a treaty that obligated members to restrict trade in certain animals and plants. The treaty contemplated that additional species could become protected through treaty amendments, and the bobcat was added to the treaty as a protected species in 1977. 659 F.2d at 171. Congress's implementing statute commanded the Secretary of Interior to "do all things *necessary and appropriate* to carry out the functions of the Scientific Authority under the Convention." 659 F.2d at 174 (quoting 16 U.S.C. § 1537a(c)(1)) (emphasis added). Pursuant to that statutory authority, the Fish and Wildlife Service issued regulations imposing a quota on the number of bobcats that could be exported.

A nonprofit group contended that those regulations violated the treaty by not providing sufficient protection to the bobcat. The Court of Appeals for the District of Columbia held that this claim was justiciable because the implementing statute requiring "necessary and appropriate" action made the treaty "a source of rights enforceable by an individual litigant in a domestic court of law." *Id.* at 175 (quoting *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974)). The court then set aside the regulations under the APA because they were inconsistent with the treaty. *Id.* at 183.

Just like in *Defenders of Wildlife*, here the court should find that the Secretary of State's duty under APPS to take "appropriate action" makes Appendix III a source of enforceable rights. In *Defenders of Wildlife*, the court set aside agency regulations as

inconsistent with a treaty. Here, as explained below, the court should set aside the Secretary of State's acceptance of the ECA—the relevant "agency action" under the APA—because the ECA proposal did not comply with Appendix III.

B. The Secretary of State Failed To Ensure That The ECA Proposal Complied With The Procedures In Appendix III

Appendix III provides that the "geographical limits of an emission control area will be based on" eight criteria. (SAC, Ex. C at 30-31.) The proposal to extend the ECA to Alaska did not comply with two of those criteria because it did not include a sufficient scientific justification for extending the ECA to Alaska. For that reason the decision to extend the ECA to Alaska was arbitrary and capricious and should be set aside. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 602 (9th Cir. 2008) ("An agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.") (quotations omitted).

1. The ECA proposal lacked "an assessment that emissions are contributing to ambient concentrations of air pollution or to adverse environmental impacts" and a "description of the impacts of the relevant emissions on human health and the environment"

The fourth criterion in Appendix III requires "an assessment that emissions from ships operating in the proposed [ECA] are contributing to ambient concentrations of air pollution or to adverse environmental impacts." (SAC, Ex. C at 30.) It further provides

that the "assessment shall include a description of the impacts of the relevant emissions on human health and the environment." (*Id.*) The ECA proposal contained none of these things.

First, in the proposal, the United States admitted that it could not quantify the effects of emissions in the ECA on air quality in Alaska because its modeling did not include Alaska. (ECA Proposal at 19.) If the United States could not quantity the effects of emissions on air quality in Alaska, then it could not make a rational assessment that such emissions "are contributing to ambient concentrations of air pollution" in Alaska. The magnitude of the effects of emissions in the ECA on air quality in Alaska was an important aspect of deciding whether the ECA should extend to Alaska, which the United States entirely failed to consider.

What the United States did not do in Alaska stands in stark contrast to what it did in the Lower 48. In the Lower 48, the United States compared expected emissions under a "current performance" scenario, which assumed no ECA, with a scenario that assumed zero emissions from ships in the ECA. (*Id.* at 13.) The proposal used state-of-the-art modeling to show the expected distribution of ozone and $PM_{2.5}$ in the Lower 48 under those two scenarios.[14] (*Id.* at 14.) For example, the United States showed that, without

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[14] The only ambient air pollutant concentrations that would potentially be affected by EPA's low-sulfur fuel requirements are sulfur dioxide and $PM_{2.5}$. (Ex. 8, Landsberg Decl. ¶ 7.) The proposal did not directly allege an impact from marine air emissions on ambient air concentrations of sulfur in Alaska, and indeed Alaska has never exceeded EPA's requirements for ambient air concentrations of sulfur dioxide. (*Id.* ¶ 8.) The low-

the ECA, annual mean concentrations of $PM_{2.5}$ in Southern California are expected to be more than 16 $\mu g/m^3$, but would improve if emissions from ships were reduced to zero. (*Id.* at 15 & 21, Figures 3.3-1 & 3.3-9.) The proposal did not do any of that in Alaska. If anything, the proposal shows that marine emissions in Alaska are *not* contributing to any meaningful ambient concentration of air pollution. For example, the Canadian air quality modeling in the proposal appears to show that, without the ECA, in 2020 the annual mean concentration of $PM_{2.5}$ along the Southeastern Alaska-Canadian border is expected to be *less than 1.0 µg/m3*. (*Id.* at 19, Figure 3.3-5.) The national ambient air quality standard for annual mean concentration of $PM_{2.5}$ is 15 $\mu g/m^3$. 40 C.F.R. § 50.7(a) (2012).[15]

The proposal also did not make a rational assessment that emissions from Alaska are contributing to environmental impacts, or include a description of the impacts of emissions in Alaska on human health and the environment. The proposal did try to draw a link between emissions in Alaska and impacts on lichen and caribou. For lichen, the proposal relied exclusively on one study to assert that "the main source of sulphur and nitrogen found in lichens from Mt. Roberts (directly north of the City of Juneau in

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sulfur fuel requirements in the ECA would potentially affect concentrations of $PM_{2.5}$ because when sulfur dioxide is emitted into the air, it can combine with other molecules to form an aerosol and contribute to concentrations of $PM_{2.5}$. (*Id.* ¶ 7.) $PM_{2.5}$ is particulate matter with a diameter smaller than 2.5 microns, where a micron is one millionth of a meter. (*Id.* ¶ 5.)

[15] The term $\mu g/m^3$ means micrograms per cubic meter. *Id.*

southeastern Alaska) is likely the burning of fossil fuels by cruise ships and other vehicles and equipment in Juneau." (ECA Proposal at 34.) But that study only concluded that marine emissions from the cruise ship docking area, along with other "industrial and urban sources," in downtown Juneau, had probably contributed to contamination of lichen on Mt. Roberts. (Tongass Study at 320.) The study did not conclude that marine air emissions hundreds of miles (or even one mile) from the Juneau port were having an environmental impact. (*Id.*) Even if the proposal showed an environmental impact from emissions in the cruise ship docking area, it failed to show an environmental impact that would justify a 200-mile wide ECA.

Finally, the proposal did not contain a description of any meaningful "impact[] of the relevant emissions on human health" in Alaska. Although the proposal asserted that any ambient air concentration of particulate matter is harmful to human health, it admitted that the guideline established by the World Health Organization for annual mean $PM_{2.5}$ is 10 $\mu g/m^3$. (ECA Proposal at 6.) The national air quality standard for annual mean concentration of $PM_{2.5}$—which as a matter of United States law is defined as the minimum standard necessary to protect human health—is 15 $\mu g/m^3$.[16] 40 C.F.R. § 50.7(a). The ECA proposal appears to show that, without the ECA, in 2020 the annual mean concentration of $PM_{2.5}$ along the Southeastern Alaska-Canadian border is expected

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[16] National ambient air quality standard is defined as the "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(1).

to be less than 1.0 $\mu g/m^3$, and it does not otherwise quantify concentrations of $PM_{2.5}$ in Alaska with or without the ECA. (ECA Proposal at 19, Figure 3.3-5.) Thus, if anything, the proposal demonstrates that there is no impact on human health from marine air emissions in Alaska.[17]

For all of these reasons, the proposal did not comply with the fourth criterion in Appendix III.

2. The ECA proposal lacked "relevant information, pertaining to the meteorological conditions in the proposed [ECA] … or other conditions that contribute to ambient concentrations of air pollution or adverse environmental impacts"

The fifth criterion in Appendix III requires "relevant information, pertaining to the meteorological conditions in the proposed [ECA], to the human populations and environmental areas at risk, in particular prevailing wind patterns, or to topographical, geological, oceanographic, morphological, or other conditions that contribute to ambient concentrations of air pollution or adverse environmental impacts." (SAC, Ex. C at 30.) EPA admitted that it does not have gridded meteorological data for Alaska. (*See* TSD at

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[17] In December 2009, long after the deficient ECA proposal had been submitted, EPA contended that the ECA was needed in Alaska in part because in December 2009 portions of the Fairbanks North Star Borough—a community hundreds of miles and at least one mountain range from the ECA—were designated nonattainment for $PM_{2.5}$. (Responses at 112.) Because that fact was not cited in the proposal, it has no bearing on whether the proposal complied with Appendix III. Even if it were relevant, the notion that marine air emissions are causing ambient air concentrations of $PM_{2.5}$ to exceed national standards in Fairbanks, but not coastal communities like Anchorage or Juneau, is curious. In fact, the $PM_{2.5}$ issue in Fairbanks is largely due to the use wood-burning stoves in the winter for heat. (*See* Landsberg Decl.. ¶¶ 11-12.)

3-31 n.P ("We were unable to consider effects beyond the 48-State area due to the unavailability of gridded meteorological data for locations like Alaska and Hawaii.").) Without that data, the proposal could not comply with the fifth criterion.

Indeed, the United States admitted that gridded meteorological data and modeling was not just relevant, but *essential* to deciding where the ECA should be located. The United States asserted that it was not proposing an ECA beyond 200 miles solely because its modeling did not extend beyond that distance. (*See* ECA Proposal at 5 ("Because the modeling we performed did not extend beyond 200 nm, we are not proposing to extend the ECA any further from the baseline at this time.").) Modeling was no less essential to deciding whether the ECA should extend to Alaska.

For all of these reasons, the proposal did not comply with the fifth criterion in Appendix III. Because the proposal did not comply with the fourth and fifth criteria in Appendix III, the Secretary of State failed to take "appropriate action" when she accepted the ECA amendment.

III. THE EXECUTIVE BRANCH CANNOT UNILATERALLY CONVERT THE ECA DESIGNATION INTO DOMESTIC FEDERAL LAW

During the rulemaking process, EPA claimed it was bound by the Secretary of State's ECA designation because that designation was part of a treaty. But to have domestic effect, a non-self-executing treaty such as MARPOL must be implemented by Congress. Parts of MARPOL have been implemented, but the amendment that designated the ECA never was. EPA was therefore wrong to believe that the ECA

designation was binding as domestic federal law. To the extent §1909(b) authorizes such unilateral lawmaking by the executive branch, that statute is unconstitutional.[18]

A. The Designation Of The ECA Was Unconstitutional

EPA was wrong to believe that the ECA designation was binding on it as domestic federal law. In *Medellin v. Texas*, the Supreme Court explained that an international commitment may become domestic federal law only if it is either: (1) created in a self-executing treaty that is made by the President and approved by two-thirds of the Senate, or (2) implemented pursuant to legislation passed by both houses of Congress. 552 U.S. 491, 525-27 (2008). Neither act occurred here with respect to the ECA amendment.

Although it is accepted that the executive branch can enter into non-Article-II international agreements without the approval of the Senate, such agreements are "international law commitments [that] do not by themselves function as binding federal law" unless and until Congress enacts implementing legislation to carry them into effect. *Id.* at 505; *see also id.* at 525-26 ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."); *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (J. Kavanaugh, concurring) ("non-self-executing treaties have no effect or force as a matter of domestic law"). The executive branch cannot unilaterally create domestic federal law

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[18] Because the ECA designation violated the Constitution, that designation should be set aside under the APA. *See* 5 U.S.C. § 706(2)(B).

by entering into an international agreement. Separation of powers would be meaningless if it could.

MARPOL is a non-self-executing treaty. *See United States v. Pena*, 684 F.3d 1137, 1142 (11th Cir. 2012); *Medellin*, 552 U.S. at 508 (holding an agreement to "undertake to comply" is a non-self-executing agreement). When the Secretary of State failed to object to the ECA amendment within the time allowed, under the terms of MARPOL, the United States became obligated as a matter of international law to implement the ECA designation. That never happened.

Congress did not pass a statute to implement the ECA designation. EPA did not implement the designation pursuant to its rulemaking authority under APPS. And the ECA designation was not approved by the President and two-thirds of the Senate. Thus, under *Medellin*, the ECA designation is not domestic federal law. It remains an unimplemented international law commitment. *See also Natural Res. Def. Council v. EPA*, 464 F.3d 1, 10 (D.C. Cir. 2006) ("Without congressional action, however, side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations.").

Even though the ECA was never implemented, EPA treated it as binding domestic federal law, thereby violating the Constitution. EPA claimed when it engaged in rulemaking to implement the low-sulfur fuel requirement that the ECA designation was a "requirement[] of the MARPOL Annex VI treaty." *See Final Rule*, 75 Fed. Reg. 22896,

22936. By that, EPA acted as if the ECA amendment were a self-executing treaty that was binding as domestic federal law. Under the Constitution, it was not.

This is true even though the Senate ratified MARPOL and Annex VI, and thereby approved the treaty amendment procedures therein. The senators that approved MARPOL and Annex VI knew those treaties were non-self-executing agreements that required implementing legislation, as evidenced by (among other things) the Senate committee report recommending ratification of Annex VI. *See* S. EXEC. REPT. 109–13 at 5 (Annex VI "will require implementing legislation"). Those senators therefore implicitly prohibited the executive branch from unilaterally making any of the treaty obligations in Annex VI—including any obligations flowing from amendments—domestic federal law. *See Medellin*, 552 U.S. at 527 ("the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so").

As the Supreme Court explained in *Medellin*, "[t]he President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them." 552 U.S. at 525. The ECA amendment is not domestic federal law and EPA violated the Constitution by treating it as such.

B. If § 1909(b) Authorizes Unilateral Lawmaking By The Executive Branch, Then § 1909(b) Is Unconstitutional

Courts should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Here, there is a reasonable interpretation of APPS that would avoid a constitutional question. The court should hold that—despite EPA's repeated statements to the contrary—§ 1909(b) merely authorized the Secretary of State to enter into an international commitment to designate the ECA, and that it was up to EPA to implement that designation as a matter of domestic federal law through a rulemaking.[19] Because EPA failed to designate the ECA through a rulemaking, the ECA does not exist as a matter of domestic law and EPA should be enjoined from enforcing the low-sulfur fuel requirement in it.

If the court concludes that Congress intended in § 1909(b) to allow the Secretary of State to unilaterally convert a non-self-executing treaty amendment into domestic federal law, then the court should declare that statute unconstitutional. Whatever may be the constitutionality of ex-ante congressional-executive agreements, or treaty-authorized agreements, those agreements do not have domestic effect absent approval by the President and two-thirds of the Senate, or implementation by Congress. *See Medellin*, 552 U.S. at 505 ("[W]hile treaties may comprise international commitments ... they are

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[19] Indeed, the plain language of APPS demonstrates that Congress intended that EPA would designate the ECA through a rulemaking. *See infra* at 33-37.

not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (quotations omitted).

IV. EPA VIOLATED THE APA BY NOT DESIGNATING THE ECA PURSUANT TO A RULEMAKING

Congress intended that the ECA would be designated through a rulemaking. Instead, EPA claimed that the Secretary of State's acceptance of the ECA amendment designated the geographic scope of the ECA. But because EPA's rule has the effect of extending the ECA to Alaska—despite EPA's repeated denials that it designated the ECA—EPA was required by the APA to provide notice and an opportunity to comment on the geographic scope of the ECA. EPA violated the APA by failing to provide interested persons an opportunity to comment. Furthermore, APPS only applies to foreign-flagged ships when those ships are in an ECA "designated under section 1903" of APPS, which is the section that authorizes EPA to implement Regulation 14 of Annex VI. EPA therefore also violated the APA by promulgating a rule in excess of its statutory authority and not in accordance with law.[20]

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[20] EPA's rule violated the APA, and should be held unlawful and set aside, because EPA's rule was promulgated without statutory authority and without observance of a procedure required by law. 5 U.S.C. § 706(2)(C) & (D).

A. EPA Violated The APA By Failing To Provide An Opportunity To Comment On The ECA Designation

Under the APA, EPA must publish a notice of its proposed rulemakings in the Federal Register and "give interested persons an opportunity to participate in the rule making." *See* 5 U.S.C. § 553(b)-(d). Here, EPA's rule had the effect of designating the ECA even though EPA repeatedly denied that it designated the ECA. EPA's effective designation of the ECA qualified as a rule and triggered the APA's notice-and-comment requirement. *See* 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

EPA never gave interested parties an opportunity to comment on the geographic scope of the ECA. Rather, it issued a NPRM and Final Rule that purported to implement the ECA as prospectively designated by the Secretary of State and the IMO. In other words, EPA assumed the designation of the ECA as a given, and dismissed comments on the geographic scope of the ECA as irrelevant. (Responses at 22, 48, 81.) EPA violated the APA by treating the ECA designation as automatically binding regardless of any comments it received. *Cf. Paulsen v. Daniels*, 413 F.3d 999, 1007 (9th Cir. 2005) ("That petitioners had an opportunity to protest an already-effective rule prior to the time it was applied to each of them does not render the APA violation harmless.").

B. EPA Violated The APA By Issuing A Rule In Excess Of Its Statutory Authority And Otherwise Not In Accordance With Law

It is axiomatic that "agencies derive their legal powers from congressionally enacted statutes." *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 773 (2002). EPA cited APPS as the statutory authority for its rule implementing the low-sulfur requirement in the ECA. *See* 40 C.F.R. Part 1043. With respect to Annex VI and its low-sulfur fuel requirement, APPS plainly applies to foreign-flagged ships only when those ships are in an ECA "designated" by a rulemaking pursuant to § 1903. 33 U.S.C. §§ 1902(a)(5)(B)(ii) & (C)(ii).[21] Although APPS allows the Secretary of State to play a role in designating an ECA as a matter of international law, as a matter of domestic federal law any ECA must be designated through a rulemaking. Congress thereby ensured that the public would be given notice and an opportunity to comment on the geographic scope of the ECA. *Cf. Defenders of Wildlife v. Guttierez*, 532 F.3d 913, 926 (D.C. Cir. 2008) ("By giving the [agency] authority to promulgate [regulations], Congress intended to make the [agency] accountable for them.").

EPA denied the public its opportunity to comment on the geographic scope of the ECA. Rather than designating the ECA under its rulemaking authority, EPA made it

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[21] With respect to Annex VI, APPS applies to foreign-flagged ships that are "bound for, or departing from, a port, shipyard, offshore terminal, or the internal waters of the United States, and [are] in . . . (ii) an emission control area designated pursuant to section 1903 of this title" 33 U.S.C. § 1902(a)(5)(B)(ii). APPS also applies, with respect to Annex VI, to foreign-flagged ships that are "entitled to fly the flag of, or operating under the authority of, a party to Annex VI, and [are] in . . . (ii) an emission control area designated under section 1903 of this title." *Id.* § 1902(a)(5)(C)(ii).

clear that it was the ECA proposal to the IMO that "designated" the ECA. *See, e.g.*, *Final Rule*, 75 Fed. Reg. 22896, 22899 ("On July 17, 2009, the IMO approved in principle a U.S.-Canada proposal to amend MARPOL Annex VI to designate North American coastal waters as an ECA"). Since APPS does not apply to foreign-flagged ships in an ECA designated by the Secretary of State or an international body, EPA's rule is in excess of statutory authority and otherwise not in accordance with law. EPA's rule should be held unlawful and set aside under 5 U.S.C. § 706(2). *See, e.g.*, *EME Homer City Generation, L.P. v. EPA*, --- F.3d ----, 2012 WL 3570721, at *14 (D.C. Cir. Aug. 21, 2012) (vacating EPA rule because it exceeded EPA's statutory authority).

V. FAILING TO ENJOIN ENFORCEMENT OF THE ECA IN ALASKA WILL LIKELY CAUSE THE STATE TO SUFFER IRREPARABLE HARM

Failing to enjoin enforcement of EPA's rules in Alaska waters will cause the State to suffer irreparable harm by raising the cost of transporting goods and resources to and from Alaska. These increased costs will increase the price of goods the State purchases to run State government, and decrease the State's primary sources of revenue—royalties and production taxes on oil—by tens of millions of dollars. These harms are all irreparable because the State cannot recover damages from the United States due to its sovereign immunity. *See, e.g.*, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009) (agreeing that economic harm that cannot be remedied because of

sovereign immunity constitutes irreparable harm), *vacated on other grounds by Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).[22]

A. EPA's Rule Will Raise The Price Of Goods Purchased By The State

EPA has admitted that the social costs of the low-sulfur fuel requirement "are expected to be borne by the final consumers of goods transported by affected vessels in the form of slightly higher prices for those goods." (Impact at 7-2; *see also* Responses at 100.) The State purchases hundreds of millions of dollars of goods per year to run State government, a significant portion of which reach Alaska on large container marine vessels that travel through the ECA. (Jones Decl. ¶¶ 5-6.) EPA's rule will cause the State's costs to increase. (*Id.* ¶ 11.) For a large consumer such as the State, even "slightly higher prices" translate into a significant impact.

B. EPA's Rule Will Decrease The Royalty And Production Tax Revenue That The State Relies On

Tankers that transport oil produced in Alaska to be sold on the West Coast of the United States must travel through the ECA and are subject to the new low-sulfur fuel requirements. (Impact at 7-6.) By raising the costs of operating the oil tankers that export oil from the State, EPA's rule will decrease the royalty and production tax

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[22] Even if the State had not shown irreparable injury, so long as it has suffered an injury, it is entitled to an injunction on its APA claims. *See Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("But, whether or not appellant has suffered irreparable injury, if it makes out its case under the APA it is entitled to a remedy."). Likewise, the "constitutional violation alone, coupled with damages incurred, can suffice to show irreparable harm." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2008).

revenues that the State relies on. (Tangeman Decl. ¶¶ 5-10.) The Alaska Department of Revenue estimates that the EPA's rule will likely cost the State tens of millions of dollars in revenues per year. (*Id.* ¶ 10.) About 87% of the State's revenues come from royalties and taxes on oil production. (*Id.* ¶ 4.)

For all of these reasons, the State will likely suffer irreparable harm from EPA's requirement that marine vessels use low-sulfur fuel in the ECA.

VI. THE BALANCE OF EQUITIES TIPS SHARPLY IN THE STATE'S FAVOR

The balance of the equities in this case tips sharply in favor of granting the requested injunction. The harm to the State in the absence of an injunction is likely to be substantial, amounting to tens of millions of dollars in reduced revenues per year on top of an increase in the costs of goods the State must purchase. By contrast, the United States would suffer little harm from an injunction.

If enforcement of the ECA in Alaska is enjoined, ships will be allowed to operate in Alaska as they did before the rule. Before the rule, Alaska already "enjoy[ed] air quality that is generally cleaner than [EPA's] National Ambient Air Quality Standards." (Responses at 112.) Given that, and also given EPA's failure to show that marine air emissions in the 200-mile wide ECA are having any other environmental impact, the threat of environmental harm from granting the injunction is small. This weighs in favor of granting the requested injunction. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)

(concluding that where the asserted environmental injury was "not at all probable," economic interest was properly given more weight in balancing harms).

Although granting the injunction might have political implications for the United States in that it would be temporarily out of compliance with MARPOL, that should be given little weight in the light of the clear statutory and constitutional violations demonstrated above. *Cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

For all of these reasons, the balance of the equities tips sharply in favor of granting the injunction.

VII. AN INJUNCTION IS IN THE PUBLIC INTEREST

Enjoining enforcement of the ECA off the coast of Alaska is also in the public interest. In addition to the harmful effects of EPA's rule on the State's proprietary interests, the ECA designation and EPA's rule will likely have significant and harmful effects on Alaska's economy and citizens. Because of the ECA designation, in 2015 EPA is expected to require, in accordance with Annex VI, that ships in the ECA use fuel with a sulfur content that does exceed .1%. Cruise ship companies expect to redeploy cruises away from Alaska as a result. (Binkley Decl. ¶ 11.) This expected cutback on cruises to Alaska will hurt Alaska's economy. (Binkley Decl. ¶ 11, Marquardt Decl. ¶ 7.) EPA's rule will also increase the costs of goods purchased by nearly all Alaskans, many of

whom already pay high prices for essential goods as compared to prices in the Lower 48. (Marquardt Decl. ¶ 4.) All of these impacts demonstrate that it is in the public interest to grant the requested injunction. *See, e.g.*, *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (holding that a Forest Service project would "further the public's interest in aiding the struggling local economy and preventing job loss").

Against all that is weighed the threat of environmental harm from granting the injunction, which as demonstrated above is small. For all of these reasons, the public interest favors granting the injunction.

CONCLUSION

For all of these reasons, the State requests that the Court enjoin enforcement of EPA's low-sulfur marine fuel requirement in the waters of the coast of Alaska.

Respectfully submitted this 28th day of September, 2012 by:

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