MICHAEL C. GERAGHTY
ATTORNEY GENERAL
Seth M. Beausang
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
Phone: (907) 269-5274
Fax: (907) 278-7022
seth.beausang@alaska.gov
Attorney for Plaintiff

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 **SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTION

1. The State of Alaska seeks relief from the enforcement of a North American emission control area ("ECA") in the waters off the coast of Alaska. On August 1, 2012, the Environmental Protection Agency ("EPA") and the United States Coast Guard, a division of the Department of Homeland Security ("DHS"), began jointly enforcing rules that require that marine vessels use low-sulfur fuel in the ECA. 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 coast of Hawaii. Marine vessels in the ECA are now required to use fuel with a sulfur content that does not exceed 10,000 parts per million, which is more expensive than the standard marine fuel used before. 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, which is even more expensive. Ships traveling through the ECA, such as container ships and oil tankers, bring to Alaska the vast majority of goods that are consumed in the state, and carry the oil exports the State relies on to fund its operations. EPA's low-sulfur fuel rules will harm the State's proprietary interests in at least two ways: by increasing the price of the goods the State must purchase every year, and by reducing the royalty payments and production taxes the State receives from oil companies. EPA's rules will also raise costs for Alaska residents who must purchase goods shipped through the ECA, and for the cruise ships that bring the tourists that support thousands of Alaska jobs. In all of these ways, EPA's rules will have an adverse effect on the State and Alaska's citizens and economy.

2. The extension of the ECA to Alaska was never the subject of any public process before Congress or through rulemaking at the agency level. Indeed, during its rulemaking to implement the low-sulfur fuel requirement, EPA dismissed as irrelevant public comments on the geographic scope of the ECA, including comments from the Governor of Alaska. Thus, Alaskans and other interested persons did not have an opportunity to participate in the process and formally express their concerns about the negative economic impacts of the ECA and the inadequate scientific basis for extending the ECA to Alaska.

3. The Federal Government has not shown that including Alaska in the ECA is necessary to protect against environment impacts or ambient concentrations of air pollution. Although EPA used state-of-the-art scientific modeling to support including the waters off the East and West coasts in the ECA, that modeling did not include Alaska. The decision to include Alaska in the ECA was supported by assumptions and misinformation, such as the far-fetched claim that purported evidence of sulfur damage to lichen in downtown Juneau is linked to problems suffered by a caribou herd a thousand miles to the west in the Aleutian Chain.

4. The decision to extend the ECA to Alaska was arbitrary and capricious, in excess of statutory authority, and otherwise not in accordance with law. Upon information and belief, the Secretary of State purported to accept, by failing to reject, the ECA as 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. The Act to Prevent Pollution from Ships ("APPS"),

33 U.S.C. §§ 1909(b) & (c), which was enacted to implement MARPOL and Annex VI, required the Secretary of State to either take "appropriate action" concerning the proposed ECA amendment, or reject the ECA amendment. The Secretary of State did neither. For that reason, the Secretary of State's decision to accept an ECA that included Alaska should be set aside under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706.

5. The extension of the ECA to Alaska was also unlawful because EPA held it out as binding domestic federal law even though the ECA amendment was solely an international commitment. Under the United States Constitution, 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. Neither occurred here with respect to the ECA amendment. The Secretary of State accepted the ECA amendment, which was a non-self-executing international commitment, without the approval of the President and the Senate. And the ECA amendment was never implemented by Congress or by EPA through rulemaking under APPS. The ECA amendment is therefore not domestic federal law. To the extent that Congress intended, through APPS, to authorize the Secretary of State or an international body to unilaterally create domestic federal law, APPS is unconstitutional under the Treaty Clause and the separation of powers doctrine.

6. EPA's rules implementing the low-sulfur fuel requirement are also unlawful because the ECA was not designated pursuant to a rulemaking as Congress

intended. First, because EPA's rules have the effect of extending the ECA to Alaska—despite EPA's repeated denials that it designated the ECA—EPA was required to provide notice and an opportunity to comment on the geographic scope of the ECA. EPA failed to do that. Second, because APPS only applies to foreign-flagged ships in an ECA if the ECA was designated pursuant to a rulemaking, EPA's rules were promulgated in excess of its statutory authority. For all of these reasons, Defendants should be enjoined from enforcing the ECA in Alaska.

II. PARTIES

7. Plaintiff, the State of Alaska, is a sovereign state of the United States that has compelling economic and environmental interests in the management and regulation of marine vessels within its jurisdiction and in the areas extending 200 miles from its coastline. Increased regulation of container ships and oil tankers harms the State's proprietary interests by raising the price of the goods the State must purchase to run State government, and reducing the largest source of State revenue—royalties and production taxes on oil.

8. Defendant Hillary Rodham Clinton is named solely in her capacity as United States Secretary of State. When the United States received the proposal from the International Maritime Organization ("IMO") to extend the ECA to Alaska, Secretary Clinton failed to take appropriate action by failing to make a declaration that the United States did not accept that extension. Secretary Clinton also purported to bind the United States to the ECA and make the ECA designation domestic federal law, even though the

President and two-thirds of the Senate did not consent to the ECA, and even though the extension of the ECA to Alaska was not carried out pursuant to legislation or rulemaking.

9. Defendant Environmental Protection Agency is a federal agency that administers and enforces federal environmental laws. APPS authorizes EPA to promulgate rules to carry out the provisions of Annex VI, and gives EPA and DHS joint authority to implement and enforce Annex VI. EPA treated the Secretary of State's ECA designation as domestic federal law, and is enforcing the ECA in Alaska, despite the absence of a scientific basis for extending the ECA to Alaska, and even though the ECA designation was never made domestic federal law. EPA also violated the APA by failing to provide notice and an opportunity to comment on the geographic scope of the ECA, and promulgating rules in excess of its statutory authority.

10. Defendant Lisa P. Jackson is named solely in her official capacity as EPA Administrator. Administrator Jackson treated the Secretary of State's ECA designation as domestic federal law, and is enforcing the ECA in Alaska, despite the absence of a scientific basis for extending the ECA to Alaska, and even though the ECA designation was never made domestic federal law. Administrator Jackson is also enforcing the ECA in Alaska, even though EPA violated the APA by failing to provide notice and an opportunity to comment on the geographic scope of the ECA, and promulgating rules in excess of its statutory authority.

11. Defendant Department of Homeland Security is a federal agency whose mission is to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards. DHS is enforcing the ECA in Alaska through the Coast Guard,

despite the absence of a scientific basis for extending the ECA to Alaska, and even though the ECA designation was never made domestic federal law. DHS is also enforcing the ECA in Alaska through the Coast Guard, even though EPA violated the APA by failing to provide notice and an opportunity to comment on the geographic scope of the ECA, and promulgating rules in excess of its statutory authority.

12. Defendant Janet Napolitano is named solely in her official capacity as the Secretary of DHS. Secretary Napolitano is enforcing the ECA in Alaska through the Coast Guard, despite the absence of a scientific basis for extending the ECA to Alaska, and even though the ECA designation was never made domestic federal law. Secretary Napolitano is also enforcing the ECA in Alaska through the Coast Guard, even though EPA violated the APA by failing to provide notice and an opportunity to comment on the geographic scope of the ECA, and promulgating rules in excess of its statutory authority.

13. Defendant United States Coast Guard is a division of DHS whose mission is to safeguard United States maritime interests. The Coast Guard and EPA have entered into a Memorandum of Understanding agreeing to jointly implement and enforce the ECA. The Coast Guard is enforcing the ECA in Alaska, despite the absence of a scientific basis for extending the ECA to Alaska, and even though the ECA designation was never made domestic federal law. Coast Guard is also enforcing the ECA in Alaska, even though EPA violated the APA by failing to provide notice and an opportunity to comment on the geographic scope of the ECA, and promulgating rules in excess of its statutory authority.

14. Defendant Robert J. Papp, Jr. is named solely in his official capacity as Commandant of the Coast Guard. As Commandant, Admiral Papp is responsible for all world-wide Coast Guard activities. Admiral Papp is enforcing the ECA in Alaska, despite the absence of a scientific basis for extending the ECA to Alaska, and even though the ECA designation was never made domestic federal law. Admiral Papp is also enforcing the ECA in Alaska, even though EPA violated the APA by failing to provide notice and an opportunity to comment on the geographic scope of the ECA, and promulgating rules in excess of its statutory authority.

III. JURISDICTION

15. Subject Matter Jurisdiction. The Court has jurisdiction of this matter under 5 U.S.C. §§ 701-706, 33 U.S.C. §§ 1901-1915, and 28 U.S.C. § 1331. The State has standing to protect its proprietary interests from the harm caused by enforcement of the ECA in Alaska.

16. Declaratory And Injunctive Relief. The State seeks declaratory and injunctive relief to protect its proprietary interests from enforcement of the ECA in the waters off the coast of Alaska. EPA and the Coast Guard began enforcing the ECA in these waters on August 1, 2012 with direct, substantial, and irreparable effects on Alaska's proprietary interests. As a result, an actual, justiciable controversy exists between the State and Defendants. The State seeks the requested relief under 28 U.S.C. §§ 2201-2202, Fed. R. Civ. P. 57, 5 U.S.C. §§ 701-706, and 33 U.S.C. §§ 1901-1915. The State has no other remedy to redress the unlawful acts alleged in this Second Amended Complaint.

IV. VENUE

17. Venue. Venue is proper in the District of Alaska under 28 U.S.C. § 1391(e)(1) because a substantial part of the events or omissions giving rise to the claims occurred here, a substantial part of the property that is subject of the action is situated here, and because the State is the plaintiff. Venue is also proper in the District of Alaska under 33 U.S.C. § 1910(c)(1) because this case concerns ports in Alaska. Venue is also proper in the District of Alaska under 33 U.S.C. § 1910(c)(3) because this case concerns ships in the portion of the ECA off the coast of Alaska, wherein the ships or owners or operators may be found.

V. BACKGROUND

18. MARPOL. The IMO first adopted the MARPOL Convention in 1973 to establish international standards governing marine pollution from ships. (Exhibit A.) The IMO amended MARPOL with the Protocol of 1978. (Exhibit B.) In 1980, two-thirds of the Senate approved the Protocol of 1978, making the United States a party to MARPOL.

19. Amendments To MARPOL. The procedure to amend MARPOL is set forth in Article 16 of the Protocol of 1973. To amend an Annex to MARPOL, the proposed amendment must be submitted to the IMO by a party to MARPOL. The proposed amendment is then circulated by the Secretary-General of the IMO to all of the members of the IMO and parties to MARPOL at least six months prior to voting on the amendment. Amendments are adopted by a two-thirds majority vote of the parties to the MARPOL. Once adopted, amendments must be communicated by the Secretary-General

to all of the parties to MARPOL for acceptance. 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. The 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. 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.

20. Annex VI. In 1997, the IMO adopted Annex VI to MARPOL. (Exhibit C.) Two-thirds of the Senate approved Annex VI in April 2006, making the United States a party to Annex VI. Among other things, Annex VI imposes limits on the sulfur content of fuel used by marine vessels in certain areas. Under Regulation 14 of the version of Annex VI now in effect, the sulfur content of fuel used on ships operating in ECAs cannot exceed 1.0% after July 1, 2010. Beginning in 2015, the sulfur content of fuel used on ships operating in ECAs cannot exceed 0.1%. Regulation 14 describes the location of ECAs, and contemplates that additional ECAs will be designated through amendments to MARPOL proposed by parties to Annex VI. The version of Annex VI that the Senate approved did not include the North American ECA.

21. Appendix III To Annex VI. Appendix III to Annex VI sets forth certain mandatory criteria that parties to Annex VI must include when proposing an ECA amendment. Under Appendix III to Annex VI, ECA proposals must include:

.1 a clear delineation of the proposed area of application, along with a reference chart on which the area is marked;

.2 the type or types of emission(s) that is or are being proposed for control (i.e. NOx or SOx and particulate matter or all three types of emissions);

.3 a description of the human populations and environmental areas at risk from the impacts of ship emissions;

.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*;

.6 the nature of the ship traffic in the proposed Emission Control Area, including the patterns and density of such traffic;

.7 a description of the control measures taken by the proposing Party or Parties addressing land-based sources of NOx, SOx and particulate matter emissions affecting the human populations and environmental areas at risk that are in place and operating concurrent with the consideration of measures to be adopted in relation to provisions of regulations 13 and 14 of Annex VI; and

.8 the relative costs of reducing emissions from ships when compared with land-based controls, and the economic impacts on shipping engaged in international trade.

(emphasis added).

Appendix III further 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."

22. APPS. MARPOL is a non-self-executing treaty, meaning it is not binding as domestic federal law until the commitments therein are implemented by Congress. To implement MARPOL, Congress passed APPS in 1980. APPS has been amended several times since, most recently in 2008 to implement Annex VI. Under APPS, EPA and DHS have joint authority to enforce the provisions of Annex VI. APPS gives EPA the authority to prescribe any necessary or desired regulations to carry out the provisions of Regulation 14 of Annex VI, which is the part of Annex VI that requires the use of low-sulfur fuel in ECAs, and contemplates the designation of additional ECAs.

23. Procedures Under APPS For Amending MARPOL. Section 1909 of APPS dictates how the United States will act on proposed amendments to the MARPOL Protocol and Annexes. In order for the United States to accept a proposed amendment, Section 1909(a) provides that generally the President must act with the advice and consent of the Senate:

> A proposed amendment to the MARPOL Protocol received by the United States from the Secretary-General of the [IMO] pursuant to Article VI of the MARPOL Protocol, may be accepted on behalf of the United States by the President following advice and consent of the Senate, except as provided for in subsection (b) of this section.

Section 1909(b) purports to provide an exception to the advice and consent requirement for certain MARPOL amendments, including amendments to Annex VI, whereby the

Secretary of State may take "appropriate action" concerning such amendments without the approval of the President and the Senate:

> A proposed amendment to Annex I, II, V, or VI to the Convention, appendices to those Annexes, or Protocol I of the Convention, received by the United States from the Secretary-General of the [IMO] pursuant to Article VI of the MARPOL Protocol, may be the subject of appropriate action on behalf of the United States by the Secretary of State following consultation with the Secretary [of DHS], or the Administrator [of EPA] as provided for in this chapter, who shall inform the Secretary of State as to what action he considers appropriate at least 30 days prior to the expiration of the period specified in Article VI of the MARPOL Protocol during which objection may be made to any amendment received.

Section 1909(c) allows the Secretary of State to reject a proposed amendment on behalf of the United States.

VI. THE U.S.-CANADIAN ECA PROPOSAL, AND THE SECRETARY OF STATE'S UNLAWFUL ACCEPTANCE THEREOF

24. EPA's Role In The U.S.-Canadian ECA Proposal. In 2008, upon information and belief, EPA began working on an ECA proposal. Around that time, EPA contacted an employee at the Alaska Department of Environmental Conservation about a hypothetical North American ECA. In response, on October 1, 2008 the employee sent EPA a document entitled "Statement in Support of EPA Considering Alaska as Part of a Marine Emission Control Area." In the statement, the employee advocated including all of Alaska in an ECA. Among other things, the employee cited a 2007 study purporting to show some damage from sulfur pollution to lichen on Mt. Roberts near downtown Juneau, Alaska. The employee then attempted to draw a connection between damage to

lichen on Mt. Roberts and effects on the Southern Alaska Peninsula Caribou Herd, which the employee stated "has been decreasing in size, exhibiting poor calf survival and low pregnancy rates which are typically a sign of dietary distress." In fact, there is no connection between the two, as the Southern Alaska Peninsula Caribou Herd lives some 1,000 miles away from Juneau, across the Gulf of Alaska.

25. EPA's January 2009 Regulatory Update. 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 application, EPA issued a Regulatory Update entitled "Frequently Asked Questions about the Emission Control Area Application Process." In the update, EPA revealed that, "[i]deally," it wanted to include Alaska in the ECA it was considering. 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 ECA designation." In other words, EPA 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 yet 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." 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." EPA never completed the necessary air quality modeling for

Alaska, and it utterly failed to provide a sufficient scientific basis for the extension of the ECA to Alaska.

26. The U.S.-Canadian ECA Proposal. On April 2, 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 to create a North American ECA that included waters off the coast of Alaska.[1] 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." To demonstrate that the ECA was needed 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. The model "simulated the multiple physical and chemical processes involved in the formation, transport, and deposition" of pollutants. However, the model did not include any part of Alaska. 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 sole 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

[1] The ECA proposal is available at http://www.epa.gov/nonroad/marine/ci/mepc-59-eca-proposal.pdf

populated areas. 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. Based on that, the U.S. 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." The only other "evidence" cited by the United States for extending the ECA to Southeast and Southcentral Alaska was the false connection between lichen on Mt. Roberts and the health of the Southern Alaska Peninsula Caribou Herd. The U.S.-Canadian proposal to extend the ECA to Alaska did not comply with Appendix III to Annex VI.

27. EPA's Technical Support Document. The ECA proposal referred to a Technical Support Document ("TSD"),[2] which was a document published by EPA in April 2009 in support of the proposed ECA. With respect to the extension of the ECA to Alaska, the TSD repeated the same justification 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. The region identified as Alaska East included the waters off Southeast and Southcentral Alaska that were included within the

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

proposed ECA. The region identified as Alaska West included the waters off the Western and Northern Alaska that were excluded from the ECA proposal. The TSD indicated that for 2002, 10,618 metric tons of sulfur dioxide (SO_2) were emitted in Alaska East, while 34,786 metric tons of SO_2 were emitted in Alaska West. 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).

28. The IMO Approved, And The Secretary Of State Accepted, The North American ECA. 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." Thus, only if the Secretary of State failed to reject the ECA proposal could the proposal enter into force with respect to the United States. The Secretary of State did not reject the ECA proposal within the time allowed. As a result, the ECA purportedly 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.

29. The Secretary Of State Violated APPS By Accepting An ECA That Did Not Comply With Annex VI, Appendix III. In APPS, Congress gave the Secretary of State limited authority to act on a proposed amendment to Annex VI. The Secretary of

State's duty to take "appropriate action" concerning a proposed amendment to Annex VI includes a duty to ensure that the amendment complies with Appendix III. Appendix III sets forth in detail the mandatory criteria that an ECA proposal must include, and provides that "geographical limits of an Emission Control Area will be based on the relevant criteria." Here, the Secretary of State failed to ensure that the ECA proposal complied with Appendix III to the extent it advocated including Alaskan waters in the ECA. The ECA proposal did not come close to satisfying the Appendix III requirements in that regard. For that reason, the Secretary of State's acceptance of the ECA amendment was arbitrary and capricious, an abuse of discretion, in excess of statutory authority, and otherwise not in accordance with law.

VII. EPA CONSIDERED THE ECA DESIGNATION TO BE DOMESTIC FEDERAL LAW

30. EPA's Notice Of Proposed 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. 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. 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. As for the environmental justification for including Alaska in the ECA, the NPRM cited only

the Juneau lichen study and the nonsensical link between that study and the Southern Alaska Peninsula Caribou Herd.

31. Alaskan Officials Express Concerns. Alaskan officials immediately expressed concerns over the NPRM's lack of scientific or environmental data (including any ambient air quality data) to justify including Alaskan waters in the ECA. For example, Governor Parnell, on behalf of the State, submitted a letter to EPA dated September 28, 2009 (Exhibit D), asking EPA to exclude Alaska from the ECA. 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." 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 lives "some 1,000 miles away, across the Gulf of Alaska (and outside the emission control area)." Governor Parnell emphasized "the absence of any air quality modeling for Alaska, and EPA's admission that demonstrating the need for a control area outside the contiguous 48 states will be challenging." 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. Similarly, U.S. Senator Lisa Murkowski submitted a letter to EPA dated September 28, 2009 (Exhibit E), 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. 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." U.S. Senator Mark Begich submitted a letter to EPA dated September 28, 2009 (Exhibit F), asking EPA to delay implementation of its rule "in Alaska until the appropriate science has been completed." Other officials raised similar concerns.

32. EPA's Summary And Analysis Of Comments. In December 2009, EPA responded to comments on its NPRM.[3] In response to the comments critical of the decision to extend the ECA to Alaska, EPA deferred to the U.S.-Canadian ECA proposal, saying comments critical of the geographic boundaries of the ECA were irrelevant because the ECA proposal did "not [come] within the scope of this final rulemaking." EPA's position was that it did not decide in the rulemaking to extend the ECA to Alaska or have the power to revisit that decision. Still, EPA provided very minimal and confusing responses to the comments about the lack of scientific data showing a need for an ECA off the coast of Alaska. For example, EPA argued 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 EPA's new air quality standard concerning $PM_{2.5}$.

[3] 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), is available at http://www.epa.gov/nonroad/marine/ci/420r09015.pdf.

33. EPA's Final Rule. On April 30, 2010, shortly after the IMO amended Annex VI to designate the North American ECA, EPA published its Final Rule. EPA identified APPS as the statutory basis for its rules to implement the ECA. Among other things, EPA promulgated rules implementing Annex VI's low-sulfur fuel requirements in the ECA. With respect to the geographical scope of the ECA, EPA contended that the ECA amendment was binding domestic federal law as a treaty amendment to Annex VI and therefore the ECA had to apply in Alaska. EPA's rules enforcing the low-sulfur fuel requirement in the ECA became effective on August 1, 2012.

VIII. THE ECA AMENDMENT IS NOT DOMESTIC FEDERAL LAW AND EPA WAS WRONG TO TREAT IT AS SUCH

34. Self-executing And Non-self-executing Treaties. Article II, Section 2 of the Constitution empowers the President to make treaties "by and with the Advice and Consent of the Senate … provided two thirds of the Senators present concur." The supermajority requirement in the Treaty Clause is an important check on executive power, and also protects less populous states, like Alaska, from the whims of more populated areas. Self-executing treaties that are made by the President and approved by two-thirds of the Senate under the Treaty Clause create domestic federal law. By contrast, non-self-executing treaties, even if made by the President and approved by two-thirds of the Senate, do not create domestic federal law unless and until the international obligations therein are carried out by or pursuant to implementing legislation. Other kinds of international agreements entered into by the executive branch with other nations

also do not create domestic federal law unless and until the international obligations therein are carried out by or pursuant to implementing legislation.

35. The ECA Amendment Is Not Domestic Federal Law. MARPOL and Annex VI are non-self-executing treaties. Congress passed APPS to implement MARPOL and Annex VI, and portions of the international obligations therein have been carried out as a matter of domestic federal law by APPS and rules promulgated thereunder. Like MARPOL and Annex VI, the ECA amendment that the Secretary of State accepted is also non-self-executing. But the international obligation in the ECA amendment—the duty to designate an ECA that includes Alaska—has never been carried out as a matter of domestic federal law by legislation or agency rule. The ECA amendment was also never approved the President and two-thirds of the Senate. As a result, the ECA amendment, even if it is a valid international obligation, is not domestic federal law.

36. The Attempt By The Secretary Of State And EPA To Unilaterally Make The ECA Amendment Domestic Federal Law Was Unconstitutional. EPA was wrong to believe that the ECA designation was binding on it as domestic federal law simply because the Secretary of State accepted it. The Constitution does not permit the Secretary of State to make a self-executing treaty amendment or unilaterally convert a non-self-executing amendment into domestic federal law. To the extent APPS purports to authorize such unilateral lawmaking by the Secretary of State, APPS should be declared unconstitutional.

IX. EPA VIOLATED THE APA BY FAILING TO PROMULGATE A RULE TO DESIGNATE THE ECA

37. Congress Intended That The ECA Would Be Designated Through Rulemaking. APPS only applies with respect to foreign-flagged ships in an ECA when the ECA is "designated under section 1903" of APPS through rulemaking. By mandating that any North American ECA be designated pursuant to rulemaking, Congress ensured that the public would be given notice and an opportunity to comment on the geographic scope of the ECA, and that those harmed by the ECA designation would have judicial review of that designation under the APA.

38. EPA's Rules Give Effect To The ECA Designation, Even Though EPA Failed To Provide An Opportunity To Comment On That Designation. Because EPA's rules have the effect of extending the ECA to Alaska—despite EPA's repeated denials that it designated the ECA—EPA was required under the APA to provide notice and an opportunity to comment on the geographic scope of the ECA. But when EPA received comments critical of the extension of the ECA to Alaska, EPA's response was to dismiss those comments as irrelevant because EPA purportedly had no power to revisit the Secretary of State's ECA designation. By denying interested persons the opportunity to participate in the ECA designation, EPA violated the APA.

39. EPA's Rules Are In Excess Of Its Statutory Authority. Agencies derive their legal powers from congressionally enacted statues. EPA repeatedly denied that it designated the ECA in its rulemaking to implement the ECA. But because APPS only applies to foreign-flagged ships in an ECA designated by rulemaking, and not in an

ECA designated by the Secretary of State or the IMO, EPA's rules are in excess of statutory authority and otherwise not in accordance with law.

X. EFFECTS OF THE ECA ON ALASKA

40. EPA Has Admitted That Its Rules Will Raise Costs For Vessels Operating In The ECA. In December 2009, EPA published a Regulatory Impact Analysis in connection with its rulemaking.[4] In that document, EPA admitted that the social costs of its new rules "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." EPA estimated the costs of its rules 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. 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 $18 per container (3 percent price increase), assuming the total increase in operating costs is passed on to the purchaser of marine transportation services." EPA also admitted that oil tankers will be affected by the requirement to use low-sulfur fuel.

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

Similarly, in the December 2009 responses to comments on its proposed rule, EPA stated that "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."

41. EPA's Rules Will Increase The Costs Of Goods Purchased By The State. The State purchases hundreds of millions of dollars of goods every year to run State government. A substantial portion of these goods reach Alaska on large container marine vessels that travel through the ECA. Most 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 operating between Singapore, Seattle, and Los Angeles/Long Beach. EPA's rules 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.

42. EPA's Rules Will Decrease The Royalties And Production Taxes Received By The State. 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. The cost of transporting oil to its sales point, including the cost of tanker fuel, factors in as a deduction in calculating both the royalty payments and the production taxes that oil producers owe the State. By raising the costs of operating the oil tankers that export oil from the State, EPA's rules will decrease the royalty and

production tax revenue that the State relies on. A majority of the State's revenues come from royalties and taxes on oil production.

43. Other Effects On Alaska. It is estimated that the Port of Anchorage serves 85 percent of Alaska's population as the entry point for 90 percent of the commodities entering Alaska. That cargo comprises groceries, fuel, retail goods, cars, school supplies, and construction material and equipment. The increased cost of shipping this cargo to Alaska will be passed on to Alaskan consumers. The residents of remote Alaskan villages will be particularly hard hit given their already high cost of living, which is due in part to the high cost of shipping goods to villages. Also, many of Alaska's communities, and in particular Southeast Alaska, depend heavily on the cruise ship industry to generate economic activity. The economic activity generated by the cruise ship industry is crucial to local businesses. EPA's rules will increase the cost of operating cruise ships, and increased costs translate into fewer cruise ship visitors. In all of these ways, EPA's rules will have a substantial and harmful effect of Alaska's citizens and economy.

XI. CLAIMS FOR RELIEF

First Cause of Action

(Violation of the APA and APPS)

44. The State repeats and re-alleges each allegation in Paragraphs 1 through 43.

45. Sections 1909(b) & (c) of APPS required the Secretary of State to either take "appropriate action" concerning the IMO's proposed extension of the ECA to

Alaska, or reject that extension. The Secretary of State's duty to take "appropriate action" included the duty to ensure that the proposed ECA amendment complied with Annex VI, including Appendix III. In violation of that duty, the Secretary of State allowed an ECA that included Alaska to become an amendment to Annex VI.

46. The Secretary of State's acceptance of an ECA amendment that extended the ECA to the waters off the coast of Alaska and violated Appendix III to Annex VI, was arbitrary and capricious, an abuse of discretion, in excess of statutory authority, and otherwise not in accordance with law. The Secretary of State's acceptance should be set aside.

Second Cause of Action

(Violation of the Treaty Clause and Separation of Powers Doctrine)

47. The State repeats and re-alleges each allegation in Paragraphs 1 through 46.

48. The Framers designed a system of separate powers "to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of N.Y.*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). Under the Framers' separate powers system, Congress possesses the lawmaking authority, while the executive branch possesses the authority to execute laws. A violation of the separation of powers doctrine occurs when one branch invades the territory of another, even if both branches approve the encroachment.

49. Domestic federal law may only be made with the involvement of Congress. An international commitment, such as the ECA amendment, can only become

domestic federal law if it is either: (1) created in a self-executing treaty made by the President and approved by two-thirds of the Senate under the Treaty Clause, or (2) implemented pursuant to legislation passed by both houses of Congress.

50. The ECA amendment did not create domestic federal law under the Treaty Clause upon its acceptance by the Secretary of State because it was not made by the President with the advice and consent of the Senate.

51. The ECA amendment also never became domestic federal law because it was never implemented pursuant to legislation passed by both houses of Congress.

52. Under the Treaty Clause and the separation of powers doctrine, the Secretary of State and EPA cannot unilaterally convert an international obligation like the ECA amendment into domestic federal law. To the extent the Secretary of State attempted to unilaterally convert the ECA amendment into domestic federal law, she violated the Constitution. By relying on the ECA amendment as if it were domestic federal law, EPA also violated the Constitution.

53. To the extent APPS permits the Secretary of State, without the approval of the President and two-thirds of the Senate, to accept a treaty amendment to Annex VI and make domestic federal law without further implementation, Congress has unconstitutionally yielded its lawmaking powers and the Senate's treaty-making role—and those of future Congresses—to the executive branch.

Third Cause of Action

(Violation of the APA)

54 The State repeats and re-alleges each allegation in Paragraphs 1 through 53.

55. Under the APA, agencies must publish a notice of proposed rulemaking in the Federal Register and give interested persons an opportunity to participate in the rulemaking.

56. An agency violates the notice-and-comment requirement even if it provides an opportunity to comment, if that opportunity occurs after the rule is already effective.

57. Because EPA's rules have the effect of designating the geographic scope of the ECA—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. But by the time EPA issued its notice of proposed rulemaking, under its view, the ECA designation was final and could not be revisited. Accordingly, EPA denied the right of interested persons to participate in the designation of the ECA.

Fourth Cause of Action

(Violation of the APA)

58. The State repeats and re-alleges each allegation in Paragraphs 1 through 57.

59. Agencies derive their legal powers from congressionally enacted statutes. EPA cited APPS as the relevant statutory authority for its rules implementing the ECA.

60. APPS only applies with respect to foreign-flagged ships in an ECA when the ECA is "designated under section 1903" of APPS. By providing that any North American ECA would be designated pursuant to a rulemaking, Congress ensured that the public would be given notice and an opportunity to comment on the geographic scope of the ECA, and that those harmed by the ECA designation would have judicial review of that designation under the APA.

61. EPA denied the public its right to notice and an opportunity to comment on the scope of the ECA. Rather than designating the ECA through rulemaking, EPA attempted to rely on the Secretary of State's acceptance of the IMO's ECA designation. EPA's rules should therefore be held unlawful and set aside under the APA as in excess of its statutory authority.

XII. RELIEF REQUESTED

Based on the foregoing, the State requests the following relief:

A. Declare that the Secretary of State's acceptance of an ECA extending to Alaska is set aside because it was arbitrary and capricious, an abuse of discretion, in excess of statutory authority, and otherwise not in accordance with law, all in violation of the Administrative Procedures Act;

B. Declare that the Secretary of State's and EPA's attempt to unilaterally convert the ECA amendment into domestic federal law was unconstitutional;

C. Declare that the ECA amendment is not domestic federal law;

D. Declare that to the extent 33 U.S.C. § 1909(b) purports to allow the Secretary of State to unilaterally make a treaty amendment that is effective as domestic federal law, it violates the Treaty Clause and the separation of powers doctrine;

E. Declare that EPA's rules violated the APA's notice-and-comment requirement and that those rules are set aside;

F. Declare that EPA's rules were promulgated in excess of EPA's statutory authority and that those rules are set aside;

G. Enjoin all Defendants from enforcing the ECA in the waters off the coast of Alaska; and

H. Grant the State such other and further relief as this Court deems just and equitable.

Respectfully submitted this 18th day of September, 2012 by:

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: /s/ Seth M. Beausang
Seth M. Beausang
AK Bar No.1111078
Assistant Attorney General
Office of the Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
Tel.: (907) 269-5274
Fax: (907) 278-7022
Attorney for the State of Alaska