

SAN PEDRO BAY PORTS CLEAN AIR ACTION PLAN

March 19, 2018

Mary D. Nichols
Chair
California Air Resources Board
1001 I Street
Sacramento, California 95814

RE: Comments on Concepts to Minimize the Community Health Impacts from Large Freight Facilities

Dear Ms. Nichols:

The Port of Long Beach and Port of Los Angeles (Ports) appreciate the opportunity to comment on the advance materials of the *Concepts to Minimize the Community Health Impacts from Large Freight Facilities*, which will be presented to the California Air Resources Board (CARB) on March 22, 2018. The Ports recognize the effort that has gone into developing the advance materials and staff's evaluation of potential concepts along with the various public meetings to discuss them.

The Ports first offer our appreciation for CARB's recognition of the 2017 Clean Air Action Plan (CAAP) Update and the potential for further reduction of freight-related emissions through such voluntary initiatives. CARB's existing measures and incentive funding programs, coupled with collaborative efforts such as the CAAP, have already substantially reduced freight-related emissions. This type of approach is best suited both for maintaining reduced emissions, and achieving further reductions. The Ports are concerned, however, that CARB's advance materials recommend working with South Coast Air Quality Management District (SCAQMD) to implement indirect source rules (ISRs) or other facility-based mobile source measures (FBMSMs). The Ports assert that neither CARB nor SCAQMD has the legal authority to enact ISRs or other FBMSMs to regulate the Ports. Further, ISRs or FBMSMs would be unnecessary, inappropriate, and counter-productive. This position has been presented to SCAQMD and CARB on multiple occasions and is restated in the attachment to this letter.

The Ports are committed to implementing our recently adopted 2017 CAAP Update. With the approval of this plan, the Ports' Boards of Harbor Commissioners have set the course for development and implementation of numerous ambitious strategies that



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will dramatically reduce emissions from ongoing operations at the Ports. The Ports are moving forward expeditiously with executing the strategies in the 2017 CAAP Update, however, adequate time is needed for these programs to be fully developed and implemented. These efforts will build on our previous successes. The Ports have invested, together with grant funding from CARB, SCAQMD, the California Energy Commission, and United States Environmental Protection Agency, millions of dollars to support demonstrations to test the new and emerging technologies and equipment to advance toward zero- and near-zero-emissions. The Ports will also continue to work with the maritime industry to seek incentive funds to turnover their engines and equipment to these more costly new technologies as quickly as possible.

The Ports strongly urge the CARB Board to implement the portions of CARB Resolutions 17-8 and 17-17 that directed staff to return to the Board with alternative concepts capable of achieving similar, if not better, levels of emission reductions than would be achieved through an ISR. To this end, there are many other approaches that would ensure State Implementation Plan (SIP) creditable emission reductions; these include voluntary incentive programs, Voluntary Mobile Source Emission Reduction Programs (VMEPs), and credit generation for surplus CAAP driven emission reductions as publicized in our Emission Inventory. An ISR or FBMSM regulatory approach will eliminate the grant funding available for voluntary, surplus emission reductions, which has been one of primary drivers for the Ports' significant success working with the freight industry to adopt cleaner new technology under the CAAP.

Concerns with Facility-Based Mobile Source Measures

The ISR or FBMSM approach does not address how the multiple potential requirements would be implemented.

CARB has acknowledged that the Ports are landlords that do not own, operate, or control mobile sources used in goods movement. However, CARB has suggested that the Ports will be required to provide the infrastructure to support zero- and near-zero-emission equipment purchased by the facility operators. This approach raises several key concerns regarding how this requirement can practically be implemented:

- The bifurcated approach for infrastructure and equipment could result in mismatches, particularly if the infrastructure installed does not support the equipment purchased by the facility because the equipment and infrastructure were not designed in tandem.
- The Ports cannot accurately predict in advance what type of equipment will be commercially available or which type of technology an operator might choose. The Ports could be forced to install and/or maintain costly infrastructure for multiple technology types such as electric, hydrogen and natural gas fuels, some of which may be obsolete in a few years given the rapid improvements in zero-emission technology.
- How facility owners will recover the significant costs associated with building out the infrastructure and/or providing the electricity or fuel for new technologies has not been addressed.

- The lack of unified standards for heavy-duty electrical charging infrastructure significantly hampers our ability to plan and build the necessary infrastructure. The Ports urge the State to adopt heavy-duty charging standards before requiring the installation of costly infrastructure.

Comments on Specific Concepts

The Ports also offer the following comments on the specific concepts described in the advance materials:

Drayage Trucks

Under the original CAAP, the Ports were successful in implementing our Clean Trucks Programs, which required a complete transformation of the trucks serving the ports to the latest engine standards in a few short years, resulting in greater than 95% reduction in diesel particulate matter emissions. These programs were successful because of the accelerated efforts of the Ports, working with the trucking industry, coupled with the regulatory efforts of CARB. To that end, the Ports support a new drayage truck rule to transition to zero-emission trucks that will support the Ports' 2017 CAAP Update goal of transitioning the drayage trucks serving the Ports to zero emissions by 2035. Achieving this goal will have numerous challenges, including ability of the vehicle manufacturers to develop new zero-emission trucks that can handle the operational demands of drayage service, constructing the regional infrastructure necessary to charge or fuel the new trucks, and the ability of the trucking industry to overcome the economic challenges of investing in these more expensive technologies. We again look forward to working with CARB and all of the stakeholders to overcome these challenges and achieve our desired goals.

We also welcome CARB's participation in the San Pedro Bay Ports' drayage truck rate study. To ensure the success of the study, however, we strongly urge CARB to first provide a definition of and certification standards for "zero emissions" to clearly articulate the exemption for the applicable trucks. Further, we also recommend that the CARB Board formally adopt a "near-zero-emissions" engine standard as expeditiously as possible. These definitions and standards are imperative in clarifying for the engine manufacturers what emission levels must be achieved, and for constructing our programs to accelerate the turnover to zero- and near-zero-emission trucks.

Commercial Harbor Craft

The Ports strongly support CARB moving forward with the Commercial Harbor Craft regulation concept. Harbor craft are one of the largest sources of emissions at the Ports. Emissions from port-related harbor craft have decreased over the last several years as a result of implementation of the state's current commercial harbor craft regulation. However, port-related harbor craft emissions are expected to rise over the next decade in the absence of more stringent regulation. The Ports' ability to influence emission reductions from harbor craft is limited, as most operate on private property and are not subject to port leases. Proposing more stringent statewide standards would assist

the Ports in achieving further reductions. Repowering and replacing engines on harbor craft is a very cost-effective option for achieving significant emission reductions, as evidenced by a recent study¹ and our experience with facilitating marine engine repower or retrofit projects by harbor craft operators operating in San Pedro Bay through state and federal incentive programs. The proposed timeline seems appropriate, as little to no infrastructure would be necessary and cleaner engine standards and cleaner technologies are currently available. Further, over the past few years funding for demonstrating new harbor craft engine technologies from the Ports' joint Technology Advancement Program, and state and federal incentives to repower or retrofit marine engines, have assisted to offset the incremental cost to accelerate the deployment of cleaner harbor craft for a portion of the fleet.

Cargo-Handling Equipment

To achieve our long-term emission-reduction goals, the Ports' 2017 CAAP Update includes a goal of transitioning the terminal equipment to zero emissions by 2030. Therefore, the Ports support a statewide approach to regulating cargo-handling equipment (CHE) that can assist the Ports in meeting our goals; however, the Ports believe cargo-handling equipment should be a lesser regulatory priority than other mobile sources. Through previous efforts of the terminal operators, the Ports, and state regulations, emissions from cargo-handling equipment (CHE) have been dramatically reduced—nearly a 90% reduction in diesel particulate matter emissions since 2005. In addition, the Ports and the terminal operators have been very successful in advancing pilot demonstrations of emerging technologies and early deployments of cleaner terminal equipment through state and federal incentive programs. These demonstrations are promising, and through continued focused efforts working with the operators and the technology manufacturers, we believe these technologies will be proven successful and commercialized in the near future. Further, CHE generates a relatively small proportion of Port emissions, and the Ports have been proactive in addressing these emissions by working directly with the marine terminal operators through our green leases, development projects, and by securing incentive funding.

The Ports appreciate the revised recommendation by CARB staff to push back the proposed CHE amendment timeline, from beginning in 2022 to starting in 2026. Constructing the necessary infrastructure to support this strategy will have many challenges. The Ports and terminals need time to properly design the infrastructure, and electrifying terminals at this scale will be one of the most complex engineering efforts undertaken by either Port, requiring years of thoughtful design and construction. The Ports must secure environmental clearances, complete the planning and permitting process, and hold a transparent bid and award process for a construction contractor per the Public Contracting Code, which together will take years. It is also likely that more power will need to be brought down to terminals, and such extensive installations of electrical infrastructure must be contemplated relative to our electrical grid's resiliency

¹ Ramboll. (January 9, 2018). *Emission reductions and cost effectiveness for marine and locomotive projects - Update* [Memorandum]. Environmental Defense Fund and Diesel Technology Forum. Retrieved from https://www.dieselforum.org/files/dmfile/Cost-Effectiveness_Memo-Task-1-Final-February-2018.pdf

and capacity to handle such increased loads. Ports are critical to the local economy and the loss of power could result in significant financial costs to the industry.

Moreover, infrastructure is dependent upon uniform charging standards, which should be adopted statewide at minimum. Once adopted, the standards must then be communicated to the manufacturers to avoid obsolete equipment and charging outlets.

Finally, similar to our comments on trucks, it is imperative that CARB establish “near-zero-emission” engine standards and develop a definition of and certification standards for “zero emissions” as expeditiously as possible to provide clarity to engine manufacturers.

Other Concepts

Emissions from locomotives remain a significant concern for the local communities. The Ports have little to no ability to influence the railroads to operate cleaner locomotives on Port property. Therefore, the Ports support CARB’s proposed approach of developing new locomotive and rail regulations within legal authority.

The Ports also support the general concept of the Freight Handbook to minimize land-use conflicts and to encourage use of “best practices” when practical. The success and usefulness of such handbooks however, is dependent on the existence of a robust public process and stakeholder involvement. Real world experience and expertise is required to understand complex freight operations and the inter-working of the industries. We suggest establishing workgroups consisting of industry, expert stakeholders, and respective city departments, to which the Ports are enthusiastic to join.

Again, the Ports appreciate this opportunity to provide comments on the advance materials of the *Concepts to Minimize the Community Health Impacts from Large Freight Facilities*, and we commend the CARB staff in developing these potential concepts and for the process they have undertaken to receive feedback on these proposals so early in the development process. The Ports look forward to continuing to work with CARB to identify sustainable and practical solutions to achieve further emission reductions.

Sincerely,



Heather A. Tomley
Director, Environmental Planning
Port of Long Beach



Christopher Cannon
Chief Sustainability Officer
Port of Los Angeles

cc: Board Members for the California Air Resources Board
Richard Corey, California Air Resources Board Executive Officer
Wayne Nastri, South Coast Air Quality Management District Executive Officer

SAN PEDRO BAY PORTS CLEAN AIR ACTION PLAN

ATTACHMENT: POSITION ON AN INDIRECT SOURCE RULE OR OTHER FACILITY-BASED MOBILE SOURCE MEASURES FOR COMMERCIAL MARINE PORTS

CARB's "Advance Materials" Staff Report² for the March 22-23, 2018, CARB Board meeting discusses the Indirect Source Rule ("ISR") or other Facility-Based Mobile Source Measures ("FBMSMs"), primarily in the context of regulatory approaches to CARB's "Update on Concepts to Minimize the Community Health Impacts from Large Freight Facilities." Such discussions include "basic regulatory approaches for freight" that are "facility based" to "limit emissions from all mobile sources operating at a facility type," and "impose obligations on facility operators who may or may not own/control the equipment" (Staff Report Attachment A, pages 3, 8-10, 15-16).

CARB and SCAQMD appear to agree that CARB would not be the implementing agency but would work on ISR/FBMSMs with SCAQMD with SCAQMD to be the implementing agency. The Staff Report adds a concept of "hybrid" approach to regulate large freight facilities through both ISR/FBMSMs and sector regulations. None of these regulatory approaches discuss answers to the important questions and concerns that the Ports have previously raised to CARB and SCAQMD about previous concepts for an ISR or FBMSMs approach.³ The Ports have presented comments against ISR or FBMSMs regulatory approaches as being unnecessary, inappropriate, and unauthorized. Unless the questions and concerns of Port of Los Angeles (POLA) and Port of Long Beach (POLB) are substantively resolved, neither CARB nor SCAQMD should consider ISR or FBMSMs approaches for Port facilities. While we appreciate that the Staff Report did not specifically recommend an ISR on Seaports, it did not clearly close the door to future consideration, nor did it respond to the CARB Board's request for "alternatives to ISR." For the above reasons, the Ports again provide detailed comments opposing any approach involving an ISR or FBMSMs.

² CARB also published a revised version, "Advance Materials (Revised)" dated 3/14/18, which omitted Attachments A and B from the "Advance Materials" dated 1/13/18.

³ For instance, CARB described potential regulatory "facility caps" based on emissions, emissions per unit of freight activity, and cancer risk in CARB's "Pathways to Zero Emissions 2015 Discussion Document". CARB also described an ISR approach in the addendum to CARB Resolutions 17-7 and 17-8. Finally, CARB's Draft Freight Hub Survey for Seaports from August 2017 also discussed a potential freight hub/facility cap approach to regulating the Ports.



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Major Concerns

The Ports have consistently opposed consideration of ISR or FBMSMs regulations for Port facilities while supporting voluntary measures to reduce mobile source emissions at the Ports. The numerous and significant reasons the Ports oppose an ISR or FBMSMs approach are summarized below.

The 2017 CAAP Needs Time. The voluntary approach to emissions reductions reflected in the San Pedro Bay Ports Clean Air Action Plan (CAAP) 2017 should be given time to work for a very simple reason: the voluntary approach has been proven to work to minimize emissions and community health impacts. The Ports successfully met all past CAAP emission reduction targets both in the original 2006 CAAP and the 2010 CAAP Update. The Ports have a strong track record of CAAP achievement as evidenced in their 2016 Emissions Inventories: Diesel Particulate Matter (“DPM”) reduced by 87%, NOx reduced by 56%, and SOx reduced by 97%—reflecting achievement of the 2014 targets and on track to achievement of the 2023 targets. In the supporting information for the SCAQMD meeting on March 2, 2018, staff noted that the 2017 CAAP Update “needs [an] opportunity to succeed.”⁴ The CAAP voluntary approach has achieved more than 10 years of successful emission reductions as a result of extraordinary cooperation and collaboration between and among the Ports, the maritime industry, and the air agencies (EPA, ARB, and SCAQMD). Any pivot to rulemaking affecting the Port facilities will have a chilling effect on the ongoing cooperative voluntary activities, put the CAAP’s success in peril, and result in counterproductive challenges and delays.

CARB lacks authority to enact an ISR or FBMSMs for the Ports. CARB has no authority to adopt an ISR under the Clean Air Act or the California Health and Safety Code. (42 U.S.C. § 7410(a)(5)(D)(i); Health and Safety Code §§ 39002, 40414, 40440, 40468, 40717.5(c).)⁵ Under both federal and California law, only local air districts may adopt and implement ISRs. Since FBMSMs, like ISRs, are facility-based regulations of mobile sources, CARB also lacks the authority to adopt FBMSMs regulations controlling emissions from the Ports. Although the documentation prepared by CARB’s staff for the March 22, 2018, CARB Board meeting refers to CARB’s “toxics authority” for adopting FBMSMs for freight, CARB also does not have the authority under the Toxic Air Contaminant (“TAC”) Identification and Control Act (AB 1807) or other legislation, to adopt Airborne Toxic Control Measures (“ATCMs”) for Port facilities above and beyond the Diesel Particulate Matter emissions controls pursuant to 13 CCR § 2479. The ATCMs adopted for TAC to date are for specific TAC-emitting equipment and activities, not all TAC emissions in a given geographic area. <https://www.arb.ca.gov/toxics/atcm/atcm.htm> Further, AB 1807 requires a detailed consideration of risks, costs, and economic growth issues to support ATCMs that CARB has not undertaken with respect to evaluating emissions of TAC from Port facilities.

⁴ AQMD staff proposed to “re-evaluate the proposed approach for Ports from 2019 to 2020.”

⁵ Transportation Control Measures (“TCMs”) (Health & Safety Code, § 40717) are strategies to reduce vehicle trips, vehicle use, VMT, vehicle idling, traffic congestion. TCMs are NOT indirect sources.

Neither the Clean Air Act nor the Health and Safety Code authorizes the SCAQMD to adopt an ISR or FBMSMs for the Ports. Despite the fact that SCAQMD and CARB's ISR/FBMSMs are incomplete concepts lacking significant details, and neither agency has responded to the Ports' previous comments; we understand the basic premise has been to generally define the two Ports as a single indirect source or facility against which specific emission reductions targets would be set with deadlines. The San Pedro Bay Ports are two distinct ports (POLA and POLB), owned separately by two independent cities (Los Angeles and Long Beach), operated under separate Tideland grants, and operated separately on more than 7,500 acres and 7,600 acres of property, respectively. The Ports include numerous emissions sources—mobile sources, buildings, and facilities—just like any other large geographic area or governmental entity. Therefore, the Ports are fundamentally different entities than what can appropriately be regulated as indirect sources. The Clean Air Act defines an indirect source as “a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution.” (42 U.S.C. § 7410(a)(5)(C).) Specifically included in the definition of indirect source are “parking lots, parking garages, and other facilities subject to any measures for management of parking supply.” An “indirect source review program” is “the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution” that would contribute to the exceedance of the National Ambient Air Quality Standard (“NAAQS”). (42 U.S.C. § 7410(a)(5)(D)(i).) The Ports are not explicitly defined as indirect sources, and in fact each consists of multiple indirect sources like the cities themselves. (See, e.g., 39 Fed. Reg. 25,292, 25,300 (July 9, 1974) (which did not list ports as possible indirect sources).) Given the multiplicity and diversity of activities at the Ports, it makes as little sense to consider the Ports to be indirect sources as it would to consider any other large geographic or municipal area as an indirect source. The legal decision frequently cited to support ISRs (*National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*, 627 F.3d 730, 736-737 (9th Cir. 2010)) does not support an ISR for the Port. *National Association of Home Builders* involved mobile sources at geographically limited construction sites involving single stationary sources. Geographic areas like ports do not constitute a single facility and, therefore, no facility-by-facility review as contemplated by the indirect source provisions under the Clean Air Act is possible for the Ports. POLA and/or POLB (either individually or collectively) are no more “indirect sources” than the cities of Los Angeles and/or Long Beach (either individually or collectively) are indirect sources.

An ISR or FBMSM for the Ports may improperly regulate mobile sources and other emitting activities (e.g., vessels) outside of SCAQMD's authority. Contrary to statements in the CARB Staff Report, an ISR is not a way to regulate mobile sources despite preemption concerns.⁶ Congress did not intend or authorize the use of the indirect source provisions of the Clean Air Act as a way to circumvent mobile source preemption to regulate mobile sources. (42 U.S.C. § 7410(a)(5)(C).) Congress vested the federal government with the authority to set nationwide emission standards for mobile sources,

⁶ On page 6 of 21 of the CARB Staff Report, staff identify a potential ISR as having the following positive attribute: “(+) District ISR may cover facilities with preempted mobile sources.”

including non-road mobile engines and vehicles. (42 U.S.C. §§ 7521, 7547.) Congress expressly and impliedly preempted states from setting standards or other requirements relating to the control of emissions for mobile sources. (42 U.S.C. § 7543, (a) & (e).) The Clean Air Act allows California to seek authorization from EPA to adopt “standards and other requirements related to the control of emissions” for some, but not all, mobile sources. (42 U.S.C. §§ 7543 (b) [on-road sources] & (e)(2)(A) [off-road sources].) Although an ISR or FBMSMs applicable to the Ports would presumably cover all mobile sources, regulation of some mobile sources at the Ports would remain preempted. An ISR or FBMSM applicable to the Ports could also unlawfully require the Ports to regulate emissions outside of its jurisdictional boundaries and vessels subject to the international MARPOL Treaty. (U.S. Const. art. 6, cl. 2; 33 U.S.C. §§1901 et seq.)

The Ports do not control all emitting activities within the Ports. POLA and POLB are “landlord ports” that lease their land to approximately 50 marine terminal operators. Each marine terminal operator operates its own terminal and has contracts with shipping lines, railroads, logistics companies, and other parties in the goods movement chain. The Ports do not own, operate, or control through contracts, the actual purchase, operation, or deployment of mobile sources used in goods movement. The Ports are also not U.S. air regulatory agencies and lack authority to regulate mobile source or stationary source emissions. POLA and POLB, therefore, have no authority to enforce an ISR or FBMSM even if such regulations were within SCAQMD’s authority to enact. (See, e.g., 75 Ops. Cal. Atty. Gen 256, 261 (finding that imposing penalties is appropriate in circumstances where the activity is “within the reasonable control of the employer”).)

An ISR or FBMSMs for Port facilities could conflict with the Ports’ own jurisdictions as governmental agencies, and also violate their Public Trust obligations as Tidelands Trustees. POLA and POLB are separate governmental entities that have received separate Tidelands grants from the State of California. Any ISR or FBMSM covering the Ports could conflict with the Ports’ own jurisdictions as governmental agencies and also violate their Public Trust obligations as Tidelands Trustees. If an ISR or FBMSMs resulted in limiting cargo ships, trucks, or trains (which seems inevitable), it would also violate the Public Trust obligations to provide access for and facilitate maritime cargo/navigation/fishery shipping facilities to the goods movement industry under the statutory Tidelands grant, the Los Angeles City Charter, the Long Beach City Charter, and the Federal Shipping Act. SCAQMD cannot interfere with the Ports’ duties under their Tidelands Trust obligations or direct expenditures of Tidelands funds. In addition, SCAQMD cannot use its indirect source authority to control growth or overrule local land use decisions. (Health & Safety Code, § 40716 [Air Districts cannot infringe on the existing authority of counties and cities to plan or control land use]; see also Health & Safety Code, §§ 40000, 40414, 40440.1, 40717.5(c)(1).)

If the CAAP is converted into a mandatory regulation, the Ports will be unable to obtain grant funding from governmental sources. The CAAP voluntary approach has been successful in part due to grant funding that is available from governmental sources. Such funding is not available for “compliance with regulation” activities. If the successful voluntary activities at Port facilities are replaced by an ISR or FBMSMs regulatory approach, such governmental sources of funding will become unavailable. Thus, an ISR or FBMSMs regulatory approach could in fact be counterproductive to the efforts to

minimize emissions and achieve community health benefits of the CAAP voluntary approach.

Conclusion

POLA and POLB contend that an ISR or FBMSMs approach to regulating Port facilities are precluded for all of the above reasons. The Ports have been expressing similar concerns and raising similar questions for several years, but neither CARB nor SCAQMD has provided meaningful responses with evidence. The Ports, therefore, request that CARB cease efforts to pursue an ISR or FBMSMs to be imposed on the Ports. CARB and SCAQMD should direct staff to increase efforts to ensure SIP credit for the voluntary and collaborative CAAP. Unless and until CARB and SCAQMD address the numerous and significant concerns and provide answers to the questions that the Ports have raised, no potential ISR or FBMSMs approach to Port facilities should be pursued.