



July 27, 2020

Clerk of the Board  
California Air Resources Board  
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Sacramento, California 95812

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[https://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=ogvatberth2019&comm\\_period=2](https://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=ogvatberth2019&comm_period=2)

**Subject: OGV At Berth -- PMSA Comments on Second Supplemental 15-Day Notice**

On behalf of its ocean carrier and marine terminal operator member companies, the Pacific Merchant Shipping Association (PMSA) appreciates the opportunity to comment on the latest version of the proposed At Berth Regulation for Oceangoing Vessels. The second 15-Day Notice provides for changes to the regulatory structure of the proposed At Berth Regulation that address some of the concerns that PMSA has raised during rule development that result from the elimination of the current regulation and its replacement with an entirely new enforcement regime.

PMSA and its members are proud of our record of compliance with the current Vessel At Berth regulation and the significant emissions reductions that we have achieved from our operations. Changing the effective date for the existing regulated fleet from 2021 to 2023 in the proposed rule validates this success and will maintain the current regulation for two more years without any degradation in emissions controls. This is beneficial in that it will forestall unnecessary rule change impacts, provide regulatory and enforcement compliance continuity for the existing regulated fleet, and give all stakeholders and CARB an additional opportunity for making improvements to the proposed new measure. PMSA remains concerned that many of the issues that have been raised during this rulemaking have not yet been addressed or even responded to substantively, and we would respectfully request that the Board commit to taking this additional time to address these issues and concerns prior to the implementation of a new regulatory regime in 2023.

PMSA has been pleased to work with CARB staff for many years on the implementation and enforcement of the current regulation and on addressing the potential changes in this proposed measure. We incorporate herein by reference all of our previous comments, reports, and submissions during the informal rulemaking and formal rulemaking periods, including the technical evaluation work of third-party consultants regarding the proposed rule. We are also proud to work with a coalition of diverse cross-industry stakeholders who have been working to create a cost-effective and technologically feasible set of conditions for rule expansion for the past several years, including a comprehensive alternative proposal. PMSA continues to associate itself with the comments of the industry coalition consisting of CAPA, CLIA, PMSA, WSPA and WSC.

**New Effective Date Provides an Opportunity**

PMSA is concerned that the proposed rule cannot be successfully complied with by many fleets which have invested significant resources into a working shore power system and are plugging in at ports and terminals which are similarly equipped and compliant with the current regulation. These concerns are amplified given the realities and uncertainties present in the maritime industry. Therefore, the revised effective date of 2023, which allows for these fleets to continue to operate under current law, is appreciated. This date will allow PMSA and its members to continue to work with CARB staff to improve the rule structure without risking temporal non-compliance for shore power equipped vessels. In addition, serious concerns remain regarding the feasibility and true cost-effectiveness of controlling tanker and Ro/Ro vessels and this framework should provide benefits for those fleets as well.

**US EPA Waiver Required for 2023 Implementation**

CARB sought and was granted the waiver from USEPA for the existing At Berth regulations which implement emissions standards applicable to the running of auxiliary engines while at berth in California's ports. (76 FR 77515) This waiver was granted after previous auxiliary engine emissions standards were determined to be unenforceable by ARB without the prior issuance of a US EPA §209(e)(2) waiver and after objection to the waiver by PMSA. See *Pacific Merchant Shipping Association v. Goldstene*, 517 F.3d 1108 (9th Cir., 2008). The US EPA waiver process is one component of the Clean Air Act that ensures the preservation of the current and previously adopted regulatory structure in a uniform manner nationwide, as an alternative emissions standard over and above or in addition to a US EPA standard, and that the adoption or change to any existing uniform rule is completed in the best interests of the currently regulated vessel fleets, CARB, and the entire United States. More importantly, regulations for vessels at berth, including specifically any newly promulgated emissions standards, are legally unenforceable without the provision of a new waiver.

Now that CARB has set the effective date for changes to the existing At Berth Rule in 2023, it should clearly and affirmatively lay out its schedule for seeking an obtaining a new waiver for the new At Berth Regulation from the U.S. Environmental Protection Agency, or it should create a clear compliance pathway for currently regulated vessel fleets which is consistent with the existing waiver.

**Proposed Rule's Joint & Several Liability and Indirect Source Approach is Unnecessary**

An indirect source rule is a regulation which assigns a liability and responsibility to a facility to reduce indirect mobile source emissions which that facility does not control, when the mobile source can be directly regulated to reduce emissions through a traditional emissions standard, engine standard, or other in-use standard.

We are concerned that many of these hallmarks are present in the proposed control measure when they were successfully avoided in the current regulation. Ports and marine terminals at present are responsible for the provision of shoreside power infrastructure and operational support and manning under the current rule, and that will not change under the proposed rule. These entities can be held accountable for such responsibilities, but they cannot be held liable for an emissions standard violation

by an off-road engine on a vessel over which they have no control. This proposal seeks to do just that by establishing a novel and unnecessary Joint & Several Liability measure for vessel emissions.

Assigning a vessel's emissions standard liability to a port or marine terminal must be avoided. The creation of third-party liability for vessel emissions for a marine terminal is just as misplaced as trying to hold a vessel operator responsible for the actions of a marine terminal operator once at berth. These should all be treated as independent bases of responsibility and given independent measures of reporting and review. PMSA has proposed multiple bases upon which these liabilities may be established and believes that continued investment in compliance can be maintained without the establishment of a new liability regime.

#### **Projections and Analyses Must Be Revised**

During the June 25<sup>th</sup> hearing, CARB staff acknowledged that the COVID-19 crisis has impacted existing and future cargo volumes in California ports. Staff also stated that the current crisis will have disparate effects across the maritime industry, with the timeline to recovery being long. Even before the current crisis, data was submitted demonstrating that the cargo and resulting emissions estimates were wrong. The crisis has amplified those misapplications and projections.

The derived data from the cargo forecasts has led to unreliable information presented in the updated emissions forecast. As stated in the letter on the first 15-Day Notice<sup>1</sup>, cargo volumes in 2020 for the ports of Los Angeles and Long Beach will be at least 26% below the values contained CARB's data set. CARB staff has not addressed any of forecast issues raised in the prior letter.

More information continues to become available demonstrating the problems attendant to the existing CARB forecasts and inventories. PMSA recently released an analysis<sup>2</sup> that provides the most recent annual data on the loss of containerized trade market share experienced by U.S. West Coast ports, including Los Angeles, Long Beach, and Oakland in recent years. This analysis demonstrates the accelerating market share erosion of California ports. As a result, all dependent analyses, including rule emissions benefits, health benefits, CEQA review including the Statement of Overriding Considerations, and cost-effectiveness, will all be based on flawed data. CARB should re-evaluate baseline emissions, proposed emission reductions, health benefits, costs, and cost-effectiveness based on a revised forecast and assumptions.

#### **Interim Evaluation**

The text of the interim evaluation contained in the proposed regulation presupposes the feasibility of emission control technology for Ro/Ro vessels. The language should be clear that the interim evaluation will evaluate the feasibility of technology to control emissions successfully and cost-effectively from

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<sup>1</sup> <https://www.arb.ca.gov/lists/com-attach/137-ogvatberth2019-UzpXP1w5UnQCd1Im.pdf>

<sup>2</sup> <https://www.pmsaship.com/wp-content/uploads/2019/12/Briefing-Paper-Loss-of-Market-Share-at-U.S.-West-Coast-Ports.pdf>

Ro/Ro vessels since there is no existing technology to reduce emissions in exhaust streams in a manner that can safely operate on tanker Ro/Ro vessels in operation. The technology which is currently in demonstration has a number of technical, safety, and operational constraints it must overcome. At the same time, any proposed system needs to also abide by Coast Guard, OSHA, and other regulatory requirements, while not being prohibitively expensive.

The interim evaluation should be clear that it will evaluate all considerations that would impact the success of new control technologies, including the configuration of Ro/Ro vessels, which make reaching the exhaust an engineering challenge. The only way to answer these questions is with a demonstration that must be completed before the interim evaluation is conducted. With a presentation date of December 2022, it is likely that the demonstration will not even be operating before CARB staff must prepare their evaluation and is not expected to be complete until long after the interim evaluation is complete. An interim evaluation that is not informed by a complete demonstration is mere speculation.

The interim evaluation should also address issues regarding rule implementation raised by PMSA and other maritime industry stakeholders over the next two years. As work on implementation continues, it will be critical to resolve issues, including the sufficiency of TIEs/VIEs, incorporation of fleet averaging under Innovative Concepts or CARB Approved Emission Control Systems (CAECS), sufficient compliance pathways for non-frequent fliers, and other issues identified in this letter.

#### **Industry Grappling with the Effects of COVID-19**

The scale of the current crisis is unprecedented. The World Trade Organization (WTO) has estimated that global trade could decline up to 32% this year.<sup>3</sup> As a result of this crisis, the analyses on which this rule is based are out of date and no longer valid. The ISOR analysis is predicated on strong growth assumptions based on a number of forecasts. Questions about those assumptions were raised prior to the current crisis. For example, the ISOR analysis assumes that from 2016 (the inventory base year) through 2020 container cargo at the ports of Long Beach and Los Angeles would grow 4.5% per year. Last year (before the current crisis), the two ports declined 3.3%. Since the crisis, the decline has accelerated, with year-over-year declines in January (-5.1%), February (-16.9%), March (-19.7%), April (-11.4%), May (-13.7%), and June (-10.3%). For the first six months of the year, the two ports are down 12.5% over the same period last year. Before even considering the rest of the year, the current crisis means the emissions inventory contained in the ISOR is wrong. That gap only grows if the rest of 2020 is forecast based on WTO projections. By the end of this year, the baseline forecast used in the ISOR will overestimate cargo volumes by between 26% and 62%.

The estimates of benefits, emissions estimates, costs, cost-effectiveness, and health impacts, which presume the rate of growth contained in the ISOR, are now no longer valid. Even if growth were to immediately resume at levels assumed in the ISOR, cargo volumes and resulting activity will likely be millions of containers off from the cargo volume estimate.

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<sup>3</sup> [https://www.wto.org/english/news\\_e/spra\\_e/spra303\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra303_e.htm)

### **Innovative Concepts**

PMSA appreciates proposed changes to the Innovative Concepts (IC) of the proposed regulation but believes that these changes remain insufficient. While increasing the term to five years does provide some additional certainty for select regulated parties to propose an innovative concept, it still fails to provide the long-term assurance necessary to make it a viable compliance pathway. A number of other changes should be considered to make the concept viable.

- A fleet averaging concept should be a defined path within the IC section. Fleet averaging, as a program whose parameters are known, should not be subject to unnecessary restrictions for new concepts. Given the known success of fleet averaging to reduce emissions, it is not necessary to create uncertainty by having a five-year term with extension subject to uncertain approval. In addition, concerns remain that at this time it is unknown how fleet averaging would be handled under the IC provisions and that CARB staff cannot describe or even assure that fleet averaging is consistent with all the requirements of the IC provisions.
- While IC must be “surplus” at the time of creation, CARB could revoke or decline to renew approval if the emission reduction became subject to regulation at a future date, or by any CARB-approved AB 617 Community Emission Reduction Plan. The IC section should be modified to allow IC reductions without this limitation.
- Limiting the location of IC emissions reductions only to “adjacent” communities and distances no greater than 3 nautical miles may have unintended consequences. Neither “adjacent” nor “community” are defined in the Proposed Regulation, so it is unclear how close an area would need to be in order to be deemed “adjacent,” and where the boundaries of that area would end. The IC section should be modified to encourage any project (adjacent or not) that would benefit the port and terminal communities.
- The IC section sets a single, one-time deadline for submitting a proposal. This implies that ICs will not be considered after December 1, 2021. The deadline should be removed and replaced with a process for IC plan review at any date such plans are submitted in the future. In addition, if IC will be used to facilitate fleet averaging, the ability to use fleet averaging should be available beyond 2021. Fleets will encounter different circumstances over the life of this regulation that may allow them to comply with the proposed regulation versus making use of a fleet average approach. New fleets may want to enter the California market after the 2021 deadline and this ensures they will be forever precluded from using fleet averaging. The original rule contained a similar fixed date requirement for alternative technologies, CARB staff eventually were forced to revise that through the use of an “Advisory”. As a result, we strongly recommend that IC applications be accepted continuously with the understanding that CARB needs a minimum lead time before an approved application becomes effective.

- The prohibition on public funding for ICs is too broad. Funding may come from different sources, including federal, other states, or other nations. In addition, such a prohibition would exclude demonstration projects. Fleets that are likely to engage in ICs, including fleet averaging, are also likely to participate in demonstration projects sought by CARB or other air quality agencies. Being innovative should not prohibit technology advancement.
- Revocation of the IC plan provides for a 30-day notice. This is likely to be inadequate for an ocean carrier to transition to original provisions of the rule. The risk of a 30-day transition at the uncertain end of a five-year program is enough to prevent an ocean carrier opting to implement an IC. The IC section should include a nine-month transition period upon revocation of an IC plan.

#### **Fundamental Problems with Emissions Inventory Unresolved**

Even before addressing the changes brought about by the COVID-19 crisis, the emissions inventory has not addressed known problems as described in previous industry stakeholder comment letters. The inventory overestimates growth, resulting in a significant overestimation of the proposed rule's emissions benefit. The inventory does not consider the emission reductions associated with Proposition 1B funding, requiring emission reductions of 90% under the existing rule – 10% more than the proposed rule. This results in the inappropriate attribution of emission reductions from existing requirements to the proposed rule. The emissions inventory also inappropriately caps emission reductions under the existing rule at 80%. Every vessel with a call greater than 15 hours will result in emission reductions greater than 80%. In San Pedro Bay, where calls greater than 100 hours are typical, emission reductions can exceed 97%. Section 93118.3(e)(4)(A) of the current regulation explicitly states that any vessel using grid power is assumed to reduce emissions 90%. Yet, no explanation or reason is given in the emissions inventory for capping emission reductions at 80%. The inventory must be updated to correct these issues.

CARB inventory staff have acknowledged these issues in a variety of phone calls and emails with stakeholders and have indicated that these issues will be resolved sometime this summer. That delay does a disservice to both the public and decisionmakers in understanding the benefits of the proposed rule changes.

#### **Timed Connection Requirement**

CARB staff has revised the one-hour limit on the connect and disconnect times for shore power to a two-hour connect time limit and one-hour disconnect time limit. While it is appreciated that the infeasibility of the one-hour requirement was acknowledged, a two-hour requirement is still arbitrary and capricious and not based on any evidence that it is safe or feasible. As we have said in previous letters, the existing rule permits multiple connection strategies, some of which will require more than one hour. More importantly, the shore power connection process requires individual people to manhandle heavy, high-voltage equipment and energize that equipment – sometimes in adverse weather conditions. Under no

circumstances should that work be performed under a stopwatch. The two-hour requirement would likely be ineffective because any exceedance of the one-hour requirement would likely result in a safety exemption being sought, as having labor move faster handling high voltage equipment would be fundamentally unsafe.

CARB staff has still provided no basis on which it can be assumed that connection times can be consistently and safely accelerated. In fact, no data is available from CARB justifying the previous one-hour connection window or the new two-hour connection window.

### **VIEs/TIEs**

PMSA is concerned that the number of Vessel Incident Events (VIEs) and Terminal Incident Events (TIEs) are insufficient to ensure rule compliance. An analysis prepared by Starcrest Consulting Group previously submitted, demonstrated that there are insufficient VIEs/TIEs available to ensure compliance for known issues identified by CARB. As discussed earlier, VIEs/TIEs will be needed for unknown and unexpected changes in trade, vessel deployments or equipment failures and maintenance. If VIEs/TIEs are not increased, CARB will penalize ocean carriers and terminals for already known and unavoidable circumstances.

### **Previous Comments Continue to Be Unaddressed**

PMSA has submitted numerous letters under its own name and in cooperation with other maritime stakeholders<sup>4</sup>. Those comments are incorporated herein by reference. This includes numerous technical comments which have not been formally addressed or responses provided. We request that CARB staff review and respond to all industry comments before Board consideration of the proposed regulation. The rulemaking process should be an iterative process in order to develop a rule that achieves air quality goals in a manner that creates the least burden and at the lowest cost. The purposes of the informal rulemaking period should be to ensure stakeholders have an opportunity to lay out issues *and* have those issues responded to. Hundreds of pages of comments, data, and technical information have been provided to CARB, all of which are awaiting a response. An iterative rulemaking process can only exist if CARB staff *responds* to the data submitted by stakeholders during the process.

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<sup>4</sup> <https://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=ogvatberth2019>

**Conclusion**

While the current form of the proposed rule remains problematic with a number of issues that will make full compliance unachievable at times, the fact that the effective date of the proposed rule has now been set for 2023 will allow all PMSA to continue to work with CARB staff to address these issues. PMSA looks forward to opportunity to continue to improve the proposed rule and ensure successful and full compliance can be achieved.

Sincerely,

A handwritten signature in blue ink that reads "Thomas Jelenić". The signature is written in a cursive style with a large initial 'T'.

Thomas Jelenić  
Vice President