November 6, 2006

Clerk of the Board
California Air Resources Board
1001 I Street, 23rd Floor
Sacramento, CA 95814

SUBMITTAL OF COMMENTS

Re: Proposed Airborne Toxic Control Measure Amendments Limiting Onboard Incineration on Cruise Ships And Oceangoing Ships

I am providing comment on behalf of the members of the Pacific Merchant Shipping Association (PMSA), which represents ocean carriers and shipping companies servicing regular trade routes into California ports. We appreciate the work done by California Air Resources Board (CARB) Staff in the development of this proposed regulation and especially the effort made to better understand the shipboard practices and existing federal and international regulation of ship onboard incineration.

Our comments focus on the amendments to the existing regulations on cruise ship incineration that expands the regulated population to include cargo ships greater than 300 gross tons. In surveying the membership of PMSA, it is clear that existing industry practices are closely aligned with proposals under this rulemaking. This is supported by data collected by CARB indicating that as a rule ships have not been operating incinerators within the three mile jurisdictional waters of the state.

Given the explicit clarity of the statute enabling this proposed rulemaking, and the stated purpose of the regulation, which states that the ban on the operation of onboard incinerators should extend no further that the three mile jurisdictional limit of the territorial waters of the state, it is improper to include the definition "Regulated California Waters" within the language of this rulemaking.

Given that this definition is wholly irrelevant to the rulemaking, it also fails to meet the basic regulatory requirement of necessity, as CARB has been unable to demonstrate by substantial evidence the need for this term to effectuate the purpose of the statute that the regulation implements, interprets or makes specific, taking into account the totality of the record. Our finding of a lack of necessity for the inclusion of this term in the rulemaking is informed by the lack of a demonstrated need for the term to be used, given the fact that no evidence is included in the statement of reasons justifying its use. In fact the evidence given is limited to Section

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VI(A)(5) of the Initial Statement of Reasons regarding "Definitions", wherein CARB staff suggests that "Several definitions have been included in subsection (c) of the proposed amended Cruise Ship ATCM to ensure clarity. These definitions were taken from HSC 39631, Bureau of Customs and Border Protection regulations, marine vessel industry documents, and prior ARB rulemakings."

Unfortunately, the limited explanation and background to the definition proffered with regard to "Regulated California Waters" encourages confusion, is less clear than the statute itself, presents no explicit authorization for the term's inclusion, and is patently defective.

CARB has not presented its authority to include this definition of "Regulated California Waters" in the regulation, nor has it provided any legal reference which would allow the agency to implement or interpret the statute such that this definition of "Regulated California Waters" should be contemplated in this rulemaking. The definition purports to define the regulatory jurisdictional limit for the State of California solely based on the definition itself, with no supporting state, federal or international treaties, statutes, regulations or legal precedent. In fact, this untested and arbitrary definition exists only in one separate proposed rulemaking[1] that has not yet passed preliminary review by the Office of Administrative Law nor been enacted by the Secretary of State. We do not believe that a prior ARB rulemaking, especially one that has yet to be effectuated and finalized, is a provision of law which permits or obligates the agency to adopt this definition.

This definition is also misleading in the context of the statutory acknowledgment of the state's three mile territorial limitation and, therefore, does not advance the legal standard of clarity as it expands regulatory terms beyond those presented clearly in statute. To the extent that the definition suggests four separate and distinct areas of suggested state territorial waters, it undermines its own validity under the clarity standard by its own terms. This fact was clearly acknowledged by ARB in Section VI(C)(4) as "Staff did not consider other prescriptive standards because the standard was set forth in SB 771 (i.e., no onboard incineration is permitted within three nautical miles of the California coast)."

The inclusion of the definition of "Regulated California Waters" is not in harmony with, and in conflict with and contradictory to, existing statutes, court decisions and other provisions of law, chief among them the very statute enabling the proposed amendments. The statute specifically defines the reach of the proposed regulation out to three miles from the coastline. In fact the original enabling legislation's[2] language as introduced suggested a ban on incineration out to 90 miles. The legislation was amended on July 16, 2003 to read 20 miles and amended a second time on August 5, 2004 to read 3 miles. This supports recognition by the Legislature of the established jurisdictional limits for territorial waters of the state. Including the "Regulated California Water" definition within the proposed rule ignores this finding, the clear legislative history, serves no purpose to the rulemaking and most troubling suggests the regulation is broader than the enabling statute.

Clearly the adoption of this term within this rulemaking would constitute a violation of the Administrative Procedures Act's standards on necessary, authority, clarity, consistency and reference and for this reason alone should be stricken from the rulemaking.

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[1] Proposed Regulation Order Imposing Emission Limits and Requirements for Auxiliary Diesel Engines and Diesel-Electric Engines Operating on Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline; CARB, 2006.

[2] AB 471; Simitian; statutes of 2004

We are pleased with the efforts of CARB to reduce duplicative record keeping and reporting to the greatest extent possible. Because federal and international requirements mandate extensive record keeping of incinerator operation and the handling and disposal of garbage in general, using these existing shipboard protocols and practices for monitoring and enforcement of the regulation avoids adding additional burden to vessel crews. CARB should be applauded for this effort.

However, in an effort to reduce taxpayer cost and expense, CARB should consider subsequent review of federal and international efforts at regulating garbage and incineration on ships, with the intent of placing a sunset on the California regulation when federal and international regulations provide equal or greater protection to the environment of the state. In addition, while current industry practices are closely aligned with proposals under this rulemaking, we are obliged to further identify the additionally problematic status of this regulation with regard to authority and duplication issues. Specifically, the amendments and underlying regulations are preempted by the federal requirements established by 33 U.S.C. §§1401, et seq. and 33 CFR, §§151.69 et seq.

Thank you for the opportunity of comment on the proposed modification to the regulations. If you have any question or need additional information, please feel free to contact PMSA at any time.

Sincerely,

John McLaurin
President, Pacific Merchant Shipping Association