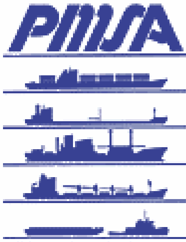


March 23, 2009

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

SUBMITTAL OF COMMENTS

Re: 15 Day Notice of Availability and Modified Text on the Proposed Regulations on Fuel Sulfur and Other Operational Requirements for Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline.

The Pacific Merchant Shipping Association (PMSA), a maritime trade association representing shipping companies servicing regular trade routes into California ports, appreciates the work done by California Air Resources Board (CARB) staff in the development of this proposed regulation and have worked closely with staff throughout the process. PMSA has commented extensively on these regulations and other related regulations, including the previous Auxiliary Engine Fuel Regulation (2005), and we incorporate by reference that extensive body of comments as well.

In our previous comments, and here again, PMSA has concluded that these regulations contain most of the same fundamental problems concerning the state's authority to regulate the activities of vessels, both U.S.-flagged and foreign-flagged, in and outside of California's territorial waters. Specifically, the current proposed regulation should not be adopted as it is inconsistent with, and contradictory to, existing statutes, court decisions and other provisions of law, it exceeds the rulemaking authority of the Board, and, in light of the totality of the record, it demonstrates that the current record is inadequate in terms of technical, safety and legal issues and has not taken into account supporting evidence that would fairly detract from the agency's current conclusions. These concerns were the basis of our previous challenge to the "Ocean-Going Vessel Auxiliary Diesel Engine Regulation" that was approved by the CARB Board in December of 2005.

On August 30, 2007, the United State District Court for the Eastern District of California (see *PMSA v. Goldstene*, Case No. 206-cv-02791) ruled that the regulation was preempted by the Federal Clean Air Act (CAA§ 209(e)(2)(A)) and permanently enjoined CARB from enforcing the regulation until they received a waiver from U.S. EPA for the implementation of the standard. That decision was subsequently upheld by the United States Court of Appeals for the Ninth Circuit on February 27, 2008. To our knowledge, staff has yet to apply for the waiver from U.S. EPA.

Pacific Merchant Shipping Association
250 Montgomery Street, Suite 700, San Francisco, CA 94104 (415) 352-0710 fax (415) 352-0717

Another cause of action that was briefed, but not adjudicated in the *Goldstene* case, was the authority of CARB to regulate beyond three miles from the California baseline. This proposed regulation attempts to regulate extraterritorially, just as the Auxiliary Diesel Engine regulation did and PMSA continues to believe that CARB is preempted under the Submerged Land Act from such action.

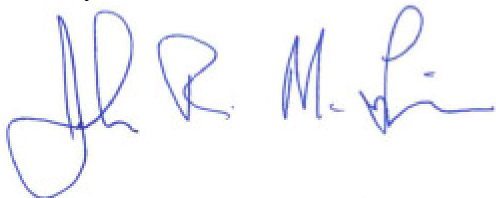
While the ISOR for this proposed regulation notes that "the Court did not reach the Submerged Lands Act issue" (ES-25), the question of under what authority the state is allowed to regulate vessels beyond its territorial waters are also at issue in the current proposed regulations. We feel that it is important for the Board to consider that, while the District Court did not make a ruling on the merits of the Submerged Lands Act cause of action, it did make the following comments on the attempt of the Board to regulate international and foreign maritime commerce generally:

> More importantly, the challenged regulations affect the field of international maritime commerce, which has historically been within the purview of the federal rather than the state government. United States V. Locke, 529 U.S. 89, 108 (2000). In Locke, the Supreme Court observed that maritime commerce is "an area where the federal interest has been manifest since the beginning of our Republic and is now well established." 529 U.S. at 99. Indeed, during the debates on the ratification of the Constitution, the Federalist Papers touted the authority of Congress to regulate interstate navigation without intervention from separate states that would result in difficulties conducing foreign affairs, as a primary reason for adopting the Constitution. See Federalist Nos. 4, 6, and 22.

Since the 15 Day Notice does not contain any new information that would change these fundamental concerns, PMSA again must respectfully request that the Board take no further action on this regulation. Upon review of our comments we hope that you will concur and will continue to work with the industry on strategies to reduce emission reductions from ocean-going vessels and will avoid the potential risk of nothing being done while this regulation is contested. Specific to the new information that has come to light subsequent to the approval of the regulation and the Supplemental Environmental Analysis included in the 15 Day Notice we have prepared additional comments for your consideration.

PMSA appreciates the opportunity to comment on this proposed regulation. If you have any questions or need clarification of our abbreviated comments, please feel free to contact me or T.L. Garrett, Vice President, at (562) 377-5677, or by e-mail at tgarrett@pmsaship.com.

Sincerely,



John McLaurin, President

The Current Record Is Deficient in Failing to Address the Benefits of Pending International and U.S. Regulations

The Initial Statement of Reasons (ISOR) that was the basis of the CARB Board approval on July 24, 2008, noted that "there was much uncertainty with respect to the possibility of implementing an ECA in the U.S." Fortunately most that uncertainty has been resolved. On July 21, 2008, the Maritime Pollution Protection Act of 2008 was signed into law by the President. That federal law enabled the United States to deposit the U.S. Instrument of Ratification for the International Convention for the Prevention of Pollution from Ships (MARPOL) to the International Maritime Organization (IMO) on October 6, 2008. As a result the United States is now a signatory to the treaty that includes Annex VI to reduce emission from vessels. On October 9, 2008, the Marine Environmental Protection Committee adopted the sweeping amendments that empower the United States to designate an Emission Control Area (ECA). The U.S. EPA, in coordination with Environment Canada, is preparing an application to the IMO for the creation of an Emission Control Area (ECA), under the provisions of MARPOL Annex VI. The ECA will include the east, west, and gulf coasts, and the Great Lakes for the U.S. and Canada. It is expected that the application will be submitted in time for consideration by the Marine Pollution Protection Committee (MEPC) in July of this year. The final piece will be for U.S. EPA to complete the regulation for "Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder," that will incorporate the enforceable requirements of the ECA by the end of this year. The ECA is expected to approved and be fully in force by August of 2012. Cleary, there is little, if any, uncertainty that there will be an ECA in place for California.

The Air Resources Board has expressed their support for Annex VI and ECA establishment in the ISOR as long as it is at least as protective of public health as the proposed regulation. PMSA agrees with that position. The need for uniform and consistent regulation is also why PMSA joined with the World Shipping Council (WSC), the American Association of Port Authorities (AAPA), the West Coast Diesel Collaborative (WCDC) and others in endorsing the amendments to Annex VI that were approved in October 2008. These amendments, when fully implemented, exceed the emission reductions of this proposed regulation. This is because the Annex VI amendments also includes emission standards for engines, world wide limits on marine fuel sulfur, and extended jurisdictional boundaries, that are not included in the proposed regulation. Even without consideration of these additional benefits, the second phase of the Annex VI will trigger the sunset provision of the proposed regulation when it is implemented in 2015.

With the reduced number of vessel calls and the greater geographical extent and scope of the ECA, combined with voluntary measures of the maritime industry, PMSA continues to believe that the emission reduction goals of the proposed regulation can be achieved without the proposed regulation and without placing the maritime industry in California at a competitive disadvantage with other ports in the U.S., Canada, and Mexico.

The Supplemental Environmental Analysis did not Assess the Most Likely Alternative to Re-Routing of Vessels

The "Supplemental Environmental Analysis of Potential Impacts from Changes in Southern California Vessels Routing as a Result of the ARB Ocean-going Vessel Fuel Rule (February 2009)", did assess the potential impacts of vessels rerouting outside of the Channel Island using two alternative routes.

The analysis concluded that "the overall statewide environmental and public health benefits OGV Fuel Rule are very significant, even if an avoidance strategy is adopted by many OGV operators". This conclusion was reached even though there would be small but significant increases in localized on-shore ozone concentration and overall CO2 emissions.

However, PMSA believes the analysis is fundamentally flawed under Public California Environmental Quality Act Public Resources, Public Resources Code section 21000 *et. seq.* The Supplemental Environmental Analysis (SEA) does not consider all feasible alternatives for rerouting vessels. The SEA analysis is based on two potential routes provided by the U.S. Navy as shown on Figure 4. These routes assume that all vessels will transit to and from a common point north of Point Conception and would diverge from that point when transiting to and from the southern California ports. Nowhere in the SEA was any consideration given to the routes that OGV operators would take if they were rerouting vessels to and from the Southern California Ports. Trans-pacific vessels would take the most direct route through the Sea Range that would be a straight line extension of the "orange route". In other words, it is unlikely that trans-pacific vessels that are avoiding the Santa Barbara Channel would add distance and time to their transit traveling to or from a common point when crossing the Pacific. PMSA believes that this alternative must be assessed since it is likely to show that rerouting would reduce fuel consumed and greenhouse gas emissions, and would change the on-shore ozone impacts when compared with the alternatives presented and with the baseline conditions assumed for the regulation in the ISOR. PMSA believes this analysis must be completed to comply with a fundamental CEQA requirement to assess feasible alternatives that may lessen the impacts of the proposed regulation.

The Baseline Conditions have Fundamentally Changed due to the Economic Downturn

Appendix D of the ISOR used estimated growth rates for container vessels of 4.4% at the Port of Oakland to 8.3%, at the Port of Hueneme, and 6.8% for the Southern California Ports of Los Angeles, Long Beach and San Diego. However, the reality is that due to the current economic recession the actual growth at these ports were negative for 2008 and will likely be even worse for 2009. Lloyds recently reported that worldwide, 9.1% of container vessel capacity has been taken out of service. Los Angeles and Long Beach just reported that the February throughput is down 40% from a year ago. Some of this decline is attributed to the diversion of cargo to ports outside of California and it is not clear what percentage, if any, of that diverted cargo will return to California when the economy improves. A contributing factor to that diversion is the increased costs and uncertainty of doing business in California like those imposed by the proposed regulation. While everyone anticipates that there will be an economic recovery, it is not known when that recovery will occur or at what rate growth will be when it does. The reduced throughput is resulting in decreased emissions resulting in environmental and public health benefits but at significant social costs of increased unemployment and decreased tax revenue.

In response to the economic downturn and the unintended environmental and public health benefits PMSA strongly urges that the proposed regulation be set aside and reevaluated in light of the economic down turn and the approved international regulations. We believe it likely that a reevaluation will led to the conclusion that, when combined with MARPOL Annex VI requirements, California could reach the same emissions levels outlined in the ISOR without creating the competitive disadvantages of this California only approach that will likely continue to drive cargo away from California and delay the recovery of California's economy.