



July 23, 2008

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

SUBMITTAL OF COMMENTS

Re: Proposed Regulation Order Airborne Toxic Control Measure for 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 ocean carriers servicing regular interstate and international trade routes into California ports, appreciates the work done by California Air Resources Board (CARB) staff in the development of this proposed regulation. We have worked closely with the staff throughout the process and appreciate all of their efforts. However, we must nonetheless object to its adoption on jurisdictional, legal and technical grounds, despite the fact that both CARB and PMSA see and share the same ultimate levels of emissions reductions from vessels and improved Californian air quality. In the spirit of cooperation and achieving our collective goals without litigation, we would respectfully request that the Board instead pursue more creative and collaborative approaches that are less legally problematic to addressing our shared goal of reducing ocean-going vessel emissions.

While we question this regulation, our members fully accept and support the need to reduce the air quality impacts that result from the use of high-sulfur residual fuels in marine engines. PMSA has long recognized and advocated for an international approach to solving vessel emission problems that is uniform and consistent across local, state, national and international political boundaries. We are pleased that CARB staff agrees in the ISOR that an international approach would be preferred (ES-2). Consistent with that approach PMSA has consistently supported voluntary efforts to reduce those emissions and have sponsored and supported the passage of international regulations. Examples include our sponsorship of Assembly Joint Resolution 8 (Canciamilla) (Res. Chapter 93, Statutes of 2005), our continued advocacy for Congressional ratification and implementation of Annex VI of the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL Annex VI or Annex VI), and our ongoing support of the creation of a North American Sulfur Emission Control Area (SECA) under the terms of Annex VI. The need for uniform and consistent regulation is also why PMSA joined with the World Shipping Council (WSC), the

SUBMITTAL OF COMMENTS

Proposed Regulation for Fuel Sulfur Requirements for Ocean-Going Vessels

July 23, 2008

Page 2

American Association of Port Authorities (AAPA), the West Coast Diesel Collaborative (WCDC), and others, in endorsing the proposed amendments to Annex VI that are scheduled to be approved by the International Maritime Organization (IMO) in October 2008. These amendments, when fully implemented, will create new, strict rules on vessel emissions and fuel use with air quality benefits that will far exceed the emission reductions of this proposed regulation. This is not only because the Annex VI amendments also include emission standards for engines and world wide limits on marine fuel sulfur, but the international agreement is the only legal method available that allows for their application extended far beyond the jurisdictional boundaries of nations, much less the territorial limits of the state. These additional benefits are not included or accounted for in the proposed regulation. We would also note that, even without consideration of these additional benefits, the second phase of the amended Annex VI will trigger the sunset provision of these proposed regulations when it is fully implemented in 2015.

As we support achieving the CARB emissions benefits through compliance with international regulations that are soon to be adopted, our principal issue and complaint with this proposed rule is that it is built on and contains most of the same fundamental problems concerning the state's authority to impose such a regulation on vessels involved in interstate and international trade as the previous, now enjoined, "Ocean-Going Vessel Auxiliary Diesel Engine Regulation". The Initial Statement of Reasons (ISOR) does not reflect the current state of the law, as it simply rehashes and represents old arguments that have already failed to pass judicial muster.

To adequately address the deficiencies in legal reasoning presented to the Board that led to the preemption of the previous rule, the Board should require a full and complete legal assessment of how the proposed regulation based on a "fuel only" compliance strategy is not preempted by the Federal Clean Air Act. In addition, the Board should require an updated explanation from staff on how these changes somehow extends the State's authority to regulate international shipping beyond the state's traditional territorial three-mile limit from the California Baseline.

These concerns were the basis of our successful challenge to the previous Auxiliary Engine regulation. On August 30, 2007, the United State District Court for the Eastern District of California (PMSA v. Goldstene, Case No. 206-cv-02791) ruled that CARB's regulation of ocean-going vessels 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 emission 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. The other claim that remains before the federal district court, but will not be adjudicated until the State receives its waiver, is the question of CARB's assertion of authority to regulate vessels more than three miles from the California coast. PMSA believes that CARB is clearly preempted from extending authority beyond three miles under the Submerged Lands Act.

In addition, the proposed regulations purport to govern the internal operations of foreign vessels in international trade by dictating what fuel these vessels can use. Compliance with the regulations will require the ships to purchase the required fuel in foreign ports, and, in many cases, to retrofit their tanks, piping and engines and modify engine use and maintenance practices. The regulations force

SUBMITTAL OF COMMENTS

Proposed Regulation for Fuel Sulfur Requirements for Ocean-Going Vessels

July 23, 2008

Page 3

these measures on the vessels without regard to the effect of the particular engine's operations on emissions or air quality within the State of California. For these reasons, and based on the principles set forth in United States v. Locke, the regulations are beyond the police power of the State and are further preempted by the provisions of §209(e)(2) of the Clean Air Act.

Beyond the legal issues, PMSA believes that the analysis in the Initial Statement of Reasons (ISOR) is both incomplete and inaccurate in assessing the impacts and the benefits of the proposed regulation. The ISOR fails to fully assess the benefits of current federal and international regulations under development. In addition, there are voluntary efforts adopted by the industry and Port authorities in California that are already in place and providing emission benefits that are not considered in the ISOR. In addition, the ISOR also fails to inform the Board of the impacts and benefits of the regulation if the jurisdiction of the regulation is limited to three-miles from the California coast.

Substantial emissions benefits will soon begin to result from the efforts to reduce vessel emissions at the international level. These international steps will minimize even the short term benefits of the proposed regulation. In light of the outstanding questions regarding CARB's authority to implement this regulation and the substantial efforts by the international and federal authorities, PMSA respectfully makes the following recommendations to the Board:

1. Direct staff to include language in the proposed regulation to ensure that this proposed regulation will only be enforced if any of the following conditions fail to occur:
 - a) IMO fails to approve the amendments to Annex VI at MEPC 58.
 - b) EPA fails to achieve designation of an Environmental Control Area under the terms and conditions of the Annex VI amendment, on or before March 31, 2010.
 - c) Equivalent emission reductions efforts are in place to make up the differences between the proposed CARB regulation and the IMO ECA provisions off California after 2012.
2. Upon approval by IMO of the amendments of Annex VI, work cooperatively with the industry and Port authorities to provide public health benefits equivalent or greater to the proposed regulations prior to the implementation of Annex VI. One example of such an effort would be to expand the Clean Marine Fuels Incentive Program throughout California.
3. Direct staff to work closely with the U.S. EPA and supportive industry stakeholders to prepare and file the petition for an Environmental Control Area (ECA) at the earliest possible date to take full advantage of the benefits provided by Annex VI.

PMSA is committed to assisting CARB in addressing these issues and we hope to work together to explore all feasible and workable mechanisms to achieve the goal of reducing emissions from vessels to the maximum extent practical at the earliest possible date. While from a safety, technical, logistical, jurisdictional and legal perspective we do not believe that this proposed regulation can or should be implemented in its current form, the meaningful reductions sought by the Board can still be achieved.

SUBMITTAL OF COMMENTS

Proposed Regulation for Fuel Sulfur Requirements for Ocean-Going Vessels

July 23, 2008

Page 4

The question that we believe is actually facing the Board today is not whether or not vessel emissions will be reduced, but, rather, will you decide to work with us to address vessel emissions within the federal and international context or not.

Upon review of our comments and suggested future steps to work cooperatively to manage vessel emissions, we hope that you will concur and direct CARB staff to work vigorously with the industry on cooperative, comprehensive strategies to reduce emission reductions from ocean-going vessels that can be implemented as quickly as possible.

PMSA appreciates the opportunity to comment on this proposed regulation. In addition to this letter, please find attached our General Comments and Requests for Revisions on the proposed regulation. Should the Board choose to proceed with the current proposed regulation, our concerns, questions, and criticisms are described in detail herein. In addition, please also find enclosed, and we hereby incorporate into the rulemaking record, our previous comments submitted on the previous rule and all of our associated court filings.

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

Attachment: **General Comments on & Requests for Revisions to the Proposed Fuel Sulfur and Other Operational Requirements for Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline**

Enclosures: PMSA Brief to the District Court
District Court Decision, August 2007
PMSA Brief to the Ninth Circuit Court of Appeals
Ninth Circuit Decision, February 2008
PMSA Submitted Comments on previous Auxiliary Engine Rule

General Comments on & Proposed Revisions to the Proposed Fuel Sulfur and Other Operational Requirements for Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline

Current Efforts to Use Low Sulfur Fuels and Reduce Emissions from Marine Vessels Calling in California

PMSA recognizes that the need for emissions reductions is now and we are proud of the efforts of our member companies that are providing leadership in reducing emissions from marine vessels. In one major example of PMSA members' voluntary leadership in this area, we have strongly recommended that our members continue to use low-sulfur distillate fuels in auxiliary engines when operating in California despite the fact that CARB's regulations mandating such use were enjoined by the courts. An informal survey of our members confirmed that all those surveyed continue to use distillate fuel in auxiliary engines.

With emissions benefits already beyond those contemplated by the proposed regulation, the Ports of Long Beach and Los Angeles have recently created a "Clean Marine Vessel Fuel Incentive Program" that will compensate registered vessels 100% of the incremental cost between residual fuel and maximum 0.2% sulfur content distillate fuels in main engines. Not only is the fuel required under this program significantly lower in sulfur content than the proposed regulation, it also makes use of the same low-sulfur fuel in auxiliary engines and compliance with the voluntary vessel speed reduction program mandatory in order for vessels to be eligible for the incentive. This program recently went into effect on July 1, 2008 and already has 14 ocean-carrier lines, with over 120 vessels subscribed. PMSA believes that the continuation and expansion of these types of programs at ports throughout California offers the best means of achieving the near-term emission benefits needed until the pending international regulations are implemented.

Other members have pioneered the use of shore-power for at-berth vessels. The voluntary vessel speed reduction program, initiated in May 2001, has achieved over 90% compliance by the vessels arriving and departing from the Ports of Long Beach and Los Angeles.

It is important to note that no quantification of the benefits of these voluntary efforts has been provided to the Board in the ISOR. PMSA firmly believes that the Board's emission reduction goals can be achieved in advance of the full implementation of amended Annex VI. Based on our members' direct experiences with these programs, and their own initiatives to make their fleets more environmentally-friendly, PMSA respectfully requests that the Board direct staff to complete an evaluation of the costs and benefits of this rule compared to existing voluntary efforts and the feasibility of meeting the Board's goals through cooperative, non-regulatory measures before the regulation is pursued any further.

This Regulation is Preempted by the Federal Clean Air Act

In 1990, Congress amended the Clean Air Act (“CAA”) to authorize the U.S. Environmental Protection Agency (US EPA) to adopt emission standards and other requirements related to the control of emissions from nonroad sources. Congress amended Section 209, which pertains to motor vehicle emission adding Paragraph (e) (1):

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emission from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter...

The CAA further defines a “non-road engine as “an internal combustion engine (including the fuel system) that is not used in a motor vehicle” (42 U.S.C. section 7550(10)).

Here, the CARB vessel survey for the proposed rule estimated that 22 percent of the vessels calling California ports would have to make modifications to their internal combustion engines, including their fuel systems, in order comply (ISOR, VI -8). Therefore, it is clear that this regulation is preempted by the CAA.

PMSA and CARB have both previously commented extensively on case law that make it clear that this proposed regulation is preempted by the CAA (including *Engine Manufacturers Association v. US EPA*, 88 F.3d 1075 (D.C. Cir.1996) and *United States v. Locke*, 529 U.S. 89 (2000)). Through its court arguments and legal analysis for the previous regulations the CARB legal staff all but conceded this point, as the rule was specifically not drafted to be a fuel use standard in order to avoid the conclusion that engine and fuel system retrofits may have been necessary.

As such, PMSA respectfully requests that the Board direct staff to fully discuss the current justification for their position that they have the authority to enforce the proposed regulation in light of recent Court decisions and their past analyses.

This Regulation is Preempted by the Submerged Lands Act

Through our review of the issues it is clear that the authority to regulate beyond the state’s three mile limit is restricted to the federal government. The state of California lacks authority to impose any regulatory requirements on vessels in territorial and international waters beyond the California three mile limit and under federal law it may not do so without specific Congressional consent. The ISOR assumes that California has the authority to regulate the use of low-sulfur fuel on foreign flagged vessels in international waters that are involved in international trade with the United States. Not only is the analysis presented in Section V facially flawed in that it assumes that the jurisdictional limit imposed by the IMO will be the same as the proposed regulation, but it also assumes that California has authority beyond the traditional three-mile limit. We have reviewed CARB’s legal opinion and respectfully disagree with of its assumptions.

SUBMITTAL OF COMMENTS

Proposed Regulation for Fuel Sulfur Requirements for Ocean-Going Vessels

July 23, 2008

Page 7

The federal Submerged Lands Act preempts CARB's assertion of extraterritorial rights to regulate commerce which is, by definition, exclusively foreign and interstate, since it is extraterritorial conduct. This issue has also been thoroughly briefed with regard to the previous rule. While the rather dismissive statement in the ISOR that "the Court did not reach the Submerged Lands Act issue" (ES-25) is a factual summation of the disposition of our claim, the ISOR legal appendix fails to analyze the Court's statements on the issues at hand. Specifically, the District Court has taken preliminary note of this issue as follows:

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 conducting foreign affairs, as a primary reason for adopting the Constitution. See Federalist Nos. 4, 6, and 22.

It is also obvious to us that staff does not fully believe they have the authority to regulate out to 24 nm since they specifically provided three geographic limits (3 nm, 12 nm, and 24 nm), in the definition of "Regulated California Waters". While severability language is certainly a valid drafting concept to apply to any rule, statute or contract, in this instance its use is contrary to the very stated policy bases for the creation of the fictional jurisdiction that has been labeled "Regulated California Waters." Indeed, because this jurisdiction does not exist in any federal or state statute, we are meant to believe that this definition is based on actual impacts or scientific estimation of public health impacts, but such a distinct analysis is missing. Coincidentally, this fictional definition is built around three internationally recognized limits to national jurisdiction and the previous rule's legal analysis predicated its enforceability on assuming that the term "coastal state" in the International treaties setting national boundaries referred to an individual state of the United States rather than a signatory nation.

Moreover, if the 3 and 12 mile limits are indeed distances that are alternative applicable definitions of "Regulated California Waters" they are alternatives that should be considered by the Board. If it was predetermined that a court may likely rely on the suggestion of the CARB legal staff that 3 or 12 mile limits would be as likely as 24 miles to define the state's jurisdiction, then the Board should also be afforded the same option to consider these alternative limits. Yet, missing from the ISOR, is any assessment of the impacts or benefits of implementing and enforcing the regulation at the 3 nm or the 12 nm distances.

PMSA believes that the Board must be informed of the impacts and benefits of implementing the proposed regulation at those distances in order to reach a fully informed decision on the proposed regulation. If the CARB staff is truly suggesting that there is specific scientific relevance to these mileages, then this is particularly relevant for the Board to consider. In limiting the analysis to 24 nm

the Board has no way of evaluating the proportionate costs and benefits of applying this proposed rule nearer to shore and within California ports adjacent to the most impacted communities. In order to reach a fully informed decision on the proposed regulation, PMSA respectfully requests that the Board delay approval until staff has completed a through analysis of the impacts and benefits of the proposed regulation limited to 3 nm and 12 nm limit, consistent with existing federal and international law.

Appendix B, CARB's Legal Analysis is Deficient and Insufficient to Support Approval of the Proposed Regulation by the Board

Appendix B of the ISOR begins with the following statement:

The following is the regulatory authority explanation included in the rulemaking documents for the ocean-going ship auxiliary engine regulation that was adopted by the Air Resources Board in December 2005. We believe the principal legal reasoning in this document also applies to the current regulatory proposal.

This is an astounding statement. First, this legal analysis and reasoning was the basis for an argument against preemption that was summarily rejected by a federal district court and the 9th Circuit Court of Appeals. Also, because of the outcome of that case CARB has completely changed its approach to how to handle the principal of Clean Air Act preemption. As preemption is an entirely legal proposition dependent on the facts of the specific case at hand, a complete analysis should be provided in the ISOR.

Furthermore, this opening statement is astounding because it contradicts staffs own reasoning in other portions of the ISOR. For instance, the Executive Summary (ES-25) states that:

“The Court held that the Auxiliary Engine Regulation was an emission standard because it allowed vessel operators to comply by showing equivalence to the specified low sulfur. To address this holding, we have incorporated into the proposal direct fuel-use requirements for the main and auxiliary engines.”¹

Also, the previous Legal Authority section contradicts this generalized statement as well since “the [previous] proposed regulation would apply *emission limits to the auxiliary engines* on ocean-going vessels” and goes on to say that the vessel operator can choose “*Alternative Compliance Plans . . . which allows the operator to implement alternate emission control strategies that the operator chooses*” (emphasis added).

Taken together, these inconsistent statements simply fail to describe the underlying reasons for how the Board can assert that the proposed regulation will not be preempted under the CAA. Simply labeling this a “fuel-use” regulation is not a substitute for such an analysis. It also fails to discuss why

¹ PMSA disagrees with this characterization of the Courts' reasoning on the issue which nowhere states that the previous regulation was a prohibited “standard” because it allowed alternative compliance. The Courts merely held that the provisions for alternative compliance did not save the regulation from preemption, not that the alternative compliance provisions were the reason that the regulation was a standard.

only the use of fuel that meets specific sulfur content levels for main engines and boilers, in addition to auxiliary engines, is not preempted. It fails to address the direction by the Court that CARB must apply and be granted a waiver by U.S. EPA, in order to implement the previous regulation.

The regulation is also beyond the scope of California's authority under federal law because it will require substantial retrofits of the fuel tank and piping systems on ships in interstate and international trade as well as significant changes in the ships' fuel purchasing practices at foreign ports, and their internal record-keeping and maintenance practices, procedures and requirements for the engines using the required fuels. This is beyond the scope of the state's police power as analyzed in *United States v. Locke*.

Even more deficient for rulemaking purposes, because the Legal Authority appendix appears to be a simple "cut and paste" of the previous auxiliary rule, it references provisions that no longer exist in the current rulemaking. That being the case, the Board and general public have not been provided with a current and complete rulemaking package. We would also note, because of this "cut and paste" of the previous legal analysis, that the Board is now relying on legal arguments about preemption originally written for a rule that applied emissions standards in order to avoid the previous rulemaking being labeled as a fuel only rule – exactly what this rule was drafted to be. In other words, this legal analysis is a justification of a preemption avoidance strategy that not only failed, but now the staff has embraced the very regulatory form that they previously avoided because they believed it was preempted. How can the proposed regulation which will require modifications, which were acknowledged as a basis for preemption in the litigation process, now not be treated as a basis for preemption?

PMSA disagrees that the proposed regulation is not preempted by the Clean Air Act for reasons that have been extensively briefed to the Court. We are disappointed that these arguments have not even been acknowledged, much less discussed by staff in this legal analysis. There are other elements of the legal analysis that are equally dated and have been corrected by the Courts and PMSA's briefs that are missing from this discussion as well.

PMSA must insist that CARB clarify their legal authority for this revised "fuel-use" regulation before it is approved by the Board. We would respectfully request the Board to direct staff to write a legal analysis specific to the rulemaking at hand and, at the very least, analyze the opinions of the District Court and 9th Circuit when reviewing the legal authority under which they are recommending that the Board proceed.

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

In the time since the staff began to draft the previous rule and the currently proposed regulations, there has been substantial activity by the International Maritime Organization (IMO) to regulate the emissions from ocean-going vessels under MARPOL Annex VI. The recent proposed amendments are listed in the ISOR on page V-14, but the ISOR does not account for the full benefits

of the proposed amendment as they have not been identified or assessed. The most important example of the quickly evolving federal and international situation is that MARPOL Annex VI has been signed into law by President Bush on July 21, 2008, as the “Marine Pollution Prevention Act of 2008” (H.R. 802).

As stated above we fully support and expect the Annex VI amendments to go into force on schedule. Our belief is supported by the U.S. Senate’s advise and consent to Annex VI in April 2006 as well as the recent passage of the implementing legislation to enforce the provisions of Annex VI by both the House and the Senate and the passage of the implementing legislation by the President. It is important to note that authority to enforce the pending amendments to Annex VI has been incorporated into the implementing and ratifying legislation, and upon the final ratification by the United States, no additional action at the Congressional level will be necessary. That leaves the process by which the US EPA applies for designation of Environmental Control Areas (ECAs) in the U.S. as the only federal action necessary to achieve the benefits of Annex VI implementation.

Following the filing of the instruments of ratification of Annex VI, the U.S. EPA will petition IMO for the creation of an ECA that could go into force as soon as March 1, 2010. This is only eight months after the July 1, 2009, implementation date of the proposed regulation.

The ISOR states that the benefits of the proposed regulation exceed the benefits of an ECA. However, the ISOR fails to acknowledge that the jurisdictional limit of the ECA will almost certainly exceed the 24 nautical mile (nm) limit of the proposed regulation. According to the U.S. EPA, in their Advance Notice of Proposed Rulemaking for the “Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder” (December 7 2007), it is expected that the limit will be determined by a science-based approach to determine the appropriate geographical distance for the ECA. Further indication that the ECA boundary will exceed that of the proposed regulation can be found in the pending federal legislation by Senator Barbara Boxer (Senate Bill 1499) that specified a limit of 200 nm. The ISOR is only able to reach the conclusion that the benefits of the IMO-EPA efforts would achieve less emission and health based benefits than the proposed regulation only because it fails to evaluate the entire benefits that will occur by extending the ECA beyond the arbitrary 24 nm limit selected by CARB staff.

PMSA respectfully requests that the Board direct staff should be directed to revise the analysis of the benefits of an extended ECA with the goal of assisting U.S. EPA in determining the most appropriate distance to achieve the desired benefits for California and the U.S.

The Current Record Is Deficient in Appropriately Addressing Significant Technical Issues

PMSA has previously expressed concerns that ships that are designed to operate primarily on residual fuel, will need to retrofit vessels to switch to and from low sulfur distillate fuels when entering and leaving California. We have also previously raised concerns about switching of fuels that could result in problems that would effect the safe operation of the vessel. These problems include, but are not limited to the following:

1. The lower viscosity of low sulfur distillate fuel may result in excessive fuel leakage from the fuel oil pumps and fuel injectors.
2. The potential for seizing of fuel injector pumps due to lower lubrication properties of such fuels.
3. During switch over, the asphaltenes from residual fuel may be precipitated out by the distillate fuel and result in the clogging of fuel filters.
4. The change in combustion temperature between residual and distillate fuel can result in differential expansion and consequent fuel line leakage.
5. Switching from residual fuel with its required high combustion temperature to distillate can result in the vaporization of the fuel, which then becomes unpumpable.
6. Switching from distillate back to residual fuel at lower temperatures can result in elevated fuel viscosity, threatening injection pump and high pressure fuel failure.

All of the technical problems identified above can result in a loss of power and possibly catastrophic engine room incidents such as fire or explosion, any of which can result in a consequent loss of ship's power and navigation. The potential for a resultant loss of property, life, and environmental damage, in this instance is cause alone to refrain from adoption of this proposed regulation. We appreciate that CARB staff has acknowledged that additional work is necessary to address these issues and has also proposed additional studies on the effects of low viscosity fuels on vessel fuel pumps, and on the long term impacts of fuel switching on main engine performance (ES-29).

PMSA believes that the potential for catastrophic environmental, economic and public safety impacts that could result from even one vessel mishap is sufficient reason for the Board to delay approval of this regulation until these proposed studies are completed. We would respectfully request that the Board consider these important safety issues before they proceed with this rulemaking.

The Results of the Vessel Survey are Insufficient to Anticipate the True Impacts Resulting from Implementation of the Regulation

According to the survey completed by staff in Section VI of the ISOR, 22 percent of those responding believed that the regulation would require modifications to their vessels. We believe these results likely underestimate the number of vessels requiring modifications since less than 40 percent of the vessels calling in California in 2006 responded to the survey. We believe that the vessel operators that responded have multiple vessels that call regularly in the California and are aware of the proposed regulation and its potential effect on their operations. In contrast, vessels that call infrequently would have been less likely to respond but may have a greater need to make modifications to their vessels to comply. This would result in a bias of the responses to the survey, and we believe that it is more likely than not that the rate of necessary modifications in the other 60 percent of vessels that did not respond would actually be higher than those captured by the survey.

The survey also likely resulted in an underestimate of the modifications required by the responders. The questions of the modifications required at 24 nm, 50 nm, and 100 nm, are misleading in that the transit distance into Los Angeles and Long Beach with a 24 nm boundary would be well over 100 nm of transit distance. This is because a vessel calling in southern California enters and leaves the 24 nm

boundary off Point Conception, not 24 nm from the Ports. Further extension to 50 nm would result in the entire transit of a vessel from southern California to the Bay area and/or the Pacific Northwest as the traffic lanes along the California coast are within the 50 nm, boundary. This additional transit distance is much more likely to result in needed modifications than were reported under the survey as written. This can be readily seen on the map on page III-6 where the vast majority of the vessel transit distance to and from California ports occurs within the 24 nm boundary. Even the brief distances north of Point Conception where the vessel track goes outside of the 24 nm limit are extensive enough to result in the ship switching back to residual fuel.

Further underestimating the potential cost impacts of the proposed regulations is the statement in the ISOR that “modifications (for the fuel system piping and pumps) most likely would have been performed to comply with the Auxiliary Engine Regulation” (VI-10). This statement ignores the vastly greater fuel requirements of the main engines and boilers that would not require modifications of pumps and piping and additional tanks for the distillate fuels far beyond that required for auxiliary engines alone. This statement also ignores the data in the survey itself, which shows that the number one modification required in the responses to the survey reported in Table 19 of Appendix being the fuel tanks. There is also the issue of matching lube oil to the fuel type that is far more critical for two-stroke main propulsion than for four-stroke auxiliary engines that could require the addition of duplicate lube oil systems to meet engine manufacture recommendations. Modifications to the lube oil system was the third most reported required modification listed in Table 19, behind fuel pumps and piping.

Clearly, additional work on the needs of vessels calling in California to meet the requirements of the proposed regulation is required. PMSA would respectfully request that the Board find that the current survey results are insufficient bases on which to act and to require additional research before this regulation is acted on.

The Current Record Is Deficient as it Fails to Appropriately Address Significant Economic Impact Issues

As stated above, we believe the ISOR greatly underestimates the modifications to the vessels and the amount of fuel required transiting along the California Coast needed to comply with the proposed regulation. More importantly there is an assumption that the fuel necessary to comply will be readily available in the quantities required. Although the fuel survey information in Appendix F shows that fuel of the appropriate quality is available in California it does not address whether or not that fuel is available in sufficient quantity. The same survey also shows that fuel of the appropriate quality will be difficult, if not impossible, to obtain in most ports in Asia. With the incremental cost of compliant fuel already double the cost of residual fuel, and no consideration of the additional premium of the even lower sulfur fuels that will be required in 2012, we believe that the costs of the complying with the regulation are significantly underestimated.

While we appreciate the recent addition of the “Essential Modification” exemption to the proposed regulation, we continue to be concerned about the ever increasing “non-compliance fees” provisions of the regulation. Vessels that cannot find compliant fuel, or is sold non-compliant fuel without their

knowledge, or is unexpectedly re-directed to California, must pay a fee beginning at \$45,500 that increases by \$45,500 each subsequent visit until it reaches a maximum of \$227,500 on the fifth visit. In theory a vessel that makes ten calls to California would be subject to paying \$1,365,000 the first year and \$2,275,000 each subsequent year.

Also not considered in the costs is the need of vessels to carry additional lube oil to match the pH and viscosity of the lower sulfur fuels resulting in additional lube oil tanks and plumbing. The actual need for a far greater number of fuel coolers, blenders, and filtration systems, to make a safe and efficient switch from residual fuels to distillates while underway exists on many more vessels than the Oceangoing Ship Survey results indicated.

Therefore, additional consideration of the real costs to retrofit the vessels to comply with this regulation is in order. If the cost of compliance is under-estimated then the cost-effectiveness is over-estimated and needs to be adjusted as well. We respectfully request that the Board direct staff to reevaluate their cost-benefit analysis based on these cost factors, especially in addition to the reduced benefits vis-à-vis existing voluntary efforts underway and a future expanded ECA.

The Proposed Regulation is Inherently Unfair in that it Places the Burden for Obtaining Fuel on the End User not the Fuel Provider

The ISOR states that vessel operators will experience “challenges in both the procurement and on-board fuel management are significant...” (ES-15). While we understand that a vessel may get relief from the noncompliance fee once a year if the vessel buys compliant fuel while at berth in California there is no requirement that compliant fuel be available for sale under the terms of this regulation.

This is in direct contrast to other fuel-use regulations where the requirements actually do not regulate fuel use at all, but rather fuel sales. For practical purposes, these requirements are placed on the fuel provider, not the end user. For example, except in limited circumstances, the recent requirements for Locomotives and Harborcraft are sales requirements, not end-user requirements:

§ 2299. Standards for Nonvehicular Diesel Fuel Used in Diesel-Electric Intrastate Locomotives and Harborcraft.

(a) *Requirements.*

(1) *Standards for Nonvehicular Diesel Fuel Used in Harborcraft in the South Coast Air Quality Management District (SCAQMD) Beginning January 1, 2006.*

Beginning January 1, 2006, California nonvehicular diesel fuel sold, offered for sale, or supplied within the SCAQMD for use in harborcraft is subject to all of the requirements of Title 13 CCR sections 2281 (sulfur content), 2282 (aromatic hydrocarbons content) and 2284 (lubricity) applicable to vehicular diesel fuel, and shall be treated under those sections as if it were vehicular diesel fuel.

(2) *Standards for Nonvehicular Diesel Fuel Used in Intrastate Diesel-Electric Locomotives and Harborcraft Beginning January 1, 2007.*

Beginning January 1, 2007, California nonvehicular diesel fuel sold, offered for sale, or supplied for use in diesel-electric intrastate locomotives or harborcraft is subject to all of the requirements of title 13 CCR sections 2281 (sulfur content), 2282 (aromatic hydrocarbons content) and 2284 (lubricity) applicable to vehicular diesel fuel, and shall be treated under those sections as if it were vehicular diesel fuel.

Unlike the above regulatory approach (which even takes place in a relatively small, limited domestic marketplace for fuel), the proposed regulation to be enforced on vessel operators from all over the globe expects ocean carriers to identify the source of compliant fuel and pay whatever premium is charged by the fuel provider. If the fuel isn't available, the vessel will pay substantial fees to California for availability of fuel outside of their control.

On the other hand, there is no requirement that a fuel provider, even in California, produce or make available for sale compliant fuel for vessels, and there is no restriction on the sale of non-compliant fuel within California. This entire regulatory scheme seems to be backwards as compared to most other "fuel only" rules, by assigning the burden of fuel compliance on the end-user and not on the fuel provider. The question of fuel availability, that is key to the effectiveness of this regulation, must be addressed in a more comprehensive manner prior to implementation and cannot be put off on a promise of future monitoring of non-compliance fees collected or some undefined measurement of increased compliant fuel sales in California as a future indicator of fuel availability.

We would respectfully request that the Board direct staff to rewrite this regulation as a fuel provision rule, like other "fuel only" rules on mobile sources of emissions.

Availability of Fuels in Foreign Ports is Uncertain

The assumption of the regulation seems to be that vessels can purchase marine gas oil at any port of call in the world for use in complying with the regulation. It seems to assume that all MGO will be 0.5 percent sulfur content or less regardless of where it is purchased. It is also apparent that CARB staff is not convinced that compliant fuels will be generally available since the regulation specifically includes noncompliance fee options for vessels that either can't purchase enough compliant fuel or has unexpectedly purchased fuel that does not comply. Until the worldwide availability of compliant fuels can be assured, the regulation should not be adopted. At the minimum, a vessel should not be subjected to fees and penalties until the availability of compliant fuels for all vessels calling at California ports can be assured.

This is not an Airborne Toxic Control Measure and therefore Adoption of Section 93118, Title 17, California Code of Regulations Is Invalid as an Administrative Regulation that Enlarges its Scope Beyond its Exercise of Authority

Finally, this regulation does not qualify as an Airborne Toxic Control Measure since the reduction in fuel sulfur content addresses the criteria pollutants of SO₂ and particulate sulfate and not the chemical constituents associated with diesel toxicity. Therefore, any reference to airborne toxic control and the cancer risk benefits assumed should be removed from this regulation.

The Proposed Regulation Frustrates the U.S. ability to “Speak with One Voice”

Governor Schwarzenegger, joined by the Governors of Oregon and Washington, recently filed a joint letter (July 10, 2008) to the President of the United States, requesting the President’s signature on House Resolution 802, The Maritime Pollution Prevention Act of 2007 which authorizes the US EPA and US Coast Guard to issue enforcement regulations for MARPOL Annex VI. The letter stated, “IMO negotiations to establish cleaner global ship standards are at a critical juncture...It is imperative that the United States is able to take a strong position in support of strict vessel emission limits at a meeting of the IMO in October 2008. We believe an international regulatory solution is needed to reduce diesel emissions from ships. Implementation of the U.S. proposal by the IMO will reduce emissions of soot and nitrogen dioxide, action that will significantly improve local air quality in our coastal states and will also help to address global climate change...We hope you will seize this unique opportunity in which industry, environmental organizations and regulatory agencies are aligned in moving forward for the common good of the people of the United States.”

PMSA strongly agrees with the sentiments of the ISOR (page ES-26) that “having a patchwork of district regulations . . . may frustrate the efficient execution of the nation’s foreign policy to speak with one voice”. However, we disagree that this is an issue limited to any concurrent jurisdiction questions that may arise between CARB and the local air districts. This is our fundamental jurisdictional issue that arises with respect to CARB’s attempts to regulate ocean-going vessels without seeking US EPA waivers. To our point, the legal concept of regulatory uniformity and speaking with “one voice” is from the Japan Line case, which was litigated over who had jurisdiction of the containers from ocean carriers calling in California – the concept of “one voice” is how the US Supreme Court established the traditional “foreign commerce clause” tests still used today.

CARB is not a nation and by taking unilateral action it frustrates the ability of the United States to “speak with one voice when regulating commercial relations with foreign governments”, a traditional role of the federal government. It is this fundamental conflict of law, where the federal government preempts states from adopting regulations that could adversely affect interstate commerce and foreign trade, that we challenged the previous auxiliary engine regulation. PMSA firmly believes that this regulation also subverts the carefully conceived system to have uniform regulations for all states and could lead to a patchwork of conflicting and confounding regulation. These rules also put California’s ports at a competitive disadvantage for cargo growth, jobs growth and the critical investment that is necessary for us to finance the development of the some of the cleanest public port authorities in the world.

Ironically, by insisting that this regulation is actually an “in-use” requirement and arguing that it is not subject to the U.S. EPA waiver provisions of the Clean Air Act (section 209(e)(2)(B)) the State has possibly jeopardized postponing the ability of other states to adopt these regulation since, if a waiver is ultimately needed, no other state can replicate a California adopted standard until the regulation has been authorized and in place for two years.