July 22, 2011

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

SUBMITTAL OF COMMENTS

Re: Proposed Amendments to the Regulations 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 shipping companies servicing regular trade routes into California ports, appreciates the work done by California Air Resources Board (CARB) staff in the development of these proposed amendments to the current ship fuel regulation. We have worked closely with the staff throughout the process and appreciate all of their efforts. However, these amendments do not correct fundamental problems concerning the state's authority to impose such a regulation on vessels involved in international trade. Staff has failed to adequately address in the Initial Statement of Reasons (ISOR) how rerouting of vessels to the south of the Channel Islands somehow justifies the extension of the State's authority to regulate international shipping beyond the traditional three-mile limit from the California Baseline. More importantly staff has failed to demonstrate that the extension of jurisdiction will achieve the desired results of moving the vessels back inside the Santa Barbara Channel. Finally, staff has failed to acknowledge that the approved Emission Control Area (ECA), extending 200 nm offshore, is far more likely to achieve the desired emission reductions and stabilize vessel routes than these amendments.

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 at least some cases, to retrofit their tanks, piping and engines and modify engine use and maintenance practices. The regulations force 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 further preempted the provisions of §209(e)(2) of the Clean Air Act.

These concerns were the basis of our previous challenge to the Auxiliary Engine regulation and the current 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 the regulation was preempted by the Federal Clean Air Act (CCA§ 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.

The other claim that was raised but not adjudicated is the authority of CARB to regulate beyond three miles from the California baseline. PMSA raised that issue as the basis for the current challenge (PMSA v. Goldstene, Case No. 2:09-cv-01151-MCE-EFB) to the regulation. Although the District Court denied our petition for summary judgment on June 30, 2009, and the Court of Appeals upheld that decision on March 28, 2011, PMSA believes that the Commerce Clause of the U.S. Constitution precludes CARB from regulating the fuel use of ships and that the Submerged Land Act preempts CARB's regulations beyond the three mile limit. Based on that belief PMSA is currently preparing a petition to the U.S. Supreme Court for a *writ of certiorari* to review the judgment of the Court of Appeals for the Ninth Circuit.

Beyond the legal issues PMSA believes that the analysis in the 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 that have been approved since the current regulation was approved in July 2008. CARB also fails to demonstrate how the extension of the regulatory boundaries beyond the Channel Islands will result in vessels returning to use the traffic separation scheme in the Santa Barbara Channel or what health benefits will accrue to the State's population as a result of this extension. Finally, the ISOR 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.

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. 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, 2005) and Assembly Joint Resolution 24 (Lowenthal, 2010). The first of the joint resolutions supported the ratification of the Annex VI of the International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 (MARPOL 73/78). The more recent joint resolution called for the creation of a United States and Canada Emission Control Area (ECA) under the terms of Annex VI. The United States and Canada ECA was approved by the IMO in March 2010 and is scheduled to be implemented in August 2012.

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 proposed amendments to Annex VI that were approved in October 2008. These amendments, when fully implemented, exceed the emission reductions of the current regulation and the proposed amendments. This is because the Annex VI amendments also includes emission standards for engines, world wide limits on marine fuel sulfur, and extended jurisdictional boundaries 200 nautical miles (nm) from the west coast of the United States

and Canada. 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.

In conclusion, PMSA strongly supports an international approach to addressing the emission issues associated with international shipping throughout the world. We believe that the international approach is critical to maintaining competitive parity of California ports with all other North American Ports of Entry.

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 at (562) 377-5677, or by e-mail at tgarrett@pmsaship.com.

Sincerely,

T.L. Garrett
Vice President

Attachments: Comment Letter of July 23, 2008 on Vessel Fuel Regulation
Comment Letter of March 23, 2009 on 15 Day Notice for the Vessel Fuel Regulation

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

This Regulation and these Amendments are Preempted by the Dormant Commerce Clause and the Submerged Lands Act

The state of California lacks authority to impose any regulatory requirements on vessels in territorial and international waters beyond the California three mile limit without specific Congressional consent. The ISOR also assumes that California has the authority to regulate the use of low-sulfur fuel on foreign flagged vessels in international water that are involved in international trade with the United States. Not only does the analysis presented in Section IV fail to assess the entire benefits of the Emission Control Area (ECA) since that analysis is limited to 100 nm, not the 200 nm of the ECA, it is fundamentally flawed in that it assumes that California has authority beyond the traditional three-mile limit. We have reviewed CARB's legal opinion and respectfully disagree with its conclusions. 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.

Although PMSA has repeatedly requested that CARB provide an assessment of the impacts or benefits of implementing and enforcing the regulation at the 3 nm or even the 12 nm distances, CARB has failed to do so. PMSA believes that the Board must be informed of the impacts and benefits of the proposed regulation at those distances in order to reach a fully informed decision on the proposed regulation in the event that the jurisdictional distance is indeed limited to 3 nm. By only providing the analysis that extends 100 nm staff has created an artificial scenario that fails to fully disclose the benefits of the ECA and also fails to justify the extension of the jurisdictional limits beyond 3 nm. In limiting the analysis to 24 nm the Board has no way of evaluating the disproportionate benefits 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 the Board should delay approval until staff has completed a through analysis of implementing the regulation at 3 nm.

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

Since the regulation was originally approved in 2008 the International Maritime Organization (IMO) has completed international regulations to regulate the emissions from ocean-going going vessels under Annex VI of MARPOL 73/78 that go far beyond the limited approach of the regulation and these proposed amendments. In addition, the United States and Canada have successfully amended the international regulation by the creation of a joint Emission Control Area (ECA) that is scheduled to be implemented according the schedule listed in table ES-2. These additional benefits can partially be seen in figure in figure ES-3 on page ES-8. However, since this analysis is limited to 100 nm it does not show the entire benefits of the ECA that extends to 200 nm.

In addition, while CARB has assessed the benefits of the current regulation and proposed amendments assuming a fuel quality with average fuel sulfur content of 0.3% (page 1-4 and Chapter II) based on surveys of actual fuel quality used by the vessels. This in in spite of the fact the current regulation and these amendments allow for sulfur contents as high as 1.5% during this phase of the regulation. Likewise, the analysis assumes that during the first phase of the ECA vessels will use a fuel with an average fuel sulfur content of 1.0% outside of the CARB regulated waters and then make a second switch to a fuel with an average sulfur content of 0.3%. In discussions with our members we find this scenario to be extremely unlikely. There is no analysis that shows fuels of different sulfur content other than those currently in use will become available with the first phase of the ECA next year. Further, it is unlikely that a vessel that switches fuel to comply with the ECA at 200nm, will switch a second time at this new California Regulated Waters boundary. The result of failing to assess the entire zone of the ECA and practical limitations of new types of fuels and the unlikely occurrence of vessels carrying multiple fuel types and preforming multiple switches means that the ECA will most likely provide equivalent emission benefits to the current and amended CARB regulation upon implementation on August 1, 2012. At the very least CARB should revise the analysis to include the availability and operational limitations of multiple fuel types and switches and consider the "sunset" of the amended regulation if equivalence is shown with the first phase of the CARB regulation.

The Delay of the Second Phase to 0.1% Fuel Sulfur Content from 2012 to 2014 Highlights Key Deficiencies of the Current and Amended Regulation

As stated in the ISOR 90% of the emission benefits of this regulation result from the implementation of the first phase of the regulation (page ES-9). The relatively minor benefits of the second phase of the regulation, coupled with the current decline in vessel calls due to the economic downturn, results in the conclusion that the "two-year delay will not impact the significant reductions achieved with Phase 1 fuels". In addition, PMSA disagrees with the statement that the delay in the second phase will somehow help ensure the success of the first phase of the ECA and the transition to the second phase. The ECA is a regulatory requirement that will occur regardless of the CARB regulation. Therefore, the only possible justification for the second phase of the CARB regulation in 2014 is to ensure meeting the SIP requirement in the South Coast Air Basin by April 5, 2015 (pages ES-14 & 15). It is hard to envision how the additional 10% reduction provided by this single regulation in 2014 will assure attainment of the PM 2.5 standard in the South Coast Air Basin given the complexity of emission sources, economic, and meteorological conditions. Again, we believe that a full analysis of the benefits of the ECA beginning in August 2012, would lead to the conclusion that the benefits of the amended CARB regulation are already being met and are unnecessary to achieve the SIP attainment requirements for the South Coast Air Basin. We strongly urge CARB to complete this analysis and to provide for an early "sunset" of the amended regulation based on confirmation of the ECA providing equivalent emission reductions.

The Amendments to the Regulation Fail to Demonstrate how the Objective of Returning Vessels to the Santa Barbara Channel will be Acheived

The premise of the amendments to the current regulation is that extension of the jurisdiction 24 nm beyond the Channel Island will compel vessels to return to the vessel traffic separation scheme within the Santa Barbara Channel. This is based largely on the observed routing of vessels that has occurred subsequent to the original regulation going into effect in July 2009. In our conversations with ship

operators PMSA has found that there are several reasons for this rerouting including the cost of fuel, need to maintain schedule, and maintenance concerns associated with the extended use of distillate fuels within Regulated California Waters. All of these concerns share a common goal to minimize the amount of time that the vessel must operate on the regulated distillate fuel. Just as the original regulation resulted in the rerouting of vessels to achieve that goal it is entirely possible that some portion of the vessels will again reroute to minimize the amount of time they are subject to the amended boundaries. As we have commented previously, a likely scenario would be for some vessels to take a diagonal route, directly through the Naval Test Range, to minimize the distance of operation subject to the amended regulation. Without any analysis of this alternative vessel routing we do not believe that staff has provided your Board with all the potential impacts of these proposed amendments necessary for them to make a truly informed decision. We suggest that staff conduct an analysis of vessel further rerouting to minimize time subject to the amended regulation using percentages up to the current levels before approving these amendments.