September 8, 2008

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

SUBMITTAL OF COMMENTS

Re: Proposed Modified Regulations to Reduce Emissions from Diesel Auxiliary Engines on Ocean-Going Vessels While At-Berth at a California Port

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. We appreciate the modifications to the regulations that have clarified the rights and responsibilities of our members in complying with the proposed regulation, including the relief if utilities cannot provide grid power and the development of the terminal plan criteria plan instructions and forms. In addition, we are concerned about the potential release of proprietary information included in these forms and in the fleet plans. CARB should provide a process to allow for companies to specify that the information they are providing is proprietary in nature and should not be made public without expressed written permission.

Industry's support of the goals of the proposed regulation is evidenced by the current high level of voluntary participation by several ocean carriers in equipping vessels for connections with shore power. In fact, to our knowledge, PMSA member company vessels operating in the California trade are significantly ahead of every other private fleet currently sailing anywhere in the world with regard to their capability, capacity and actual use of shore power. Indeed, we have observed the capacity of oceangoing vessels to utilize shore power has generally outpaced the development and availability of the shore-side infrastructure necessary to connect to shore power equipped vessels. This is not surprising given the diversity of economic variables facing our member companies, both marine terminals and ocean carriers alike, and the current lack of international standards governing the modification of vessels for shore power, requirements for new vessel construction, and the provision of shore power to vessels. While PMSA and its members are supportive of the goals of the proposed

regulation, several outstanding issues of serious concern remain problematic for the maritime industry and preclude us from supporting the proposed regulation.

Within the State's ports, the creativity and experimentation with various forms of shore power is beginning to bear fruit for those who have been on the leading edge of this new investment. In addition to various shore power projects and agreements, our members who are not similarly situated to become an early adopter of these new shore power technologies are nevertheless actively developing alternative measures of reducing emissions from vessels while at berth and while underway that go beyond existing regulatory requirements.

These regulations, in addition to the previous regulations on "Auxiliary and Diesel Electric Engines", and "Fuel Sulfur and Other Requirements for Ocean-going Vessels" have exposed several fundamental problems concerning the state's authority to impose such a regulation on vessels, both U.S.-flagged and foreign-flagged, both 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.

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 (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.

It is because of the jurisdictional issues resulting from previous legal challenge, in addition to significant concerns regarding the specifics of this modified regulation that we feel have not been adequately addressed, that we submit the following comments for your consideration.

<u>This Regulation is Preempted by the Federal Law from Implementing the Regulation.</u>

The Board's authority in this rulemaking, derived from Health & Safety Code §§ 43013 and 43018, explicitly authorizes ARB to regulate marine sources only to the extent it is not preempted by federal law. The Board's authority derived from Health & Safety Code §39666 is also subject to federal pre-emption. In addition, the State's statutory authority to regulate emissions from mobile non-road sources is, to any extent, derived directly from the explicit grant of such authority under federal law. These regulations, similar to the previous regulations on Auxiliary and Diesel Electric Engines, have exposed several fundamental problems concerning the State's authority to impose such a regulation on vessels, both U.S.-flagged and foreign-flagged. Specifically, PMSA believes that the proposed regulations' paragraph (d) should not be adopted. This section places requirements on vessels that are inconsistent with, and contradictory to, existing statutes, court decisions and other provisions of law, and they exceed the rulemaking authority of the Board.

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)). The requirements of the regulation require the modification of the vessel that is preempted under the CAA. The evidence of the requirement to retrofit can be found in the first definition of in the regulation, "Alternative Control Technologies" (§ (c) (1)) that allows for anything "other than shutting down the engine". Because of the required modification of the vessel to comply, regardless of resulting emission reductions, the regulation clearly in conflict with federal law and should not be implemented.

PMSA and CARB have both previously commented extensively on case law that make it clear that this proposed regulation is preempted by the CAA, the Port and Waterways Safety Act (PWSA) and OPA 90 (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)). For this regulation the same arguments apply, as the state of California is preempted under federal law from imposing regulations that result in modifications to the vessels or their operation.

Even if limited to California's Territorial Waters, this proposed regulation is a violation of the Commerce Clause of the Constitution. The regulation at hand affirmatively and facially discriminates in fact and in practical effect against only selected vessels types, calling at selected ports. In so doing, the State is actively discriminating against vessels by choosing to regulate only those vessels that are engaged in interstate and foreign commerce. In fact, PMSA is not aware of any single vessel, much less any container, "reefer", or cruise vessels, plying intercoastal waterways in a purely intrastate capacity that meets the proposed definition of "Oceangoing Vessel." Simply put, this rule imposes requirements, fees, and penalties that only impact international trade and interstate commerce without any commensurate impacts on, or regulatory parity for, any other vessels involved in intrastate trade.

In summary, the proposed regulation should be invalidated because it violates the Congressional intent of the Clean Air Act, PWSA, OPA90, in addition to the commerce clause and other federal statutes, and violate the general preemption principles that "give force to the long standing rule that the enactment of a uniform federal scheme displaces state law."

The Regulation is Inherently Discriminatory in Nature.

PMSA has previously commented on the fact that the regulation is discriminatory, arbitrary and capricious, (PMSA comment letter of December 3, 2007) and will not repeat those comments here but

do include them by reference. However, we expand on those previous comments with another example of staff's own assessment of alternatives that highlights that the selected regulatory process was not only discriminatory, but that its principle motivation for the proposed regulation was staff convenience rather than emission reductions.

Staff states, as part of the "Analysis of Alternative Regulatory Approaches" on page X-24 and X-26,

> " 1) targeting the highest-emitting ships to obtain the necessary reductions . . .
> Staff estimated that this regulatory approach would be as effective as the proposed regulation. An advantage to this approach is that it would identify the most cost-effective ships from which to reduce emissions; however, staff abandoned this approach because of the complexity and difficulty of tracking the ships that were required to reduce emissions."

In other words, staff decided that the most cost-effective and appropriate regulation should be discarded because it would be too difficult for staff to administer. Instead staff decided to that the regulation should only apply to three pre-selected types of vessels and they did not need to address either the frequency of visits, engine loads, or consider actual emissions from specific vessels at berth. The regulations simply require that terminals that receive more than 50 vessel calls in 2008 must complete terminal plans under the regulation. But only fleets of container, reefer vessels that make more than 25 visits to any of the six selected California ports, or passenger vessels that receive more than 5 annual visits will be subject to the regulation. In contrast, any other type of vessel, regardless of how many visits it makes to the same ports, or the amount of emissions from that vessel are exempt from the requirements of the regulation. Designation by type of vessel without provisions to excuse infrequent calls of low duration and activity cannot be justified on the basis of air quality improvements and is clearly arbitrary and capricious under the stated objectives of reducing emissions from vessels at berth. As such, with these provisions the regulation is discriminatory in nature and arbitrary and capricious in application. In order for this regulation to avoid being clearly discriminatory it should be applied to vessels based on the stated criteria that can be directly related to emissions from those vessels.

The Ultimate Cost and Benefit of the Modified Regulation are Significantly Different from those of the Regulation Approved by the Board.

PMSA and others have previously commented that there is substantial uncertainty of the impacts and benefits of this regulation primarily due to the uncertainties in the cost of the shore-side infrastructure, the cost to modify the vessels, and the variability in vessel visit duration and auxiliary engine load while at berth. Now, because of the additional requirements that vessel fleets' compliance will not be enforced on percent emissions reductions in addition to percent vessel calls, our members are faced with a radically different regulation. The economic impacts of meeting both requirements has not be assessed anywhere in the record supplied by staff. The cost-effectiveness of adding this requirement is non-existent and, we believe significant. Because of this radical change to the nature of the regulation, the consequences of which were not provided to the Board when making there decision, PMSA insists that the economic impacts of the revised regulation be completed and the results of that analysis be provided for full public review and comment. Following the public review the regulation, with the completed staff analysis, should be submitted to the Board for re-consideration.

The Modified Regulation Requires Additional Clarification of the Requirements of Vessel Fleets.

PMSA has received comments that additional clarification of the intended application of § (d) (1) and § (d) (2) to vessel fleets is needed to avoid future confusion and inappropriate application of § (d) (2). We suggest some specific language in the Applicability and General Exemption Sections (§ (b) (b)), to the effect that "vessels fleets must communicate their decision to pursue vessel connection to a grid based shore power pathway under § (d) (1), that must be implemented on or before January 1, 2014, or a equivalent emission pathway under section § (d) (2), that may include multiple strategies to reduce emissions from a vessel at berth that may include grid based shore power, distributed generation, or other methods to reduce emission from a vessel at berth beginning on or before January 1, 2010. The pathway selection must be made by the vessel fleet and communicated to the executive officer by to July 1, 2009."

The Terminals' Plan Responsibility should be on the Port Authorities.

While PMSA is appreciative of the efforts by CARB staff to take some reasonable steps in accommodating the complexities of the international maritime industry, the proposed regulations still threaten the viability of the established business models in operation at the ports of California, potentially upset existing lease agreements, and will throw our ports out of balance with ports throughout the rest of the country and internationally.

While PMSA appreciates the extensive efforts of staff to develop instructions and forms for the terminal operators to assist in the preparation of terminal plans, our primary concerns remain that, without the full cooperation of the Port authorities, public utilities, and the ocean-carriers, the information requested of the terminal operators is unlikely to be more than a "best guess". This is especially true when the terminal plans provided in July 2009, will have to predict the deployment and characteristics of use of vessels beginning as late as 2014. Given the highly dynamic nature of international trade the accuracy and value of these predictions are likely to be inaccurate requiring extensive modifications at a future date.

As we have repeatedly asserted, PMSA continues to believe a more reasonable approach would be to place this planning burden upon the port authorities which are the only entities with land-use authority, retain ownership of capital improvements, and have the same access to cargo and vessel forecasts as terminal operators. We believe that the elevation of the terminal plans to Port plans will not only result in more robust and accurate predictions of future fleet operations but will also result in a more uniform approach to implementation of the requirements of the regulation and infrastructure investment.

The Inclusion of the Definition of "Regulated California Waters" is Unnecessary and is in Conflict with other Definitions in the Regulation.

PMSA has previously documented our concerns about the creation of the artificial concept of "Regulated California Waters" that is contrary to the authority granted to California by the federal government and has no basis in statute. In addition to those concerns, we strongly object to the inclusion of this definition in this regulation since it is entirely out of context. While we strongly believe that California is preempted by federal law from implementing this regulation, no one is

contesting that California has control over the waters and Ports within 3 nm of the California baseline. We readily concede that all California Ports are well within California's jurisdiction of 3 miles from the baseline.

Therefore, not only is this definition unnecessary, the inclusion of this definition is also inconsistent and in conflict with the already included definition of California Ports in the regulation. The definition of "California Ports" for this regulation is restricted to six ports, Hueneme, Long Beach, Los Angeles, Oakland, San Diego, and San Francisco. The definition within the "Regulated California Waters" includes "all California ports", not just the six that are subject to the regulation creating conflicting and confusing definitions of California Ports that could lead the reader to believe that all California Ports are covered.

The staff justification that the definition of "Regulated California Waters" is needed because it is included in section (b) (3) (A) is more easily and clearly resolved by modifying that section as follows:

> "Ocean-going vessel voyages that consist of continuous and expeditious navigation ~~through any of the Regulated California Waters~~ for the purpose of traversing such bodies of water without entering California internal or estuarine waters or calling at a port, roadstead, or terminal facility. "continuous and expeditious navigation" included;"

Since the State of California has no claim or reason to affect the innocent passage of vessels there is any reason for the artificial concept of "Regulated California Waters" to further confuse and conflict with the stated purpose of the regulation to be imposed only on limited types of vessels at six selected ports in California. In order to avoid the conflicting definition of California Ports, and clarify that the application of the regulation only applies to the six ports listed above the obvious solution is to remove the definition of "Regulated California Waters" from the regulation.

Conclusion

The planning and acknowledgment of this rule will result in substantial costs to the industry that could affect the long term use of California ports as a gateway for imported and exported goods. Therefore it is imperative that the industry and CARB work to avoid otherwise unnecessary disruption of goods to and from California. The clearest and most direct way to work towards a mutually acceptable outcome that will yield significant results similar in scope and affect to those that are expected to accrue from the proposed rulemaking would be to work out a Memorandum of Understanding between industry and the Board.

To make the MOU fully actionable and comprehensive and consistent with Port plans, adopted pursuant to our proposed changes, it would need to be developed under a scenario that doesn't punish early adopters, recognizes that some vessels and marine terminals will be more suited for shore side power in the short-term than others, and acknowledge the lack of an international standard. We believe that the costs would be substantially reduced, the benefits accrued would be similar in significance to those presented to the Board at present, and that in such a scenario the proposed rules

that are currently before you, with the exception of paragraphs (d), (e) and (f), could move forward without major industry opposition or the threat of litigation hanging over the Board.

A final consideration in favor of a voluntary MOU approach is the existence of the 1B bond funds, and the potential of other funding sources, that could be used to provide shore side infrastructure and/or ship retrofits in the absence of a regulation but would be restricted, if not precluded, after the regulations are approved.

PMSA and its members are committed to reducing impacts on the environment and surrounding communities from ocean going vessels. With that commitment comes a desire to truly assist CARB in addressing these issues and hopefully exploring other mechanisms that will achieve our shared goal of reducing emissions from the most appropriate vessels to the maximum extent practical at the earliest possible date, but from a financial, logistical and legal perspective we do not believe that this regulation should be, or legally can be, implemented in its current form.

In addition to actively supporting and facilitating industry commitment to the U.S. ratified MARPOL Annex VI, and with confidence that the amendments to the treaty will be approved in October of 2008, PMSA, on behalf of our members, still desires to pursue the voluntary Memorandum of Agreement that we have previously discussed with CARB to develop practical near term strategies to reduce emissions from vessels at the earliest possible date through a cooperative agreement.

PMSA appreciates the opportunity to comment on this proposed regulation. We would also respectfully request that any and all of our previous comments made during this rulemaking and on previous occasions regarding related CARB initiatives related to vessel emissions be incorporated by reference into this rulemaking file,

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: PMSA Comment Letter of December 3, 2007