Karen Gregory

From: Secretary
Sent: Friday, May 30, 2008 8:40 PM
To: Karen Gregory
Subject: FW: Letter to FMC Commissioners
Attachments: FMC Letter 5.30.08.pdf

From: Primo, Penny [mailto:pprimo@nrdc.org]
Sent: Friday, May 30, 2008 2:42 PM
To: Secretary
Cc: Pettit, David; Martinez, Adriano
Subject: Letter to FMC Commissioners

Dear Ms. Gregory,

Please distribute the attached letter to the FMC Commissioners this afternoon. Thank you for your assistance with this matter and please contact me should you have any questions.

Best,

- Penny

Penny Primo
Program Assistant
Natural Resources Defense Council
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Santa Monica, CA 90401
ph: 310-434-2324
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NATURAL RESOURCES DEFENSE COUNCIL

May 30, 2008

Members of the Federal Maritime Commission
c/o Karen V. Gregory
Assistant Secretary
Federal Maritime Commission
800 N. Capitol Street, SW
Room 1046
Washington D.C. 20573
secretary@fmc.gov

Re: Ports of Los Angeles and Long Beach Clean Trucks Programs

Dear Members of the Commission:

On behalf of the American Lung Association, Sierra Club, and the Natural Resources Defense Council, we write regarding the clean trucks programs at the Ports of Los Angeles and Long Beach (collectively "Ports"). Specifically, we remain concerned that your agency's actions related to Federal Maritime Commission ("FMC") Agreement No. 201178 are impeding the long-overdue clean-up of the one of the dirtiest and oldest fleets in California. As such, we respectfully request that your agency allow the Ports to clean up the harmful diesel truck pollution at the Ports.

It is our understanding that the Ports have responded in good faith to your agency's April 3, 2008 request for additional information. *See* Cunningham Quickie 5-19-08. As such, your agency has done its due diligence and should allow these programs to proceed. Since the FMC does not have extensive expertise on environmental issues, it may not be aware that diesel exhaust is well known to be hazardous to human health—responsible for 84% of total cancer risk from air toxics in the Los Angeles Region. *See* Draft Multiple Air Toxic Exposure Study III, 6-1 (January 2008) ("MATES III"). In fact, those at greatest risk are workers in diesel industries, such as trucking and rail, and communities located near major sources of diesel pollution, such as ports and freeways. Moreover, the Los Angeles region suffers from some of the most intractable air pollution problems in the nation, and consistently is placed high on the list for the nation's filthiest air. In the Los Angeles region, "the highest risks from air toxics [are] surrounding the port areas." *See* Draft MATES III, 6-2. While not all of the diesel pollution stems from port trucking, it comprises a significant source of impacts to residents adjacent to goods movement facilities and the region in general. After more than a decade of advocacy from environmental and environmental justice groups, the Ports are finally working to clean up truck pollution, and we are concerned that interference from Washington D.C. will greatly hamper this effort.

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If you need further background, we would be more than willing to meet with you face-to-face to discuss the vast public health benefits of cleaning up the port trucking fleet. Please contact Penny Primo at (310) 434-2300 to set up a time when we can meet to discuss the grave health consequences of further delays in cleaning up the port truck fleet.

Sincerely,

David Pettit
Senior Attorney
Natural Resources Defense Council

Tom Politeo /pp

Tom Politeo
Co-Chairman
Sierra Club – Harbor Vision Task Force

Bonnie Holmes-Gen

Bonnie Holmes-Gen
Senior Policy Director
American Lung Association of California

cc via facsimile:

Senator Daniel Inouye
Congressman James Oberstar
Senator Frank Lautenberg
Congressman Elijah Cummings
Senator Barbara Boxer
Senator Dianne Feinstein
Congresswoman Nancy Pelosi
Congresswoman Laura Richardson
Mary Nichols, Chair of the California Air Resources Board
William Burke, Chair of the South Coast Air Quality Management District
David Freeman, President, Board of Harbor Commissioners, Port of Los Angeles
Mario Cordero, President, Board of Harbor Commissioners, Port of Long Beach

BARBARA BOXER
CALIFORNIA

COMMITTEES:
COMMERCE, SCIENCE, AND TRANSPORTATION
ENVIRONMENT AND PUBLIC WORKS
FOREIGN RELATIONS

United States Senate

HART SENATE OFFICE BUILDING
SUITE 112
WASHINGTON, DC 20510-0505
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June 5, 2008

The Honorable Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol St., NW
Washington, DC 20573

Dear Ms. Gregory:

I write to express my support for an expedited review period for the Los Angeles/Long Beach Port/Terminal Administration and Implementation Agreement (FMC Agreement No. 201178.) As you know, both ports have undertaken efforts to craft a port plan that will dramatically improve air quality, reduce congestion, improve working conditions and labor standards for port truck drivers, and strengthen port safety and security. I strongly support the goals of the proposed plan. I want to thank the Federal Maritime Commission for its willingness to work with my office on this issue and look forward to continuing an open dialogue on the Clean Trucks Program as this process moves forward.

It is my understanding that there is good reason to support an expedited review process for the ports' Clean Trucks Program. The Ports are scheduled to begin implementing the initial components of the plan in only a few short months, including the implementation of the Drayage Truck Registry on June 30, 2008 and a ban on pre-1989 trucks effective October 1, 2008. The Ports have conducted public hearings and votes on the Clean Trucks Program, and the overall proposal has garnered overwhelming support from the community.

It is also my understanding from both Ports that over 100 days have passed since the initial filing of the Agreement, and that staff from the Federal Maritime Commission have been actively engaged with port staff for some time on the details of the program. The Ports must be given adequate time to coordinate with all relevant parties on the implementation of the plan to avoid any delays.

The Ports of Los Angeles and Long Beach and the nation cannot afford any delays to the implementation of a Clean Trucks Program. As you are well aware in 2006, the Ports of Los Angeles and Long Beach, together, were responsible for nearly 44 percent of all containerized cargo brought into the U.S. by ship, with an estimated value of nearly $200 billion, and this trade is expected to more than double by the year 2020.

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While both ports need to increase capacity to accommodate growing trade demands, the ports are unable to expand legally without addressing the growing air pollution and health problems generated by the increased vessel and truck traffic.

The California Air Resources Board (CARB) has found that port activity will be responsible for about one-third of the South Coast particulate matter air pollution in 2014, and nearly half of this air pollution by 2020. CARB estimates that particulate matter air pollution alone in the South Coast area is responsible for approximately 5,400 premature deaths, 980,000 lost work days, 2,400 hospitalizations, 140,000 asthma and lower respiratory cases, and a significant increase in cancer risks.

Residents of Southern California cannot afford any further delays to clean air initiatives proposed by the ports without risking the health of millions of children and families. In addition, with trade at the Ports expected to double by 2020, future nationwide impacts in trade appear inevitable if the ports are unable to take the necessary steps to safely expand and complete infrastructure improvements.

I thank you for consideration.

Sincerely,

Barbara Boxer

Barbara Boxer
U.S. Senator

Congress of the United States
Washington, DC 20515

June 9, 2008

The Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, DC 20573-0001

Dear Federal Maritime Commissioners:

We are writing to express our support for the Clean Trucks Program, a groundbreaking green growth initiative approved by the Port of Los Angeles on March 20. This program will produce sustainable environmental and public health improvements, enhance the efficiency and productivity of port trucking, and reduce congestion, while appropriately placing the financial responsibility for operating and maintaining a fleet of clean trucks on the trucking companies that negotiate haul rates instead of on the truck drivers who are trying to make ends meet. For these reasons, we are encouraging the Federal Maritime Commission (FMC) to give this important clean-air proposal full and fair consideration as it moves towards implementation.

We are aware that the FMC has traditionally limited its consideration of port plans to the question of whether it would decrease the supply of transportation services or increase the costs to shippers. However, as our country grapples with unprecedented new environmental, public health and homeland security challenges, we believe the FMC must also prioritize the public health effects and the security of port operations.

In 2007, the Port of LA was responsible for over 22 percent of all containerized cargo brought into the U.S. by ship, with an estimated value of over $100 billion, and this trade is expected to more than double by the year 2020. An upcoming National Geographic Society series on the Port of LA appropriately describes it as "America's Port" because of the vital role it plays in our nation's economy.

Over the past decade, the Port of LA has had difficulty increasing its capacity due to legal challenges based on environmental and public health concerns. Port officials have worked diligently to address air pollution problems in order to move forward with delayed infrastructure projects to increase capacity and port throughput. The Clean Trucks Program is a critical piece of this puzzle. In fact, its passage played a vital role in clearing the environmental challenges that had delayed TraPac, the largest terminal expansion project in years, which will now finally be able to move forward.

The California Air Resources Board (CARB) estimates that particulate matter air pollution in the South Coast area causes approximately 5,400 premature deaths, 980,000 lost work days, 2,400 hospitalizations, 140,000 asthma and lower respiratory cases and a significant increase in cancer risks. CARB also has found that port activity will be responsible for about one-third of the South Coast particulate matter pollution in 2014, and nearly half of this air pollution by 2020 statewide. CARB estimates that air pollution costs $2.3 billion in health care costs annually. The LA Clean Truck program will help decrease pollution in the South Coast area which will have a positive affect on the environment and health of people living and working near the port.

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In order to achieve these environmental and public health improvements, a substantial investment will have to be made. Cleaning up port trucking is a $2 billion problem that requires a sustainable solution so this effort does not have to be repeated in ten years when these 16,000 trucks will need to be replaced again. The LA Clean Truck Program will help ensure that the trucking sector is capable of maintaining a clean fleet of trucks without public subsidies.

Currently five out of six drivers only work for one trucking company at a time and nearly nine in ten drivers own only one truck. These drivers are dependent on the trucking companies for work and after expenses, fuel and insurance, they take home roughly $29,000 per year and struggle to afford routine repairs and upgrades. This business model would make it hard for these drivers to keep up with the technology updates needed to reduce pollution and improve the environment and public health situation near the port

We believe that changes to the port trucking system are vital to creating a sustainable clean truck program. A critical component is the transition away from relying on trucking companies that act as brokers, and to licensed motor carriers which take full responsibility for their vehicles and their workers by hiring them.

The LA Clean Trucks program will actually strengthen competition within the port trucking industry as well as between port trucking and their retail clients. Since port trucking costs are a relatively small component of overall transportation costs, the increased operational costs required by this program will be far outweighed by the overwhelming public benefits.

As the FMC moves forward in its review of the LA Clean Trucks Program, we hope to work with you to ensure we avoid the huge economic, environmental, and public health costs that would result if this vital program is delayed.

Thank you for your consideration.

Sincerely,

Loretta Sanchez
Member of Congress

George Miller
Member of Congress

Barbara Lee
Member of Congress

Bob Filner
Member of Congress

Linda T. Sánchez
Member of Congress

Jane Harman
Member of Congress

Lucille Roybal-Allard
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Lois Capps
Member of Congress

Jim Costa
Member of Congress

FEDERAL MARITIME COMMISSION

Federal Maritime Commission

Washington, D.C.

NR 08-07

FMC Grants Early Clearance to Ports/Terminals Agreement; Calls on San Pedro Ports to File Clean Truck Program

CONTACT: Florence A. Carr, Director, Bureau of Trade Analysis, (202) 523-5796

FOR RELEASE - June 13, 2008

The Federal Maritime Commission announced today that it has concluded review of the *Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement* ("AIA"). The Commission determined to grant expedited review of the agreement, as requested by the agreement parties, allowing the AIA to take effect as of Friday, June 13, 2008.

The AIA contemplates future discussions to determine the extent to which the terminal operators will administer certain aspects of the San Pedro Ports Clean Trucks Program, and the AIA Parties have not yet agreed on implementation of any program referenced thereunder. Accordingly, the Commission concluded that there was no basis at this time to determine that the AIA is likely to result in an unreasonable increase in transportation costs or decrease in transportation services. The Commission noted that its decision today does not foreclose future actions with respect to the AIA, or these Parties' activities under other related agreements, that may contravene the Shipping Act of 1984 ("Shipping Act").

In announcing the Commission's action, Florence A. Carr, Director of the Commission's Bureau of Trade Analysis stated: "The Shipping Act directs the Commission to evaluate the potential impacts of all agreements, both prior to their effectiveness and on an ongoing basis. Under these statutory requirements, further agreements reached pursuant to the AIA, and those related agreements of the Ports of Los Angeles and Long Beach, must be timely filed with the Commission to allow for the competitive review and analysis required by Congress. In addition, the Commission evaluates individual or joint activities to prevent or redress any concerns with respect to statutorily prohibited acts enumerated in section 10 of the Shipping Act. Today's decision letter has again emphasized to the Parties the need to immediately file with the Commission all substantive aspects of the Clean Truck Programs."

* * * * *

Press Contact: Karen V. Gregory (202) 523-5725; e-mail: secretary@fmc.gov

FEDERAL MARITIME COMMISSION

Office of the Secretary
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Washington, DC 20573-0001

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June 13, 2008

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Counsel to the West Coast Marine Terminal Operator Agreement, FMC No. 201143

Re: Los Angeles/Long Beach Port/Terminal Administration and Implementation Agreement, FMC No. 201178

Dear Messrs. Benner and Smith:

This is to inform you that the Federal Maritime Commission ("Commission" or "FMC") has determined to grant the Parties' request for expedited review and to allow the early effectiveness of the Los Angeles/Long Beach Port/Terminal Administration and Implementation Agreement, FMC No. 201178 ("AIA" or "Agreement") as of the date of this letter. After completing its analysis, the Commission concluded that there was no basis at this time to determine that the Agreement is likely to result in an unreasonable increase in transportation costs or decrease in services.

The Parties' Request for Expedited Review was received by the Commission on May 28, 2008. In their request, the Parties claim that early effectiveness is warranted because "[k]ey requirements of the Ports' Clean Truck Program become effective on June 30, 2008 (Drayage Truck Registry), August 1, 2008 (Compliance Reader Installation) and October 1, 2008 (Pre-1989 Truck Bans and Clean Truck Fee)." However, we note that these "key requirements" have not yet been reflected in the Ports' Agreement (FMC No. 201170), contrary to the requirement of the Commission's regulations and the Shipping Act of 1984. Based on previous discussions and correspondence, the Ports should appreciate that they are required to file amendment(s) to their Agreement (FMC No. 201170) reflecting the Ports' agreement on these programs well in advance of their desired implementation dates.

The Commission has no wish to delay unnecessarily the implementation of programs to address air quality issues at the Ports of Los Angeles and Long Beach. We believe the Commission has demonstrated that sentiment with our approval of the instant request for expedited review. The Commission does, however, have important statutory duties to ensure that complete agreements are on file and to thoroughly analyze every agreement's potential impact. It remains the Commission's intention to ensure that further agreements reached pursuant to the AIA, and those related agreements of the Ports of Los Angeles and Long Beach, are timely filed with the Commission to allow for the review and analysis required by Congress under section 6 of the Shipping Act. The Commission also takes seriously its obligation to evaluate individual or joint activities to prevent or redress any concerns with respect to statutorily prohibited acts enumerated in section 10 of the Shipping Act.

We also wish to expressly apprise the Parties of their duty to file minutes of all meetings pursuant to the Commission's regulations at 46 C.F.R. § 535.704. Commission staff is prepared to explain the requirements of this regulation if any of the Parties have questions. Additionally, we wish to remind you that when and if the Parties reach further determinations pursuant to the Agreement, the Director of the Bureau of Trade Analysis may determine that the Parties will be subject to additional reporting requirements related to those agreements. The staff of the Bureau of Trade Analysis encourages you to discuss with them possible options for the electronic filing of this information.

Sincerely,

Karen V. Gregory

Karen V. Gregory
Assistant Secretary

FOR IMMEDIATE RELEASE
Contact: Arley Baker
(310) 732-3093
abaker@portla.org

PORT OF LOS ANGELES' CLEAN TRUCK PROGRAM CONCESSION AGREEMENT AND APPLICATION ARE NOW AVAILABLE FOR LICENSED MOTOR CARRIERS

Port Will Hold Informational Workshops for Licensed Motor Carriers

San Pedro, Calif. – July 18, 2008 – The Port of Los Angeles today posted its Clean Truck Program Concession **Agreement** and **Application**. The Concession Agreement is designed to encourage an evolution of the Port drayage market towards an asset-based system in which Licensed Motor Carriers (LMCs) enter into drayage concession agreements with the Port and are responsible for owning and maintaining the trucks used to perform drayage services at the Port.

"We are pleased to bring to the trucking community a Concession Agreement and Application that reflect a truly strategic approach to cleaning the air, strengthening safety and security of the port, and creating a port drayage system that will be economically viable and environmentally sustainable for the long haul," said Port of Los Angeles Executive Director Geraldine Knatz, Ph.D.

As operators with a vested interest in maintaining their truck assets, Port of Los Angeles concessionaires will run trucks that generate lower emissions and retain maximum value over the long haul. They also will have more incentive to pursue business efficiencies that are common within today's trucking industry, like operating fewer trucks to accomplish the same number of container hauls – one of the easiest ways to reduce pollution and truck congestion.

Upcoming Licensed Motor Carrier Workshops

To provide an overview of the Port's Clean Truck Program, Concession Agreement and Application, the Port will be holding three workshops for Licensed Motor Carriers at Banning's Landing Community Center, located at 100 East Water Street in Wilmington. The first workshop will take place from 9:00 am to 11:00 am on July 24th. The second and third workshop will be

held at the same location on July 30th, from 9:00 am to 11:00 am, and from 1:00 pm to 3:00 pm.

The LMC workshops will cover the following information: Truck Ban (beginning Oct. 1, 2008) and Drayage Truck Registry (DTR); Concession Agreement and Application and subsequent requirements like truck drivers with TWIC and phased-in employees; Port-subsidized truck replacement grants and Prop 1B funding requirements; and the Port of Los Angeles' Truck Scrap Buyback Program. Staff will be on hand at each event to present the program and answer questions.

Click the links below for more information:

- **Los Angeles Harbor Commission Approves Landmark Clean Truck Program**
- **Clean Truck Program Fact Sheet**
- **Clean Truck Program Overview and Benefits**

The Port of Los Angeles, also known as "America's Port," has a strong commitment to developing innovative strategic and sustainable operations that benefit the economy and the quality of life for the region and the nation it serves. A recipient of numerous environmental awards, including the U.S. Environmental Protection Agency's 2007 Clean Air Excellence Award, the Port of Los Angeles is committed to innovating cleaner, greener ways of doing business. As the leading seaport in North America in terms of shipping container volume and cargo value, the Port generates 919,000 regional jobs and $39.1 billion in annual wages and tax revenues. A proprietary department of the City of Los Angeles, the Port is self-supporting and does not receive taxpayer dollars. The Port of Los Angeles - A cleaner port. A brighter future.

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News Release

Clean Trucks Concession Applications Available

Trucking agreements outline pollution-reducing requirements

July 18, 2008

Concession applications are now available for trucking firms that wish to provide drayage services at the Port of Long Beach. With a concession from the Port, trucking firms will become part of the landmark Clean Trucks Program, which will reduce air pollution from trucks by 80 percent by 2012.

The application is available at www.polb.com/cleantrucks.

The concession agreement requires drayage trucking firms (licensed motor carriers) to:

- Register their trucks and drivers with the Port
- Ensure that drivers have federal Transportation Worker Identification Credentials (TWIC)
- Ensure that drivers adhere to local parking and travel restrictions
- Certify that the trucks they dispatch to terminals comply with Clean Trucks emissions guidelines.

The concession agreement is the core of the Clean Trucks Program insuring that trucking firms adhere to pollution-reducing requirements at the risk of losing their right to operate in the Port.

Under the Port of Long Beach Clean Trucks Plan, trucking companies are permitted to hire employees or contract with independent owner-operators. Licensed motor carriers are required to pay a one time application fee of $250 plus an annual fee of $100 per truck.

"We encourage trucking firms to sign up quickly and join us in this landmark clean-air program," said Port Executive Director Richard Steinke. "We need to move quickly to improve air quality while assuring that trade will continue to move smoothly."

Under the Clean Trucks air quality improvement program, older big-rigs will be phased out of drayage service at the Port of Long Beach starting with a ban on 1988 and older trucks starting on October 1, 2008. By January 1, 2012, trucks that do not meet 2007 federal emission standards will be banned from the Port.

To speed the transition to new, clean trucks, a $35 per twenty-foot container fee will be collected on all trucked cargo beginning October 1, 2008, to help pay for the $2 billion

replacement of nearly 16,800 trucks that serve the ports. The Port will be offering truckers grants and a leasing program to acquire new trucks.

Contact: Art Wong, Assistant Director of Communications, (562) 619-5665 or mailto: wong@polb.com?subject=Clean Truck Concession Application; John Pope, Media Relations Manager, (562) 590-4126 or pope@polb.com

recommendations, research materials, or other relevant documentary material that either (a) supports an employee mandate requirement as necessary to achieving the CTP air quality goals, or (b) indicates what the impact on CTP air quality goals would be in the absence of an employee mandate? If so, provide those documents.

Response to Question #32: See response to Question 30A, above.

Question #33: Identify the dates of any outreach meetings that POLA and/or POLB have participated in, in the last six months, with LMCs that do not normally serve their Ports, regarding the possibility of those companies undertaking drayage services at POLA and/or POLB. Identify POLA or POLB participants in any such meetings, the trucking companies that participated, the nature and extent of any negotiations that took place, and the types and amounts of any incentives discussed.

Response to Question #33: The Port of Los Angeles held four organized outreach meetings with LMCs in July, 2008. One meeting on July 23, 2008 was held by John Holmes, Chris Cannon, Michael DiBernardo and Tom Shurstad, with approximately 25 LMCs, primarily regional and national companies not yet involved in local port drayage but that had previously expressed an interest to the Port. Three other meetings were held, one on July 24, 2008, and two on July 30, 2008 by John Holmes, Chris Cannon, Michael DiBernardo and Tom Shurstad, with collectively approximately 200 LMCs, primarily local companies already in the local port drayage business. The Port of Long Beach participated in the following outreach meetings with LMCs on July 29 and 31, 2008. Also, Chris Lytel had the following meetings: on May 14, he met with Patti Senecal and several trucking companies; on May 20, he met with Industry on the Trucking Program; on May 28, he had lunch with ATBS & Fenway Partners; on July 29, The Port of Long Beach held an LMC workshop in the Board Room; on August 20, he had a meeting with Mike Fox; and on September 4, he had a meeting with Patti Senecal & trucking companies.

In addition, in July and August 2008, Port of Los Angeles staff had telephone discussions with approximately 800 local port drayage LMCs and approximately 50 regional and national LMCs not yet involved in port drayage, and had individual meetings with approximately 30 LMCs from both categories. Meetings were held in August and September, 2008 with 11 regional and national companies not yet involved in Port drayage: Arkansas Best Freight, C.R. England, J.B. Hunt, Knight, Link, May, Pacer, Roadlink, Schneider, Swift, and Werner. In addition, meetings or telephone discussions were held with many of the concession applicants (for a list please see http://www.portoflosangeles.org/CAAP/CTP_Concession_Application_Log.pdf) and those that submitted Letters of Intent for Incentives.

Incentives are offered by the Port of Los Angeles on the publicly-posted terms approved by the Board of Harbor Commissioners on August 21, 2008 (see http://www.portoflosangeles.org/Board/2008/August/082108_ctp_item1.pdf) and no specific offers were made at the above meetings. See the answer to question 27.

To the extent this question relates to LMCs with trucks seeking occasional access to the Ports, see response to Question 20 above, regarding Day Passes.

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AMENDED AND RESTATED

AGREEMENT NO. 201170 - 001

THE LOS ANGELES AND LONG BEACH PORT INFRASTRUCTURE AND ENVIRONMENTAL PROGRAMS COOPERATIVE WORKING AGREEMENT

COOPERATIVE WORKING AGREEMENT
[as defined in 46 C.F.R. § 535.104(i)]

EFFECTIVE
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Federal Maritime Commission

The Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement
FMC Agreement No. 201170

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The Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement
FMC Agreement No. 201170

A COOPERATIVE WORKING AGREEMENT BETWEEN THE CITY OF LOS ANGELES AND THE CITY OF LONG BEACH

ARTICLE I - FULL NAME OF THE AGREEMENT

This Agreement shall be known as the Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement, hereinafter referred to as the "Agreement".

ARTICLE II - PURPOSE OF THE AGREEMENT

The purpose of the Agreement is to promote cooperation, openness and joint action through means of discussion, consultation, development of consensus and agreement between the Cities of Los Angeles and Long Beach ("the Parties") for the establishment and implementation of programs and strategies to (i) improve port-related transportation infrastructure, (ii) increase cargo movement efficiencies and port capacities, (iii) improve the safety and security of port terminals and properties, and (iv) decrease port-related air pollution emissions in the San Pedro Bay area.

The Ports of Los Angeles and Long Beach are located in California's South Coast Air Basin, an area with one of the worst air quality problems in the nation. Collectively, tenant operations at the two ports are significant contributors to the air quality problem and, historically, each port has addressed the issue separately by implementing a wide range of environmental initiatives. Inconsistent or conflicting transportation projects and environmental measures implemented by each city may have unintended or counterproductive effects on air quality improvements. Therefore, through the authority of this Agreement, the Parties seek to accommodate projected trade growth volumes through implementation of jointly approved transportation infrastructure improvement plans and environmental projects. The goal for these joint actions is to increase the efficiency of cargo movement through the port area while concurrently addressing adverse environmental impacts such as air pollution emissions and improving port area security and safety. In addition, the Parties, the goods movement industry and the communities

will benefit from the Parties' cooperation in measures to ensure appropriate physical security, access control, cargo handling security and intermodal cargo transportation (rail and drayage trucks).

ARTICLE III - PARTIES TO THE AGREEMENT

The parties to the Agreement are the City of Los Angeles and the City of Long Beach, municipal corporations, acting by and through their respective Boards of Harbor Commissioners.

ARTICLE IV - GEOGRAPHIC SCOPE OF THE AGREEMENT

This Agreement covers the geographic scope of the ports of Los Angeles and Long Beach, California.

ARTICLE V - OVERVIEW OF AGREEMENT AUTHORITY

A. The Parties may from time to time meet to confer, discuss, exchange information and agree on a voluntary basis with respect to rates, charges, operating costs, practices, legislation, regulations, and terminal operations, including trucking, rail and vessel operations, regarding matters for the funding, establishment and construction of (i) port-related transportation infrastructure projects, (ii) environmental programs, and (iii) safety and security programs. Transportation infrastructure and environmental projects may include, but are not limited to, truck and engine replacement programs, engine and equipment fuel use and emissions standards and incentives, and bridge, rail and roadway improvements. The parties are also authorized to discuss potential impacts resulting from policies adopted under the Clean Air Action Plan that may apply to truck and rail sectors outside of the port properties. Safety and security programs may include, but are not limited to, the development and implementation of requirements and common security systems at access and egress points in port terminals.

B. The Parties may seek input and gather information on matters concerning the establishment and implementation of programs and strategies to improve port-related transportation infrastructure, environmental, safety and security projects and programs from users of the services and facilities provided by the Parties to this Agreement. Ocean common carriers and marine terminal operators may provide information to the Parties, as well as attend and participate in public meetings as set forth in the Ralph M. Brown Act, California Government Code, Section 54950 *et seq.*, but shall not participate in any decisions made by the Parties to the Agreement. Information sharing and attendance and commenting in public meetings by ocean common carriers and marine terminal operators shall not be deemed participation in the deliberation and decision making authority granted by this Agreement.

C. It is understood that the Parties may in the future by amendment to this Agreement, subject to the requirements of the Shipping Act of 1984, as amended, broaden the authority regarding this agreement.

D. The Parties acknowledge that joint projects and programs under this Agreement may require approval from one or both of the Parties' respective boards of commissioners and city councils. The Parties contemplate entering into joint agreements before undertaking any joint projects or programs, which shall, to the extent required by the Shipping Act of 1984, as amended, be filed with the Federal Maritime Commission.

E. The Parties agree to discuss, exchange information, cooperate and, to the extent each Port in its sole discretion deems appropriate, coordinate the adoption and implementation of programs to reduce truck emissions and to improve Port safety and security (Clean Truck Programs). The Clean Truck Programs implemented by the Ports may include the following:

1. Adoption of drayage truck deadlines, whereby Port terminal operators grant access to Port

terminals to drayage trucks that meet U.S. EPA emissions standards for particular model year trucks. Specific deadlines, model year and emissions thresholds, exemptions and administrative procedures shall be prescribed in each Port's tariff or otherwise noticed to the public, to the extent consistent with applicable law.

2. Adoption of a clean truck fee, assessed on containerized merchandise entering or leaving the Ports by drayage truck, to be paid by the cargo owner, for a fund to be used by the Boards of Harbor Commissioners exclusively for the replacement and retrofit of drayage trucks that service the Ports. The level of the fee, exemptions, and rules and requirements for its collection shall be prescribed in each Port's tariff or otherwise noticed to the public, to the extent consistent with applicable law.

3. Adoption of concession programs with Licensed Motor Carriers, whereby Port terminal operators shall grant access to Port terminals to those drayage trucks that are authorized under a concession agreement with the Ports. The Ports may discuss and, to the extent each Port in its sole discretion deems appropriate, coordinate concession requirements for Licensed Motor Carriers, including: environmental compliance; vehicle and driver safety and security; parking and routes in the community near the Ports; vehicle maintenance; driver credentialing and other security measures; driver licensing, qualifications and requirements; truck identification systems; assessment of concession-related fees; insurance; and compliance with other applicable laws, rules and regulations. The specific requirements for each Port's concessionaires, including the concession agreements themselves; shall be maintained on each Port's websites, at www.portoflosangeles.org and www.polb.com.

F. The parties may agree to discuss, exchange information, cooperate and, to the extent each Port

in its sole discretion deems appropriate, coordinate the adoption of the adoption of infrastructure fees assessed on containers to support an infrastructure fund, which funds shall be used to fund approved infrastructure projects approved by each Port's Board of Harbor Commissioners. The level of any fee that may be agreed upon, any exemptions, and any rule or requirement for its computation and collection shall be prescribed in each Port's tariff or otherwise noticed to the public to the extent consistent with applicable law.

G. The parties may agree to discuss, exchange information, cooperate and, to the extent each Port in its sole discretion deems appropriate, coordinate the adoption of the adoption of environmental programs to promote the reduction of air pollution from ocean vessels. The rules for any fuel or vessel speed that may be agreed upon, any incentives, and any rule or requirement for its computation and collection shall be prescribed in each Port's tariff or otherwise noticed to the public, to the extent consistent with applicable law.

H. The parties may discuss, agree, cooperate and share information regarding the implementation and evaluation of their Clean Truck Programs, infrastructure fees, and ocean vessel programs, including the adoption of standards for recordkeeping, databases (including development of a registry of drayage trucks), hardware and software, and other systems for identifying and granting access to drayage trucks, and may retain common vendors (either individually or jointly) to assist with implementation of the Programs, including administration and information technology-related functions. The parties may retain a third party vendor to administer the Ports' respective concession programs.

I. Nothing in this agreement shall be interpreted to require a Port to obtain approval or consent from the other Port before making any changes to its own Clean Truck Program, infrastructure fee requirements, ocean vessel programs, or any tariff requirements established thereunder.

ARTICLE VI - OFFICIALS OF THE AGREEMENT AND DELEGATION OF AUTHORITY

A. Co-Chairs

Two Co-Chairs shall call and preside over all meetings held pursuant to this agreement. The two Co-Chairs will consist of one individual representing the City of Los Angeles and one individual representing the City of Long Beach. Each Party shall have the authority to appoint its respective Co-Chair and each Party may appoint a replacement Co-Chair upon written notice to the other Party. Any future appointments of Co-Chair representatives will be effective upon filing notice with the Federal Maritime Commission. The initial Co-Chairs are:

1) City of Los Angeles Harbor Department Executive Director Geraldine Knatz, Ph.D., whose address is 425 S. Palos Verdes Street, San Pedro, California 90731.

2) City of Long Beach Harbor Department Executive Director Richard Steinke, whose address is 925 Harbor Plaza, Long Beach, California 90802.

B. Secretary

The parties to this Agreement shall select a Secretary from among the party members to be responsible for all administrative tasks as directed by the parties hereto. The initial Secretary of this Agreement is the Los Angeles City Attorney's Office, whose address is 425 S. Palos Verdes Street, San Pedro, California 90731. The Secretary shall keep a minute record of the proceedings of the meetings of (i) the Boards of Harbor Commissioners of the Cities in which actions are taken related to the subject matter of this Agreement, (ii) Clean Trucks Program Executive Committee, (iii) the Clean Trucks Program Coordination Committee. Copies of the minute records, to the extent they reflect activities

subject to the jurisdiction of the Federal Maritime Commission and any other exchanged materials shall be furnished by the Secretary to the Federal Maritime Commission and to each Party. These minute records, to the extent they reflect activities subject to the jurisdiction of the Federal Maritime Commission, shall be filed in accordance with the requirements of the Federal Maritime Commission's regulations and shall be certified by the Secretary as to their accuracy.

C. Committees

The Co-Chairs may appoint such committees as may, from time to time, be necessary, and such committees may meet from time to time as may be necessary to accomplish their assignments. At meetings held by these committees, the Co-Chairs and the Secretary shall be entitled to participate *ex officio*.

1. Each such committee shall keep accurate minutes of each meeting, whether in person or by telephone conference, recording subjects discussed and recommended actions, and such minutes shall be promptly filed with the Co-Chairs. Each such committee shall also make an oral report of subjects discussed and views expressed within the committee to the full membership at each meeting, same to include all activities since the last report to the membership.
2. Any committee formed under this article shall be entitled to have and exercise all the applicable rights, privileges and processes as set out in this Agreement, and which are available to the parties of the Agreement as a whole.

D. Meetings

1. Meetings of the parties to this Agreement may be called by either member commencing on the effective date of this Agreement.

2. Meetings may be held in person or by telephone or video conference call, or other means agreed to by the members.

ARTICLE VII - MEMBERSHIP AND WITHDRAWAL

The City of Los Angeles and the City of Long Beach, acting by and through their respective Boards of Harbor Commissioners, are the Parties to this Agreement, and either party may withdraw from membership upon ninety (90) days written notice to the other party. If either party withdraws from the Agreement, the Federal Maritime Commission shall be promptly informed of such termination, and the Agreement shall become ineffective upon said filing with the Federal Maritime Commission.

ARTICLE VIII - DURATION AND TERMINATION OF THIS AGREEMENT

The term of this Agreement shall be until December 31, 2012.

In the event that either party elects to terminate this Agreement, the Parties shall conclude their current activities relating to the Agreement and return all documents evidencing shared information to the originating party.

Any termination of this Agreement or suspension of future performance under this Agreement shall not relieve the Parties of liability for any obligation previously incurred.

ARTICLE IX - AMENDMENTS

This Agreement may be amended at any meeting provided that such amendment is filed with the Federal Maritime Commission and effective under the Shipping Act of 1984, as amended.

ARTICLE X - FILING AGENT

Each of the Parties appoints C. Jonathan Benner of Troutman Sanders LLP, 401 Ninth St. NW, Washington, DC 20004, (*jonathan.benner@troutmansanders.com*), as its representative authorized on

their behalf to file this Agreement, and any modifications or amendments to this Agreement with the Federal Maritime Commission, and to make all other filings on their behalf with the Commission relating to this Agreement, including the filing of minutes required by 46 C.F.R. § 535.704.

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IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date to the left of their signatures.

This Agreement and each amendment to or republication of this Agreement may be executed in one or more counterparts, and all of such counterparts shall constitute one Agreement, notwithstanding that all Parties are not signatory to the same counterpart.

THE CITY OF LOS ANGELES, acting by and through its Board of Harbor Commissioners

Dated: 7/24/08

By: Geraldine Knatz
Geraldine Knatz, Ph.D.
Executive Director

Attest: Rose M. Dwarshak
Board Secretary

APPROVED AS TO FORM

July 24, 2008
ROCKARD J. DELGADILLO, City Attorney

By Heather M. McCloskey
Heather M. McCloskey, Deputy

THE CITY OF LONG BEACH, acting by and through its Board of Harbor Commissioners

Dated: _____

By: _____
Richard D. Steinke
Executive Director

Attest: _____
Board Secretary

APPROVED AS TO FORM

_____, 2008
ROBERT E. SHANNON, City Attorney

By _____
Dominic Holzhaus, Principal Deputy

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date to the left of their signatures.

This Agreement and each amendment to or republication of this Agreement may be executed in one or more counterparts, and all of such counterparts shall constitute one Agreement, notwithstanding that all Parties are not signatory to the same counterpart.

THE CITY OF LOS ANGELES, acting by and through its Board of Harbor Commissioners

Dated: _____

By: _____
Geraldine Knatz, Ph.D.
Executive Director

Attest: _____
Board Secretary

APPROVED AS TO FORM

_____, 2008
ROCKARD J. DELGADILLO, City Attorney

By _____
Heather M. McCloskey, Deputy

THE CITY OF LONG BEACH, acting by and through its Board of Harbor Commissioners

Dated: 7-28-08

By _____
Richard D. Steinke
Executive Director

Attest: C. J. Mike Walter
Board Secretary

APPROVED AS TO FORM

7/24, 2008
ROBERT E. SHANNON, City Attorney

By _____
Dominic Holzhaus, Principal Deputy

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

August 1, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Coast Guard and Maritime Transportation

FROM: Subcommittee on Coast Guard and Maritime Transportation Staff

SUBJECT: Hearing on "Port Development and the Environment at the Ports of Los Angeles and Long Beach"

PURPOSE OF HEARING

The Subcommittee on Coast Guard and Maritime Transportation will meet on August 4, 2008, to examine the efforts of the Ports of Los Angeles and Long Beach to meet infrastructure needs, including through the assessment of a container fee that will be applied to containers passing through the port and then expended on projects intended to improve infrastructure in and around the port areas.

The Subcommittee will also consider the ports' efforts to reduce emissions from port-related activities, including from trucks that provide drayage services at the ports as well as from vessels in transit to and from the ports. Specifically, the hearing will examine the ports' adoption of the San Pedro Bay Ports Clean Air Action Plan, including the Plan's "Clean Trucks" program. Under the Clean Trucks program, the Ports of Los Angeles and Long Beach plan to assess a fee on each container loaded in the port to generate the funding necessary to replace the entire fleet of trucks providing drayage services at the ports with clean trucks meeting 2007 federal emissions standards.

BACKGROUND

Overview of the Ports of Los Angeles and Long Beach (LA/LB)

The Ports of Los Angeles and Long Beach are adjacent port facilities located on San Pedro Bay in southern California. Together, they constitute the fifth busiest port complex in the world, moving some $260 billion in total trade, including handling 15.7 million 20-foot containers (commonly referred to as twenty-foot equivalent units or TEUs) in 2007 (approximately 40 percent

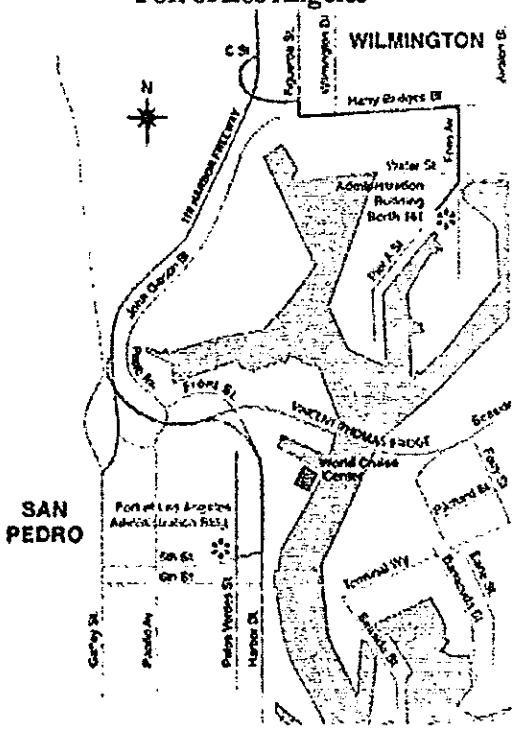
of all the containers entering the United States). In 2007, the Ports of Los Angeles and Long Beach received 5,881 vessel calls – a decline of 3 percent in total vessel calls under the previous year.[1]

The Port of Los Angeles

The Port of Los Angeles is the busiest seaport in the United States. Its port facilities cover approximately 7,500 acres along 43 miles of waterfront property; these facilities employ approximately 16,000 people. The Port of Los Angeles is a department of the City of Los Angeles; it is managed by an executive director and administered by a five-member Board of Harbor Commissioners.

In calendar year 2007, the Port of Los Angeles handled 8.4 million TEU containers – which was a slight decline below the port's container traffic in 2006. In fiscal year 2007, the port handled a total of 190.1 million metric revenue tons of cargo, of which 171.9 million metric tons was general cargo.

Port of Los Angeles

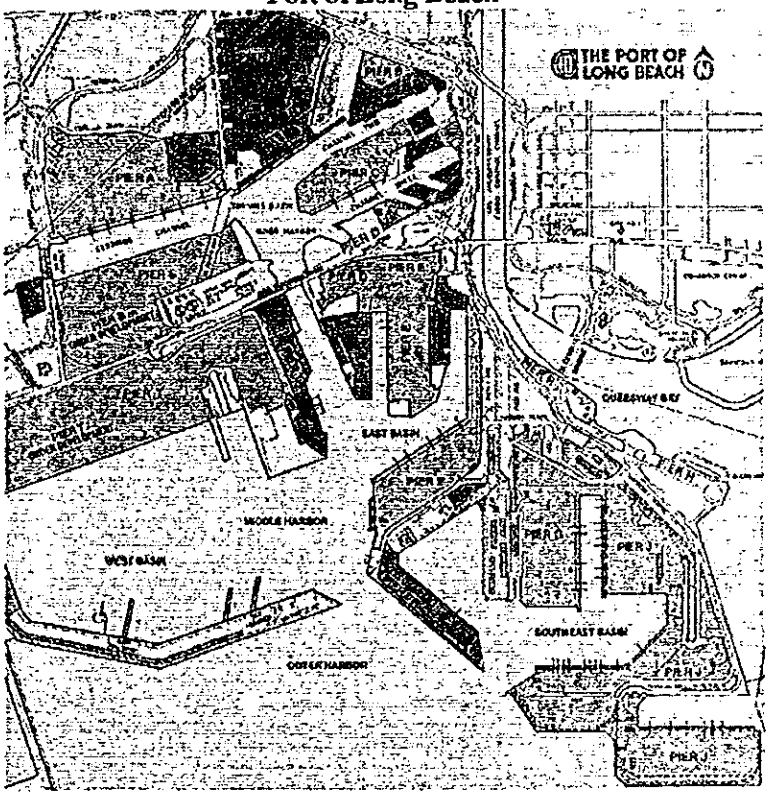


[1] Chris Phillips, "Regional Report: Los Angeles and Long Beach," *Pacific Maritime Magazine*, June 2008.

The Port of Long Beach

The Port of Long Beach is the second busiest port in the United States. It encompasses 10 piers located on more than 3,000 acres of land. In 2007, the port handled more than 7.31 million TEU containers and a total of 87 million metric tons of cargo valued at $140 billion. The Port of Long Beach is managed by the Long Beach Harbor Department, part of the city of Long Beach. The Harbor Department is managed by a five-member Board of Harbor Commissioners.

Port of Long Beach



Container Fees

The Ports of Los Angeles and Long Beach have identified extensive infrastructure needs in and around the port facilities, including the Gerald Desmond Bridge Replacement, the SR-47 Expressway, the Navy Way/Seaside Avenue Interchange, the South Wilmington Grade Separation,

the I-110 Connectors Program, and the development of an on-dock rail system. In an effort to generate revenue to support the development of this infrastructure, the Ports of Los Angeles and Long Beach have approved an "infrastructure cargo" fee that will be applied to containers moving through the ports. Additionally, the State of California is considering legislation to create a container fee at the Ports of Los Angeles, Long Beach, and Oakland which would support infrastructure projects as well as projects intended to mitigate the environmental impacts of port operations. These fees are described in more detail below.

Ports of Los Angeles and Long Beach Infrastructure Fees

Beginning January 1, 2009, the ports of Los Angeles and Long Beach will each assess an "infrastructure cargo" fee on containers moving through the ports to support. The fees approved by ports are expected to be $15 per 20-foot TEU in 2009 – but the fees can fluctuate based on the funding needs of infrastructure projects in progress. A fact sheet authored by the Port of Los Angeles anticipates that the fee will grow to $18 in 2010 and 2011 but could fall to $14 in 2012. The fee is expected to raise approximately $1.4 billion to support designated infrastructure projects.

California State Container Fee

California is considering legislation that would create a State-imposed container fee. According to an analysis of SB 974 as amended on July 14, 2008 (Senate third reading) produced by the California Assembly, the legislation would require the Ports of Los Angeles, Long Beach, and Oakland to begin collecting a container fee of up to $30 per 20-foot TEU by January 1, 2009. The analysis indicates that 50 percent of the funds generated through this fee would be utilized to fund projects that would contribute to congestion relief and improve the flow of containerized cargo, while the other half of the funding would be utilized to fund projects that mitigate air pollution created by the movement of cargo through the ports. SB 974 also authorizes the ports that collect these fees to bond against the fees collected to finance the projects for which the funds are authorized to be expended. The analysis of SB 974 indicates that the container fees collected by the Ports of Los Angeles and Long Beach will generate approximately $100 million in 2008 to 2009 – and will generate approximately $340 million annually in each year after 2009.

In its analysis of SB 974, the Assembly notes that critics have suggested that imposition of the container fee the legislation would create may violate the Commerce Clause of the United States Constitution. The Commerce Clause, found in Article I, Section 8, reads in part:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
>
> To borrow money on the credit of the United States;
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Regarding this issue, the Assembly analysis of SB 974 states that a 2005 opinion provided by the Assembly's Legislative Counsel concluded "it is our opinion that a court faced with the question would find that the charge proposed is a valid regulatory fee imposed under the police power of the state, as long as the amount of the charge assessed does not exceed the reasonable cost of providing the services described, and that amount bears a reasonable relationship to the burdens created by the marine terminal operators."

As of July 22, 2008, SB 974 had passed the California Assembly and awaited final action by the California Senate.

In their report "Cargo on the Move Through California: Evaluating Container Fee Impacts on Port Choice," dated July 28, 2006, Dr. James Corbett, Dr. James Winebrake, and Erin Green argue that imposition of a container fee of up to $30 per TEU would increase voyage costs to these ports by between 1.5 percent and 2.5 percent on average, resulting in ship diversions of less than 1.5 percent.

Air Emissions at the Ports of Los Angeles and Long Beach

Ships are a major source of polluting air emissions in California – and the port complex of Los Angeles/Long Beach is the largest single source of polluting air emissions in southern California. According to the South Coast Air Quality Management District (SCAQMD), ships generate 70 percent of the sulfur dioxide emissions in that management district. The SCAQMD also reports that ships traveling along the southern California coast generate more emissions of nitrogen oxides than are emitted from all of the power plants and refineries in that area combined.

Further, the shipping lanes that ships traverse to reach the ports of Los Angeles and Long Beach bring them close to the coasts of Ventura and Santa Barbara counties – causing significant air pollution in these counties. The Santa Barbara Air Pollution Control District estimates that ships are the sources of more than 40 percent of all nitrogen oxides generated in that county.

The trucks that serve the Ports of Los Angeles and Long Beach are also a significant source of polluting emissions. According to one source, approximately 10 percent of total emissions from the port complex and port-related activities come from trucks[2]. However, according to the California Air Resources Board (CARB), the particulate matter released from diesel is the greatest single threat to public health – and 66 percent of diesel particulate matter released as part of port-related activities originates from trucks. CARB indicates that in California, diesel particulate matter accounts for up to 70 percent of the cancer risk associated with air pollution.

San Pedro Bay Ports Clean Air Action Plan

Together, the Ports of Los Angeles and Long Beach have adopted a plan to reduce polluting air emissions at the ports called the San Pedro Bay Ports Clean Air Action Plan. Full implementation of the plan's components is expected to require the combined expenditure of billions of dollars from all participating sources, including the ports, the State of California, and industries that work in and around the ports of Los Angeles and Long Beach. The plan's

[2] Jon Haveman and Christopher Thornberg, "Clean Trucks Program: An Economic Policy Analysis" Beacon Economics, February 2008.

components are expected to cut emissions of particulate matter from port-related sources by 47 percent within five years. The plan will also reduce emissions of nitrogen oxides by 12,000 tons per year and reduce emissions of sulfur oxides by 8,900 tons per year.

The specific components of the plan include the following:

- Requiring the use of clean diesel trucks at the ports (the "Clean Truck" initiative).
- Requiring the use of low sulfur fuels during transits close to the ports and requiring reductions in transit speeds – and providing shore-side electricity to vessels docked at ports (so that they do not have to idle their engines to generate electricity).
- Replacing or retrofitting cargo-handling equipment to meet stricter air emissions standards.
- Requiring the use of cleaner locomotives in the port complexes, including requiring the use of cleaner fuels and equipment that treats the exhaust produced by locomotives.

Several of these plan elements are discussed in more detail below.

Clean Truck Programs

The San Pedro Bay Ports Clean Air Action Plan includes as one of its centerpieces the implementation by the Port of Los Angeles and the Port of Long Beach of Clean Truck programs, which are intended to reduce the air pollution emitted by trucks used in port properties by more than 80 percent below current emissions levels. The programs will achieve these reductions by replacing (or retrofitting) as many as 16,000 trucks by the year 2012.

The Clean Truck programs developed by each of the Ports of Los Angeles and Long Beach are described in more detail below. The two plans are similar – but not identical – and individual trucking companies wishing to carry cargo in each port must enter into a separate concession agreement with each port.

Port of Los Angeles Clean Truck Program

Under the terms of the Clean Truck program adopted by the Port of Los Angeles, beginning October 1, 2008, trucks built before 1989 will be forbidden from entering the Port of Los Angeles. Beginning January 1, 2010, trucks built before 1993 will be banned from the port together with all trucks built between 1994 and 2003 that have not been retrofitted with emissions control technologies. Beginning January 1, 2012, any truck not in compliance with the 2007 Federal Clean Truck Emissions Standard will be forbidden from entering the port.

Only Licensed Motor Carriers (LMC) who have "direct control over employee drivers" will be eligible to receive a concession agreement from the Port of Los Angeles – though the employment requirements will be phased in between 2008 and 2012 (for example, 20 percent of an LMC's drivers must be employees of the LMC by the end of 2009). Individual truck owner-operators that are not LMCs will not be eligible to receive concessions at the Port of Los Angeles – but they will be eligible to operate at the port until the employment requirement is fully phased in to effect.

LMCs will be required to pay $2,500 for a five-year concession; they will also be required to pay an annual fee of $100 for each truck they operate. Concessionaires must meet specified safety and security standards and hold required licenses and insurance policies.

Concessionaires will be eligible to receive grants from the Port of Los Angeles Clean Truck Fund (described below) to cover up to 80 percent of the cost of purchasing a 2007 standard diesel truck or a truck that runs on LNG. Concessionaries purchasing a 2007 diesel truck with funding from the Clean Truck Fund must turn in an old truck to be scrapped. Further, only trucks sold by vendors authorized to participate in the Clean Truck Program will be eligible to be purchased through the assistance provided to concessionaires.

Entities that do not receive funding for the purchase of a new truck will be eligible to receive $5,000 for every truck built prior to 1989 that they turn in for scrapping. Additionally, certain older trucks will be eligible to receive funding to cover the installation of equipment that will make emissions compliant with the 2007 emissions standards.

Beginning October 1, 2008, the Port of Los Angeles will collect a "clean truck fee" of $35 from cargo owners for each 20-foot TEU loaded in the port; this fee will not apply to cargo moving on a train or cargo moved from one terminal to another terminal within the port complex. The fee will be collected until 2012, when the entire fleet of trucks serving the Port of Los Angeles will be required to meet 2007 emissions standards. The funds collected from this fee will be deposited in a Clean Truck Fund and will be used to assist LMCs in purchasing clean trucks. Trucks privately funded by LMCs that meet the requirements of the Clean Truck program will be exempted from the container fee.

According to data issued by the Port of Los Angeles, there are approximately 1,000 LMCs currently coordinating the drayage provided by 17,000 owner-operator truckers in the Port of Los Angeles. The Port states that this is "a financially unstable, inefficient system that perpetuates the use of cheap, high-polluting and poorly maintained trucks." The Clean Truck Program seeks to remedy this problem by instituting a concession plan that "establishes a contractual relationship between the Port and the licensed motor carriers to provide drayage services under guidelines meeting the Port's business objectives." The Port of Los Angeles claims that this will benefit truck drivers by "freeing drivers from the burden of purchasing and maintaining the trucks they drive."

Port of Long Beach Clean Truck Program

The Port of Long Beach's Clean Trucks Program specifies that trucks of model year 1988 and older will be banned from the Port of Long Beach beginning October 1, 2008. Beginning January 1, 2010, trucks of model year 1993 and older will be forbidden from serving the Port of Long Beach – together with trucks from model years 1994 through 2003 that have not been retrofitted with emissions control technology. Beginning January 1, 2012, any truck not meeting the model year 2007 federal truck emission standard will be forbidden from serving the Port of Long Beach.

Under the Port of Long Beach's Clean Truck program, only LMCs holding concessions issued by the Port of Long Beach will be able to provide drayage services at that port. However, unlike at the Port of Los Angeles, at the Port of Long Beach, LMCs holding a concession agreement

will be allowed to dispatch either employee-operators or owner-operators to serve the Port of Long Beach. Owner-operator truck drivers serving the port will be required to enter their truck in the Port Drayage Truck Registry.

LMCs seeking a concession will be required to pay an application fee of $250 for a concession lasting 5 years; they will also be required to pay a fee of $100 per year for each truck they operate at the port. Concession sign-up begins at the Port of Long Beach on July 28, 2008.

Concessionaire employees and owner-operators dispatched by concessionaires will be offered financial assistance through two different programs to assist them in purchasing clean trucks. Concessionaires can participate in a lease-to-own program, through which they can trade in an old truck and make monthly payments ranging between $500 and $600 for the lease of a new diesel truck or make monthly payments ranging between $500 and $1000 for the lease of a new LNG-powered truck. These leases will last for seven years. At the end of the lease period, concessionaires will be eligible to purchase their leased truck by paying half of the remaining cost of the truck. Conversely, concessionaires can trade in an old truck and receive a grant that will cover up to 80 percent of the purchase cost of a new clean truck.

Like the Port of Los Angeles, the Port of Long Beach will begin collecting a $35 fee for each 20-foot TEU ($70 per 40-foot TEU) loaded in the port. The fee will not be applied to containers that move through the port by train. These container fees will be collected in a fund that will be utilized to pay for concessionaires' lease-to-own program and truck purchase grants.

Containers carried on privately financed LNG-powered trucks will not be charged a container fee. Containers carried on privately financed diesel-powered trucks will pay half the standard container fee. However, if the privately financed clean truck enters service after October 1, 2008, the truck's owner must provide proof that a truck that did not meet the 2007 federal emissions standards has been removed from service.

Potential Economic Impact of the Clean Truck Programs

The Port of Los Angeles and the Port of Long Beach have commissioned several different studies of the potential economic impacts of their Clean Truck Programs. Most of the studies conclude that implementation of the Clean Truck Programs will raise drayage costs by some amount (though the predicted increases vary widely) and that some containers could be diverted from the Ports of Los Angeles and Long Beach. Importantly, the studies suggest that the actual increase in drayage costs will result from an equation that will involve some increased costs (such as the increased costs of labor when all drivers serving the Port of Los Angeles become employees and increased truck maintenance costs) balanced by reduced costs in other of the factors contributing to drayage costs (including efficiencies predicted in dispatching through the management of the drayage process that is expected to be provided by LMCs and increased fuel efficiency).

In his "Economic Analysis of Proposed Clean Truck Program," Dr. John Husing found that drayage rates could increase by as much as 80 percent at the Ports of Los Angeles and Long Beach. He also found that there are between 800 and 1,200 LMCs currently serving the port – but that 85 percent or more of the actual drivers are owner-operators.

In a report dated September 27, 2007, prepared for the Ports of Los Angeles and Long Beach by Moffat & Nichol and BST Associates, the authors examined the Husing report and found that some of the drayage cost increases Husing identified were likely due to the implementation of the Transportation Workers Identification Credential (TWIC) and that if these increases were excluded, "the increase in trucking costs *relative to trucking costs at other ports* is actually closer to 40 percent." They attributed much of this increase to increases in labor costs that will be created when drivers become employees of LMCs. The authors of this report suggest that no more than 193,000 TEUs will actually be diverted from the Ports of Los Angeles and Long Beach due to the Clean Trucks Programs.

A February 2008 report by Jon Haveman and Christopher Thornberg with Beacon Economics entitled "Clean Trucks Program: An Economic Policy Analysis" projects the likely increase in drayage costs at the Ports of Los Angeles and Long Beach will be between 20 percent and 25 percent. Haveman and Thornberg also found that trucks 10 years old or older provide more than half of the truck miles of drayage service at the ports. They also argue strongly that consolidating drayage services through LMCs that hold concessions will improve the efficiency of trucking operations through the ports – which will contribute some of the savings in the equation that will yield the final increase in drayage rates.

Interestingly, in a report made to the Los Angeles Harbor Board of Commissioners on March 6, 2008, the Boston Consulting Group suggested that if – as has happened – the Ports of Los Angeles and Long Beach adopted different Clean Truck programs, "there is a risk that volume of containers and supply of truckers could divert from Los Angeles to Long Beach" [sic.].

Federal Maritime Commission's Role in Reviewing the Clean Truck Programs

The Federal Maritime Commission (FMC) is an independent regulatory agency responsible for enforcing U.S. shipping laws. The FMC reviews agreements made by ports, liner services, and other maritime entities – many of which enjoy some immunity from anti-trust provisions – to assess their compliance with U.S. law, including whether they may result in an unreasonable increase in transportation costs or a decrease in transportation services. Under the Shipping Act of 1984, agreements filed with the FMC are allowed to go into effect unless challenged by the FMC in court. Once agreements filed with the FMC take effect however, any party affected by them can file a challenge with the FMC – which can then initiate an investigation of the agreement that has been challenged.

Section 40301 of Title 46, United States Code, requires that all agreements between or among marine terminal operators be filed with the FMC if they are intended to "discuss, fix, or regulate rates or other conditions of service" or if they are created to "engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States." Additionally, Title 46 forbids certain conduct by marine terminal operators. For example, section 41106 states that marine terminal operators may not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person" and may not "unreasonably refuse to deal or negotiate."

On June 13, 2008, the FMC announced that it had concluded its review of the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement (AIA). In its announcement, the FMC noted that the AIA under review did not provide sufficient detail regarding how the Clean Trucks Program will be administered. As a result, the FMC determined "that there was no basis at this time to determine that the AIA is likely to result in an unreasonable increase in transportation costs or decrease in transportation services." The FMC instructed that the parties to the AIA "need to immediately file with the Commission all substantive aspects of the Clean Truck Programs" so that a determination of the programs' impacts on costs and service levels could be made. Even if the FMC allows the AIA to go into implementation, the Commission may investigate the actions of the marine terminal operators at the Ports of Los Angeles and Long Beach and penalize them if violations of Sections 40301 or 41106 of Title 46 are found.

Lawsuit Challenging Clean Truck Programs

On July 28, 2008, the American Trucking Associations (ATA) filed a complaint for declaratory judgment and injunctive relief in the U.S. District Court for the Central District of California against the Board of Harbor Commissioners of the City of Los Angeles, the Board of Harbor Commissioners of the City of Long Beach, the cities of Los Angeles and Long Beach, and the Harbor Department of the City of Long Beach. The ATA alleges that the concession plans approved by the Ports of Los Angeles and Long Beach would "unlawfully re-regulate the federally-deregulated trucking industry and, effective October 1, 2008 bar more than one thousand licensed motor carriers from continuing to enter and service routes in interstate commerce directly to and from the ports of San Pedro Bay."

The suit alleges that the Ports of Los Angeles and Long Beach have violated the Federal Aviation Administration Authorization Act, P.L. 103-305, which states that a "State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." The suit further alleges that the concession plans impose unreasonable burdens on interstate commerce under the Commerce Clause of the U.S. Constitution and 49 U.S.C. §14504a.

Importantly, the ATA lawsuit challenges only the concessions portion of the Clean Truck programs. The suit does not challenge the schedule for banning older trucks from the ports.

Reducing Emissions from Ships

In 2006, the Port of Long Beach initiated its Vessel Speed Reduction Program, which offered vessels a 15 percent reduction in their dockage fees if they slow their speed to 12 knots or less within 20 miles of the port.

On July 1, 2008, the ports announced that they were initiating another incentive plan intended to reduce emissions from ships transiting the California coast line near the Ports of Los Angeles and Long Beach. Under this plan, the ports have offered to pay ships that switch to low-sulfur fuel within 40 nautical miles of the ports the difference in cost between this fuel and regular

bunker fuel, which is typically high in sulfur. On July 10, 2008, the ports announced that 13 shipping lines had enrolled their ships in this program.

Regulations promulgated by the CARB took effect in 2007 requiring that ships sailing within 24 miles of the California coast use fuel in their auxiliary engines (which are used to generate the electricity that powers systems on board vessels) containing less than 1,000 parts per million of sulfur. These regulations were written specifically to limit polluting air emissions. In February 2008, the U.S. Court of Appeals for the Ninth Circuit ruled that California could not issue such regulations without first receiving a waiver from the Environmental Protection Agency from current federal law.

In July 2008, CARB approved a new regulation requiring that ships use lower sulfur fuel in both their auxiliary and main engines within 24 miles of the California coast line. The regulations phase in reductions in allowable sulfur content between 2009 and 2012, when fuel with no more than 1,000 parts per million of sulfur will be allowed to be used. This regulation has been written to specify allowable fuels – rather than to limit emissions. The CARB estimates that enactment of this regulation would reduce the emissions from ships of particulate matter by 15 tons per day

Internationally, air emissions from ships are governed by the International Convention for the Prevention of Pollution from Ships (MARPOL), Annex VI. This Annex limits the sulfur content of fuel to 4.5 percent, limits nitrogen oxide emissions from new engines, and prohibits the intentional release of ozone depleting emissions. The *Maritime Pollution Prevention Act*, H.R. 802, which brings U.S. laws into compliance with the provisions of Annex VI, passed the Senate on June 26, 2008 and passed the House of Representatives on July 8, 2008. The measure was signed by the President on July 21, 2008, becoming Public Law 110-280.

PREVIOUS COMMITTEE ACTION

The Subcommittee on Coast Guard and Maritime Transportation previously held hearings on April 15, 2008, and on June 19, 2008, to examine the Federal Maritime Commission's proposed fiscal year 2009 budget as well as the administration of the Commission and its conduct of the regulatory business before it.

AGENDA

Subcommittee on Coast Guard and Maritime Transportation

Field Hearing
Monday August 4, 2008
3:00 p.m
925 Harbor Plaza
Long Beach, CA 90802

"Port Development and the Environment at the Ports of Los Angeles and Long Beach"

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Witnesses

PAENEL I

The Honorable Ronald O. Loveridge
Mayor, City of Riverside
Riverside, California

PANEL II

Mr. Richard D. Steinke
Executive Director
Port of Long Beach

Dr. Geraldine Knatz
Executive Director
Port of Los Angeles

PANEL III

Mr. Charles Mack
Director, Port Division
International Brotherhood of Teamsters

Mr. David Petitt
Senior Attorney
Natural Resources Defense Council

Ms. Elizabeth Warren
Executive Director
FuturePorts

Members

Rep. Elijah Cummings
Baltimore, MD

Rep. Laura Richardson
Long Beach, CA

Rep. Grace Napolitano
Norwalk, CA

Rep. Bob Filner
San Diego, CA

Rep. Hilda Solis
Los Angeles, CA

Rep. Dana Rohrabacher
Huntington Beach, CA

WITNESSES

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Mr. David Petitt
Senior Attorney
Natural Resources Defense Council

Ms. Elizabeth Warren
Executive Director
FuturePorts

August 4, 2008

Purpose: The Subcommittee on Coast Guard and Maritime Transportation will meet on August 4, 2008, to examine the efforts of the Ports of Los Angeles and Long Beach to meet infrastructure needs through the assessment of a container fee. The Subcommittee will also consider the ports' efforts to reduce emissions from port-related activities. Specifically, the hearing will examine the ports' adoption of the San Pedro Bay Ports Clean Air Action Plan, including the Plan's "Clean Trucks" program.

Overview: The Ports of Los Angeles and Long Beach are adjacent port facilities located on San Pedro Bay in southern California. Together, they constitute the fifth busiest port complex in the world, moving some $260 billion in total trade, including handling 15.7 million 20-foot containers in 2007.

Container Fees: The Ports of Los Angeles and Long Beach have identified extensive infrastructure needs in and around the port facilities, including the Gerald Desmond Bridge Replacement, the SR-47 Expressway, the Navy Way/Seaside Avenue Interchange, the South Wilmington Grade Separation, the I-110 Connectors Program, and the development of an on-dock rail system. In an effort to generate revenue to support the development of this infrastructure, the Ports of Los Angeles and Long Beach have approved an "infrastructure cargo" fee that will be applied to containers moving through the ports.

Ports of Los Angeles and Long Beach Infrastructure Fees: Beginning January 1, 2009, the Ports of Los Angeles and Long Beach will each assess an "infrastructure cargo" fee on containers moving through the ports to support. The fees approved by ports are expected to be $15 per 20-foot TEU in 2009 – but the fees can fluctuate based on the funding needs of infrastructure projects in progress. A fact sheet authored by the Port of Los Angeles anticipates that the fee will grow to $18 in 2010 and 2011 but could fall to $14 in 2012. The fee is expected to raise approximately $1.4 billion to support designated infrastructure projects.

California State Container Fee: California is considering legislation, SB 974 that would create a State-imposed container fee. The legislation would require the Ports of Los Angeles, Long Beach, and Oakland to begin collecting a container fee of up to $30 per 20-foot TEU by January 1, 2009.

Air Emissions at the Ports of Los Angeles and Long Beach: Ships are a major source of polluting air emissions in California – and the port complex of Los Angeles/Long Beach is the largest single source of polluting air emissions in southern California. The trucks that serve the Ports of Los Angeles and Long Beach are also a significant source of polluting emissions.

San Pedro Bay Ports Clean Air Action Plan: The plan's components are expected to cut emissions of particulate matter from port-related sources by 47 percent within five years. The plan will also reduce emissions of nitrogen oxides by 12,000 tons per year and reduce emissions of sulfur oxides by 8,900 tons per year.

Port of Los Angeles Clean Truck Program: are intended to reduce the air pollution emitted by trucks used in port properties by more than 80 percent below current emissions levels. The programs will achieve these reductions by replacing (or retrofitting) as many as 16,000 trucks by the year 2012.

Federal Maritime Commission's Role in Reviewing the Clean Truck Programs: The Federal Maritime Commission (FMC) is an independent regulatory agency responsible for enforcing U.S. shipping laws.

BEFORE THE
FEDERAL MARITIME COMMISSION

In Re: **AMENDED AND RESTATED LOS ANGELES AND LONG BEACH PORT INFRASTRUCTURE AND ENVIRONMENTAL PROGRAMS COOPERATIVE WORKING AGREEMENT**	**FMC AGREEMENT No. 201170-001**

COMMENTS OF THE INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS

I. SUMMARY AND INTRODUCTION

The Intermodal Motor Carriers Conference ("IMCC") of the American Trucking Associations ("ATA") files these Comments in Response to the Federal Maritime Commission's ("Commission") August 8, 2008 *Federal Register* Notice in the above-captioned matter.[1] In sum, the Amended and Restated Los Angeles and Long Beach Port Infrastructure and Environmental Program Cooperative Working Agreement ("the Agreement") represents an attempt by the Ports of Los Angeles and Long Beach ("the Ports") to: (1) avoid the Commission's requirement that Agreements between the Ports related to its Clean Trucks Program be filed with the Commission "to allow for the competitive review and analysis required by Congress;"[2] and thus (2) obtain Commission acquiescence, *sub silentio,* via new section V(E)(3), in the Ports' adoption and

[1] 73 *Federal Register* 46271 (2008).
[2] "FMC Grants Early Clearance to Ports/Terminals Agreement; Calls for San Pedro Ports to File Clean Truck Program" (NR 08-07, June 13, 2008).

implementation of Concession Plans, finalized on July 18, 2008, and, indeed, any future Concession Plans as amended or adopted by the Ports.

Consequently, the Commission should undertake the required competitive review and analysis regarding the effects of the Ports' Concession Agreements—prior to allowing Amended and Restated Agreement 201170 to become effective. Such a review should place particular emphasis on the unreasonable burdens that would be imposed by the Port of Los Angeles by requiring drayage trucks operating under Port of Long Beach concessions also to sign the separate, and more burdensome, Los Angeles concession simply to cross the Long Beach city line to pick up or drop off cargo containers and chassis at the Port of Los Angeles. Further, the Ports should be required to: (a) respond to those questions raised by the Commission in its investigation of the related Port-MTO Administration and Implementation Agreement (Agreement 201178) earlier this year to which the Ports did not respond on the grounds that the Commission's inquiries were premature; and (b) describe their planning and procedures to ensure a supply of drayage trucks and drivers with port access sufficient to meet the needs of ocean commerce after October 1, 2008.

II. BACKGROUND

The IMCC is an affiliated conference of the ATA. The ATA is the non-profit national trade association for the trucking industry established as a federation of affiliated state trucking associations, conferences, and organizations that includes more than 37,000 motor carrier members representing every type and class of motor carrier in the country. The IMCC provides educational and training services to the intermodal motor carrier members of the ATA, as well as representing the interests of these members in a broad

range of federal, state, local and industry policy forums. Numerous IMCC members provide drayage services to and from the Ports of Los Angeles and Long Beach.

Since the adoption of the Ports' "Clean Air Action Plan" in November 2006, the IMCC and its members have worked cooperatively and constructively with the Ports' staff members to develop methods of upgrading or replacing the most "dirty" of the diesel trucks in port drayage service in a manner that actually could be accomplished by the motor carrier industry and not contravene federal law. Notwithstanding these efforts, the Ports have continued to link their efforts to reduce diesel emissions at the Ports to requirements that motor carriers sign Concession Agreements that are preempted by federal statute (e.g., 49 U.S.C. §§ 14501(c). 14504a(c), 14506(a)).

In October 2007, the IMCC wrote the Commission detailing its concerns with respect to the Ports' proposed concession mechanisms, particularly their cost and likely impact on smaller motor carriers providing drayage services to the Ports.[3] On February 21, 2008, the Commission noticed[4] the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement, in part, an effort by the Ports to enlist their tenant Marine Terminal Operators as the day-to-day enforcers of the Ports' unlawful concession mechanisms. On March 3, 2008, ATA and the IMCC filed comments challenging the "blockade" provisions of the Agreement (sections 5.1(e) and 5.3), and suggesting several areas of inquiry of that Agreement's parties to permit the Commission to fulfill its obligations under the Shipping Act regarding review of filed agreements. In so doing, the IMCC argued that the Concession mechanisms: (a) were an effort by the

[3] Letter from Curtis E. Whalen, Executive Director, IMCC to Byant VanBrakle, Secretary, Federal Maritime Commission, October 2, 2007.
[4] 73 *Federal Register* 9569 (2008).

Ports to evade preemption under the federal transportation statutes cited above; and (b) were "unreasonable" under various provisions of the Shipping Act.

In a joint response,[5] the parties argued that, among other things:

a. No provision of the Agreement establishes "drayage concessions" or compels "the 'shutting out' of motor carriers using independent owner operators…" … While it is possible that the parties may discuss or even agree on the implementation of policies relating to motor carriers, the substance of any such policies will be decided outside of this Agreement. *The time for any challenge to such policies would be when and if the Ports adopt them. Only then could the Commission evaluate their lawfulness under the Shipping Act.* Page 4, ¶ 2 (emphasis added).

b. The preemptive section of 14501(c) of the Federal Aviation Administration Authorization Act ("FAAAA") is a statute outside the Commission's jurisdiction. The Commission cannot reasonably be expected to take action with respect to this or any other agreement based on application of the FAAAA. If ATA encounters FAAAA issues in the operation of the Ports' Clean Truck Program, it can raise those issues in an appropriate forum. Page 5, ¶ 4.

c. To the limited extent ATA has suggested Shipping Act issues are at issue, these claims are, at most, premature and misdirected. … If the Ports take actions that ATA believes are in violation of the Act, that would be the time for legal challenge. The agreement review process is not the time for any such challenges, especially because *the Agreement only deals with implementation, not the adoption of any underling policies.* Page 5, ¶ 5 (emphasis added, footnote omitted).

Subsequently, the Commission advised the Agreement's applicants that it would not allow the Agreement automatically to become effective 45 days after filing, but would request that the applicants furnish additional information to permit the Commission to complete its assessment of the Agreement's impact. The requested information was specified in an April 3, 2008 letter from the Commission.

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[5] FMC Agreement No. 201178, *Responsive Comments of the Ports of Los Angeles and Long Beach and the West Coast MTO Agreement,* March 11, 2008.

On June 13, 2008, the Commission announced it had concluded its review of the materials provided in response to its requests and allowed the Agreement to take effect on that day. In announcing this determination, the Commission stated:

> The [Agreement] contemplates future discussions to determine the extent to which the terminal operators will administer certain aspects of the San Pedro Ports Clean Trucks Program, and the … Parties *have not yet agreed on implementation of any program referenced thereunder.* Accordingly, the Commission concluded that there was no basis at this time to determine that the [Agreement] is likely to result in an unreasonable increase in transportation costs or decrease in transportation services. The Commission noted that its decision today does not foreclose future actions with respect to the [Agreement], or these Parties' activities under other related agreements, that may contravene the Shipping Act of 1984 ("Shipping Act").
>
> In announcing the Commission's action, Florence A. Carr, Director of the Commission's Bureau of Trade Analysis stated: "The Shipping Act directs the Commission to evaluate the potential impacts of all agreements, both prior to their effectiveness and on an ongoing basis. Under these statutory requirements, further agreements reached pursuant to the [Agreement], and those *related agreements of the Ports of Los Angeles and Long Beach, must be timely filed with the Commission to allow for the competitive review and analysis required by Congress.* In addition, the Commission evaluates individual or joint activities to prevent or redress any concerns with respect to statutorily prohibited acts enumerated in section 10 of the Shipping Act. Today's decision letter has again emphasized to the Parties the need to immediately file with the Commission all substantive aspects of the Clean Truck Programs."

"FMC Grants Early Clearance to Ports/Terminals Agreement; Calls for San Pedro Ports to File Clean Truck Program," NR 08-07 (June 13, 2008, emphasis added).

On July 18, 2008, the Ports simultaneously released their final Concession Agreements and Applications, attached to these Comments for reference (Attachment 1, Los Angeles Application; Attachment 2, Los Angeles Agreement; Attachment 3, Long Beach Application; Attachment 4, Long Beach Agreement) and began to solicit motor carriers to file such Applications. If Concessions are not applied for, and granted, by

October 1, 2008, the Ports intend to "shut out" motor carriers and their subcontractors from each Port.

On July 28, 2008, ATA filed a Complaint in the U.S. District Court for the Central District of California (Case No. CV 08-04920) alleging that the Ports' Concession Plans: (a) violated the Supremacy Clause of the Constitution because they were preempted, in whole and in part, by 49 U.S.C. §§ 14501(c), 14506(a); and (b) constituted a violation of 42 U.S.C. § 1983, which, *inter alia,* prohibits local governments from acting under color of state law to deprive persons of rights established by the Constitution and laws of the United States, specifically the right to engage in interstate commerce free of any undue burden or unreasonable discrimination, Article I, Section 8, Clause 3; 49 U.S.C. § 14504a(c). Subsequently, ATA filed a Motion for Preliminary Injunction against implementation of the Ports' Concession Plans under the Supremacy Clause counts of the Complaint. A hearing on this motion is currently scheduled for September 8, 2008.

III. The Commission Should Undertake a Competitive Review and Analysis of the Ports' Concession Programs and Assess the Impact of Enforcement of the Clean Truck Programs' October 1 Deadlines Prior to Permitting the Agreement to Take Effect.

A. The Time Has Come for the Commission to Undertake Its Promised Competitive Review of the Ports Concession Requirements.

As set out in the responsive Comments on Agreement 201178, above, the Ports apparently contend that the Commission can *never* inquire into the substance of the Concession mechanisms in its review of Agreements *implementing* the Concession mechanisms. Rather, the Commission may make such an inquiry only if the agreement at hand incorporates an actual agreement between the Ports adopting Concession Program

elements, themselves. It is thus not surprising that the Ports artfully have put before the Commission an agreement that permits the Ports to engage in unlimited "discussion," "cooperation," "coordination," and retention of "common" contractors regarding port concessions, but that leaves the formal adoption of the Concession mechanisms to the "independent" judgment of each Port.

More specifically, the Amended and Restated Agreement's new sections V(E) and (H) authorize the Ports to discuss, cooperate, and coordinate the adoption of "concession programs" and the elements thereof that determine whether or not the trucks of licensed motor carriers will be allowed access to the Ports' terminals, and to operate those programs using a common administrator. In so doing:

> E. The Parties agree to discuss, exchange information, cooperate and, *to the extent each Port in its sole discretion deems appropriate, coordinate* the adoption and implementation of programs to reduce truck emissions and to improve Port safety and security (Clean Truck Programs). The Clean Truck Programs implemented by the Ports may include the following: …
>
> 3. Adoption of concession programs with Licensed Motor Carriers, whereby Port terminal operators shall grant access to Port terminals to those drayage trucks that are authorized under a concession agreement with the Ports. The Ports may discuss and, *to the extent each Port in its sole discretion deems appropriate, coordinate* concession requirements for Licensed Motor Carriers, including: environmental compliance; vehicle and driver safety and security; parking and routes in the community near the Ports; vehicle maintenance; driver credentialing and other security measures; driver licensing, qualifications and requirements; truck identification systems; assessment of concession-related fees; insurance; and compliance with other applicable laws, rules and regulations. The specific requirements for each Port's concessionaires, including the concession agreements themselves, shall be maintained on each Port's websites….
>
> H. The parties may discuss, agree, cooperate and share information regarding the implementation and evaluation of their Clean Truck Programs, infrastructure fees, and ocean vessel programs, including the adoption of standards for recordkeeping, databases (including development of a registry of drayage trucks), hardware and software, and other systems for identifying and granting access to drayage trucks, and *may retain common vendors* (either individually

> or jointly) to assist with implementation of the Programs, including administration and information technology-related functions. *The parties may retain a third party vendor to administer the Ports' respective concession programs.*

Through this concept of "coordinated, but independent" actions, the Ports attempt to limit the Commission only to review of the framework for establishing the Ports' Concession Programs, but to deny the Commission an opportunity to review the programs themselves. Implicitly, there will never be a time when the Commission may review the Concession mechanisms. Either such a review will be premature (as the Ports claimed April 3) or too late (as they now implicitly assert). According to the March 11, 2008 Comments of the parties to Agreement 201178, "[t]he time for any challenge to such [concession plan] policies would be when and if the Ports adopt them. Only then could the Commission evaluate their lawfulness under the Shipping Act." But since there is never to be an "agreement" on the content of the Concession Plans, the Ports' actions will be unreviewable under the Agreement process – contrary to the Commission's expectations regarding ongoing review contained in its June 13, 2008 letter regarding the effectiveness of Agreement 201178.

In toto, the Ports' approach is less logic than legerdemain. The Amended and Restated Agreement 201170 confronts the Commission with after-the-fact ratification of the Ports' Concession mechanisms (including use of a common concession administrator, which has already been selected[6]). In this context, the Ports simply cannot: (a) demand (in the Agreement 201178 proceeding) that the Commission assess their Concession programs, only "when and if the Ports adopt them;" (b) adopt their Concession programs;

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[6] The administrator, Tetra Tech, Inc., was chosen by Long Beach and Los Angeles on July 14 and 17, 2008, respectively.

and then (c) request that an Agreement incorporating the adopted Concession programs be processed on an expedited basis without any Commission inquiry at all into the Concession mechanisms and the impact of their enforcement by the Ports effective October 1, 2008.

Instead, the Commission must now fulfill its statutory responsibilities and assess the competitive impact of the adopted Concession mechanisms. As part of this effort, the Commission should consider: (a) the impact of Los Angeles' refusal to let Long Beach concession holders to enter the Port of Los Angeles without signing an additional and more burdensome Concession Agreement; and (b) the impact of agreements between the Ports and with third parties that were not yet finalized when the Commission undertook its investigation of Agreement 201178 earlier this year.

B. The Commission Should Investigate the Impact on Services and Costs of the Ports' Joint Administration of Their Concession Programs While Refusing to Grant Concession Holders Reciprocal Rights of Entry.

As noted in Section II, the ATA is challenging the legality of each Ports' Concession Plan under relevant sections of 49 U.S.C. chapter 145 in the U.S. District Court in Los Angeles, a determination that is outside the Commission's jurisdiction.[7] The pendency of that case should not lead the Commission to defer an inquiry into a key question that this Commission should investigate in reviewing the Amended and Restated

[7] ATA notes that the requested injunction would have no material impact on the environment and truck safety. The Ports anticipate that most independent owner operators continuing to operate at the Ports, as older trucks are banned, will seek financial assistance in the form of subsidized leases for environmentally compliant trucks. In turn, those leases would be overseen by the Ports' same common Clean Truck Program Administrator, Tetra Tech, Inc., which has responsibility for oversight of financial assistance programs as well as concession programs, to assure the lessees' continuing compliance with environmental and maintenance obligations.

Agreement: whether the Agreement is likely "to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation costs" due to the Ports' *refusal* to grant concession holders of the other Port reciprocal rights of entry while jointly administering their Concession programs under Agreement section V(H)). *See* 46 U.S.C. § 41307(b). In particular, Los Angeles' exclusion of drayage trucks operating under a Long Beach concession on the eastern side of San Pedro Bay's port complex from crossing the city line into the jurisdictional area of the Port of Los Angeles on the western side is likely to produce this unlawful outcome.

Under the Los Angeles Concession requirement, in order to enter the Port of Los Angeles, a Long Beach Concession holder must apply for, and be granted, a separate Los Angeles Concession, the awarding of which is *not* automatic, pay an application fee of $2,500 and an annual fee of $100 per truck, and meet additional requirements beyond those that are common to both Agreements. For example:

a. A drayage truck entering the portion of the San Pedro Bay port complex under Los Angeles' jurisdiction (subject to transition provisions) must be driven by an employee of the concession holder using a company-owned truck, rather than a subcontractor of the concession holder, even though the *same* third party Concession Administrator supervising the Los Angeles concession requirements is ensuring (on behalf of Long Beach) that the truck meets environmental and maintenance standards even if it is owned and operated by a subcontractor. *Compare* Attachment 2, Section III (d) *with* Attachment 4, Section III(d).

b. A parking plan must be on file with the Los Angeles Concession Administrator (again, the *same* third-party Concession Administrator under contract to Long Beach), demonstrating that a Long Beach-registered truck that crosses the city line (*e.g.*, merely to return an empty container) has an *off-street* parking place, rather than simply a *legal* parking place (on *or* off-street) as required in the Long Beach plan on file with the same administrator. *Compare* Attachment 2, Section III (f) *with* Attachment 4, Section III(f). Consequently, a drayage truck legally parked on a *Long Beach* street while off duty under an approved *Long Beach* plan cannot cross the city line into the Port of Los Angeles, unless the Long Beach Concession holder obtains a Los Angeles concession and demonstrates that it has obtained off-street parking for that truck.

c. The Long Beach Concession holder must meet both the contract conditions required by the City of Long Beach and the more comprehensive "standard terms and conditions" required by the City of Los Angeles for services contractors to the City, *e.g.*, participation in Los Angeles small business development programs, simply so that a Long Beach Concession holder can have its trucks pick up and return containers on the Los Angeles side of the city line. *Compare* Attachment 2, Schedule 5 and Exhibits *with* Attachment 4, Schedule 5.

d. The Long Beach concession holder must demonstrate to the satisfaction of the Executive Director of the Port of Los Angeles (under standards not yet available) that it is financially viable over a multi-year period, even though Long Beach has grandfathered drayage companies in business as of June 1, 2008,

as meeting the financial viability requirement. *Compare* Attachment 1 and Attachment 2, Section III(n) *with* Attachment 3 and Attachment 4, Section III(o).

The impact of imposing these additional conditions on Long Beach Concession-holders wishing also to pick-up or return containers across the Los Angeles City line are far from trivial. Indeed, the consulting firm used by the Port of Los Angeles to develop the elements of its Concession mechanism estimated that Los Angeles' approach will increase *drayage carriers' annual operating costs by $500 million*, compared to a "basic" plan largely identical to that adopted by Long Beach.[8]

The imposition of such direct costs (as well as the cost of resulting operational inefficiencies) will not only adversely affect motor carriers and their customers through higher costs and poorer service (the § 41307(b) test), but also adversely affect other Shipping Act policies. For example, the cost and efficiency barriers created by the inability of Long Beach concession holders to have their trucks enter Los Angeles' jurisdictional areas may interfere directly with the ability of ocean carriers efficiently to execute commission-filed Vessel Sharing Agreements, as allowed under 46 U.S.C. § 40303(d).

It is thus "unreasonable" for Los Angeles to impose an additional $500 million in drayage industry operating costs to meet the additional burdens set out above, just to permit trucks operating under Long Beach Concessions also to access the Port of Los

[8] Boston Consulting Group, *San Pedro Bay Clean Truck Program- CTP Options Analysis,* at 79 (March 2008).

Angeles. The Commission has summarized and affirmed its precedents regarding predecessor Shipping Act provisions currently codified in § 41102(c):[9]

> Section 17 requires that the practices of terminals be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the ends in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice otherwise lawful but not excessive and which is fit and appropriate to the end in view.

Under the very premise of the Ports' signing of Agreement 201178 and Amended and Restated Agreement 201170—that the San Pedro Bay Ports must operate as an integrated ecosystem for the movement of international ocean commerce in an environmentally conscious manner—erection of high financial and operational barriers to the movement of Clean Truck Program-compliant drayage trucks across the San Pedro Bay port complex's internal city boundary inherently is "excessive" and "not fit and appropriate" to the achievement of the Ports' objectives.

According to the Commission's FY 2007 *Annual Report,* "Vessel-sharing agreements ("VSAs") make up the largest type of agreements on file with the Commission. … Most VSAs authorize some level of service cooperation *with the goal of reducing individual operating costs.*" (Page 91, emphasis added). Given the Ports' failure to permit reciprocity among drayage concession holders, ocean carriers that call at Long Beach may find that use of VSAs with carriers that call at Los Angeles will subject them to a financial penalty. If they contract for drayage services exclusively at Long

[9] As quoted in *Ceres Marine Terminal v. Maryland Port Administration,* 27 SRR 1251, 1274-75 (1997) (citations omitted).

Beach, their cost of drayage services would presumably reflect the lower cost of operating under a Long Beach concession. If the carrier takes advantage of a VSA to move a container on a ship calling at Los Angeles, it would have to pay a penalty associated with using a holder of a Los Angeles concession to dray the container, whose rates presumably would reflect a prorate proportion of the $500 million higher annual cost of complying with Los Angeles concession requirements.

Additionally, the Commission has upheld a "reasonable transportation-related factors" test in assessing a port's refusal to allow a complainant to use various port facilities under 46 U.S.C. § 41106(3):

> The ALJ found that the Shipping Act does not guarantee "the right to enter into a contract, much less a contract with any specific terms. . .[A]ll that is required is that … *MTOs refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors*." … After a review of the record, we believe that although NOS was "shut out," it was done for legitimate, transportation-related reasons.[10]

Unlike the outcome in that case, however, here, Los Angeles' "shutting out" of Long Beach concession holders using independent owner-operators (or using trucks that park in legal, but on-street, spaces)[11] cannot be for "legitimate transportation-related factors."

Finally, it is self-evident that the Commission's fulfillment of its Shipping Act responsibilities must be informed by the Commerce Clause, for no conduct by a municipal agency that would impose an unconstitutional undue burden on interstate and foreign commerce could possibly be "reasonable" conduct under the Shipping Act. In

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[10] *New Orleans Stevedoring Co. v. Board of Commissioners of the Port of New Orleans,* 29 SRR 1066, 1070 (2002, emphasis added).

[11] The issue of the "financial viability" of Long Beach Concession holders is relevant only to the Port of Long Beach, since, by definition, those Concession holders have obligations only to Long Beach, not Los Angeles, as overseen by the Ports' common Concession Administrator.

Automobile Club of New York, Inc., v. Dyskstra, 423 F. Supp. 2d. 279 (S.D.N.Y., 2006), *aff'd*, 520 F. 3d 210 (2d Cir., 2008), the court found New York City's failure to grant reciprocity to tow trucks registered in other jurisdictions to be an unreasonable burden on commerce. In that case, New York City had adopted a comprehensive system for registering tow trucks (the legality of which was neither challenged nor ruled upon in the litigation), including inspections, background checks for drivers, and payment of annual fees. Until 2004, New York nonetheless had granted reciprocity to trucks registered in other jurisdictions, so long as the tow involved had one end that was not in New York City. Beginning in 2004, however, New York began to impound any tow truck operating without a permit.

The court found that tow truck services had become multistate in scope (such as through the plaintiff automobile association), and that that imposing New York's rules on tow trucks licensed elsewhere would have no material benefit for public safety (the justification given by New York). Thus, "New York City's licensing scheme, if allowed full flow, would create a major burden to the flow of interstate commerce by essentially imposing either a high toll on towers if they were to pay to be licensed to use its roads and highways or a duplication of towers, and expensive 'handing-off' procedure between said two towers at New York City's county lines, … which the City itself considered to be 'inefficient.'" 423 F. Supp. 2d at 282-83. And if other jurisdictions imposed New York's rules and non-reciprocity policies, the result would be to make towing in the area "a shamble." *Id.* at n. 6. This is precisely the same situation as would be faced by Long Beach concessionaires seeking to pick up or drop off containers at Los Angeles: either pay the "high toll" of higher operating costs and duplicative concession fees (paid to the

same Concession Administrator as for their Long Beach Concession), or incur the inefficiency and expense of "handing off" containers at an intermediate terminal for final movement into the Port of Los Angeles by a Los Angeles concession holder.

Thus, the court concluded:

> [S]eizure by a City agency of any outsider tow truck in New York City is prohibited where the only ground the agency reasonably has and can assert for the seizure is that the tow truck is not licensed by the City of New York. All tow trucks lawfully operating, with or without a tow, from anywhere outside New York City, whether based within the State or elsewhere, are to be permitted the same access to and use of New York City's roads as those towers licensed by New York City. *Id.* at 287.

In light of the above precedents, as part of its review of Amended and Restated Agreement 201170, the Commission should request that the Ports provide:

1. All reasons and justifications for the Ports' refusal to grant reciprocal rights of access to concession holders of the other Port;
2. An assessment of the potential impact on the flow of ocean commerce at the ports from the lack of reciprocity, including the impact on use of Vessel Sharing Agreements; and
3. An assessment of the impact on ocean commerce and on the Ports, if the Ports were to permit reciprocity of entry to the other Port's concession holders.

C. The Commission Should Investigate the Current Status and Impact of Agreements Implementing Clean Truck Program Elements that Become Effective October 1, 2008 and the Ports' Plans to Assure an Adequate Supply of Drayage Trucks with Access to the Ports.

On October 1, 2008—fewer than 45 days from today—the applicants have committed to (a) excluding from each Port motor carriers and drayage trucks operating on their behalf, if the motor carriers have not signed concession agreements; and (b)

excluding, for clean air reasons, all pre-1989 drayage trucks. These exclusions are to be enforced through a Drayage Truck Registry in which all trucks eligible to enter the Ports are to be listed, along with required information about each truck. In turn, drayage trucks are to have radio-frequency identification devices ("RFIDs") that will interface with receivers at marine terminal entry gates. These receivers are to be linked to the Drayage Truck Registry. Presumably, "unauthorized" trucks will be turned away. The above elements apparently are to be coordinated between the Ports pursuant to Amended and Restated Agreement 201170 and implemented through agreements between the Ports and their tenant MTOs (and their affiliates, such as PierPass) pursuant to Agreement 201178.

In its June 13, 2008 announcement regarding the effectiveness of Agreement 201178, the Commission stated that, the parties to the agreement "have not yet agreed on implementation of any program referenced thereunder." Presumably at this late date, such agreements have been entered or will be entered shortly—or there is a significant risk that the underlying systems and procedures necessary to implement the Clean Truck Program elements that come into effect on October 1 will not be tested and ready on that date. Consequently, the Commission should:

1. Require the Ports to answer those questions first asked of them in the Commission's investigation of Agreement 201178, for which the Ports did not then provide a definitive response (claiming that the underlying agreements, contracts, systems, processes, and procedures were not yet in existence);

2. Request that the Ports identify all the agreements, contracts, systems, processes, and procedures necessary to the effective implementation of Clean Truck

Program elements coming into effect or being enforced as of October 1, 2008 and their current state of readiness for implementation on that date; and

3. Request that the Ports state their plans to deal with any deficiencies in readiness identified in responding to paragraph 2 immediately above. This response should address with particularity their planning and procedures to assure a supply of sufficient drayage trucks and drivers with permissible port access to meet the needs of ocean commerce after October 1 (the date for exclusion of pre-1989 trucks and trucks not operating under the auspices of a separate Concession agreement with each port), given that the Ports' programs of financial assistance to replace or upgrade trucks not complying with port environmental requirements are not yet fully in operation.

V. CONCLUSION

The Ports of Los Angeles and Long Beach have now made the policy decisions establishing the Concession program element of their Clean Truck Programs and other elements that are to come into effect on October 1, 2008. They also have, or should have, entered into all necessary contracts and agreements with MTOs and third parties. Consequently, the Ports can no longer appropriately request that the Commission defer undertaking the full competitive analysis necessary to understand the effects of the Ports' Concession requirements. Further, the Ports can no longer claim they cannot respond to inquiries regarding the nature and effect of agreements with third parties under related Agreement 201178.

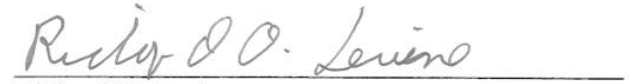
Consequently, the Commission should: (a) deny expedited effectiveness for Amended and Restated Agreement 201170; (b) undertake the promised—but deferred—assessment of the impact of the Ports Concession requirements, including the barriers to

efficient movement of cargo within the San Pedro Bay port complex resulting from the Ports' failure to grant reciprocity to each other's concession holders; (c) require the Ports to respond to questions asked of them in the Commission's inquiry into Agreement 201178 that the Ports then claimed they could not answer because anticipated arrangements were not yet in place; (d) require the Ports to identify agreements, contracts, systems, methods, and procedures necessary for effective implementation of Clean Truck Program elements coming into effect on October 1, 2008 and the state of their readiness; and (e) require the Ports to describe their planning and procedures to ensure a supply of drayage trucks and drivers with port access sufficient to meet the needs of ocean commerce after October 1, 2008.

Respectfully submitted,

Curtis E. Whalen
Executive Director
Intermodal Motor Carriers Conference
American Trucking Associations
950 North Glebe Road, Suite 210
Arlington, VA 22203

By its Counsel:



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Stephen S. Anderson, Jr.
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August 18, 2008

TAB B

Benner letter 10/9/08

P.O. Box 29243 • Phoenix, Arizona 85038-9243
2200 S. 75th Avenue • Phoenix, Arizona 85043
(602) 269-9700

SWIFT TRANSPORTATION CORPORATION

Jerry Moyes
President & CEO
Telephone 623-907-7404
Fax 623-907-7503
jerry_moyes@swifttrans.com

August 20, 2008

Captain J.M. Holmes
Deputy Executive Director
The Port of Los Angeles
425 S. Palos Verdes St.
San Pedro, CA 90731

Dear Captain Holmes:

We support the Port's adding two additional components to the truck funding program to provide grants to existing USEPA 2007 Compliant Trucks.

It is Swift's intent to commit into the port drayage market, through the Port's concession program up to 200 trucks during October, 2008, and we will continue to add trucks at the rate of about 200 trucks per month for as long as the demand and economics justify the additions. At a minimum the trucks will be USEPA 2007 compliant diesel trucks.

Compliance incentives for early committed privately funded clean trucks will help Swift to offset the considerable start-up cost associated with serving the port drayage market.

Swift currently has about 7,000 USEPA compliant diesel trucks in service, and the rest of our fleet is composed of trucks newer than 1989, therefore, we do not anticipate having scrap trucks available under the 2007 compliant truck incentive program. We would be happy to provide you with our fleet demographics.

Subject to loads being available at the appropriate times, and reasonable waiting times to load, we plan to maximize each trucks productivity by working a double shift and slip seating drivers. Per dray incentives are an important part of achieving maximum productivity.

The intent as stated above is contingent upon negotiating and executing a final definitive agreement satisfactory to both parties. We look forward to working with you in furtherance of our mutual clean air objectives.

Sincerely,

Jerry Moyes

Jerry Moyes
President and Chief Executive Officer

TAB B
Bonner letter
10/9/08

5601 West Buckeye Road
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KNIGHT
TRANSPORTATION

August 20, 2008

Via email to jholmes@portla.org

Captain J. M. Holmes
Deputy Executive Director
The Port of Los Angeles
425 South Palos Verdes Street
San Pedro, CA 90731

RE: Letter of Intent

Dear Mr. Holmes:

This letter of intent sets forth certain understandings between Knight Transportation Inc. and the Port of Los Angeles regarding transportation services for the port drayage market and also serves as support for the establishment of two new additional incentives to the Clean Truck Funding program.

Knight supports both the Compliance Incentive for the early commitment of privately funded USEPA 2007 compliant drayage trucks and the per dray Efficiency Incentive for use of privately funded USEPA 2007 compliant trucks. The incentives will assist in making it economically feasible for Knight to enter the port drayage market and cover a portion of the start up costs incurred by Knight's entry into this market.

Knight currently has approximately 1400 USEPA 2007 compliant trucks in its fleet. Knight does not have any "scrap" qualified trucks in its fleet and will provide, upon request, a detailed report of its fleet demographics. Knight intends to maximize the efficient use of the trucks committed to the port drayage market and may, if conditions dictate, utilize a second shift to increase productivity.

Subject to the availability of port drayage business at the levels and at terms that Knight deems appropriate in its sole discretion, Knight will commit to the port drayage market up to One Hundred (100) USEPA 2007 compliant trucks during October 2008 and up to an additional Five Hundred (500) USEPA 2007 compliant trucks by October 1, 2009.

Please contact me if you have any questions regarding this matter.

Very truly yours,

Kevin P. Knight
Chairman and Chief Executive Officer

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

August 29, 2008

Karen V. Gregory
Assistant Secretary
Federal Maritime Commission
800 N. Capitol Street, SW
Room 1046
Washington D.C. 20573

Re: American Trucking Associations Comments on the Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Agreement: FMC Agreement No. 201170-001.

Dear Ms. Gregory:

Please find enclosed comments with attachments on behalf of the Natural Resources Defense Council ("NRDC"), Sierra Club, and Coalition for Clean Air to be presented to the Federal Maritime Commission regarding the comments of the American Trucking Association ("ATA") on FMC Agreement No. 201170-001.

Counsel for the environmental groups filing these comments are aware that these documents are submitted for consideration after the comment period has expired and seek leave of the Commission to file comments outside of the 10 day window that 40 C.F.R. § 535.603 allows. Counsel for the environmental groups did not see a copy of the ATA's comments until August, 23rd, and because of this, could not comply with the 10 day window. It is our understanding that accepting these comments only eleven days after the comment period expired will not prejudice any of the parties to the agreement and will most surely aid the FMC in making a determination on how to approach the requests made within the ATA's comments. Thus, we respectfully request that the Commission grant NRDC, Sierra Club, and Coalition for Clean Air's leave to file these comments.

Thank you for your assistance with this matter.

Sincerely,

David Pettit
Senior Attorney

Attachments:
1) NRDC, Sierra Club and Coalition for Clean Air's Comments on FMC Agreement Number 201170-001; and
2) Exhibits A through D.

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NEW YORK · WASHINGTON, DC · SAN FRANCISCO

BEFORE THE
FEDERAL MARITIME COMMISSION

In re:	)
Los Angeles/Long Beach Port	)
Infrastructure and Environmental	)
Programs Cooperative Working	)
Agreement	)
FMC Agreement No. 201170-001	)
	)

COMMENTS OF THE
NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB AND COALITION FOR CLEAN AIR ("Environmental Commenters")

I. Summary and Introduction.

In yet another ill advised attempt to prevent remediation of the environmental catastrophe that is port drayage at the Ports of Los Angeles and Long Beach (the "Ports"), the American Trucking Association ("ATA") has asked the Federal Maritime Commission ("FMC") to engage in further review in a last ditch attempt to derail the necessary clean trucks programs at both ports. While ATA consistently purports to not be opposed to clean air, we note that each part of the clean trucks programs—e.g., 1) truck ban, 2) dirty truck fee, and 3) concession plans—are integral to reducing emissions and impacts from port trucking. The truck ban takes dirty trucks off of the roads, and the truck fee provides money for replacement of trucks to the thinly capitalized companies serving the ports. Further, the concession plans ensure proper maintenance and efficiencies take place to make the drayage system operate more effectively. More importantly, the ATA's recent requests of the FMC could impact the Ports implementation of the truck ban and the concession plans—two vital components of cleaning up pollution from port operations.

Beyond being unwarranted, the actions requested by the ATA would divert resources from the major task the Ports need to focus on at this juncture—namely achieving the objectives laid out in the San Pedro Bay Ports Clean Air Action Plan ("CAAP"). The ATA's requests of the FMC amount to nothing more than a thinly veiled attempt to delay the implementation of the clean trucks program, which if the ATA is successful, will have immense consequences for the health of residents near the harbor. We assume that the

FMC has more productive ways to use its agency resources than to engage in this "big government babysitting" urged by the ATA. Accordingly, we respectfully request that the FMC not heed ATA's request because beyond being a frivolous exercise, the public interest demands that the ports continue expeditiously on their efforts to clean up the drayage fleet without roadblocks being placed in the way.

II. The Interests of Environmental Commentators in this Matter.

The Natural Resources Defense Council ("NRDC") is a national non-profit organization, which maintains offices in Los Angeles and San Francisco, as well as New York, Washington, D.C., Chicago, and Beijing, China. NRDC has more than 1.2 million members and e-activists nationwide, more than 97,000 of whom reside in the State of California. One of NRDC's organizational purposes is to protect the environment and public health, including the environment and health of its members. Reducing harmful diesel pollution is a key component of this work. NRDC has identified port operations as a significant source of diesel pollution in California. NRDC has therefore maintained a long-standing commitment to advocate for significant reductions in diesel pollution from port operations and has developed substantial expertise in the legal and scientific issues surrounding diesel pollution. Specifically, NRDC has spent significant resources and time advocating for the clean up of the San Pedro Bay Ports, collectively the largest source of air pollution in Southern California.

The Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass ensuring that communities have clean air and helping clean up air pollution in areas that have unhealthy levels of pollution. The Angeles Chapter of the Sierra Club has approximately 49,000 members in Los Angeles and Orange Counties. Thousands of these members reside near the ports and/or major corridors where port trucks traverse. The Sierra Club has involved itself in issues affecting

San Pedro Bay since the 1970s or sooner, before the Sierra Club Harbor Vision Task Force ("SCHVTF") was organized. Founded in January 2001, SCHVTF is a volunteer group in Southern California. It has more than forty participants, including a majority residing near the Ports of Los Angeles and Long Beach. SCHVTF focuses on environmental and social issues affecting San Pedro Bay, including methods of decreasing the negative environmental and social impacts of the Ports, including air pollution, noise, and climate change, while permitting the Ports' volumes to grow.

Founded in 1971, the Coalition for Clean Air is a nonprofit organization based in California. It has more than 3,000 supporters throughout the state, including many members residing near California ports. Consistent with its role as an organization committed to restoring clean, healthy air to all of California, CCA has identified port operations as a significant source of diesel pollution in California. CCA is significantly involved in aiding decision-makers clean up harmful port pollution.

Environmental Commenters filed a motion to intervene in the case *ATA v. City of Los Angeles*, Case No. 08-04920 CAS (CTx) (C.D.Cal. 2008) referenced in ATA's comments.

III. Good Cause Showing for Late-Filed Comments.

By seeking leave of the Commission to file comments outside of the 10 day window that 40 C.F.R. § 535.603 allows, the Environmental Commenters must show good cause. Since, the ATA's comments are so far afield of the Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement No. 201170-001 that your agency noticed in the Federal Register on August 8, 2008, Environmental Commenters are compelled to provide a response to the ATA's comments based on the comments' expansive scope and the detrimental relief it seeks from the FMC. Environmental Commenters did not see a copy of the ATA's comments until the Saturday, August 23, and as such, could not comply with the 10 day window. It is our understanding that accepting these comments solely eleven days after the comment period expired will not prejudice any of the parties to the agreement and will most surely aid the FMC in making a determination on how to approach the requests made within the ATA's

comments. Thus, we respectfully request that the Commission grant Environmental Commenters leave to file these comments. If the FMC cannot accept our comments, we still urge the FMC to examine and review the attachments to this document related to health issues surrounding port pollution.

IV. Overwhelming Scientific Evidence Demonstrates the Need for the Clean Trucks Program to Move Forward.

According to data contained in the 2006 Port of Los Angeles emissions inventory,[1] banning pre-1989 trucks from port service beginning on October 1, 2008 will reduce toxic diesel PM emissions from port-serving trucks by roughly fifty percent.[2] This significant reduction is due to the fact that pre-1989 trucks are disproportionately much more polluting than newer trucks and no other truck clean-up measures are slated to begin until December 31, 2009, absent the Ports' clean trucks programs. We are confident that the FMC does not intend to delay this clean up that should have happened many years ago.

It is also important for the FMC to realize that significant new information has been released further bolstering the need for expeditious actions by the ports to clean up their toxic diesel emissions. The California Air Resources Board's ("CARB") recent reevaluation of premature death associated with long-term exposure to fine particulate matter exposure in California should provide great concern to the Ports of Los Angeles and Long Beach.[3] Of particular relevance, CARB determined that the premature deaths associated with goods movement pollution were higher than previously estimated. The report states:

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[1] *See* Port of Los Angeles, Inventory of Air Emissions for the Year 2006, prepared by Starcrest Consulting, LLC, July 2008. The Port of Los Angeles' Emissions Inventory is located at http://www.portoflosangeles.org/DOC/REPORT_Air_Emissions_Inventory_Volume1.pdf.

[2] We have also attached two declarations from a Senior Scientist at NRDC and an Executive Fellow at the Coalition for Clean Air that discusses the port trucking issue. *See* Exhibits A & B.

[3] *See* CARB, Methodology for Estimating Premature Deaths Associated with Long-term Exposures to Fine Airborne Particulate Matter in California, 37 (May 22, 2008)("CARB's Updated PM2.5 Health Impacts"). [Attached as Exhibit C].

> [S]taff estimates that annually 3,700 premature deaths can be associated with PM2.5 exposure from goods movement activity statewide. Also noteworthy is that 2,000 premature deaths are associated with exposures to primary diesel PM from goods movement activities, which is slightly more than one-half the total estimated diesel PM impact (from all sources).[4]

This increased number amounts to a more than 50% increase in the number of premature deaths associated with the goods movement system in California.[5]

Moreover, we reiterate the results from the South Coast Air Quality Management District's ("SCAQMD") Multiple Air Toxics Exposure Study that found that "the highest risks from air toxics surrounding the port areas, with the highest grid cell risk about 2,900 per million, followed by the area south of central Los Angeles where there is a major transportation corridor."[6] As the largest source of air pollution in Southern California, the SCAQMD estimates that "[c]ollectively, port-related sources create more than 100 tons per day of smog and particulate-forming nitrogen oxides – more than the emissions from all 6 million cars in the region. Port sources also release approximately 25% of diesel particulate matter emitted in the [South Coast Air Basin]."[7] The SCAQMD further notes that "without substantial control from port-related sources, it will not be possible for this region to attain federal ambient air quality standards for ozone or PM2.5."[8]

As the mounds of public health data pile up, the case becomes clear that the interference that the ATA requests would greatly hinder efforts to meet emissions reductions goals.

V. The FMC Should Not Fritter Away Its Time or the Ports' Time with Unnecessary Requests.

ATA asks that the FMC request the Ports to provide an analysis of the following: (1) "All reasons and justifications for the Ports' refusal to grant reciprocal rights of access to

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[4] *Id.* at 37.
[5] *Compare* CARB, Goods Movement Emission Reduction Plan, 2 (May 22, 2008)[Attached as Exhibit D] *with* CARB's Updated PM2.5 Health Impacts, at 37.
[6] *Id.* at 6-2.
[7] SCAQMD, 2007 Air Quality Management Plan, at IV-A-119.
[8] *Id.*

concession holders of the other port; (2) An assessment of the potential impact on the flow of ocean commerce at the ports from the lack of reciprocity, including the impact on use of Vessel Sharing Agreements; and (3) An assessment of the impact on ocean commerce and on the Ports, if the Ports were to permit reciprocity of entry to the other Ports' concession holders."[9] We do not believe this exercise is warranted. The ATA has already diverted significant port resources away from implementation of the clean trucks programs through filing a lawsuit in federal court in California. Moreover, the FMC has already engaged in a critical inquiry into the Ports clean up efforts, and it is our understanding that the Ports cooperated with the FMC. Accordingly, these requests are not warranted and are not appropriately targeted to the FMC's jurisdiction.

a. Different Programs Are Not Prohibited by the Shipping Act.

The ATA critiques the fact that the Ports of Los Angeles and Long Beach have different concession plans. We do not read the Shipping Act to authorize the FMC to require ports to maintain identical regulations and programs. Such action is not warranted by a piece of legislation that has the stated goal to "to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of *government intervention* and regulatory costs."[10] As such, the ATA appears to request that the FMC micromanage MTOs. Requiring the FMC to closely scrutinize each Ports' concession programs would be akin to the FMC being required to examine closely every business decision of every MTO that is part of an agreement filed with this agency. This type of precedent would frustrate the purposes of the Shipping Act.

b. The FMC Is Not the Appropriate Entity to Make A Determination Under the Commerce Clause.

The ATA argues that the FMC should determine whether the concession plans violate the Commerce Clause.[11] While we find the question of whether *Automobile Club of New York v. Dysktra*, 423 F.Supp.2d 279 (S.D.N.Y. 2006), bears any relevance to the instant clean

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[9] ATA Comments, at 16.
[10] 46 App. U.S.C. 1701 (emphasis added).
[11] ATA Comments, at 14-15.

trucks programs an interesting inquiry, the FMC is not the appropriate venue to raise this issue. Perhaps, the only pertinent fact about this case that should inform the FMC examination of ATA's requests is that a federal court was the entity reviewing the issues in the *Dysktra* case. Under the United States Constitution, the federal judiciary is charged with interpretation of the Constitution.[12] We have found no caselaw or text in the Constitution or federal law requiring that the FMC engage in this type of analysis. In fact, even if the FMC is concerned that the concessions may somehow constitute a violation of the Commerce Clause, the ATA has filed suit in federal District Court in the Central District of California and raised this exact issue. Thus, there is no need for the FMC to engage in this type of duplicative analysis that an federal court is already undertaking.

VI. Conclusion.

The FMC should not heed the requests of the ATA to second-guess actions taken by the Ports. The Ports are embarking upon serious programs aimed at protecting the health and allowing a backlog of expansion to proceed. Currently, the ATA is trying to act as anchor to slow down the Ports from solving one of the largest public health crises on the west coast. The FMC has a decision whether it wants to serve as another anchor holding the Ports back, or it can be like the many supporters, interested businesses in participating in the programs,[13] and other stakeholders pushing the Ports towards fixing this public health problem. The ATA obviously sees the potential in having the FMC serve as a "big government babysitter" for the Ports. However, we find no evidence in the Shipping Act that Congress envisioned the FMC being mired in the details of every action by an MTO. We appreciate your consideration of these comments. Please feel free to contact counsel

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[12] *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

[13] Several companies have already stepped forward to participate in the Los Angeles program. *See* Journal of Commerce Online, LA Port: 4,000 Trucks Commit to Concession Programs (August 28, 2008), *available at* http://www.joc.com/articles/news.asp?section=ocean&sid=46256.

for the Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air if you have any questions relating to these papers. Please direct all future correspondence with Environmental Commenters to David Pettit, Melissa Lin Perrella and Adrian Martinez.

Respectfully Submitted,

David Pettit (California State Bar No. 67128)
Melissa Lin Perrella (California State Bar No. 205019)
Adrian Martinez (California State Bar No. 237152)
Natural Resources Defense Council
1314 Second St.
Santa Monica, CA 90401
(310) 434-2300

CC: via facsimile (without exhibits)
Senator Daniel Inouye
Congressman James Oberstar
Senator Frank Lautenberg
Congressman Elijah Cummings
Senator Barbara Boxer
Senator Dianne Feinstein
Congresswoman Nancy Pelosi
Congresswoman Laura Richardson
Mary Nichols, Chair of the California Air Resources Board
William Burke, Chair of the South Coast Air Quality Management District
David Freeman, President, Board of Harbor Commissioners, Port of Los Angeles
Jim Hankla, President, Board of Harbor Commissioners, Port of Long Beach

CERTIFICATE OF SERVICE

I, Penny Primo, hereby certify that I have today, August 29, 2008, sent copies of the attached Comments of the Natural Resources Defense Council, Sierra Club and Coalition for Clean Air by electronic mail to:

Richard O. Levine
Stephen S. Anderson, Jr.
Constantine Cannon LLP
1627 Eye Street, N.W., Suite 1000
Washington D.C. 20006
Email: rlevine@constantinecannon.com

And

C. Jonathan Benner, Esq.
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Filing Agent Under Article X of Agreement 201170-001

Penny Primo

Penny Primo

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September 5, 2008

Karen V. Gregory
Acting Secretary
Federal Maritime Commission
800 North Capital St. NW
Washington, DC 20573

Re: FMC Agreement No. 201170-001, *The Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement*

Dear Ms. Gregory:

Pursuant to Subpart D of Part 535 the Commission's rules and regulations, we enclose for filing an original and seven (7) copies of: (i) the Motion for Leave to File Responsive Comments; and (ii) Responsive Comments of The Port of Los Angeles and Long Beach, regarding the above referenced FMC Agreement.

Please feel free to contact me (202) 274-2880 if you have any questions about this filing.

Yours very truly,

C. Jonathan Benner

C. Jonathan Benner

cc (via email): Peter King, Esq.
Ms. Florence Carr (w/o enclosures)

Enclosures

BEFORE THE
FEDERAL MARITIME COMMISSION

In Re: FMC Agreement No. 201170	)	FMC Agreement No. 201170

MOTION FOR LEAVE TO FILE RESPONSIVE COMMENTS

Pursuant to 46 C.F.R. § 535.603, the Ports of Los Angeles and Long Beach ("POLA" and "POLB", respectively, or collectively "Movants") respectfully request leave to file comments in the above captioned matter. As grounds for this request, Movants recite the following:

1. On August 1, 2008, Movants submitted to the Federal Maritime Commission an amended and restated Agreement No. 201170, *The Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement*, between the City of Los Angeles and the City of Long Beach, California, referred to herein as the "Agreement."

2. On August 18, 2008, comments addressing certain aspects of the Agreement were filed by the Intermodal Motor Carriers Conference of the American Trucking Associations ("ATA").

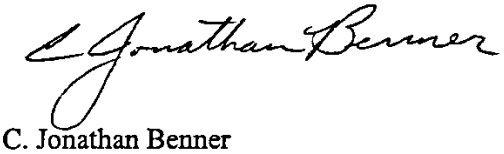
3. The Commission's regulations do not expressly provide for the submission of responsive comments.

4. Absent the grant of leave for Movants to file responsive comments addressing errors, misstatements, and misunderstandings about the content of the Agreement, the ATA comments might, if accepted at face value, cause delays in the implementation of key elements of Movants' Clean Air Action Plan and otherwise lead the Commission to err in its actions with regard to the Agreement.

5. As indicated in Movants' Responsive Comments (lodged with this motion), any deterioration of the truck ban schedule will not only cause a substantial risk of delay in achieving a significant and immediate improvement in air quality, but also will delay the safety and port security elements of the Clean Trucks Program. In their August 1 filing, Movants have asked that an expedited approval by the Commission of the pending restated agreement in order to provide the affected public with certainty and predictability about which trucks will be permitted to serve the Ports. Movants respectfully reiterate this expedited approval request.

6. Grant of leave to file Responsive Comments will not delay the implementation of the Agreement or in any way prejudice any party with an interest in the Agreement.

Respectfully submitted,



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September 5, 2008

BEFORE THE
FEDERAL MARITIME COMMISSION

In Re: FMC Agreement No. 201170	)	FMC Agreement No. 201170

Responsive Comments of the Ports of Long Beach and Los Angeles

On August 18, 2008, following the notice publication of the restated Agreement No. 201170 in the Federal Register, the Intermodal Motor Carriers Conference of the American Trucking Associations ("ATA") filed comments. These comments, instead of addressing the agreement review standards of the Shipping Act of 1984, request the Federal Maritime Commission (the "FMC" or the "Commission") to embark on what the ATA describes as a "full competitive analysis;" a process which ATA contends is necessary to "understand the effects of the Ports' concession requirements." (ATA Comments at 18). ATA has also requested that the Commission pose inquiries to the Ports that were previously propounded in connection with FMC Agreement No. 201178 and direct the Ports to provide additional information concerning details of implementation of each Port's concession programs (ATA Comments at 19).[1]

An overarching irony of the ATA's comments is that the primary concern expressed deals with areas of the two Ports' efforts to reduce truck-source air pollution in which the Ports have been unable to reach agreement. Thus, the focus of ATA's opposition to the Clean Trucks Program ("CTP") is the divergence in policies and approaches between the Port of Long Beach and the Port of Los Angeles. The Ports respectfully submit that, if separate policy decisions of

[1] FMC Agreement No. 201178 is an agreement among the Ports and tenant marine terminal operators to discuss, consult and agree upon measures that would permit the effective and efficient implementation of the Truck

marine terminal operators concerning truck pollution have any bearing on the processes and responsibilities of the FMC, the ATA's concerns are more appropriately addressed in contexts other than agreement review under Section 6 of the Shipping Act or in other fora altogether. ATA cites its pending litigation against the Ports in United States District Court in Los Angeles in its comments.[2] The pendency of that litigation provides confirmation that ATA is well aware that its issues with the Ports can be addressed in venues other than at the FMC.

ATA's comments – depicting the FMC as having deferred its economic analysis of the Ports' program – ignore the unprecedented degree of cooperative dialogue and information exchange that have been under way for more than a year between the Ports and the FMC. While difficult to measure empirically, it is a virtual certainty that no multi-Port cooperation program has ever been subjected to more intense review over a longer period of time in the history of the Commission than has this environmental exercise addressing truck exhaust, truck safety and port security interests, subjects peripheral to core statutory concerns and expertise the FMC. Both Ports are public bodies that have developed a Clean Air Action Plan ("CAAP"), of which the CTP is one component, in a highly transparent process that has involved all interested stakeholders, including the ATA. The Ports, unlike carriers and private marine terminal operators who frequently file agreements at the FMC, act through multi-member Boards of Commissioners and are required by California law to operate in a manner that permits broad public access to and participation in the decision-making processes of each Board. The Ports routinely post and broadcast extensive records of meetings and documents that inform these

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Ban and other elements of the Clean Truck Program - CTP. This agreement was the subject of extensive review by the Commission earlier this year.

[2] *American Trucking Associations v. City of Los Angeles et al.*, CV08-04920 CAS, (C.D. Cal.).

meetings. Governmental agencies, including the FMC, and any member of the interested public have unimpeded access to this extremely visible process.

The Ports, while preserving their reservations about subject matter jurisdiction of the FMC over complex environmental programs, have proceeded in a spirit of comity with local, state and federal government agencies with overlapping interests in the efficient and environmentally sound operation of the Ports. This cooperation has been particularly intense with the FMC. Voluminous documentation and hundreds of man-hours of employee and representative time by each Port and by the staff and Commissioners of the FMC have been invested in continuing efforts to ensure the transparency of the CAAP and CTP and to keep the FMC informed of developments in the Ports.

The immediate issue before the Commission relates to its review under Section 6 of the Shipping Act of 1984 of the revised agreement language to determine whether the restated agreement is likely, "by a reduction in competition, to result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." 46 U.S.C. § 41307. As the Commission is well aware, more aware than for any other joint marine terminal activity that it has ever reviewed under the Shipping Act, the controlling context of the discussions, agreements and disagreements between these adjoining portals of commerce is an urgent, immediate need to substantially ameliorate environmental conditions that sicken and kill citizens who live and work in proximity to the Ports areas. Absent dramatic improvement in these conditions, residents and workers will continue to become ill and die, particularly the young, the elderly, and the otherwise infirm. Moreover, the two Ports, which together are the largest port complex in the United States, cannot expand their current operations without having first reduced air pollution attributable to port operations. Planned expansion projects contemplated by the

Ports assume, as part of their supporting environmental assessments, that a ban on older, high-pollution trucks will take place in late 2008, the immediate effect of which will be a substantial reduction of diesel pollution.[3] To effectuate this prompt transition to cleaner, more modern trucks, the Ports have agreed to establish certain mechanisms and procedures (and have disagreed on others) that will permit the unavoidable and necessary replacement of the more aged elements of the existing truck fleet serving the Ports.

Elements of the CTP that are common to both Ports are the establishment of a Drayage Truck Registry ("DTR") data base, the installation of RFID technology that permits electronic scanners to promptly identify trucks in the DTR, the collection of fees on containerized merchandise, and the participation by truck operators in concession contracts with the Ports. These concession arrangements are similar, but not identical. As the Ports have tackled the daunting task of forging an effective air pollution reduction program, they have found that the Port Commissioners in each Port, while recognizing the benefits of close cooperation with the adjacent port, must reconcile and accept differing conclusions as to perceptions of how best to achieve common goals in environmental, safety and security programs applicable to the trucking industry.[4]

As noted above, the ATA comments focus almost entirely, not on the agreed-to revised language of the filed agreement, but on the absence of complete agreement between the Ports on the elements of their respective concession contracts with Licensed Motor Carriers ("LMCs").

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[3] In pleadings and supporting declarations submitted to the district court in Los Angeles by the National Resources Defense Council ("NRDC") in connection with ATA's pending request for a preliminary injunction against implementation of the Ports' concession programs, NRDC avers that the October 1, 2008 implementation of the pre-1989 model year truck ban component of the CTP will result in an immediate reduction of diesel particulate matter from trucks by roughly 50 percent. Declaration of Diane Bailey, pages 2-3, ¶ 5.

[4] In addition to divergent approaches on requiring drivers to be employees of the Licensed Motor Carriers with whom the Ports contract (Los Angeles requires a phase-in of this element over five years while Long Beach will permit Independent Owner Operators ("IOOs")), there are disparate application fee requirements, proof of adequate parking facilities requirements, and differing insurance requirements.

Recognizing that it is paradoxically using the agreement provisions of the Shipping Act to attack a disagreement between the Ports, the ATA has characterized the disparate approaches by the Ports to air pollution reduction as "Los Angeles' refusal to let Long Beach concession holders to [sic] enter the Port of Los Angeles . . . ." (ATA Comments at 9) or, the Ports' "*refusal* to grant concession holders of the other Port reciprocal rights of entry while jointly administering the Concession programs under Agreement section V(H)." (ATA Comments at 10, italics in the original). Based on this lack of uniformity in the approaches of the two Ports, the ATA implores the Commission to revisit Agreement 201178, a distinct agreement not at issue here, and to audit the Ports' readiness to implement the October 1 truck ban.

The precedent implied in this argument is stunningly novel, and is one that should be studiously avoided by the Commission. ATA is arguing that there are circumstances in marine terminal operator consultations on common environmental, safety or security concerns, and issues that will require increasing coordination between many American ports in coming months and years, and that challenges to agreements can be based on a theory that coordination has not gone far enough, and that complete integration and reciprocity of standards is to be preferred to independent actions. Needless to say, the Shipping Act's agreement provisions do not anticipate and do not address cooperative arrangements between regulated parties where the parties do not agree enough.

ATA assays a tortured effort to link review of the Ports' truck concession programs to the regulatory role of the FMC in its discussion of potential impacts of allegedly disparate truck operating costs in the two Ports on Vessel Sharing Agreements. ATA Comments at 13-14. The complained of disparity stems, however, from differing Long Beach/Los Angeles approaches to concession requirements, not areas of agreement between the parties. Although not relevant to

the FMC agreement review process, the obvious rejoinder to ATA's professed concern about allegedly higher trucking costs in Los Angeles is that individual decisions by a port that affect costs of doing business are subject to the discipline of competition with neighboring ports. The FMC's agreement review process does not exist to protect carriers or ports from adverse consequences of competition in the market, but rather to address agreements where competition has been supplanted by collaboration in ways that remove the beneficial influences of competition from the marketplace.

To a narrow extent, ATA links its request to specific provisions of the filed restated Agreement. It refers to elements of section V.(E) that contains new, clarifying language that authorizes the two Ports "to coordinate" concession requirements and the implementation of programs to reduce truck-source pollution and to improve safety and security "to the extent each Port in its sole discretion deems appropriate . . . ." ATA describes this language as an "attempt to limit the Commission only to review the framework for establishing the Ports' concession programs, but to deny the Commission an opportunity to review the programs themselves." ATA Comments at 8. Nothing could be more inaccurate.

As the Commission fully understands, based on its extensive review of the development of the CTP and the CAAP, the language cited by ATA does nothing more significant than to describe clearly the process by which each Port finalizes its policy decisions concerning air pollution issues. This clarifying language was added to the restated agreement because of direct, recent experience of both Ports that extensive discussion and consultation at the staff levels pursuant to the existing language of FMC Agreement No. 201170 did not and could not bind the Commissioners of either Port to uniformity of final policy and approach. One of the limited numbers of issues on which the two Ports have most visibly <u>not</u> achieved agreement is criteria

for eligibility for participation in truck concession arrangements. The revised language recognizes that consultation and discussion undertakings of the Agreement, however detailed and extensive, ultimately depend for their effect on agreement by two independent Boards of Harbor Commissioners. As now structured, the CTP concession programs for each Port have extensive areas of overlap, but are not identical. The pending revised agreement, laying aside for purposes of discussion the reserved concerns about subject matter jurisdiction of the FMC, is every bit as subject to FMC review under Section 6 standards as any other agreement. But the inescapable reality, a reality that we respectfully submit works against ATA's requested relief rather than for it, is that the two public bodies are autonomous and base their respective decisions on factors that are deemed to be in the best interests of each individual Port, and those decisions do at times diverge. The revised agreement language simply recognizes this reality.

From a more pragmatic perspective, ATA's program is quite clear. It is attempting to halt the impending October 1st, 2008 truck ban. While couched in terms of attacks on disparate elements of the two Ports' concession contracts (under the rubric of a refusal to "grant reciprocity"), any delay in the implementation of the agreed-on common elements of the Concession contracts (*e.g.*, the DTR and RFID requirements) will remove the mechanical elements necessary for the two Ports to administer the truck ban. As a result, any deterioration of that schedule will not only cause a substantial risk of delay in achieving a significant and immediate improvement in air quality, but also will delay the safety and port security elements of the CTP. In their filing, the Ports have asked that for the Commission's expedited approval of the pending restated agreement in order to provide the affected public with certainty and predictability about which trucks will be permitted to serve the Ports. ATA, both with the pending Court action in federal district court, and with its request for actions by the FMC that

can have no effect other than to render uncertain and, quite possibly, delay the effective date of joint actions by the Ports, seeks to use the processes of the Commission to prevent the immediate dramatically beneficial effects of the pre-1989 truck ban that is expected to take effect on October 1st.

In 1984 Congress provided for a prompt and effective means of reviewing filed agreements pursuant to precise, narrow standards. Much of the impetus behind the provisions that became Section 6 arose from an effort to shut down the punitively expensive, litigious, and time consuming approval process that had arisen under Section 15 of the Shipping Act, 1916. There is no evidence in the history of the Shipping Act that the Congress contemplated anything other than a predictable, affordable and swift process from filing to effectiveness. Parties to FMC agreements know nearly a quarter century of experience that the FMC has been conservative and flexible in its administration of Section 6. The timelines allow for extensive, but not indefinite, consultation between the FMC and agreement parties should issues arise that affect the Commission's analysis.

The Ports have requested expedited approval of this revised and restated agreement based on the extensive documentary record provided or available to the FMC. Four weeks have passed since its filing and no information requests have been received by the Ports from the FMC. This no doubt reflects the unprecedented to extensive degree of prior information filings and exchanges that the Ports and the Commission have benefited from over the past year. As noted in our request for expedited approval, there is no reason for the Commission to participate in or contribute to delays in the implementation of this vital program.

Respectfully submitted,

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September 5, 2008

CERTIFICATE OF SERVICE

I, C. Jonathan Benner, hereby certify that I have today, September 5, 2008, served copies of the attached **MOTION FOR LEAVE TO FILE RESPONSIVE COMMENTS and RESPONSIVE COMMENTS OF THE PORT OF LOS ANGELES AND LONG BEACH,** by First Class mail, to:

Curtis E. Whalen, Esquire
Executive Director
Intermodel Motor Carriers Conference
American Trucking Associations
950 North Glebe Road, Suite 210
Arlington, VA 22203

And

Richard O. Levine, Esquire
Stephen S. Anderson, Jr., Esquire
Constantine Cannon LLP
1627 Eye Street, N.W., Suite 1000
Washington, DC 20006
(courtesy copy transmitted electronically)

C. Jonathan Benner

C. Jonathan Benner

WEST COAST MTO AGREEMENT
100 Ocean Gate, Suite 600
Long Beach, CA 90802
562-437-9112

September 10, 2008

The Honorable James C. Hankla
Harbor Commission President
Port of Long Beach
925 Harbor Plaza
P.O. Box 570
Long Beach, CA 90801

The Honorable S. David Freeman
Harbor Commission President
Port of Los Angeles
425 South Palos Verdes Street
San Pedro, CA 90731

Re: Clean Air Action Plan

Dear Messrs. Hankla and Freeman:

The undersigned marine terminal operator tenants of the Ports of Los Angeles and Long Beach are writing with respect to the ports' Clean Air Action Plan ("CAAP"). As you know, we have been working with your staffs diligently for several months now under the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement (FMC No. 201178) to develop systems to collect the ports' clean truck fee and administer the ban on pre-1989 trucks. We will continue to work with you to complete this process. However, it is critically important that implementation only proceed when it can be done efficiently, without causing serious disruptions to cargo movements through the ports.

The long-term credibility and effectiveness of the truck ban and fee collection program will be undermined if it is implemented in an incomplete and untested fashion. In recent years, the marine terminal operators have spent millions of dollars to streamline truck/terminal interaction both at the gate and in the terminal, thereby dramatically reducing emissions from idling trucks. Disruptions in truck access to terminals and terminal operations resulting from premature implementation of the ports' program will result in a significant increase in the emissions the CAAP is intended to eliminate.

As we have recently advised you, despite our best efforts, it may not be possible to achieve an efficient implementation consistent with the ports' CAAP tariff provisions by the ports' target effective date of October 1, 2008. Much of that difficulty stems from things that the ports need to resolve and that are

beyond the control of the terminal operators. These points are not new – we have emphasized the importance of these issues to the ports repeatedly since May of this year. Among the issues are:

1. The Ports' Drayage Truck Registry ("DTR") has not been completed. The DTR, which is the responsibility of the Ports and is specifically spelled out in the ports' current tariffs as a prerequisite for implementation, is the sole basis for determining whether a truck is pre-1989 and should be excluded from the terminals per the ports' tariffs. It is also the sole basis for determining whether a container is exempt from the clean truck fee. Two of the four fee exemptions expressly depend on information from the DTR. However, the DTR just went operational only a few days ago, and does not contain the necessary information for the vast majority of trucks, and will not have that information by October 1. Moreover, since the DTR only became operational a few days ago, only now can the terminal operators work on and test the connectivity of their systems with the DTR. Absent a complete and reliably functioning DTR, implementation of the clean truck program is not feasible.

2. The ports have not concluded a contract with the terminal operators for administration of the program, despite two months of negotiations which the terminal operators have worked diligently to expedite. Importantly, the issue of the terminal operators' compensation is unresolved because of the ports' changing positions on that issue. There are a number of other contract issues that also need to be resolved for the contract to be finalized.

3. At our meeting on June 16, the Ports undertook the responsibility to inform the shipper and trucker communities, and other industry groups, of their obligations under the clean truck program. To date, such outreach has been minimal at best. Based on the MTOs' experience with other programs, substantially greater outreach is required in order to implement the clean truck program in a manner that avoids chaos upon implementation. Shippers and truckers must be given the details of compliance. At this time, it would be very difficult if not impossible to accomplish sufficient outreach and administrative follow-up between now and October 1.

4. The ports have yet to resolve other program issues, such as how shipments will be treated when carried by truckers that do not regularly operate in the ports.

Because of these and other issues, the terminal operators have not been able to finalize their computer systems that will be used in fee collection. To operate properly, these systems need to be coordinated among the terminal operators and with the ports, particularly with the DTR. They also need to be properly tested to ensure they function and communicate properly. If they do not, chaos will result when the program commences.

We assume you would agree that is it not in anyone's interests to implement a system that will not work efficiently. Attempting to begin collection of the clean truck fee without adequately tested systems creates a significant risk of delays at terminal gates, port congestion, truck lines, disputes over payment of the clean truck fee, disgruntled customers, and damage to the reputation of the Ports.

Clearly, it would be unreasonable for the ports to require the terminal operators to develop and implement, or assume any liability with respect to, a system that is not functional or to absorb the cost of that system development without having received a clear commitment from the ports to compensate them for that work.

Accordingly, we intend to press forward as promptly as possible to complete the necessary systems, and we look forward to the ports' cooperation in completing their part of the effort. In order to achieve the ports' goal of an efficient and effective truck ban and fee collection program, we believe the following should be immediate priorities:

1. The ports should acknowledge the need to permit adequate time for preparation and testing of the necessary systems prior to implementation; and

2. The ports should address and resolve the outstanding issues related to the CAAP including, but not limited to:

- completion of the DTR;
- completion of a contract with the MTOs that among other things establishes how the MTOs will be compensated for development and implementation of the systems necessary to implement the CAAP; and
- a process to deal with non-registered truckers.

FEDERAL MARITIME COMMISSION
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Office of the Secretary

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Washington, D.C. 20004

September 12, 2008

Re: Los Angeles/Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement
FMC Agreement No. 201170-001

REQUEST FOR ADDITIONAL INFORMATION

Dear Mr. Benner:

This is to advise that, pursuant to section 6(d) of the Shipping Act of 1984, 46 U.S.C. 40304(d), the Federal Maritime Commission ("Commission") has determined to formally request additional information concerning the subject Agreement. As filing counsel, this request is directed to you.

The Commission requires further information to complete an analysis of the likely impact that the subject Agreement will have on competition. Therefore, the Commission requests that the Parties submit the following information.

Note: If Parties wish to claim privilege for information responsive to any of these questions, or otherwise assert any reason why a full response is not being provided, describe that information and the nature of the claimed privilege, and notify the Commission as soon as possible of the claim.

1. Provide all research findings available to the Parties comparing the differences between the expected emissions reductions and public health benefits, with respect to the San Pedro Bay area, said to result from (a) the Ports' Clean Truck Program ("CTP"), and (b) CARB's port drayage truck requirements.

2. For calendar years 2009 – 2014, provide a comparison of the estimated year-by-year reduction of the levels of *particulate matter* emissions anticipated to result from (a) the Clean Truck Program and (b) proposed CARB port drayage rules in the absence of the CTP. Please identify sources of any estimates used in those comparisons.

3. The Ports, in their joint grant program, appear to have introduced several preferences for funding LNG or other alternative fuel ("AF") vehicles. Because new LNG/AF trucks cost significantly more than new diesel trucks that meet the same CTP emissions standards, please explain whether and how the preference for LNG/AF vehicles contributes to meeting the specified CTP emission reduction goals.

4. If, during the CTP development process, Parties discussed the option of conforming the CTP implementation dates more closely with CARB's dates, please provide copies of any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material that port staff, or third parties, may have produced that address possible benefits and/or costs involved in doing so.

5. Given the time frame of the CTP's rolling ban, have the Parties determined whether retrofitting (as compared to replacing) diesel trucks continues to be a viable option for vehicles in the current drayage fleet? What are the Parties' current estimates concerning the use of grant subsidies for retrofitted vs. replacement trucks? Provide copies of any data or reports that support the Ports' estimates.

6. Please explain how Proposition 1B funds will be used by each Port in funding its CTP. This explanation should describe how much money is expected to be used for retrofitting trucks, for replacing trucks, for providing LNG/AF vehicles vs. clean diesel vehicles, for administrative costs of CTP programs, for other "incentive" payments, etc.

7. Does the use of Proposition 1B money require that the Ports' projects be ranked according to the cost effectiveness of the funded projects?
   - If so, what level of financial and reporting detail will the Ports employ for grants for truck retrofitting and replacement;
   - What impact would such cost effectiveness standards have with respect to Parties' funding of LNG/AV trucks as compared to diesel trucks that meet the emissions standards; and
   - Will information on the cost effectiveness of projects that are awarded grants be made publicly available? If so, what information will be made public and where will this information be made available?

8. What impact do the Ports expect the TWIC registration requirement to have on the availability of drayage drivers at POLA and POLB? Other than the two Husing reports and Boston Consulting Group study, has either of the Parties, as part of their planning processes or for other purposes, produced formal or informal estimates of TWIC's likely impact. If so please provide a copy of those estimates.

9. The Husing Report (September, 2007) estimates that TWIC enforcement likely will reduce the number of drivers currently serving the Ports by 15 to 22 percent, and that to attract an equivalent number of new drivers to port drayage the current average $12 per hour net earnings will have to be increased to an average of about $20 per hour.
   - What are the Parties' currently available estimates with respect to the expected TWIC affects on driver availability and impact on driver earnings? Please

identify sources of those estimates. If documents explaining those estimates are available to the Parties, please provide copies.

- What impact would such an increase in drivers' average hourly net earnings likely have on the ability of IOO drivers to finance or maintain new or retro-fitted trucks? If the Parties have any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material (exclusive of the two Husing studies and the BCG study) addressing that question, please provide copies.

10. In recent court documents, the Parties have indicated that "[t]he security measures that are integrated into the concessions contracts cannot be implemented independently of the concession program." Please identify which specific security measures cannot be implemented (a) without a concession program, and (b) without a concession program that includes a requirement for employee drivers only.

11. For each category of exemption (or discount) applicable to payment of the Clean Truck Fee in each Parties' current version of the CTP, please provide (a) the rationale for each exemption, and (b) the estimated impact of each exemption, if any, on (1) CTP emissions reduction goals and (2) the CTP Fund.

12. How will the Clean Truck Fee be assessed against BCOs? For example, will charges be made against all cargo and reimbursements given later on exempt cargo, or will exempt cargo be excluded altogether from payment requirements? What procedures will be available for BCOs to challenge the validity of fee assessments?

13. Please state whether collection of the Clean Truck Fee will terminate when (a) the rolling ban is complete, (b) five years from October 1, 2008, or (c) at some other point. If (c), explain the rationale for this decision.

14. At one time, Parties indicated that the $35 per TEU fee was calculated based on the cost of funding 16,800 drayage trucks that are frequent and semi-frequent callers – and funding assumptions that included an 80% grant subsidy per truck, a $143 million contribution from the Ports, $200 million in Proposition 1B funds, a South Coast AQMD funding of $36 million, and container fees collected over 5 years.
    - Please describe any changes to these funding assumptions;
    - On a year-by-year basis, please provide the annual amount that the Parties estimate will be collected from the container fee at each Port separately; and
    - Explain the rationale for the difference in fees between LNG/AF vehicles financed by subsidy and clean diesel trucks financed by subsidy? Is the rationale for exempting subsidized LNG/AF vehicles based on factors other than CTP emission reduction goals? If so, please explain.

15. With respect to the Clean Truck Fund:
    - Explain how, and for what purposes, Fund monies will be disbursed;
    - Describe the management and control of the Fund;
    - Identify the parties that will have access to and/or control over Fund monies;

- State whether the two Ports' Clean Truck Fee revenues will be kept separate or commingled;
    - If separate, what restrictions, if any, apply to each Port's use of its funds?
    - If commingled, what standards, restrictions, limitations or agreements apply to the use that can be made of those funds?

Please provide a copy of any memoranda of understanding, agreement, guidelines, or other relevant documents pertaining to the Parties' management of the Clean Truck Fund and the use of its monies.

16. If the Parties' concession programs fail to attract sufficient drayage service to handle the cargo volumes at the Ports, do the Parties have any plans that can be implemented quickly to alleviate a shortfall in drayage trucks or drivers? What alternative approaches have the Parties discussed? Have any such back-up, alternative courses of action been agreed to by the Parties? Have the Parties individually developed back-up alternative approaches that could be used at their port? Please provide copies of any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material that address the issue of contingency plans for responding to an unanticipated failure to attract sufficient trucks to the concession programs.

17. Under the CTP, will drivers of non-compliant trucks be able to access the Ports' terminals to pick up and deliver empty containers without being charged the $35 per TEU clean truck fee? If so, please explain.

18. For each Port, separately, identify:
    - The total number of concession applications received to date.
    - How many of the concession applications received have been (a) granted, (b) denied, (c) are still being assessed, (d) other (explain).
    - For each application denied, list the reason for denial.
    - To the extent that the information is available to the Parties, please identify, by Port, the average number of trucks committed to port service by (a) successful concession applicants and (b) applicants denied concessions. Provide copies of any email or letters denying a concession.
    - To the extent that the information is available to the Parties, please indicate – for both (a) successful concession applicants, and (b) for applicants denied concessions – the number of trucks that have IOO drivers and the number that are driven by LMC employees.

19. Identify the number of concession applicants who have applied to (a) both ports, and (b) only a single port (and indicate which port) – Eg. *X* number of LMCs applied to both Ports, *Y* number of LMCs applied to POLB only, *Z* number of LMCs applied to POLA only.

20. Identify the Parties' plans for admission of trucks that call infrequently – both for (a) out-of-state long-distance callers, and (b) for in-state casual callers – to their property. Provide the rationale for the level of any day pass fees to be assessed against such trucks.

21. If plans for dealing with either category of infrequent callers (out-of-state, in-state casual) involve fees that are likely to encourage dray-offs outside port property, do the Parties intend to either (a) implement regulations as to where such exchanges can and cannot occur within their city limits, or (b) make available dray-off locations/facilities in designated areas, or (c) undertake any other action to address this possibility? Please provide copies of any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material regarding the potential affects of day pass fees on non-frequent drayage truck service for POLA and POLB.

22. What procedures will be used to (a) accurately identify and (b) determine whether to deny access to trucks banned under the CTP schedule after October 1, 2008? Identify whether the Ports have adopted or publicly released information specifying remedies or appeal procedures available for those denied access.

23. Describe all discussions that the Parties have had, and any agreements they may have reached between themselves and/or with any third parties regarding:
    - Procedures for denial of access to container terminals;
    - The retention and detention of equipment as security for financial obligations or other purposes;
    - Assessment of detention fees; and
    - Impact of retention or detention of equipment practices on affected cargo owners.

24. Certain of the Parties' concession requirements involve evaluation of applicant suitability (for example, those requirements referring to being in good standing, or involving the evaluation of financial strength). Identify the criteria that are being applied and the procedures that are being used in making such determinations. Provide any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material prepared or used by the Parties in developing those criteria or procedures.

25. Identify the appeal procedures that will be available to LMCs that have concession applications denied. Have the Ports adopted or publicly released information specifying such procedures?

26. Describe the standards and criteria to be employed by the administrator of the Parties' concessions and grant programs in: (1) implementing the grant program, and (2) awarding and denying concessions. Address specifically any standards to be applied with respect to the employee mandate, off-street parking requirement, financial strength assessment, vehicle maintenance requirements, and the LNG/AF vehicle preferences.

27. With respect to POLA's recently announced incentives being offered to Swift Transportation Inc., Knight Transportation, and perhaps available to other similarly situated trucking companies, please:
    - Provide a list of all "incentives" agreed upon – including direct financial payments, indirect subsidies (if any), and any offered assurances with regard to treatment of these businesses by the City of Los Angeles; and

- Explain what limitations, if any, would apply to other LMCs -- including those that may already serve POLA or are based outside the United States -- that might wish to avail themselves of the same incentives.
- Provide copies of all letters offering such incentives to Swift, Knight or other trucking companies.

28. Provide a copy of any staff analyses that supported the decision to establish the incentive program referenced in question 27 to attract previously non-drayage LMCs.

29. The Boston Consulting Group's CTP analysis (March 2008) refers, on page 21, to "estimated annualized cost savings (year 5)" in three categories. The category labeled "public health" indicates savings of $100 – 590M and provides sources used in making the estimate. The other two categories of cost savings (*Trucker and LMC* efficiency and health benefits, *City and Community* road maintenance, safety, environmental damages) are not accompanied by source citations, nor are they explained in any detail. For the other two categories, please provide (a) the estimated cost savings associated with each specific listed "externalized cost example" and (b) provide references to sources used in developing the relevant estimates for each example.

30. Please address the following:
    - *Employee mandate*: For each Port separately, please explain the rationale for the decision to include/exclude an employee mandate (and the associated LMC truck ownership requirement) as part of the CTP concession requirements. Provide copies of all memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material prepared or used by port or city officials in addressing that decision.
    - *Initial fee for concession*: For each port separately, please explain the rationale for the level of the initial concession fee established, including a breakdown of specific costs to be covered by the fee. If the fee level selected is intended to achieve goals other than covering administrative, start-up or other costs, identify and describe those goals and explain, with specificity, how the level of the initial fee will help achieve those goals. Provide any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material prepared or used by port officials in deciding on the fee levels.
    - *Parking requirements*: POLB concession requirements require that LMCs observe existing parking laws; POLA requires that concessionaires provide off-street parking facilities. For each Port, please explain (a) the rationale for the parking requirement, (b) the likely impacts on total vehicle emissions (including, for example, those from personal cars being driven to and from off-street parking facilities), and the competitive impact from any additional costs the parking requirements may impose on LMCs. Provide any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material used in deciding on the concession parking requirements.
    - *Financial strength requirements*: What factors have the Parties agreed to take into account when evaluating concession applicants' financial strength/viability? What specific criteria for each factor, if any, have been agreed to? Who will have the authority to make decisions as to the adequacy of an applicants' financial

strength/viability? Will that decision authority be delegated to the concession administrator? Has POLB opted to grandfather in existing LMCs (without applying the strength or viability criteria)?

31. For each of the following four concession requirements – (1) the employee mandate, (2) initial concession fees, (3) financial strength requirement, and (4) the off-street parking requirement -- provide any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material that address the issue of possible barriers to entry related to these requirements.

32. Beyond the two Husing studies and the Boston Consulting Group study, does either Party have any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material that either (a) supports an employee mandate requirement as necessary to achieving the CTP air quality goals, or (b) indicates what the impact on CTP air quality goals would be in the absence of an employee mandate? If so, provide those documents.

33. Identify the dates of any outreach meetings that POLA and/or POLB have participated in, in the last six months, with LMCs that do not normally serve their Ports, regarding the possibility of those companies undertaking drayage services at POLA and/or POLB. Identify POLA or POLB participants in any such meetings, the trucking companies that participated, the nature and extent of any negotiations that took place, and the types and amounts of any incentives discussed.

34. Provide any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material (other than the two Husing reports, the March 2008 Boston Consulting Group report, and the Moffat and Nichols study) available to the Parties regarding how much cargo may divert to other ports as a result of implementing the Parties' CTP programs.

35. With respect to the following, please provide the requested explanation, information, and/or documentary material:
    - Drayage truck registry:
        - What is the current status of the Drayage Truck Registry?
        - In what respects, if any, are the CTP drayage truck registry and the CARB truck registry expected to differ (for example, in types of data collected)?
        - What data fields are expected to be included in, or have already been agreed upon with respect to, the drayage truck registry system? Who will own the DTR data?
        - Provide the latest estimates available to the Parties, including from consultant studies, for the number of trucks that are (a) frequent callers, (b) semi-frequent callers, and (c) infrequent callers. Identify (1) the information sources for any estimates, (2) the estimation procedure used, and (3) the date at which the estimates were available to the ports. If information on the model years of the trucks included in these estimations is available, please also provide that.

- If the latest available estimations for (a) and (b) above, exceed the 16,800 figure used in developing the level of the Clean Truck Fee, please explain the extent of any differences and the likely impact of such differences on future fee levels and the availability and adequacy of retrofit/replacement subsidies and scrapping payments.
- Provide the latest available estimates for the number of LMCs currently providing drayage services to either or both Ports. (For example, Estimated total LMCs = X, of which Y serve both Ports, and Z serve only one Port – with the Ports identified by name.) Also provide any memos, studies, reports, estimates, staff recommendations, research materials, or other relevant documentary material available to the Parties that address likely changes in LMC service to each port under the CTP.

- Terminal Access Control:
  - What procedures will the Parties' expect MTOs to use to determine which trucks and drivers are to be allowed access to their terminals? (Including truck identification, driver identification, TWIC check, concessionaire status identification, etc.) When are these procedures expected to be implemented?
  - What is the current status of the development, testing, and implementation of technologies that will be used in the various identification procedures?
  - How will Parties require MTOs to handle trucks/drivers seeking access to their terminals that fail to provide one or more of the various types of identification required for access?
- Fee Collection and Administrative Costs:
  - What are the estimated costs to administer the overall concession and grant program? (Provide separate figures for each Port to the extent that those costs differ.)
  - Provide a copy of the Parties' contract(s) for concession and grants program services with the designated administrative entity.
  - What is the estimated cost to MTOs of administering the collection of Clean Truck Fees? What additional administration costs would the ports bear? Do these estimates include or exclude any allowance for bad debts?
  - What part, if any, of the Clean Truck Fee will be used to finance (a) the Parties' concession and grant administration program, and/or (b) the MTO's administrative costs for the identification and billing of BCOs? If none, how are those administrative costs expected to be recovered?

36. The CTP anticipates replacing and/or retrofitting about 16,800 "dirty" trucks before January 1, 2012. For each calendar year between 2008 and 2012, inclusive, please state or estimate how many of these "dirty" trucks will be:
    - Replaced by 2007 compliant trucks through the recently announced "compliance incentives" mechanism;
    - Replaced by 2007 compliant trucks by existing drayage companies using private capital (without drawing on CTP funds);
    - Retrofitted (rather than replaced) using CTP and/or Proposition 1B funds; and
    - Replaced by 2007 compliant trucks using CTP and/or Proposition 1B funds.

37. What percent of replacement trucks funded by CTP and/or Proposition 1B funds are expected to be financed under lease-to-own arrangements?

38. What percent of replacement trucks funded by CTP and/or Proposition 1B funds are expected to be bought rather than leased?

39. What percent of replacement trucks funded using CTP and/or Proposition 1B funds are expected to be LNG/AF vehicles (rather than clean diesel)? Indicate whether this percentage is expected to increase or decrease by calendar year between 2008 and 2012.

40. What will be the approximate cost to purchase a 2007 compliant new clean diesel truck and a 2007 compliant new LNG truck (as reflected in the pricing negotiated between the Ports and the selected equipment providers), including any pre-paid maintenance and warranty provisions? What percent of the purchase price will be covered by CTP grant funding?

41. What is the approximate annual sum of the monthly payments required under lease-to-own arrangements negotiated by the Ports to acquire a 2007 compliant new diesel truck and a 2007 compliant new LNG truck (as reflected in the pricing negotiated with the selected equipment and finance providers), including any pre-paid maintenance requirements? Typically, over how many months will these lease payments extend? What percent of each monthly payment will be covered by the CTP fund?

By this action pursuant to 46 U.S.C. § 40304(c)(2) and the Commission's agreement regulations, 46 CFR § 535.606(b), the effective date of the pending Agreement has been deferred to the 45th day after all of the foregoing information has been received by the Commission. If you have any questions, you should contact Florence A. Carr, Director, Bureau of Trade Analysis, at (202) 523-5796.

Sincerely,

Karen V. Gregory
Assistant Secretary

Florence Carr

From: Secretary
Sent: Friday, September 12, 2008 12:48 PM
To: 'jonathan.benner@troutmansanders.com'; 'matthew.thomas@troutmansanders.com'
Subject: FMC Agreement No. 201170-001 Request For Additional Information
Attachments: 201170 RFI_9-12-08.pdf

VIA EMAIL and FedEx

Jonathan and Matt,

This is a follow-up to my phone message left with Jonathan and conversation with Matt yesterday, informing you that the Commission has determined to formally request additional information concerning the subject Agreement. As filing counsel for the parties, this request is directed to you. Attached please find an electronic copy of the Commission's request. A hard copy will follow today via FedEx. A brief acknowledgment of receipt is appreciated.

Please let me know if you have any questions or if you have difficulty with this transmission.

Regards,

Karen

Karen V. Gregory
Assistant Secretary
Federal Maritime Commission
kgregory@fmc.gov
202-523-5725

FEDERAL MARITIME COMMISSION

Federal Maritime Commission

Washington , D.C.

NR 08-12

FEDERAL MARITIME COMMISSION COMMENCES INVESTIGATION CHALLENGING MARINE TERMINAL PRACTICES OF PORTS OF LOS ANGELES AND LONG BEACH

CONTACT: KAREN V. GREGORY (202) 523-5725; e-mail: secretary@fmc.gov

FOR RELEASE SEPTEMBER 24, 2008

The Federal Maritime Commission ("FMC") announced today that it has initiated an investigation to determine whether certain practices of the Ports of Los Angeles and Long Beach ("the Ports") violate the Shipping Act of 1984. Among practices cited in the Commission's Order of Investigation are the employee-driver mandate, incentive payments and provisions denying access to marine terminal facilities to certain harbor trucking providers.

The FMC is responsible for enforcing the requirements of the Shipping Act of 1984, 46 U.S.C. § 40101, *et seq.* As the Ports of Los Angeles and Long Beach operate as marine terminal operators (MTOs) under the Shipping Act, their activities as MTOs are subject to the Commission's jurisdiction and, in particular, to the statutory prohibitions found under section 10 of the Shipping Act. Among other things, section 10 of that Act prohibits MTOs from giving unreasonable preferences or imposing any undue or unreasonable prejudice or disadvantage.

The Commission appreciates the potential environmental and public health benefits under the Ports' Clean Truck Program ("CTP"); however, certain aspects of the Ports' CTPs may violate the Shipping Act. Accordingly, the investigation initiated today is tailored to focus on those elements of the CTP that cause the greatest concerns under the Shipping Act. The Commission's investigation does not delay the effective date of the Ports' Infrastructure and Environmental Programs Cooperative Working Agreement (Agreement No. 201170), which remains under separate review by the Commission pursuant to section 6 of the Shipping Act.

Commissioner Joseph E. Brennan voted not to initiate the Commission's investigation.

* * * * *

FEDERAL MARITIME COMMISSION

Commissioner Brennan Votes Against Investigation of Los Angeles/Long Beach Terminal Practices, Citing "Legal Cloud" Over Port Development and Clean Air Plan

September 24, 2008

Commissioner Brennan's Statement:

Today the Federal Maritime Commission voted to launch an investigation of the Ports of Los Angeles and Long Beach. Commissioner Joseph E. Brennan voted against the proposal, saying that it was premature and unnecessary.

While the investigation does not technically delay the Ports' plans to move forward, it will create a legal cloud over the Ports' plan to clean up the air and to create jobs through port expansion, according to Commissioner Brennan. It will also contribute to the perception that the Commission is unnecessarily delaying the Clean Trucks Program. The FMC issued lengthy questions and document requests in April and September of this year. Now this investigation will require interrogatories, depositions, and administrative hearings and could carry on for months or years, if similar past proceedings are instructive. Commissioner Brennan believes that the proper role of the Commission should be to follow the Shipping Act's policy of regulation "with a minimum of government intervention and regulatory costs."

Commissioner Brennan believes that the Commission, when evaluating the Clean Trucks Program, should show more deference and respect to the elected officials of Los Angeles and Long Beach and their very necessary efforts to clean the air and expand the ports.

2008 SEP 30 PM 4:04

Original Title Page

FMC Agreement No. 201196

Marine Terminal Agreement

by and between

The City of Los Angeles and the City of Long Beach

Effective Date: September 30, 2008

Expiration Date: See Section 7.2

EFFECTIVE
SEP 30 2008
UNDER THE SHIPPING ACT OF 1984
Federal Maritime Commission

Los Angeles and Long Beach
Marine Terminal Agreement
FMC Agreement No. 201196

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MARINE TERMINAL AGREEMENT

This Marine Terminal Agreement ("Agreement") is entered into as of September 30th, 2008, by and between the City of Los Angeles and the City of Long Beach, each a municipal corporation and a marine terminal operator, acting by and through their respective Boards of Harbor Commissioners (each a "Party" and collectively, the "Parties").

Article 1
Name of this Agreement

This Agreement shall be referred to as the Los Angeles and Long Beach Marine Terminal Agreement.

Article 2
Purpose of this Agreement

The purpose of this Agreement is to completely set forth terms and conditions under which drayage trucks are permitted access to Port owned and controlled properties for the purpose of: (a) improving Port-related transportation infrastructure; (b) increasing cargo movement efficiencies and Port capacities; (c) improving the safety and security of Port terminals and properties; and (d) decreasing Port-related air pollution emissions in the San Pedro Bay area.

Article 3
Definitions

As used in this Agreement, the following terms shall have the following meanings (such meanings as necessary to be equally applicable to both the singular and plural forms of the terms defined unless the context otherwise requires):

"**2007 Drayage Truck**" means a Drayage Truck equipped with an engine that meets or exceeds 2007 model year California or federal heavy-duty Diesel-Fueled On-Road emissions standards.

"**Agreement**" shall have the meaning set forth in the Preamble hereto.

"**Alternative Drayage Truck**" means a 2007 Drayage Truck with a heavy duty engine operating on liquefied or compressed natural gas, electricity or hybrid technology.

"**Approved Infrastructure Projects**" shall mean all Infrastructure Projects which have been: (1) approved by the applicable lead agency as defined in Section 21067 of the California Public Resources Code; and (2) determined by the Boards of Harbor Commissioners of Los Angeles and Long Beach to be eligible for use of tidelands funds.

"**ARB**" means the California Air Resources Board.

"**Authorized Emergency Vehicle**" is as defined in California Vehicle Code Section 165.

"**CARB Diesel Fuel**" is Diesel Fuel certified by ARB as meeting the fuel specification standards set forth at Title 13, California Code of Regulations (CCR) Section 2280 *et seq.*

"**Commission**" shall mean the U.S. Federal Maritime Commission, or any succeeding agency.

"**Compliance Label**" is a tag issued by ARB under the Drayage Truck Registry for Drayage Trucks operated at the ports and intermodal rail yards that meet ARB requirements and compliance schedules.

"**Computation Methodology**" shall mean the methodology described in the document entitled Methodology for Determining Infrastructure Cargo Fee dated January 4, 2008.

"**Concession**" means a written agreement between the Port of Los Angeles or the Port of Long Beach and a Licensed Motor Carrier to allow Drayage Truck access to a Port Terminal, with terms and conditions as set forth in Attachment A hereto.

"**Day Pass**" means a right of access from the Port of Los Angeles or the Port of Long Beach to a Licensed Motor Carrier to allow Drayage Truck access to a Port Terminal on terms and conditions set forth by the Port.

"**Dedicated Use Vehicles**" are On-Road Vehicles that do not have separate tractors and trailers, including auto transports, fuel delivery vehicles, concrete mixers, mobile cranes and construction equipment.

"**Diesel Fuel**" means any fuel that is commonly or commercially known, sold, or represented by the supplier as diesel fuel, including any mixture of primarily liquid hydrocarbons (organic compounds consisting exclusively of the elements carbon and hydrogen) that is sold or represented by the supplier as suitable for use in an internal combustion, compression ignition engine.

"**Diesel-Fueled**" means a compression - ignition engine fueled by Diesel Fuel, CARB Diesel Fuel, or jet fuel, in whole or part, including liquid natural gas engines using diesel fuel for pilot ignition.

"**Diesel Particulate Matter**" or "**PM**" means the particles emitted in the exhaust of Diesel- Fueled compression-ignition engines.

"**Drayage Truck**" means any in-use On-Road Vehicle with a Gross Vehicle Weight Rating of 33,000 pounds or greater operating on property owned by the Port of Los Angeles or

the Port of Long Beach for the purpose of loading, unloading or transporting cargo, including containerized, bulk, break-bulk and neo-bulk goods. Drayage Truck does not include Dedicated Use Vehicles, Authorized Emergency Vehicles, Military Tactical Support Vehicles or Yard Trucks.

"**Drayage Truck Registry**" or "**DTR**" is a database that contains information on trucks that conduct business on Port Property at the Ports of Los Angeles and Long Beach, including: (1) owner's name, address, phone numbers, email address, and fax number; (2) Drayage Truck and engine make, model, and model year and fuel source; (3) Dispatching Licensed Motor Carrier(s) and Concession Number(s); (4) Vehicle identification number (VIN), license number and state of issuance; and (5) VDECS equipment.

"**Gross Vehicle Weight Rating**" is defined in California Vehicle Code Section 350.

"**Highway Projects**" shall mean the Gerald Desmond Bridge Replacement, the SR-47 Expressway (including replacement of the Heim Bridge), the Navy Way/Seaside Avenue Interchange, the South Wilmington grade separation, and the I-110 Connectors Program (which includes: I-110/SR-47/Harbor Boulevard interchange improvements, I-110/"C" Street interchange improvements, John S. Gibson intersection and I-110 ramp access improvements, and SR-47 on-ramp and off-ramp improvements at Front Street).

"**Infrastructure Projects**" shall include the Ports Rail System and Highway Projects.

"**International Registration Plan**" is a registration reciprocity agreement among states of the United States and provinces of Canada providing for payment of license fees on the basis of total distance operated in all jurisdictions.

"**Legacy LNG Trucks**" means Kenworth Model T-800 trucks equipped with Cummins ISX-G engines with emissions certified to 0.96 grams per brake horsepower hour (g/bhp-hr) for oxides of nitrogen (NOx) and 0.02 g/bhp-hr for particulate matter (PM), retrofitted with the Westport High-Pressure Direct Injection Liquified Natural Gas (LNG) conversion kit, funded by the Ports of Los Angeles and Long Beach under Cost Sharing Agreement No. 2588 and Los Angeles contracts numbered 2589, 2590, 2596, 2597, 2598, 2600, 2683, 2684, and 2685, when operated on LNG.

"**Lessee**" has the same meaning as in California Vehicle Code Section 371.

"**Licensed Motor Carrier**" means a motor carrier in good standing and in compliance with the requirements of a valid: (1) California Motor Carrier Permit issued by the California Department of Motor Vehicles under the California Vehicle Code; or (2) equivalent permit or license issued by any another state; or (3) a Federal Motor Carrier License (USDOT Number) and Operating Authority (MC or MX Number).

"**Military Tactical Support Vehicles**" is as defined in Title 13, CCR, Section 1905.

"On-Road" means a vehicle that is designed to be driven on public highways and roadways and that is registered or is capable of being registered by the California Department of Motor Vehicles (DMV) under Vehicle Code Sections 4000 *et seq.*, or DMV's equivalent in another state, province, or country, or the International Registration Plan.

"Optical Character Recognition" or **"OCR"** is a system designed to read and digitize existing On-Road vehicle identifiers, such as state license plates, which will enable the Terminal Operator to access the Drayage Truck's records in the DTR.

"Oxides of nitrogen" or **"NOx"** means compounds of nitrogen and oxygen, including nitric oxide and nitrogen dioxide.

"Party" or **"Parties"** shall have the meaning as set forth in the Preamble hereto.

"Port Infrastructure Fund" shall mean a restricted fund to be used exclusively for payment of the Ports' allocable share, using the Computation Methodology, of costs of Approved Infrastructure Projects that are incurred following the approval of the Approved Infrastructure Projects by the applicable lead agencies. The Port Infrastructure Fund shall be comprised of the monies collected from the Infrastructure Fee on Containers.

"Port Property" means all property owned by the Ports of Los Angeles and Long Beach within the Harbor Districts of Los Angeles and Long Beach.

"Ports" means all waterfront property owned by Ports of Los Angeles and Long Beach and the Terminal Island Container Transfer Facility.

"Ports Rail System" shall mean: a Pier B Street Intermodal rail yard expansion, Terminal Island Wye Track Realignment, Pier B Street Realignment, Track Realignment at Ocean Boulevard/Harbor Scenic Drive, Pier F Support Yard, West Basin Rail Access Improvements, Grade Separation for Reeves Crossing, Closure of Reeves at-grade Crossing, Navy Mole Road Storage Rail Yard, Pier 400 Second Lead Track, Reconfiguration at CP Mole, Triple Track Badger Bridge, and Triple Track South of Thenard Jct.

"Program Funds" means monies disbursed by the Ports of Long Beach and Los Angeles through the Clean Truck Fund or the Harbor Revenue Fund, including funds received for that purpose from South Coast Air Quality Management District and State Proposition 1B Bond funds.

"Terminal" is any facility on Port Property used for the transfer of cargo from one mode to another, including container terminals, break bulk terminals, dry bulk terminals and rail yards.

"Terminal Operator" is the entity with contractual authority from the Port of Los Angeles or the Port of Long Beach to operate a Terminal.

"**Radio Frequency Identification Device**" or "**RFID**" is an electronic device with a unique identification number, installed on a Drayage Truck which will enable the Terminal Operator to access the Drayage Truck's records in the DTR.

"**Vehicle**" is as defined in Vehicle Code Section 670.

"**Verified Diesel Emission Control Strategy**" or "**VDECS**" is an emission control strategy that has been verified pursuant to the "Verification Procedure, Warranty and In-Use Compliance Requirements for In-Use Strategies to Control Emissions from Diesel Engines" in Title 13, California Code of Regulations, commencing with Section 2700, and incorporated by this reference.

"**Yard Truck**" means an off-road mobile utility vehicle used to carry cargo containers with or without chassis; also known as utility tractor rig (UTR), yard tractor, yard goat, yard hostler, or prime mover.

Article 4
Agreement Applicability

4.1 The Parties agree to undertake the following activities:

a. to require all Terminal Operators to install RFID or OCR readers at all truck processing gates or have obtained written consent from the Port of Los Angeles or the Port of Long Beach to use an alternative means of accessing the DTR before allowing Drayage Truck access to the Terminal;

b. beginning October 1, 2008, at 8:00 a.m., to require all Terminal Operators to deny access into any Terminal to: (1) any Drayage Truck of model year 1988 or older, except for pre-1989 model year Drayage Trucks that are equipped with 1989 or newer model year engines; or (2) any Drayage Truck that cannot be verified as compliant with this deadline by reference to the Drayage Truck's records in the DTR;

c. beginning January 1, 2010, at 8:00 a.m., to require all Terminal Operators to deny access into any Terminal to: (1) any Drayage Truck that is not equipped with: (i) a 1994 – 2003 model year engine certified to California or federal emission standards, and a level 3 VDECS which achieves a minimum 85% reduction in PM emissions and a minimum 25% reduction in NOx emissions; or (ii) a 2004 or newer model year engine certified to California or federal emission standards; or (2) any Drayage Truck that cannot be verified as compliant with this deadline by reference to the Drayage Truck's records in the DTR;

d. beginning January 1, 2012, at 8:00 a.m., to require all Terminal Operator to deny access into any Terminal to: (1) any Drayage Truck that is not a 2007 Drayage Truck or a

Legacy LNG Truck; or (2) any Drayage Truck that cannot be verified as compliant with this deadline by reference to the Drayage Truck's records in the DTR;

e. to require all Drayage Trucks seeking entry upon Port Property on or after October 1, 2008, to be registered in the DTR prior to the time of entry. Registration in the DTR shall be in electronic format or on forms and with supporting documentation as may be required by the Ports to provide required information in verifiable form;

f. in the event of a change in the information provided for registration in the DTR with respect to a Drayage Truck, to require such amendment in the registration within ten (10) calendar days of the change, in electronic format or on forms and with supporting documentation as may be required by the Ports;

g. beginning October 1, 2008, at 8:00 a.m., to assess a Clean Truck Fee of $35 per twenty foot equivalent unit on containerized merchandise entering or leaving the Ports by Drayage Truck, which shall be paid by the cargo owner. The Clean Truck Fee shall not be assessed on containerized merchandise that: (1) enters or leaves the Ports by rail; (2) moves between two terminals within the Ports; (3) enters or leaves the Ports by Alternative Drayage Truck or Legacy LNG Truck, under certain circumstances determined by each Port; or (4) enters or leaves the Ports by 2007 Drayage Truck purchased without Program Funds, under certain circumstances determined by each Port;

h. to require the first Terminal Operator to handle any containerized merchandise subject to the Clean Truck Fee to collect and remit the Clean Truck Fee to the Port of Los Angeles or the Port of Long Beach, as applicable, and the monies shall be used by the Board of Harbor Commissioners exclusively for replacement and retrofit of Drayage Trucks serving the Ports of Los Angeles and Long Beach;

i. beginning January 1, 2009 at 8:00 a.m., to assess an Infrastructure Fee on Containers of $15.00 per twenty foot equivalent on containerized merchandise entering or leaving any Terminal, which shall be paid by the cargo owner. As Infrastructure Projects are approved by the applicable lead agencies, and from time to time thereafter, the Executive Directors of the Ports of Long Beach and Los Angeles ("Executive Directors") shall have the Infrastructure Fee on Containers recomputed using the Computation Methodology and this Agreement shall be amended to reflect the amount so computed. The Infrastructure Fee on Containers shall not be assessed on any containerized merchandise moved between two terminals within the Ports. The Infrastructure Fee on Containers shall no longer be collected: (1) after the share of Approved Infrastructure Project costs allocable to be recovered by the Port Infrastructure Fund have been paid in full; (2) after the Executive Directors determine that the Infrastructure Fund balance is sufficient to pay all such costs; or (3) if the Clean Truck Fee cannot be collected, whichever occurs first;

j. to require the first Terminal Operator to handle containerized merchandise subject to the Infrastructure Fee on Containers to collect and remit the Infrastructure Fee on Containers

to the Port of Los Angeles or the Port of Long Beach, as applicable, to be held in the Port Infrastructure Fund and used exclusively for Approved Infrastructure Projects. If the share of Approved Infrastructure Projects costs allocable to be recovered from the Port Infrastructure Fund have been fully paid and funds remain in the Port Infrastructure Fund, these funds may be used for additional infrastructure projects of similar utility to the Approved Infrastructure Projects which are approved by the Board of Harbor Commissioners to be funded by the Port Infrastructure Fund;

k. to impose certain safety and security programs, including the development and implementation of requirements and common security systems at access and egress points in Port terminals, in order to ensure safe vehicle operations and to ensure compliance with local, state and federal safety and security requirements; and

l. beginning October 1, 2008, at 8:00 a.m., to require all Terminal Operator to deny access into any Terminal to any Drayage Truck unless such Drayage Truck is registered in the DTR under a Concession or a Day Pass. The Ports shall assess a Concession fee in amounts determined by each Port. The fee for a Day Pass shall be $100 per Day Pass. The fees for Concession and Day Pass shall be paid by the Licensed Motor Carrier applying for or holding the Concession or Day Pass.

4.2 It is understood that the Parties may in the future by amendment to this Agreement, subject to the requirements of the Shipping Act of 1984, as amended, broaden or narrow the activities set forth herein.

4.3 The Parties acknowledge and agree that this Agreement shall apply only to: (i) future, prospective activities of the Ports; and (ii) marine terminal facilities owned or controlled by the Ports.

4.4 The Parties also acknowledge and agree that this Agreement completely sets forth all applicable charges, terms and conditions agreed to by the Ports that are applicable to their marine terminal facilities. Nothing in this Agreement shall be construed to provide for or authorize the Ports to fix and adhere to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, or delivery of cargo. The Parties further acknowledge and agree that this Agreement does not provide for or authorize the Parties to engage in discussion of subjects including marine terminal rates, charges, practices, and conditions of service relating to the receipt, handling or delivery of cargo.

4.5 Nothing in this Agreement shall be interpreted to require a Party to obtain approval or consent from the other Party before making any changes to its own tariff, Clean Truck Program, infrastructure fee requirements, ocean vessel programs, or any tariff requirements established thereunder.

Article 5
Geographic Scope

This Agreement covers the geographic scope of the Ports of Los Angeles and Long Beach, California, and the Infrastructure Projects.

Article 6
Filing with the Commission

The Parties appoint C. Jonathan Benner, Partner at Troutman Sanders LLP, a Washington D.C. law firm, as the person with authority to file this Agreement and any amendments hereof with the Commission, and to submit any supporting materials, if applicable, in accordance with 46 C.F.R. Part 535. Mr. Benner is also authorized to receive all notices, consents, approvals, requests, instructions and communications related to this Agreement.

Article 7
Effective Date; Term; Termination

7.1 Effective Date. This Agreement shall become effective upon filing with the Commission, in accordance with 46 C.F.R. § 535.308(e).

7.2. Term; Termination. This Agreement shall be valid and effective until December 31, 2012. If a Party elects to terminate this Agreement before its expiration date, it shall provide the other Party with a ninety (90) days prior written notice of such early termination. The Parties shall notify the Commission of any such early termination, and this Agreement shall become ineffective upon said filing with the Commission. Notwithstanding the foregoing, the Parties shall continue performing their obligations under this Agreement up to and until the early termination or expiration date and shall, upon expiration or termination hereof, return all documents to the applicable disclosing Party.

Article 8
Miscellaneous

8.1 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective heirs, representatives, successors and permitted assigns.

8.2 Relationship of the Parties. The Parties agree that this Agreement by itself does not create a corporation, partnership, association, joint stock company, business trust or joint venture involving the Parties. Each Party agrees that it shall have no the authority to assume or create any obligation on behalf of the other Parties. This Agreement shall not be governed by the laws construing corporation, partnership, association, joint stock company, business trust or joint venture of any country or state.

8.3 Assignment. No Party may assign its interests, rights or obligations under this Agreement without the prior written consent of the other Party.

8.4 Amendment. This Agreement may be amended or supplemented only by a written instrument executed by both Parties. Any such amendment shall be filed with the Commission and made effective upon filing.

8.5 Severability. If any provision of this Agreement is void or unenforceable, the remainder of this Agreement shall not be affected thereby. The void or unenforceable provision shall be deemed to be replaced by a valid and enforceable provision which achieves the purposes intended by the Parties to the greatest extent possible.

8.6 Notices. Notices hereunder shall be given by mail, postage prepaid, or via facsimile transmission, to the Parties at the following addresses:

If to the City of Los Angeles:	If to the City of Long Beach:
City of Los Angeles Harbor Department P.O. Box 151 San Pedro, California 90733-0151 Attention: Executive Director Fax: (310) 831-6936	City of Long Beach Long Beach Harbor Department P.O. Box 570 Long Beach, California 90801 Attention: Executive Director Fax: (562) 901-1733

8.7 Governing Law. As it relates to disputes and disagreements between the Parties concerning the meaning, requirements, provisions or obligations of this Agreement, such disputes and disagreements shall be resolved in accordance with the laws of the State of California. As it relates to the operation, filing and other regulatory requirements that affect this Agreement under the Shipping Act of 1984, as amended, this Agreement shall be governed by and construed in accordance with the laws of the United States of America.

8.8 Waiver. The failure of either Party to insist that any one or more instances upon strict performance of any of the provisions of this Agreement, or take advantage of all of its rights hereunder shall not operate as a waiver of any of those rights.

8.9 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall constitute one and the same document, notwithstanding that both Parties may not be signatories to the same counterpart.

IN WITNESS WHEREOF, the Parties have caused this Marine Terminal Agreement to be executed by their duly authorized representatives.

[Signature page follows]

RECEIVED

THE CITY OF LOS ANGELES,
acting by and through its Board of Harbor Commissioners

By: Geraldine Knatz
Geraldine Knatz, Ph.D.
Executive Director

Attest: Rose M. Dvorshak
Board Secretary

Dated: Sept. 30, 2008

Approved as to Form:

September 29, 2008
Rockard J. Delgadillo, City Attorney

By TLM
Thomas A. Russell, General Counsel

THE CITY OF LONG BEACH,
acting by and through its Board of Harbor Commissioners

By: _____
Richard D. Steinke
Executive Director

Attest: _____
Board Secretary

Dated: _____

Approved as to Form:

_____, 2008
Robert E. Shannon, City Attorney

By _____
Dominic Holzhaus, Principal Deputy

RECEIVED

THE CITY OF LOS ANGELES,
acting by and through its Board of Harbor Commissioners

By: _____
Geraldine Knatz, Ph.D.
Executive Director

Attest: _____
Board Secretary

Dated: _____

Approved as to Form:

_____, 2008
Rockard J. Delgadillo, City Attorney

By _____
Thomas A. Russell, General Counsel

THE CITY OF LONG BEACH,
acting by and through its Board of Harbor Commissioners

By: _____
Richard D. Steinke
Executive Director

Attest: _____
Board Secretary

Dated: 9/30/08

Approved as to Form:

9/30, 2008
Robert E. Shannon, City Attorney

By _____
Dominic Holzhaus, Principal Deputy

Attachment A
Concession Terms and Conditions

Each Concession Agreement between the Port of Los Angeles or the Port of Long Beach and a Licensed Motor Carrier to allow Drayage Truck access to a Port Terminal shall include, but is not limited to, the following terms and conditions (defined terms not defined herein shall have the meanings ascribed to them in the Marine Terminal Agreement, the "Agreement"):

a. The Ports shall grant to Concessionaires a non-exclusive license to access Port property for the purpose of transporting containers and/or other cargo to and from marine terminals ("Drayage Service"). Concessionaire's right of access to and use of the Port's facilities under the Concession shall be solely for the purpose of conducting Drayage Service unless the Concessionaire obtains the Port Executive Director's prior written permission to access Port's Property for other purposes. Concessionaire's rights under the Concession shall be non-exclusive.

b. The Concession is not transferable without prior written permission from the Port, which shall be conditioned upon: (1) satisfaction in full of the transferor Concessionaire's obligations to the Port; and (2) the proposed transferee's compliance with Concession qualifications and requirements. Concessionaire requests to transfer shall be delivered to the Port in writing at least 30 days' advance of any proposed substantial change in the ownership and control of Concessionaire. The Port shall not unreasonably deny transfer of the Concession but may, in its sole discretion, choose to issue a new Concession in lieu of transfer.

c. Drayage Trucks providing Drayage Service to the Ports and operating under the authority of and in compliance with the terms and conditions of the Concession shall be referred to herein as "Permitted Trucks." Permitted Trucks may include Drayage Trucks owned and operated by Concessionaire ("Concessionaire's Trucks") or owned by contractor drivers and performing Drayage Service on behalf of Concessionaire under the authority of the Concession ("Contractors' Trucks"). Regardless of ownership status, Concessionaire shall cause all Permitted Trucks to comply fully with all of the terms and conditions of the Concession.

d. In granting Concessions, the Ports do not secure Drayage Service contracts between Concessionaires and any customers, which contracts and obligations therein shall remain the sole responsibility of Concessionaire.

e. As a condition to the right to provide Drayage Services under the Concession, the Ports shall require Concessionaires to adhere to certain terms, as set forth below. In addition, either Port may adopt additional requirements for Concessionaires unilaterally.

f. Concessionaires shall cause all Concessionaires' Trucks to be modernized by either retrofit or replacement to comply with the Clean Truck Program requirements in accordance with Sections 4.1 (b)-(d) of the Agreement. Concessionaire shall confirm that all Contractors' Trucks that operate under its Concession also comply with the Clean Truck Program requirements in accordance with Sections 4.1 (b)-(d) of the Agreement.

g. Concessionaires must be Licensed Motor Carriers in good standing and in compliance with the requirements of a valid license/permit under either: (1) a California Motor Carrier Permit issued by the California Department of Motor Vehicles under the California Vehicle Code; or (2) a state Motor Carrier Permit issued by another U.S. state, or (3) a Federal Motor Carrier License (USDOT Number) and Operating Authority (MC Number).

h. Concessionaire shall utilize Permitted Trucks to provide Drayage Service to the Ports pursuant to the Concession. To qualify as a Permitted Truck, all Drayage Trucks providing Drayage Service operating under the Concession shall have required information entered into and kept updated in the DTR and shall comply at all times with the Concession's terms and conditions.

i. Concessionaire shall be responsible for the compliance and performance of drivers and other personnel utilized pursuant to the Concession, and the Ports shall have no responsibility or liability therefor.

j. Concessionaire shall submit for approval by the Concession Administrator a parking plan for all Permitted Trucks. Concessionaire shall ensure that all Permitted Trucks comply with the plan, and with all laws, rules and regulations regarding routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads.

k. Concessionaire shall prepare an appropriate maintenance plan for all Permitted Trucks. Concessionaire shall be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with the manufacturer's specifications. Maintenance records for all Permitted Trucks shall be available for inspection by the Concession Administrator during business hours.

l. Concessionaire shall ensure that all Permitted Trucks are in compliance with all applicable existing regulatory safety standards. Concessionaire shall maintain and make available for inspection by the Concession Administrator, all records required for compliance with the Ports' Clean Trucks Program and all existing regulatory programs including U.S. Department of Transportation motor carrier safety regulations, and State of California Biennial Inspection of Terminals

program. This includes driver qualifications, driver training, vehicle maintenance, safety inspection, controlled substances and alcohol testing, and hours-of-service for all employee drivers and contractor drivers.

m. Concessionaire shall ensure and keep records of enrollment in the Transportation Worker Identification Credential ("TWIC") program, possession of a valid, current TWIC card, and ongoing compliance with the requirements of the TWIC program by all Concession drivers, including employees and contractor drivers.

n. When entering and leaving Port Property and while on Port Property, Concessionaire shall ensure that each Permitted Truck is equipped with such means of Clean Trucks Program compliance verification as may be specified by the Marine Terminal Operators of the Ports' Terminals.

o. To support the Ports' safety and security measures, Concessionaire shall ensure that all Permitted Trucks comply with applicable federal, state, municipal and Ports security laws and regulations, including without limitation, the USA Patriot Act of 2001, Maritime Transportation Security Act of 2002, and Department of Homeland Security regulations, including terminal and facility security plans. When entering and leaving Port Property and while on Port Property, Permitted Trucks shall be subject to safety and security searches in accordance with applicable law.

p. When entering and leaving Port Property and while on Port Property, Concessionaire shall post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding truck emissions, safety and security compliance to the Concession Administrator and/or authorities.

q. When entering and leaving Port Property and while on Port Property, Concessionaire shall implement technology required for the Concession and /or the Clean Trucks Program.

r. Concessionaires shall demonstrate to the satisfaction of the Executive Director that the financial capability to perform their obligations under the Concession over the term thereof.

s. Concessionaires shall, when entering and leaving Port Property and while on Port Property, comply with Ports' tariffs and all applicable federal, state and municipal laws, statutes, ordinances, rules and regulations that govern Concessionaire's operations, including without limitation, any laws, rules and regulations regulating motor carriers, transportation, hazardous materials, safety, security, employment, traffic, zoning, and land use.

t. The Concessionaire shall be responsible to enter, update and maintain accurate data in the DTR, Concession Registry and Driver Registry, and notify the Ports or their designated agents within ten (10) business days of a change to any of the following information:

   i. DTR information, including for each Drayage Truck in service under the Concession, the year, make and model, status of compliance with EPA standards and retrofit, and annual miles driven, and any other information required by the Concession Administrator;

   ii. Concessionaire information, provided under the Concession;

   iii. Driver list and, status of commercial driver's license, and TWIC compliance; and

   iv. such other information as may reasonably be required by the Executive Directors and Concession Administrator.

u. Concessionaire agrees that while the Concession in is effect and for one year thereafter the Ports, the Concession Administrator (or any other agent designated by the Ports) may inspect any property, offices or equipment utilized by the Concessionaire to perform Drayage Service, and any files or records which the Ports believe may demonstrate the extent to which the Concessionaire has complied or has failed to comply with requirements set forth in the Concession.

v. Except for the sole negligence or willful misconduct of Ports, Concessionaire shall at all times indemnify, protect, defend, and hold harmless the Ports and any and all of their boards, officers, agents, or employees from and against all claims, charges, demands, costs, expenses (including counsel fees), judgments, civil fines and penalties, liabilities or losses of any kind or nature whatsoever which may be sustained or suffered by or secured against the Ports, their boards, officers, agents, or employees by reason of any damage to property, injury to persons, or any action that may arise out of the performance of the Concession that is caused by any act, omission, or negligence of Concessionaire, its boards, officers, agents, employees, contractors, subcontractors or Permitted Trucks regardless of whether any act, omission, or negligence of the Ports, their boards, officers, agents, or employees contributed thereto; provided that: (i) if the Ports contribute to a loss, Concessionaire's indemnification of the Ports for the Ports' share of the loss shall be limited to One Million Dollars ($1,000,000); (ii) notwithstanding the foregoing limitation, Concessionaire shall remain responsible for one hundred percent (100%) of any loss attributable to it, and (iii) the provisions in (i) and (ii) apply on a per-occurrence basis.

w. Concessionaire shall ensure that the following insurance is in force at all times during the term of the Concession for all Permitted Trucks: automobile insurance within Concessionaire's normal limits of liability but not less than $1,000,000 combined single limit per occurrence for transportation of all non-hazardous commodities, including oil and hazardous material in bulk and not less than $5,000,000 combined single limit for transporting hazardous substances in cargo tanks, portable tanks or hopper-type vehicles with capabilities in excess of 3,500 water gallons, or hazardous materials meeting specified hazard classes or divisions within the Hazardous Material Table (49 C.F.R. 172.101). Each policy shall contain an additional insured endorsement naming the City of Long Beach Harbor Department or the City of Los Angeles Harbor Department, as applicable, and their boards, officers, agents, and employees.

x. Concessionaire shall certify that it is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and that the Concessionaire shall comply with such provisions before commencing the performance of the tasks under the Concession. Concessionaire shall submit Workers' Compensation policies that meet current California statutory requirements, and $1,000,000 in employer's liability coverage, whether underwritten or by the state insurance fund or private carrier, which provide that the public or private carrier waives its right of subrogation against the Ports in any circumstance in which it is alleged that actions or omissions of the Ports contributed to the accident.

y. Carriers shall obtain and maintain all insurance coverage required by the Concession with insurance carriers authorized to do business in the State of California and which are rated A-, VII or better in the Best's Insurance Guide. Carriers without a Best's rating shall meet comparable standards in another rating service acceptable to the Ports.

z. Concessionaire shall ensure that each insurance policy required to be obtained and maintained pursuant to the Concession shall provide that it will not be canceled or reduced in coverage until after the Risk Manager of the Ports has been given 30 days' prior written notice by registered mail.

aa. Concessionaire shall ensure that special endorsement forms are submitted to the Program Administrator as evidence of all required insurance. Alternatively, a certified copy of each policy containing the additional insured and 30-day cancellation notice language shall be furnished to Concession Administrator. The form of such policy or endorsement shall be subject to the approval of the City Attorney.

bb. At least 30 days prior to the expiration of each policy, Concessionaire shall furnish to Program Administrator a renewal endorsement or renewal certificate showing that the policy has been renewed or extended or, if new insurance has been obtained, evidence of insurance as specified above.

cc. Concessionaire shall report in writing to Executive Director within fifteen (15) calendar days after it, its officers or managing agents have knowledge of any accident or occurrence involving death of or injury to any person or persons, or damage in excess of Five Hundred Dollars ($500.00) to property, occurring upon Port property, or elsewhere within the Harbor District of the City of Long Beach or the City of Los Angeles, as applicable, if Concessionaire's officers, agents, employees, contractors, subcontractors or Permitted Trucks are involved in such an accident or occurrence. Such report shall contain to the extent available: (i) the name and address of the persons involved; (ii) a general statement as to the nature and extent of injury or damage; (iii) the date and hour of occurrence; (iv) the names and addresses of known witnesses; and (v) such other information as may be known to Concessionaire, its officers or managing agents.

dd. In the event Concessionaire fails to comply with the terms and conditions of the Concession or commits an event of Default (as such term is defined immediately below), such event shall be deemed a Default by the Concessionaire and the Port shall give Concessionaire written notice of such Default and, if specified in the notice, opportunity for the Concessionaire to cure the Default. If Concessionaire fails to cure the Default or fails to take substantial and diligent steps towards such corrections, within ten (10) calendar days after Concessionaire's receipt of such notification, the Port may treat the Concession as terminated not earlier than at 11:59 p.m., Pacific Time on the thirtieth (30th) day following the date of Concessionaire's receipt of notice. Upon such termination, the Port may deny any and all access to Port property by the Concessionaire. In the event that the nature of the Default is such that it cannot be cured within ten (10) calendar days, Concessionaire must take substantial steps toward corrections within said ten (10) calendar days, and diligently continue substantial efforts to complete the cure of the Default as soon as is reasonably practicable.

ee. Circumstances that constitute a default under the Concession by Concessionaire ("Default") shall include, without limitation, the following:

i. Any act or failure to act which operates to deprive Concessionaire any of the rights, powers, licenses, permits or authorities necessary for the proper conduct and operation of Drayage Service in accordance with applicable laws;

ii. Any failure to comply with the terms and conditions of the Concession;

iii. Abandonment or discontinuance of Drayage Service;

iv. Repeated violations of traffic rules and regulations in and around the Harbor District or disregard of public safety;

v. Any violation of the Patriot Act of 2001 or Department of Homeland Security regulations, including any facility security plan;

vi. Any fraud or misrepresentation in the Concession application, information or data submitted to the Ports required under the Concession;

vii. Any effort to misrepresent that a Drayage Truck complies with Sections 4.1 (b)-(d) of the Agreement, to disable or fail to maintain in proper operation emission-control equipment that has been installed in Drayage Trucks in Drayage Service, or any use of a Drayage Truck in Drayage Service that does not comply with Sections 4.1 (b)-(d) of the Agreement;

viii. Any assignment or transfer of the Concession or substantial change in the ownership and control of Concessionaire without prior notice to and consent of the Ports;

ix. The bankruptcy of Concessionaire; or the appointment of a receiver for Concessionaire; or assignment of the Concession for the benefit of creditors;

x. The failure to pay or repeated late payment of fees due under the Concession; or

xi. Violation of a Ports' tariff, a city ordinance, a state law, or a federal law. Any action by a Concessionaire's boards, officers, agents, employees, contractors, subcontractors or Permitted Trucks shall be deemed to be an action by Concessionaire for purposes of the Concession. If Concessionaire has undertaken obligations contained in truck-grant or other agreements, with the Port or with others, the Concession shall not affect such obligations contained in such other agreements.

ff. The following procedures shall apply in the event the Port issues a Notice of Default to Concessionaire:

i. The Executive Director, or any employee of the Port designated by the Executive Director, may issue a Notice of Default to a Concessionaire whenever there is reason to believe that the Concessionaire has breached the Concession or committed an event of Default.

ii. A Notice of Default shall be in writing, signed by the Executive Director or his/her designee, briefly state the nature of the Default, state the Remedy imposed, and shall be delivered by first class mail, overnight courier delivery or personal delivery to the business address provided by the Concessionaire in its application, or to any officer of the Concessionaire.

iii. A Notice of Default is an exercise of the Port's proprietorship of the Harbor District and of Port land and facilities and is not an action of the City of Los Angeles or the City of Long Beach, as applicable, in its sovereign capacity. A Notice of Default and any Remedy imposed by a Notice of Default is independent of, and without prejudice to, any civil or criminal proceeding, claim, penalty, fine, sanction, or remedy that may be instituted or imposed by any governmental entity, including the Cities, by reason of the same Default giving rise to the Notice of Default.

iv. A Notice of Default shall also state whether the Default is being designated by the Port as a Minor Default or a Major Default.

v. The Remedy stated in a Notice of Default which is designated as a Minor Default shall be effective and final fourteen (14) calendar days after the Notice of Default is mailed or personally delivered, unless the Concessionaire has delivered a completed Notice of Contest to the Port, on a form for such a purpose, that it contests the Notice of Default within the fourteen (14) calendar days.

vi. If the Concessionaire has delivered such a completed Notice of Contest, the Executive Director will designate a person (the "Hearing Officer"), who did not sign the Notice of Default, to hold an Informal Hearing on the Notice of Default. At the Informal Hearing, the Port and the Concessionaire will present any relevant information and legal contentions with respect to the Notice of Default. The Informal Hearing shall be conducted informally under such procedures as may be designated by the Hearing Officer and any rules of evidence may be dispensed with. The Decision of the Hearing Officer on the Notice of Default shall be final when rendered and shall include either upholding the Notice of Default and the Remedy stated therein or disallowing the

Notice of Default. The Decision shall be in writing and signed by the Hearing Officer, but need not be accompanied by reasons or findings.

vii. The Remedy stated in a Notice of Default which is designated as a Major Default shall be effective and final thirty (30) calendar days after the Notice of Default is mailed or personally delivered, unless (i) the Concessionaire has delivered a completed Notice of Contest to the Port, on a form for such a purpose, that it contests the Notice of Default within the thirty (30) calendar days, or (ii) the Notice of Default contains the finding such as: substantial risk of danger or injury to the Port, its customers or facilities, or persons or property at or near the Port, in which event the Remedy shall take immediate effect. If the Concessionaire completes a Notice of Contest, the Port will endeavor to hold an Informal Hearing as expeditiously as possible.

viii. If the Concessionaire has delivered a completed Notice of Contest, the Executive Director will designate a person (the "Hearing Officer"), who did not sign the Notice of Default, to hold an Informal Hearing on the Notice of Default. At the Informal Hearing, the Port and the Concessionaire will present any relevant information and legal contentions with respect to the Notice of Default. The Informal Hearing shall be conducted informally under such procedures as may be designated by the Hearing Officer and any rules of evidence may be dispensed with. A transcription or recording of the Informal Hearing shall be made. The decision of the Hearing Officer on the Notice of Default shall be final, unless either the Concessionaire or the Port staff, within ten (10) calendar days requests that the Decision be reviewed by the Executive Director. The Decision shall include any of the following results: (a) upholding the Notice of Default and the Remedy stated therein; (b) upholding the Notice of Default but ordering a greater or lesser Remedy than stated in the Notice; or (c) disallowing the Notice of Default. The Decision shall be in writing, signed by the Hearing Officer, and shall briefly state the Hearing Officer's reasons for the Decision.

gg. The following Remedy may be contained in a Notice of Default and may imposed by the Port for a breach of the Concession or other event of Default:

i. For a Minor Default, any one or more of the following may be contained in a Notice of Default as a Remedy and imposed by the Port: (a) a warning letter; (b) an order that corrective action be undertaken within a specified period of time; (c) an order that the cost of

investigation and administration of the Default be paid to the Port; (d) an order that a course of education or training be completed within a specified period of time.

ii. For a Major Default any one or more of the following may be contained in a Notice of Default as a Remedy and imposed by the Port: (a) any Remedy provided for a Minor Default; (b) an order suspending for a period not to exceed thirty (30) days the right of the Concessionaire to provide Drayage Services at the Port; (c) an order of revocation of the Concession and of the right of the Concessionaire to provide Drayage Services at the Port.

hh. For any Major Default in which there is a finding of willful or intentional fraud or misrepresentation of material information in the Concession application, information or data submitted to the Port required under the Concession, the Port may order the revocation of the Concession and of the right of the Concessionaire to provide Drayage Services at the Port, without the opportunity to cure the Default.

ii. The failure to comply with a Remedy imposed by the Port shall itself be grounds for a Notice of a Major Default.

jj. During the performance of the Concession, Concessionaire shall not discriminate in its employment practices against any employee or applicant for employment because of employee's or applicant's race, religion, national origin, ancestry, sex, age, sexual orientation, disability, marital status, domestic partner status, or medical condition.

kk. Concessionaire and the Ports have read and are aware of the provisions of Section 1090 *et seq.* and Section 87100 *et seq.* of the California Government Code relating to conflict of interest of public officers and employees. All parties to the Concession agree that they are unaware of any financial or economic interest of any public officer or employee of Cities of Los Angeles or Long Beach relating to the Concession. It is further understood and agreed that if such financial interest does exist at the inception of the Concession, Ports may immediately terminate the Concession by giving written notice thereof.

FEDERAL MARITIME COMMISSION
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Phone: (202) 523-5796
Fax: (202) 523-4372

Bureau of Trade Analysis

October 3, 2008

Matthew J. Thomas, Esq.
C. Jonathan Benner, Esq.
Troutman Sanders LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004-2134

Re: FMC Agreement No. 201170-001

Dear Messrs. Thomas and Benner:

I write with reference to the responses filed by the above-captioned agreement received by the Office of Agreements on September 19, 2008. As we have discussed by telephone, there are several pieces of data and information not included in the response which we require to expeditiously prepare our analysis and recommendation for the Federal Maritime Commission. Timely receipt of the information and data listed in the attachment to this letter would be instrumental to permitting staff to expeditiously conclude our agreement review, as well as to the Commission's consideration of the Ports' related request for expedited effectiveness. Accordingly, we ask that you furnish the requested items no later than close of business on October 7, 2008.

Thank you in advance for your swift consideration of this letter and your cooperation. Please do not hesitate to contact me or Dr. Roy Pearson at the telephone number above should you have any questions or concerns with this matter.

Sincerely,
Florence A. Carr
Florence A. Carr,
Director, Bureau of Trade Analysis

Enclosure

	Question/Topic in RFAI	Requested Details/Clarifications
11.	Exemptions to clean truck fee rationales and impacts	Provide the financial models used to derive the CTP fee and annual estimates of fund outlays and revenue referred to in the Ports' meeting with the FMC on September 10, 2008.
18.	Concession applications data including denials of concession	Provide data updated as of 10/1/08 on concession applications, etc.
28.	Request for any staff analysis on the decision to establish POLA 's last minute "incentives."	Provide letters that Swift and Knight sent to POLA on incentive proposals per John Holmes' request during a meeting with LMCs.
29.	BCG CTP Analysis of March 2008: Seeks (a) estimated cost savings for each category listed, and (b) references to sources used in developing estimate.	In the Attachment to question 29, page 2, BCG selected the high-end scenario. Please provide the same information using the low-end and average scenarios.
30.	Series of questions about the employee mandate, initial concession fee, parking requirements, and financial strength requirement (and, in particular, POLB's decision to grandfather in current LMCs on financial viability requirement). Includes request for documents.	If there are no documents, please so declare; if documents exist, please provide.
31.	Request for documents that address possible "barrier to entry" impacts of the employee mandate, initial concession, etc.	In the video of the February 19, 2008 meeting of POLB Board of Harbor Commissioners, Dr. Robert Kanter is questioned about the POLB $250 concession application fee (clocked at approximately 06:05:00 into the meeting). Dr. Kanter advises the Board that: "We [POLB staff] had an analysis that actually was run by some of our cohorts over at the Port of Los Angeles. The general agreement was that a nominal fee to cover the basic administrative costs would be good to apply, but not to make it any type of barrier to entry so that those people [small LMCs] would not be prevented from applying." Please provide the analysis and any summary thereof and any documents used to support that analysis. If there are no documents, please so declare; if documents exist, please provide.
32.	Request for documents, reports, etc. (exclusive of Husing and BCG) that either (a) support employee mandate as necessary to meet CTP goals, or (b) indicate impact on the CTP goal of its absence.	If there are no documents, please so declare; if documents exist, please provide.

35.	Multi-part question on the Drayage Truck Registry, terminal access control, fee collection and administrative costs.	Provide **Starcrest** consultant's update of drayage fleet composition data (referenced in the Ports' meeting minutes of Nov. 13, 20 and 27 of 2007); If there are no other documents in response to question 35, please so declare; if documents exist, please provide.

FAX from . . .

RECEIVED

Senator Dianne Feinstein

OFFICE OF
FEDERAL MARITIME COM

of California

331 Hart Senate Office Building
Washington, DC 20510
(202) 224-3841

DATE: 10-10-08

TIME:

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TO: The Federal Maritime Commission

FROM: Senator Dianne Feinstein

COMMENTS:

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DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
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SELECT COMMITTEE ON INTELLIGENCE

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United States Senate

WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

October 10, 2008

Commissioner Joseph E. Brennan
Commissioner Harold J. Creel, Jr.
Commissioner Rebecca F. Dye
The Federal Maritime Commission
800 North Capitol Street NW
Washington, DC 20573

Dear Commissioners Brennan, Creel, and Dye:

I am writing to express my deep concern that the Federal Maritime Commission's (FMC) ongoing review of the San Pedro Bay Ports' Clean Truck Program Agreement oversteps the Commission's mandate, expertise, and capabilities. I believe it is unwise for the FMC to consider challenging the cost effectiveness of the ports' program.

The San Pedro Bay Ports account for more than 20 percent of the toxic air emissions in the Los Angeles basin and more smog and particulate-forming nitrogen oxide emissions than all six million cars in the region. In local communities around the port, childhood asthma rates are double the national average, and the cancer risk exposure from inhalation of diesel particulates is 500 times higher than what the federal government considers acceptable.

On October 1, 2008, the Ports of Los Angeles and Long Beach began implementing their Clean Trucks Program Agreement. The two ports have agreed to prohibit trucks with the highest pollution levels from port service and collect a fee to fund the replacement of dirty trucks with clean, new vehicles. While the ports have also implemented differing labor and safety requirements, their agreement is specifically focused on the goal of reducing the environmental and public health threat posed by diesel air pollution.

I understand that next week the FMC will hold a closed door session at which it will determine whether to challenge the Clean Trucks Program Agreement in Federal District Court under the Shipping Act. To protect the public interest from "substantially anticompetitive agreements" in an industry allowed to collude, the Shipping Act instructs the FMC to review agreements to protect against shipping tariffs and rates that would likely produce a reduction in competition that causes an "unreasonable increase in transportation cost."

I do not believe Congress intended to give the FMC the power to determine whether environmental programs in ports are cost effective. The Shipping Act is intended to give FMC the power to prevent anticompetitive behavior, not to evaluate the cost effectiveness of an environmental fee.

I am also concerned that the FMC lacks the expertise to conduct a thorough and accurate assessment of the human health and environmental benefits of the Clean Trucks Program, which is the primary public benefit of the agreement under evaluation. The FMC cannot determine whether the program's costs are reasonable without considering these benefits, but quantifying the social benefit of environmental protection is an extraordinarily difficult task in which unsound assumptions or omissions can jeopardize results.

In such a circumstance, the FMC should ensure that both its methodology and conclusions for cost evaluation under the Shipping Act are conducted in compliance with standard accepted practice for environmental program review. Instead, the FMC is conducting an in-house analysis that differs from accepted standards.

- The FMC has not hired environmental economists or submitted its economic analysis and conclusions for peer review by a cost benefit expert.

- The FMC has not followed the U.S Environmental Protection Agency's "Guidelines for Preparing Economic Analyses," or the Office of Management and Budget's "Circular A-4," which is designed to assist analysts in regulatory agencies by standardizing the way benefits and costs of Federal regulatory actions are measured.

- The FMC has not consulted with the U.S. Environmental Protection Agency or the California Air Resources Board on its analysis.

The FMC does not intend to conduct a comprehensive evaluation of the environmental and human health benefits of the Clean Trucks program. Instead, the FMC economists will "accept" the ports' own assessment of these benefits. However, the FMC has never asked the ports to prepare and submit a comprehensive benefits analysis that would meet Federal standards.

Furthermore, the ports themselves have never independently conducted a benefits analysis that would meet Federal standards. The most comprehensive assessment, in which consultant John E. Husing concluded that the expected monetized human health benefits from reduced fine particulate pollution would range from $1.7 billion to $10.1 billion, was based on South Coast Air Quality

Management District staff estimates that were never finalized. More importantly, the Husing study clearly states:

> *Additional health benefits not quantified in these analyses would be anticipated from reductions in regional ozone levels. In addition, these analyses did not estimate benefits from reductions in localized cancer risks associated with reductions in diesel particulate matter near facilities where trucks operate.*

An environmental and human health impact analysis of air pollution from these ports that fails to quantify ozone level impacts or cancer risk reduction is incomplete. Husing's study is a useful tool to demonstrate significant public benefit, but it is woefully inadequate as a quantification of all benefits to be compared against the program's costs.

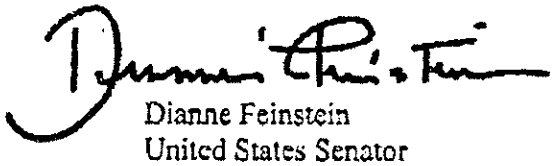
Los Angeles is one of only two "severe ozone nonattainment areas" in the United States under the Clean Air Act. Unhealthy levels of ozone, a primary precursor of smog, can cause bouts of coughing, reduce lung function, aggravate asthma, increase susceptibility to respiratory illnesses like pneumonia and bronchitis, and cause permanent lung damage. The FMC also should not ignore the impact that cleaner air would have on cancer rates. As Dr. Elaine Chang, the Deputy Executive Director of the South Coast Air Quality Management District, recently testified, "The area around the ports suffers an average cancer risk from air pollution that is more than 60% higher than the average in the South Coast Air Basin."

I understand that the FMC believes it must review the agreement established between the Ports of Los Angeles and Long Beach under the Shipping Act, even though this is not the type of agreement that Congress intended to be reviewed under this Act. However, the FMC does not have and has not obtained the capacity and expertise necessary to assess whether the agreement to establish the Clean Trucks Program would create unreasonable cost, when compared to the human health and environmental benefits that would be accrued.

Under such circumstances, I believe it would be a mistake for the FMC to assert in Federal Court that this is the first agreement in the Commission's history to reduce competition to the point that it unreasonably increases the cost of transportation. It is imperative that the FMC consider whether a cost analysis of a public health and environmental agreement that has failed to measure public benefits would stand up in Federal Court.

I encourage the FMC to provide the ports with recommended steps that could reduce the cost of implementing the Clean Trucks Program, instead of pursuing litigation. If you have any questions or concerns, please do not hesitate to contact me or my staff in my Washington office.

Sincerely,



Dianne Feinstein
United States Senator

DF/mbn