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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

NATURAL RESOURCES DEFENSE COUNCIL

December 15, 2008

Karen V. Gregory, Secretary
Federal Maritime Commission
Room 1046
800 North Capital St., N.W.
Washington, D.C. 20573-0001
Secretary@fmc.gov

Re: Comments on Petition No. P2-08

Dear Secretary Gregory:

On behalf of the Natural Resources Defense Council ("NRDC"), Coalition for Clean Air, and the Sierra Club (Collectively "Public Health Commenters"), we are writing to support the positions articulated in the November 21, 2008 Petition of APM Terminals Pacific Ltd., California United Terminals Inc., Eagle Marine Services, Ltd, International Transportation Services, Inc., Long Beach Container Terminal, Inc., Seaside Transportation Services LLC, Total Terminals LLC, West Basin Container Terminal LLC, Pacific Maritime Services, LLC, SSA Terminal (Long Beach) LLC, Trans Pacific Container Service Corporation, Yusen Terminal, Inc., SSA Terminals LLC (collectively "MTOs") and PortCheck LLC ("Fee Petition") regarding the effective date of Agreement 201199. At the outset, Public Health Commenters note that the conduct by the staff of the Federal Maritime Commission ("Commission") at issue here is another in a long list of roadblocks to improvements in public health that this agency has put in the way of the Ports of Los Angeles and Long Beach's efforts to clean up deadly diesel pollution. The Commission staff's crusade against the Ports' Clean Trucks Programs has now reached the point where staff wants to halt collection of the fee to fund newer, cleaner trucks—in effect, killing the program. Accordingly, we write to support the position of the Petitioners. In addition, there are some issues that have not been addressed by the Petition and the comments received to date. Accordingly, we have decided to provide some additional perspective on the potential impacts of the decision of the Commission to effectively delay a critical piece of efforts to clean up deadly diesel pollution.

We want to note that we generally agree with the legal analysis presented to the Commission in the November 21, 2008 Fee Petition drafted by David E. Smith, Counsel for the Petitioners. The Petition clearly demonstrates that the Commission's action of

determining that Agreement No. 201199 is subject to the 45-day waiting period under the Shipping Act is arbitrary and capricious agency behavior. There is no need in this letter to restate that legal analysis again, and accordingly, we simply incorporate by reference the arguments made in the November 21st Fee Petition. However, there are two additional points related to this Fee Petition that need to be made.

Further Delay is Unwarranted

It is our understanding that the 45-day period that Commission staff purports is required before Agreement 201199 becomes effective will expire on December 18, 2008. If the Commission staff plans to use the guise of this controversy to push for additional delays in the implementation of this agreement, we strongly suggest that the Commission exercise reasonable judgment and not allow this to happen. The environmental impacts are far too immense to impede collection of the fee to fund the billions of dollars necessary to aid Licensed Motor Carriers to purchase cleaner trucks required to remediate the current public health crisis in port-adjacent communities. Since the Commission has determined that it need not comply with federal environmental laws before seeking termination of portions of clean air programs developed by the Ports,¹ we implore the Commission to actually examine the public health information that we and others have presented and realize that clean trucks will not magically appear in the harbor—instead, a significant infusion of dollars will be necessary to create a cleaner fleet of port drayage trucks.

The Environmental Impacts of Stopping the Clean Truck Fee Will Be Significant

The environmental impacts of further delay have been articulated by Public Health Commenters many times to the Commission. We cannot emphasize enough that the Commission's actions killing the clean trucks fee will kill the clean trucks programs. We are not misled by the platitudes about the Commission's respect for environmental considerations; nor should you be. Recently, Professor Jane Hall released a study that resulted in the following findings:

Residents of the South Coast Air Basin, on average, would gain an annual economic benefit of more than \$1,250 in improved health if the federal ozone and PM2.5 standards were met, totaling nearly \$22 billion.²

¹ Letter to D. Pettit from K. Gregory (October 23, 2008) [Attached as Exhibit A].

² Jane Hall, et. al., *The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Air Basin*, at 84 (Nov. 12, 2008), available at <http://business.fullerton.edu/centers/iees/>.

The Jane Hall study also attempted to place the pollution impacts in perspective by noting that

[a]ttaining the federal PM2.5 standard would save more lives than reducing the number of motor vehicle fatalities to zero in most of the counties in this study. In Los Angeles County, PM2.5-related deaths are more than double the number of motor vehicle-related deaths.³

Given that many of the residents near the ports and areas where port trucks travel have levels of air pollution that exceed federal clean air standards on many days of the year, benefits from moving these places close to attaining cleaner air will clearly provide economic benefit to the region in addition to the moral imperative to ensure every child and adult can breathe clean air.

Conclusion

We implore the Commission to reverse course and take reasonable actions that comply with NEPA, with its own regulations, and with good public policy. The Commission should determine that the Fee Agreement went into effect upon filing on November 3, 2008 and drop its efforts to attack Agreement 201119.

Dated: December 15, 2008



DAVID PETTIT
MELISSA LIN PERRELLA
ADRIANO MARTINEZ
Natural Resources Defense Council
1314 Second St.
Santa Monica, CA 90401
Phone (310) 434-2300
Fax (310) 434-2399

Counsel for Public Health Commenters

³ *Id.*

EXHIBIT A



FEDERAL MARITIME COMMISSION

Office of the Secretary
800 North Capitol Street, N.W.
Washington, DC 20573-0001

Phone: (202) 523-5725
Fax: (202) 523-0014
E-mail: Secretary@fmc.gov

October 23, 2008

Via Federal Express

Mr. David Pettit
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401

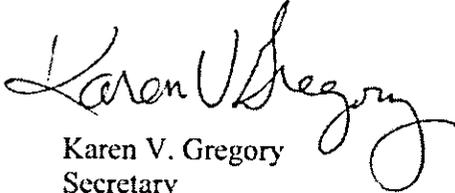
Dear Mr. Pettit:

As the Commission's Secretary, I acknowledge receipt of the Petition of the Natural Resources Defense Council, Coalition for Clean Air and the Sierra Club, filed with the Federal Maritime Commission (FMC) on October 14, 2008. In that Petition, you express concern that the FMC was taking action that would "interfere" with the implementation of the ports of Los Angeles' and Long Beach's Clean Trucks Programs. You suggest that no Commission action can be taken without first conducting an environmental review, said to be required under the National Environmental Policy Act ("NEPA").

NEPA's statutory requirement to conduct an environmental analysis comes into play when an agency proposes to undertake, *inter alia*, "major Federal actions significantly affecting the quality of the human environment." 42 USC §4332(2)(C). The regulations implementing NEPA, 40 CFR Part 1508, define such major federal actions. As relevant herein, major federal actions do not include "bringing judicial or administrative civil or criminal enforcement actions." 40 CFR 1508.18. The Commission's counterpart rules on environmental policy analysis, 46 CFR Part 504, closely mirror the NEPA implementing regulations. While the Commission has not in fact determined what action it would propose to take in its consideration of FMC Agreement No. 201170-001, an action to enforce the Shipping Act, including any action under section 6(g) or section 10 thereof, does not trigger the requirement to conduct an environmental assessment or a requirement to prepare an Environmental Impact Statement. 46 CFR 504.4(a)(22). See also 46 CFR 504.10 (exclusion for Commission decision required under statutorily-mandated deadline on Commission action.)

Please be advised that this letter reflects the determination of the appropriate Commission official to your submission under 46 CFR 504.4(b). It does not constitute a final action of the agency, and may be appealed to the Commission within the time requirements specified in 46 CFR 504.4(b).

Sincerely,



Karen V. Gregory
Secretary

Certificate of Service

I, Adriano L. Martinez, hereby certify that on this 15th day of December, 2008, the foregoing comments were served by first-class mail, postage prepaid, on:

David F. Smith and Wayne R. Rohde
Sher and Blackwell LLP, Suite 900
1850 M St., N.W.
Washington D.C. 20036

A handwritten signature in black ink that reads "Adriano L. Martinez". The signature is written in a cursive style with a long horizontal flourish at the end.

Adriano L. Martinez