BEFORE THE
FEDERAL MARITIME COMMISSION

In re:	)
Los Angeles/Long Beach Port	)
Terminal Operator Administration	)
And Implementation Agreement	)
FMC Agreement No. 201178	)
	)

COMMENTS OF THE NATURAL RESOURCES DEFENSE COUNCIL

I. Summary and Introduction.

In an ill-advised effort to prevent reform 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 halt the Ports and the West Coast Marine Terminals Operators from "collect[ing] and exchanging information, engage[ing] in discussions, and reach[ing] agreement" with regard to several environmental, security, and infrastructure programs.[1] This irresponsible step is procedurally and substantively invalid.

In its March 3rd, 2008 filing, the ATA asks the FMC to stop the development of programs that will aid in cleaning up the serious toxic pollution problems associated with Port operations. Instead of relying on science and actual emissions inventories, the ATA attempts to paint its request to halt work on the Ports' Clean Trucks Programs as "not hav[ing] a negative effect on the removal 'dirty' diesel trucks from port drayage service."[2]

Exactly the opposite is true. The ATA's transparent attempt to make their actions appear benign ignores the fact that the ATA is asking the FMC to disallow a program within the San Pedro Bay Ports Clean Air Action Plan ("CAAP") that is essential to cleaning up Port trucking: the idea that the Ports can keep dirty, polluting trucks off their property. Moreover, since the agreement at issue covers several issues, including port security, the ATA's actions could have negative impacts well beyond impeding work on the Clean Trucks Programs.

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 1.25 million members and e-activists nationwide, more than 97,700 of whom reside in the State of

[1] Comments of the Intermodal Motor Carriers Conference, American Trucking Association In Re: Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement, 18 (March 3, 2008) [Attached as Exhibit A].
[2] *Id.*

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.

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 NRDC must show good cause.[3] Since, the ATA's papers are so far afield of the Los Angeles/Long Beach Port/Terminal Operator FMC Agreement No. 201178 that your agency noticed in the Federal Register on February 21, 2008, NRDC is 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. NRDC did not see a copy of the ATA's comments until the end of the day on Monday, March 3rd, and because of this, could not comply with the 10 day window. It is our understanding that accepting these comments only seven 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 leave to file these comments.

IV. Procedural Flaws With ATA's Requests.

The ATA seeks to use the administrative comment period provided by agency regulations to cause the FMC to take premature action that is neither ripe nor warranted under current circumstances. As the FMC is well aware, the agreement filed on February 12, 2008 between the Port of Los Angeles, the Port of Long Beach, and the West Coast Marine Terminals Operators, while related to the Ports' efforts to clean the air, actually serves to allow for discussions between the Ports and their resident marine terminal operators relating to several issues pertaining to "port security, infrastructure, or clean air."[4] As the agreement states, "the purpose of this Agreement is to authorize the parties to collect and exchange information, engage in discussions, and reach agreement with respect to the administration and operation of in a manner that will benefit the Los Angeles/Long Beach port community."[5] The following sections outline two major procedural flaws with the ATA's request to have the FMC interfere with this recently filed agreement.

[3] *See* 40 C.F.R. § 535.603.
[4] Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement: FMC Agreement No. 201178, at 1 (Feb. 12, 2008) [Attached as Exhibit B].
[5] *Id.*

A. The ATA's claims and requests exceed the scope of the agreement filed with the FMC.

The ATA is asking the FMC to take action on two programs that have yet to be fully developed—namely the Port of Los Angeles Clean Trucks Program and the Port of Long Beach Clean Trucks Program. The FMC regulatory provisions covering commenting on Ocean Common Carrier and Marine Terminal Operator agreements clearly state that comments must be "regarding a filed agreement."[6] By twisting the words of the February 12, 2008 Agreement, the ATA hopes to resolve its grievance prematurely by commenting on an agreement that is simply aimed at fostering discussion and collaboration between the Port of Los Angeles, the Port of Long Beach, and their resident marine terminal operators. Significantly, the ATA has not provided the FMC with the text of the recently enacted Port of Long Beach Clean Trucks Program; nor has the ATA dealt honestly with the fact that the Port of Los Angeles has not yet adopted a Clean Trucks Program. Because the ATA's request goes well beyond what 40 C.F.R. Section 535.603 allows, the FMC should simply receive and file the comments of the ATA.

B. The ATA's Claims is Not Ripe Because the Ports Have Not Fully Developed their Clean Trucks Programs.

As indicated above, the Port of Long Beach has not finalized all portions of its Clean Trucks Program and the Port of Los Angeles has not enacted its program. Accordingly, it is premature for the ATA to ask the FMC to halt work on these key pieces of the Clean Air Action Plan—an unwarranted step that could severely impede, if not kill, the ability of each Port to effectively address the serious public health problems caused by port trucking pollution.[7] Moreover, since the agreement filed with the FMC does not even mention the concession agreement, NRDC strongly disagrees with the ATA's assertion that "the filing of the Agreement has placed the concession issue expressly on the Commission's agenda."[8] Because of this, the FMC should ignore the ATA's requests for immediate and drastic action.

V. The FMC Must Not Impede Crucial Clean Air Efforts at the Most Toxic Location in Southern California.

The San Pedro Bay ports are major sources of air pollution in Southern California, and emit high levels of diesel Particulate Matter ("DPM") and other pollutants that currently harm all residents in the South Coast Air Basin ("SCAB"). The California Air Resources Board ("CARB") identified DPM as a toxic air contaminant in 1998.[9] Recently, the South Coast Air Quality District ("SCAQMD") released a draft of its third edition of the Multiple Air Toxics Exposure Study ("MATES III").[10] MATES III found that "the highest risks from air toxics surrounding the port areas, with the highest grid cell risk

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[6] 40 C. F.R. § 535.603.
[7] The recent report released by Beacon Economics outlines the potential gains to be had from the Clean Trucks Program as proposed by the Ports in April of 2007. [Attached as Exhibit C].
[8] ATA Comments, at 5.
[9] *See* http://www.arb.ca.gov/toxics/dieseltac/factsht1.pdf.
[10] SCAQMD, Draft Multiple Air Toxics Exposure Study in the South Coast Air Basin, (January 2008).

about 2,900 per million, followed by the area south of central Los Angeles where there is a major transportation corridor."[11] 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]."[12] 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."[13]

As the FMC is aware, the Ports came together to adopt the San Pedro Bay Ports Clean Air Action Plan in 2006. Clean air regulators on the local (SCAQMD), state (California Air Resources Board) and federal (Environmental Protection Agency) level participated in the development of this plan. To the best of our knowledge, the ATA did not participate in that plan development through submitting comments or testifying at the public hearings and workshops related to the CAAP. The CAAP included a menu of options for the Ports to consider in tackling the trucking issue, and the Ports committed to "develop program details and an implementation plan for Executive Directors review by the end of the 1st quarter of 2007."[14] We understand that, in late 2007, the ATA provided comments and sought to have the FMC quash any efforts by the San Pedro Bay ports to clean up their operations. Now, the ATA is again attempting to prevent the ports from cleaning up trucking pollution, which is clearly against the public interest due to the need to retire the thousands of old, polluting trucks that are currently serving the Ports.

The ATA argues that the San Pedro Bay ports Clean Trucks Program is not needed due to the recently adopted regulation by the California Air Resources Board ("CARB") and the public subsidies provided by California Proposition 1B for air quality improvements in trade corridors. However, the ATA provides no analysis of the substantial environmental benefits the Ports' Clean Trucks Programs will have. In fact, the Ports' Clean Trucks Program are designed to *exceed* the benefits of the CARB regulation and *exceed* the CARB standards. The Clean Trucks Programs are also designed to facilitate the implementation of the CARB regulation. In fact, when writing about the Clean Air Action Plan initiatives, CARB noted that "[t]he key measures to cut air pollution from port operations are the heavily-subsidized Clean Truck Program, and a shore-side expansion program to bring grid-based electrical power to ship berths."[15] Moreover, the ATA has failed to point out that CARB was one of the agencies that helped develop the Clean Air Action Plan; it would be odd for CARB to allow inclusion of an unnecessary program in that document.

Nor does the ATA explain how preventing the Ports from engaging in discussions about how to collect a fee aimed at providing billions of the dollars *to the truck industry* serves

[11] *Id.* at 6-2.
[12] SCAQMD, 2007 Air Quality Management Plan, at IV-A-119.
[13] *Id.*
[14] Final 2006 San Pedro Bay Ports Clean Air Action Plan Technical Report, at 70.
[15] *See* CARB, Proposition 1B: Goods Movement Emission Reduction Program Staff Report on Proposed Guidelines for Implementation, at 54 (Jan. 3, 2008).

the interests of its members. Essentially, the ATA makes the argument that the Ports are allowed to donate hundreds of millions of dollars of public funds from Proposition 1B to the trucking industry, but it is not allowed to place any conditions whatsoever on the receipt of those funds by the trucking industry.

In addition, the actions requested by the ATA could be harmful to national security. While not necessarily within the purview of NRDC's advocacy, we remind the FMC that the agreement at issue provides a venue for discussing the Transportation Worker Identification Credential program with the ports' resident marine terminal operators.[16] It is our understanding that it would be positive for both Ports to work with the industry to discuss how to implement this program. We do not see how squelching the filed agreement advances the security interests of the ports.

VI. The FMC Does Not Have Jurisdiction to Address the Claims Made Under the Federal Aviation Administration Authorization Act in ATA'S Petition.

The ATA letter relies heavily on arguments that the Clean Trucks Program is preempted by the Federal Aviation Administration Authorization Act ("FAAA"). While this is an interesting inquiry, the ATA ignores the fact that the FMC is the inappropriate entity to make this determination. The statutory scope of activities that the FMC may undertake includes the following:

> The Commission regulates common carriers by water and other persons involved in the foreign commerce of the U.S. under provisions of the Shipping Act, 1984, as amended by the Ocean Shipping Reform Act of 1998 [46 U.S.C. app. 1701-1720]; section 19 of the Merchant Marine Act, 1920 [46 U.S.C. app. 876]; the Foreign Shipping Practices Act of 1988 [46 U.S.C. app. 1710a]; sections 2 and 3, Pub. L. 89-777, Financial Responsibility for Death or Injury to Passengers and for Non-Performance of Voyages [46 U.S.C. app. 817d and 817e]; and other applicable statutes.[17]

This does not include determining the preemptive scope of the FAAA. If Congress had intended the FMC to be the agency to determine what activities violate the FAAA, it would have placed that authority within the FAAA—but it did not do so. We are aware of no authority and the ATA has provided to show the FMC can engage in this conduct.

VII. The ATA has Failed to Provide Sufficient Justification for its requests of the FMC.

Of particular significance, the ATA has failed to provide sufficient justification for requesting the FMC to prevent the Ports of Los Angeles and Long Beach from finalizing their Clean Trucks Programs. For example, the ATA has failed to show how many of its more than 37,000 motor carrier members provide drayage services to one or both ports.

[16] *See* Agreement, at 1.
[17] 46 C.F.R. §501.2.

The ATA also fails to provide any information on how many of its members are so thinly capitalized that paying a $250 application fee, one of the Ports' proposed concession requirements, will be too much of a burden and prevent the company from being able to provide drayage services to the ports. Simply providing bald assertions without evidence should not persuade the FMC to stop the ports from working on the Clean Trucks Programs.

VIII. The ATA Does Not Provide A Rigorous Legal Argument In Opposition to the Clean Trucks Programs.

We are not in agreement that the Ports are preempted from implementing the varying portions of the Clean Trucks Programs. Moreover, the ATA provides an inadequate analysis of the market participant doctrine. The market participant doctrine was originally articulated by the Supreme Court as an exception to the prohibitions of the dormant Commerce Clause. These early market participant cases held that the dormant Commerce Clause does not prohibit state and local government action that affects interstate commerce if such action takes the form of government participation in the market rather than regulation.[18] Later, the Supreme Court applied the market participant doctrine in the context of federal preemption under the National Labor Relations Act ("NLRA"), holding that when the government acts in its proprietary capacity—as a market participant, buying or contracting for the goods and services it needs to function—its actions are exempt from preemption under federal law.[19]

The ATA utterly fails to note that the Ninth and other circuits have since repeatedly applied the market participant exception to uphold state and local laws of a proprietary nature that would otherwise be preempted under federal law, including the NLRA, the FAAA, and the Clean Air Act.[20] This mountain of relevant caselaw is absent from ATA's petition. NRDC is more than willing to provide additional discussion regarding the market participant doctrine to the FMC, but given the clear procedural violations at issue here, this is probably not the appropriate venue.

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[18] *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976).

[19] *Building & Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218, 231-32, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993)(hereinafter "*Boston Harbor*").

[20] *See, e.g., Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993)(upholding an Oregon statute that required contractors to pay their employees overtime wages on public projects despite claims that such action would otherwise be preempted under the NLRA); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000)(upholding ordinance allowing city to maintain exclusive list of companies eligible to tow abandoned or disabled vehicles, despite claims that such actions would otherwise be preempted by the FAAA); Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 691-692 (5th Cir. 1991) (recognizing market participant doctrine under the FAAA); Petrey v. City of Toledo, 246 F.3d 548, 555 (6th Cir. 2001) (recognizing market participant doctrine under the FAAA) *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (upholding executive order disallowing contractors on all federal contracts from requiring or prohibiting employees to enter a labor agreement, despite claims that such actions would otherwise be preempted under the NLRA).

IX. The Clean Trucks Program Does Not Violate the Shipping Act.

The FMC is charged with interpreting the Shipping Act.[21] The Shipping Act requires that the Ports establish "just and reasonable" regulations.[22] As the No Net Increase Legal Subgroup articulated the standard, "tariffs and leases may not create an unreasonable preference or advantage in favor of one Port customer or lessee over another. Likewise, tariffs and leases may not unreasonably prejudice or impose an unreasonable disadvantage on any customer or lessee."[23] It is our understanding that the proposed Clean Trucks Programs, once enacted, will treat all customers, lessees, and Licensed Motor Carriers the same by creating a uniform set of standards applicable globally within each port. The ATA has failed to provide any justification how this violates the Shipping Act—nor could it, since the Port of Los Angeles has not yet enacted its plan and the Port of Long Beach has not fully fleshed out its plan. In addition, the deadly pollution produced by existing port operations is such that further port expansion and infrastructure development, necessary to service the growing stream of imports, cannot go forward unless the port reduces truck generated pollution. In fact, the Port of Los Angeles needs the Clean Trucks Program to meet its commitments within a recent expansion plan it adopted that is currently under appeal by several groups, including NRDC.[24] Thus, ATA has not provided any factual basis for the FMC to take the ATA up on its requests to halt work on the Clean Trucks Programs.

X. Conclusion.

The FMC should not heed the requests of the ATA because the requests are procedurally incorrect, ask the FMC to engage in legally unjustified conduct that is outside the FMC's jurisdiction, and are not supported factually by the document submitted by the ATA. We appreciate your consideration of these comments. Please feel free to contact counsel for the NRDC if you have any questions relating to these papers. Please direct all future correspondence with the NRDC to David Pettit and Adrian Martinez.

Respectfully Submitted,

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[21] *See* 46 U.S.C. §1701 *et seq.*
[22] 46 U.S.C. § 1709(d).
[23] No Net Increase Task Force Legal Working Group Memorandum, at 5-18.
[24] *See* Port of Los Angeles, Berths 136-147 [TraPac] Container Terminal Project Draft EIR/EIS, at 3.2-201 (June 2007), *available at* http://www.portoflosangeles.org/EIR/TraPac/Chapter_3.2_Air_Quality.pdf.

CERTIFICATE OF SERVICE

I, Penny Primo, hereby certify that I have today, March 10, 2008, sent copies of the attached Comments of the Natural Resources Defense Council, by electronic mail and Overnight Mail to:

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