January 13, 2017

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Submitted Electronically to wnastri@aqmd.gov

COMMENTS RE: December 2016 DRAFT Financial Incentives Funding Action Plan for the 2016 Air Quality Management Plan and Suggested Revisions

Dear Mr. Nastri:

The Pacific Merchant Shipping Association (PMSA) appreciates the opportunity to comment on the draft Financial Incentives Funding Action Plan for the 2016 Air Quality Management Plan (AQMP). Our comments focus on three areas of the document: incentive funding for ocean-going vessels, the "Cargo Container Fee", and the "Guiding Principles" of the plan.

Incentive Funding

PMSA supports South Coast Air Quality Management District (SCAQMD) identifying ocean-going vessels for incentive funding. One of the most challenging emission reduction strategies identified in the 2016 AQMP is the increased penetration of Tier 3 ocean-going vessels. Due to a glut of vessel capacity, financial losses reported to exceed $10 billion in 2016, and a precipitous drop in new vessel orders, the availability of Tier 3 vessels in the next decade may be scarce. Identifying ocean-going vessels as a target of incentive funding in Table II-1 and Table II-2 is the most likely method to accelerate Tier 3 vessels calling San Pedro Bay. SCAQMD should continue its work to identify meaningfully economic incentives necessary to accelerate the use of Tier 3 vessels to San Pedro Bay.

Cargo Container Fee

The "Cargo Container Fee" category, as listed in Table IV-1 and described at pages IV-4 to IV-6, should be removed from the list of "Potential Funding Opportunities" in Chapter IV of the DRAFT *Financial Incentives Funding Action Plan for the 2016 Air Quality Management Plan* and replaced and revised to more accurately reflect the actual potential funding opportunities which exist. The current category is not an accurate representation of any actual Potential Funding Opportunity, and is a potentially misleading conflation of various and disparate programs and proposals which should be broken out into more accurate, specific categories.

While it is obviously true that there have been many taxes and fees and various programs over the years which were applied, or would have been applied, to port operations, it is equally obviously true that they were never hegemonic, varying widely and broadly in policy scope, purpose, and obligations. While some proposals – none of which were adopted – were indeed proposals for the imposition of fees or taxes directly on cargo containers, these are not contemporary with the development of this plan or any recent planning at the state or federal levels. Instead, notably for purpose of this discussion, neither the most recent proposal of merit to establish a new freight funding category (the excise tax model by Rep. Lowenthal) nor the only program cited which has been successfully implemented to date (the Ports of LA and Long Beach Clean Truck Program fee) were fees imposed directly on cargo containers.

With respect to the excise tax model in HR 1308, this should be listed as a “Potential Funding Opportunity” in the Draft Plan. HR 1308 is a serious proposal with bi-partisan support by members of the current Congress, would affect federal legislation which is being implemented contemporaneously with this Plan, and has many good features that merit consideration and discussion. However, this proposal is NOT a “Cargo Container Fee,” and it is not even a Port-specific fee at all. Instead, this proposal is intended to be a National Freight Funding tax program for all multi-modal freight transportation by freight rail or truck. Since HR 1308 is not a “Cargo Container Fee” it should be removed from this section and given its own “Potential Funding Opportunity” category (presumably “Multimodal Freight Funding Formula Program”), and its potential funding to the South Coast Region should be listed as “ND.”

With respect to the Ports’ Clean Truck Program, the only program mentioned in this category which was successfully implemented, this also was NOT a “Cargo Container Fee” imposed on container movements. Instead it was a gate fee imposed on cargo owners as a penalty for utilization of a truck which did not meet Port Clean Truck Program criteria. Importantly, while it did raise revenues for the purchase of some trucks, it was structured as a leveraged dis-incentive program; thus the primary policy basis for this fee was not to raise revenues but to encourage non-fee-paying behavior by the trucking community (i.e. encourage the investment in compliant trucks by the private sector). As a policy matter, had the fee been based on the cargo containers themselves and not on truck compliance, it would not have achieved its policy objective. However, as noted in the Draft Plan at page IV-4, this program was successfully implemented, and once it had achieved its incentivization purposes, the Clean Truck fee was terminated, and was not perpetuated as a viable, indefinite revenue-raising fee.

For these same purposes, estimating future revenues of $385,000,000 on the basis of a future application of the Clean Truck fee is not consistent with the dis-incentive policy, and the reality that such a fee is not meant to be paid across-the board, and certainly should not be labeled a “Cargo Container Fee.” If the Draft Plan wants to include a renewed Clean Truck Program fee as a “Potential Funding Opportunity,” then it should also be removed from this section and given its own specific category designation (presumably as “Port Clean Truck Program Fees”), and its potential funding to the South Coast Region should be listed as “ND.”

The Draft Plan also identifies HR 2355 of 2009, as a potential justification of this category. Like HR 1308, HR 2355 was also explicitly NOT a "Cargo Container Fee." Instead, HR 2355 called for an increase in the Harbor Maintenance Tax and expansion of the funding of projects to be paid under the proceeds of the increase out of the Harbor Maintenance Trust Fund. Unlike HR 1308, this is not a proposal with bi-partisan support, its sponsor is no longer a member of the current Congress, and alternative federal legislation has already been passed which is currently being implemented contemporaneously with this Plan which did not include these provisions. As such, if the District would like to still consider HMT increases as the basis for potential revenues, they should research the many, more recent actions of the previous Congress and current authorized legislation for management of the Harbor Maintenance Trust Fund. After such research, if this remains a viable "Potential Funding Opportunity" in the eyes of the District, then it should instead be accurately removed from the "Cargo Container Fee" section and given its own specific "Potential Funding Opportunity" category designation (presumably as "Harbor Maintenance Trust Fund Revenues"), and its potential funding to the South Coast Region should be listed as "ND."

This leaves three proposals left in this category which are actually properly labeled "Cargo Container Fees." And, for the reasons enunciated below, PMSA would recommend the deletion of the remainder of these proposals from consideration in this Draft and therefore removal of the "Cargo Container Fee" category altogether from the list of Potential Funding Opportunities. The basic criteria for inclusion in the Plan's Potential Funding Opportunities List, as enunciated by the Draft at Page IV-1, are that the list "covers some of the opportunities that are currently under discussion at the state and federal levels" and to identify "potential areas/opportunities to pursue additional funds for clean air projects" within "the 2023 timeframe." These three remaining proposals should be removed because they don't even meet these basic criteria for inclusion:

- None of these proposals are "currently under discussion," because none of them are even remotely contemporaneous to the present Draft Plan. No container fee legislation at the state or federal level has been proposed in the 9 years since they last failed to be implemented in 2008. To the best of our knowledge, there has simply been no formal advocacy for container fees by any members of the state Legislature, Congress, the Governor, or President since the Great Recession, much less currently under discussion in any meaningful way even amongst broader stakeholder groups and advisory committees.

- Both of the original bill author/sponsors moved on from their original container fee proposals and turned to other non-container fee proposals to facilitate the creation of new transportation revenues; these pivots were already highlighted in the Draft Plan, with HR 1308 for now-Rep. Lowenthal, which would have imposed a freight excise tax instead of a container fee, and HR 2355 by former Rep. Richardson, would have imposed a Harbor Maintenance Tax increase instead of a container fee.

- To emphasize the point further, no "container fee" legislation is being considered which would generate any revenues within the 2023 timeframe. Rep. Richardson has not been in elective office for some time, and then State Senator Lowenthal is now Congressman Lowenthal. And, it is HR 1308 which is Rep. Lowenthal's latest, contemporary proposal to maintain a potential excise tax which is both "currently under discussion" and would provide "potential opportunities to pursue additional funds" within "the 2023 timeframe," which should be included on the List, but not under a "container fee" label.

- Container Fees in-and-of-themselves can be highly controversial proposals and if not implemented on a true user fee, or fee-for-service basis, can present significant legal issues. For instance, many of the container fee proposals were imposed only on intermodal containers at ports in interstate and foreign commerce, but not on domestic commerce, raising commerce clause concerns. Also, fees were not set to approximate services or benefits to fee payors, which raises tax versus fee issues, and taxes levied on interstate and foreign commerce but not on domestic commerce are typically illegal. And, as demonstrated in the litigation in which the US Supreme Court shut down the most controversial components of the first Clean Trucks Program, actions which are not tightly within the scope of the Ports' proprietary capacity, but instead are regulatory by nature, are subject to additional scrutiny and challenge by the supply chain. If across-the-board "cargo container fees" were implemented as envisioned even by the short description in this discussion session, it is highly unlikely that they would be implemented without being litigated – and therefore also highly unlikely that they would create any significant funding within "the 2023 timeframe." This is especially true given there is no current discussion of the adoption of such fees.

Alternatively, and at the very least, the Potential Funding discussion section (pp. IV-5 – IV-6) should strike the references to its exceptionally specific (yet nonetheless arbitrary and inaccurate) fee imposition assumptions of $35 per TEU and 12 million TEUs annual throughput. Likewise, if this category is retained as-is and not otherwise revised, Table IV-1 should strike its reference to this rationale, the listing of $385,000,000, and simply list this as yet another "ND" opportunity. Given all of the numerous moving parts, wide variations in tax and fee purposes and applications, outstanding policy options, legal questions, and applicable universe uncertainties which are attendant to the potential funding sources referenced in this Draft Plan, there is no real defensible basis for placing a specific dollar figure on this item.

Guiding Principles

The draft funding document identifies seven guiding principles to secure and allocate incentive funds. Principle 3 states:

> *"Any potential revenue source proposed to be pursued shall be analyzed and developed in a manner that will minimize the economic impact of the funding source, if any, or that*

> *the funding source may derive either a direct benefit, or that the cost to the revenue source is offset to the greatest extent possible. Consideration will be given to the economic means of the funding source, and where appropriate, priority will be placed on recovering costs from entities that are the emitters of the targeted pollutants."*

This principle is laudable for revenue sources that are general in application and do not target specific industries or economic activities, such as property or fuel taxes. However, revenue sources could be developed that would result in one economic sector paying for emission reductions in another economic sector. As a result, Principle 3 should be amended as follows: "To the extent that any revenue source targets a specific economic sector or activity, those revenues will only be used to reduce emissions from that sector or activity."

Such an approach is critical to not create distortions between economic sectors. For example, PMSA is particularly concerned that "Cargo Container Fee" identifies $385 million in potential revenue from the maritime sector, but only identifies $31 million in possible incentive funding for the maritime sector. While the entire "Cargo Container Fee" section must revised as specifically described above (and this specific identification of funds should be removed), it is unacceptable as a stand-alone Guiding Principle that 90% of revenue generated by the maritime sector could be used fund non-maritime sources. This Guiding Principle should acknowledge that fee or tax revenues, however imposed, which are generated by the maritime sector should be used to reduce emissions from the maritime sector and not used to subsidize other modes.

PMSA looks forward to continuing to work with SCAQMD on the implementation of the 2016 Air Quality Management Plan. Please do not hesitate to contact me or Thomas Jelenic on these or any other related matters.

Sincerely,

Mike Jacob
Vice President & General Counsel

cc: Philip Fine, SCAQMD
Henry Hogo, SCAQMD
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Thomas Jelenić, PMSA