

**Pacific Merchant Shipping Association and  
World Shipping Council**

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**Petition for Review of  
Federal Maritime Commission's Environmental Assessment  
and Finding of No Significant Impact**

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**In the matter of  
Demurrage and Detention Billing Requirements  
Docket Number:  
FMC-2022-0066**

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**December 09, 2022**

This Petition for Review of the Commission’s Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) regarding Docket No. 2022-0066 is being submitted on behalf of the World Shipping Council (WSC) and the Pacific Merchant Shipping Association (PMSA).

WSC is a non-profit trade association that represents the liner shipping industry, which is comprised of operators of containerships and roll-on/roll-off (ro-ro) vessels (including vehicle carriers). Together, WSC’s members operate approximately 90 percent of the world’s liner vessel services including more than 5,000 ocean-going vessels of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.<sup>1</sup>

PMSA is a non-profit regional trade association whose members include ocean carriers and marine terminal operators who conduct business at the public ports of California and Washington. PMSA members are engaged in the transpacific trades, domestic U.S.-flagged Jones Act commerce, and other maritime activities on the U.S. West Coast. PMSA operates from offices in Oakland, Long Beach and Seattle.<sup>2</sup>

The Commission’s proposal to create an entirely new demurrage and detention billing framework will undermine and deviate from the “Incentive Principle” in existing law that creates financial incentives to move cargo promptly and efficiently.<sup>3</sup> Undermining the Incentive Principle would increase port congestion and thus air emissions and other potentially significant environmental impacts, especially in communities near ports. The Commission’s proposal will impact all U.S. ports and thus constitutes a major federal action.

As the Commission is well aware, local, state, federal, and international governments, industry, and NGO stakeholders are all concerned with the best way to address impacts on the quality of the human environment in lower income and minority communities surrounding seaport areas. This is both a global and a local concern, as industry and regulators alike are highly focused on mitigating disproportionate impacts on communities that may result from air emissions, truck traffic, and other significant negative externalities resulting from port operations.<sup>4</sup> This is precisely why almost every major U.S. seaport has air quality programs in place.<sup>5</sup>

Congestion magnifies the severity that localized impacts of intermodal freight operations including trains, trucks, and vessels can have on health, environment, and quality of life. The magnification of these issues can impact specific federal interests regarding the quality of the

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<sup>1</sup> A full description of the Council and a list of its members are available at [www.worldshipping.org](http://www.worldshipping.org).

<sup>2</sup> A full description of the Association and a list of its members are available at [www.pmsaship.com](http://www.pmsaship.com).

<sup>3</sup> 86 Fed. Reg. 29638, codified in 46 CFR Part 545.

<sup>4</sup> See [Environmental Justice Primer for Ports: Impacts of Port Operations and Goods Movement | US EPA](#).

<sup>5</sup> See [San Pedro Bay Ports Clean Air Action Plan | Air Quality | Port of Los Angeles | Port of Los Angeles; Northwest Ports Clean Air Strategy | Port of Seattle \(portseattle.org\); Maritime Air Quality - Port of Oakland; Air Emissions Inventories and Related Studies \(panynj.gov\); Environmental Sustainability | Port of Virginia; Georgia Ports Authority Reduces Diesel Emissions, Improves Efficiency, and Saves Costs | US EPA; Air - SC Ports Authority \(scspa.com\); Air Quality \(porteverglades.net\); Port Houston, Clean Air Strategy Plan \(CASP\), available at \[Air Quality - Port Houston\]\(#\); Port of Boston Massport Air Emission Reduction Efforts and Community Enhancement Projects, available at \[Massport Air Emission Reduction Efforts and Community Enhancement Projects | US EPA\]\(#\).](#)

human environment in major port areas such as Los-Angeles-Long Beach, New York-New Jersey and Houston. These ports are located in areas that do not meet federal air quality attainment standards, and have in place State Implementation Plans (SIPs) that are required by the Clean Air Act.<sup>6</sup> In these localities in particular, port air quality programs are supported by the U.S. Environmental Protection Agency (EPA), which has issued guidance on ways to reduce emissions of diesel particulate matter, nitrogen oxides, sulfur oxides, carbon dioxide and greenhouse gases.<sup>7</sup>

The Commission's proposal to abandon its Interpretative Rule's fact specific analysis entirely and replace it with absolute prohibitions on charging detention and demurrage to broad classes of entities undermines the Incentive Principle. As the Incentive Principle is designed to incentivize the fluid movement of freight through the U.S. supply chain, the erosion of this principle is reasonably foreseeable to result in the risk of increased port congestion and the resulting negative impacts to the human environment attendant to this congestion. The proposed rule is considering whether to prohibit the ability to invoice consignees for detention and demurrage charges. Consignees, as receivers of the cargo, are the party best positioned to arrange for a timely pick up and return of containers. The inability to incentivize consignees with demurrage and detention to pick up their cargo or return equipment in a timely fashion is likely to create a situation where the pier space and the container can be used as free storage, and presents a significant risk of increased congestion, resulting air emissions and other impacts to the human environment.

Additionally, the Commission stated in the preamble to the proposed rule, "Practically, the proposed rule would prohibit billing parties from invoicing motor carriers or customs brokers."<sup>8</sup> Motor carriers are an integral component of the supply chain and are relied upon to carry an overwhelming majority of containers into and out of most U.S. ports.<sup>9</sup> The Commission's proposal to implement an absolute prohibition on using detention and demurrage fees to incentivize motor carriers' performance makes increased congestion a likely outcome of its rule. As we are all acutely aware, as demonstrated by the shocks to the supply chain in the wake of the COVID-19 pandemic, congestion at marine terminals will not only slow motor carriers to creeping and idling speeds but would have the knock-on effect of increasing vessel congestion off-shore and cargo and equipment congestion at distribution centers and warehouses inland. These congestion effects in the intermodal supply chain are not isolated, rather they are cumulative and create risks of potentially increasing significant environmental impacts to local communities from all freight-related sources. For example, it is indisputable that ocean-going vessel congestion near-shore and in anchorages, and its related environmental impacts,

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<sup>6</sup> Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*

<sup>7</sup> [About EPA Ports Initiative | US EPA](#). See also, <https://www.epa.gov/ports-initiative/san-pedro-bay-ports-clean-air-action-plan-best-practices-and-lessons-learned>.

<sup>8</sup> 87 Fed. Reg. 62349.

<sup>9</sup> According to the Port of New York and New Jersey, trucks carry 85 percent of containerized cargo into and out of the port. See [Truck Information | Port Authority of New York and New Jersey \(panynj.gov\)](#).

increased specifically as a result of terminal congestion which was in turn caused by long-dwell times and a lack of container fluidity.<sup>10</sup>

Unfortunately, the Commission has failed to thoroughly assess the potential significant environmental impact of its proposal as required by National Environmental Policy Act (NEPA) and its implementing regulations.<sup>11</sup> Specifically, the Commission's Environmental Assessment (EA) is devoid of any actual assessment, analysis or review of evidence and potential harm to the environment from the risk its rule presents for increased congestion.<sup>12</sup> The Commission's EA also contains no assessment or discussion of alternatives.<sup>13</sup> As a result, the Commission's Finding of No Significant Impact (FONSI) is nothing more than a literal box-checking exercise.

Given the well-documented existing environmental impacts and risk to communities surrounding U.S. ports, the Commission's proposed rule raises significant questions. NEPA and the Commission's own Procedures for Environmental Policy analysis require the Commission to take a "hard look" at the environmental impacts of its proposed action and thoroughly analyze its impact on the quality of the human environment.<sup>14</sup> In this case, the Commission has failed to prepare a thorough EA which evaluates the significant impacts the proposed rule will likely have on the environment, otherwise it would have realized that the limited assessment provided by an EA is inadequate. The significant environmental questions raised by the Commission's proposal and its nation-wide scope necessitate an Environmental Impact Statement (EIS) be completed. "The standard for triggering an EIS instead of an EA is not high; agencies must prepare an EIS if there are 'significant questions' about whether a project's impacts are significant. *Anderson*, 371 F.3d at 488." *California v. Bernhardt*, 472 F.Supp.3d 573, 630 (2020) (citing *Anderson v. Evans*, 371 F.3d 475 (9<sup>th</sup> Cir., 2004))(when an EA does not adequately address a local impact, an EIS is required).

The "hard look" requirement exists because "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 CFR §1500.1(b). Thus, the Commission must evaluate whether these questions exist or not in a manner which "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9<sup>th</sup> Cir., 2000). "[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492 (9<sup>th</sup> Cir. 2010)(citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9<sup>th</sup> Cir. 1998).

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<sup>10</sup> While neither WSC nor PMSA endorse the specific impact methodologies or emission inventory tools used and the statistical conclusions reached in this study, the recent report by the California Air Resources Board, "Emissions Impacts of Recent Congestion at California Ports," Sep. 13, 2021, found that port emissions increased during the pandemic-caused port congestion. Available at [Emissions Impact of Recent Congestion at California Ports](#).

<sup>11</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332, *et seq*; 42 U.S.C. § 4321, and 40 CFR § 1501.5 Environmental assessments.

<sup>12</sup> See EA-FONSI Docket No. FMC-2022-0066, posted Nov. 22, 2022, available at [Regulations.gov](#).

<sup>13</sup> *Id.*

<sup>14</sup> Federal Maritime Commission Procedures for Environmental Policy Analysis, 46 C.F.R. Part 504.

As the Commission's EA provides no evidence or analysis for its conclusions, the FONSI does not rest on a demonstration that the agency has taken the requisite "hard look" at the potential impacts of this rule. Moreover, in the face of the specific impacts of terminal congestion and their very real environmental and other cascading impacts on the human environment, if such a "hard look" had been made into the subject, it would be patently obvious that significant questions exist regarding environmental impacts of congestion and container shipping efficiency.

As the express intent of the rule is to no longer allow billing structures to incentivize broad classes of entities to continue to move containers and intermodal cargo, the Commission must take a "hard look" at definitive information, accurate analysis, and public scrutiny that is a result of the congestion attendant to such a decision before concluding that there are no significant questions regarding the potential for environmental impacts.

Given the lack of such scrutiny here, it is highly likely that a reviewing court will determine the EA and FONSI decision in this proposed rulemaking to be arbitrary, capricious, an abuse of discretion, and not in accordance with the law. Accordingly, WSC and PMSA submit this Petition for Review challenging the adequacy of the Commission's EA, resulting FONSI, and failure to prepare an EIS.

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