

MINUTE ITEM

This Calendar Item No. C42
was approved as Minute Item
No. 42 by the State Lands
Commission by a vote of 3
to 0 at its 11-9-93
meeting.

CALENDAR ITEM

C42

- A: 1, 6, 12, 13, 14, 16, 19, 21, 27, 33, 35, 37,
41, 53, 54, 67, 70, 73, 74, 78
- S: 2, 3, 8, 9, 11, 15, 18, 19, 23, 27, 28, 35,
38, 39, 40

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CONSIDERATION OF ADOPTION OF AMENDMENTS TO
REGULATIONS PERTAINING TO ENFORCEMENT
OF REGULATIONS GOVERNING MARINE TERMINALS

PROPOSAL:

Commission staff proposes that the State Lands Commission adopt amendments to Article 5, §2405 and new §§2406 and 2407 to Title 2, Division 3, Chapter 1 of the California Code of Regulations. These sections pertain to marine terminals, defined in P.R.C. §8750, which are marine facilities used for transferring oil to or from tankers or barges. The regulations expressly exclude offshore drilling and production platforms and certain tank cleaning operations.

The proposed amendments and new regulations would establish and clarify procedures to be followed by the Commission staff in reporting and recording apparent or threatened violations and in proceeding with enforcement action.

BACKGROUND:

On September 24, 1990, the State of California enacted the Lempert-Keene-Seastrand Oil Spill Prevention Act (Act). The Act added P.R.C. §§8750 through 8760, establishing a comprehensive program for the prevention of and response to oil spills in California's marine waters. Under P.R.C. §8755, the Commission is required to adopt rules, regulations, guidelines and leasing policies for reviewing the location, type, character, performance standards, size and operation of all existing and proposed marine terminals within the state, whether or not on lands leased from the commission to minimize the possibilities of a discharge of oil. P.R.C. §8756 requires that the regulations be periodically reviewed and accordingly modified to ensure that all operators of marine terminals within the state always provide the best achievable protection of the public health and safety and the environment.

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To this end, §2405 was adopted in 1992 as part of the Commission's comprehensive regulations governing marine terminals. The provision established some notification, reporting and enforcement procedures for Commission staff in the event that violations were discovered.

The regulations proposed here would clarify and expand the provisions now contained in §2405. First, section would be amended to designate additional staff of the Division who are authorized to make determinations as to violations of these regulations. Provisions now in §2405, sub. (d), regarding reporting procedures in the event of a discharge threat, are moved to a new section, §2406. The most significant changes, though, are in §2407, another new section which establishes new procedures to be followed by the Commission staff in deciding whether to proceed with enforcement action. First, it ranks violations into three classes, based upon the likelihood of a spill. Several minor violations would then count as a major violation, and enforcement actions would be taken only against major violations. In this way, action may be taken against minor violations without the Commission having to initiate proceedings each time such a violation is discovered. Second, the new regulation requires that the Chief of the Marine Facilities Inspection and Management Division meet with parties accused of violations prior to initiating enforcement action. This would provide the parties with an opportunity to present their position as to whether violations occurred or to pursue some settlement in the event a violation is admitted, thereby avoiding unnecessary enforcement costs.

On July 2, 1993, Commission staff circulated the proposed regulations for public review and comment. Commission staff conducted a public hearing on August 19, 1993, in Long Beach to receive oral and written testimony. After considering all comments, the final version of the proposed regulations is herein proposed for adoption.

STATUTORY AND OTHER REGULATIONS:

A. P.R.C. §§8750 through 8760.

AB 884:

N/A.

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (14 Cal. Code Regs. 10561), the Commission staff has determined that this activity is exempt from the requirements of the CEQA as a categorically exempt project. The project is exempt under classes 7 and 8, Action by a Regulatory Agency as Authorized by State Law to Assure the Maintenance, Restoration, Enhancement or Protection of a Natural Resource and of the environment where the regulatory process involves procedures for protection of the environment, 14 Cal. Code Regs. 15307 and 15308.

Authority: P.R.C. §21084 and 14 Cal. Code Regs. 15300.

EXHIBIT:

- A. Proposed Regulations.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF THE CEQA PURSUANT TO 14 CAL. CODE REGS. 15061 AS A CATEGORICALLY EXEMPT PROJECT, CLASSES 7 AND 8, AN ACTION BY A REGULATORY AGENCY AS AUTHORIZED BY STATE LAW TO ASSURE THE MAINTENANCE, RESTORATION, ENHANCEMENT, OR PROTECTION OF NATURAL RESOURCES AND OF THE ENVIRONMENT WHERE THE REGULATORY PROCESS INVOLVES PROCEDURES FOR THE PROTECTION OF THE ENVIRONMENT (14 CAL. CODE REGS. 15307 AND 15308).
2. FIND THAT NO ALTERNATIVE WOULD BE MORE EFFECTIVE IN CARRYING OUT THE PURPOSE FOR WHICH THE REGULATION IS PROPOSED OR WOULD BE AS EFFECTIVE AND LESS BURDENSOME TO AFFECTED PRIVATE PERSONS THAN THE PROPOSED REGULATION.
3. ADOPT REGULATIONS SUBSTANTIALLY IN THE FORM OF THOSE SET FORTH IN EXHIBIT "A", TO BECOME EFFECTIVE IMMEDIATELY UPON FILING WITH THE SECRETARY OF STATE.
4. AUTHORIZE COMMISSION STAFF TO MAKE MODIFICATIONS IN THE REGULATIONS IN RESPONSE TO RECOMMENDATIONS BY THE OFFICE OF ADMINISTRATIVE LAW.

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5. DIRECT COMMISSION STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO COMPLY WITH PROVISIONS OF THE GOVERNMENT CODE REGARDING ADOPTION OF REGULATIONS AND TO ENSURE THAT THE REGULATIONS BECOME EFFECTIVE.
6. DIRECT COMMISSION STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO IMPLEMENT THE PROVISIONS OF THE REGULATIONS AT SUCH TIME AS THEY BECOME EFFECTIVE.

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PROPOSED ENFORCEMENT REGULATIONS

Section 2405 is amended as follows:

Section 2405. Notifications regarding Apparent or Threatened Violations Enforcement

(a) Authorized Agents or Employees.

(1) For the purposes of ~~§2405~~ §§2405 and 2406, each of the following shall be referenced as an "authorized agents agent or employees employee" of the Division:

- (A) The Executive Officer of the Commission;
- (B) The Assistant Executive Officer of the Commission;
- (C) The Division Chief;
- (D) The Assistant Chief of the Division;
- (E) The Marine Terminal Safety Field Operations Supervisor of the Division;
- (F) Any Marine Terminal Safety Supervisor of the Division;
- (G) Any Marine Terminal Safety Specialist of the Division; ~~or~~
- (H) Any Marine Terminal Safety Inspector of the Division; or
- (I) Any other staff as designated by the Executive Officer or Division Chief.

(2) Any and all of the referenced agents or employees listed in subsection (a)(1) of this section, are authorized to make a determination as to apparent or threatened violations, as defined in §2315, subsection (b) and subsection (u) of Article 5.

(b) Apparent or Threatened Violations: Reporting and Records.

(1) In the event that an authorized agent or employee of the Division determines that there is an apparent or threatened violation, he or she shall notify the TPIC or VPIC, as appropriate, of the apparent or threatened violation as soon as he or she has an opportunity to do so.

(2) Each and every authorized agent or employee of the Division shall report to the Division any and all apparent or threatened violations.

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- (3) The Division shall maintain records of all reported violations for a period of not less than five (5) years.
- (4) The Division shall, upon request, make available to the Administrator or the U.S. Coast Guard copies of records of violations.

~~(c) Enforcement Actions: General.~~

~~(1) When the Executive Officer determines that any person has engaged in, is engaged in, or threatens to engage in an apparent or threatened violation, the Executive Officer may take any or all of the following actions:~~

~~(A) The Executive Officer may request that the Administrator do one or more of the following where appropriate:~~

- ~~1. Issue an order under Government Code §8670.69.4 requiring that person to cease and desist;~~
- ~~2. Take whatever legal action that is necessary and appropriate, to obtain an order from the court enjoining the apparent or threatened violation; or~~
- ~~3. Initiate and pursue proceedings under Government Code §§8670.66 and 8670.67 to subject the person who has engaged in, is engaged in, or threatens to engage in the apparent or threatened violation to statutory penalties.~~

~~(B) The Executive Officer may do one or more of the following:~~

- ~~1. Take whatever legal action is necessary and appropriate to obtain an order from the court enjoining the apparent or threatened violation; or~~
- ~~2. If appropriate, take whatever action is necessary and appropriate to initiate and pursue proceedings under Government Code §8670.66 to subject the person who has engaged in, is engaged in, or threatens to engage in the apparent or threatened violation, to statutory penalties.~~

~~(2) The Executive Officer shall also notify the U.S. Coast Guard of any apparent violation which may also constitute violation of federal law or regulation.~~

~~(d) Discharge Threat.~~

~~(1) For the purpose of this section only, the term "discharge threat" means an apparent or threatened violation of regulations which, if unabated, would directly cause or substantially increase the risk of an unauthorized discharge of oil into marine waters during transfer operations at a terminal.~~

~~(2) (A) In the event that an authorized agent or employee of the Division determines that there is a discharge threat, the agent or employee shall immediately notify the TPIC or VPIC, as appropriate, of the discharge threat.~~

~~(B) Upon receiving notification of a discharge threat, the TPIC or VPIC, as appropriate, shall take immediate action to eliminate the threat, either by correcting the apparent or threatened violation or by suspending transfer operations until the apparent or threatened violation is corrected.~~

~~(3) If the TPIC or VPIC does not take immediate action to eliminate the discharge threat, either by correcting the apparent or threatened violation or by suspending transfer operations until the apparent or threatened violation is corrected, then:~~

~~(A) The authorized agent or employee shall notify the Division of the immediate threat, and~~

~~(B) The Division shall then immediately notify:~~

~~1. The U.S. Coast Guard;~~

~~2. The Administrator; and~~

~~3. The District Attorney of the County in which the terminal is located.~~

~~(C) The Division may also take whatever legal action is necessary and appropriate to obtain an order from the superior court having jurisdiction over the terminal to abate the discharge threat.~~

Authority: Sections 8750, 8751, 8755 and 8760, Public Resources Code.

Reference: Sections 8670.66, 8670.67, 8670.69.4, Government Code; Sections 8750, 8751, 8755 and 8760, Public Resources Code.

Section 2406 is added as follows:

Section 2406. Notifications regarding Discharge Threat

- (a) For the purpose of this section only, the term "discharge threat" means an apparent or threatened violation of regulations which, if unabated, would directly cause or substantially increase the risk of an unauthorized discharge of oil into marine waters during transfer operations at a terminal.
- (b) (1) In the event that an authorized agent or employee of the Division determines that there is a discharge threat, the agent or employee shall immediately notify the TPIC or VPIC, as appropriate, of the discharge threat.
- (2) Upon receiving notification of a discharge threat, the TPIC or VPIC, as appropriate, shall take immediate action to eliminate the threat, either by correcting the apparent or threatened violation or by suspending transfer operations until the apparent or threatened violation is corrected.
- (c) If the TPIC or VPIC does not take immediate action to eliminate the discharge threat, either by correcting the apparent or threatened violation or by suspending transfer operations until the apparent or threatened violation is corrected, then:
- (1) The authorized agent or employee shall notify the Division of the immediate threat; and
- (2) The Division shall then immediately notify:
1. The U.S. Coast Guard;
 2. The Administrator; and
 3. The District Attorney of the County in which the terminal is located.
- (3) The Division or the Executive Officer may also take whatever legal action is necessary and appropriate to obtain an order from the superior court having jurisdiction over the terminal to abate the discharge

threat without first complying with the provisions of §2407 of this Article 5.

Authority: Sections 8750, 8751, 8755 and 8760, Public Resources Code.

Reference: Sections 8670.66, 8670.67, 8670.69.4, Government Code; Sections 8750, 8751, 8755 and 8760, Public Resources Code.

Section 2407 is added as follows:

Section 2407. Enforcement Procedures

(a) For purposes of this section, the term, "cited party," means the person or entity which appears to have committed a violation of a provision or provisions of this Article 5 or Article 5.3.

(b) Classifications of violations:

(1) All violations of provisions of this article 5 and Article 5.3 shall be considered within one of three classes:

(A) Class 1: Violations each of which could not directly result in a discharge of oil or pose a threat to public health and safety and the environment

(B) Class 2: Violations each of which could result in a discharge of oil or pose a threat to public health and safety and the environment under certain circumstances, in combination with other violations or over time.

(C) Class 3:

1. Violations each of which could, by itself, directly result in a discharge of oil or pose a threat to public health and safety and the environment;or

2. Violations of Section 2320, sub. (c), concerning access by the Division to the terminal, terminal records, or vessels at the terminal.

(2) If a single person or entity has committed a number of Class 2 violations at the same time which, taken together, could directly result in a discharge of oil

or pose a threat to public health and safety and the environment, then each violation shall be considered a separate Class 2 violation and the total combination of violations may be considered a separate Class 3 violation.

(3) If a single person or entity has committed three (3) Class 1 violations in any twelve-month period, five (5) in any 24-month period, or seven (7) in any 36-month period, that series of violations may be considered a single Class 2 violation.

(4) If a single person or entity has committed three (3) Class 2 violations in any twelve-month period, five (5) in any 24-month period, or seven (7) in any 36-month period, that series of violations may be considered a single Class 3 violation.

(c) When it appears to the Division Chief that a cited party has committed a Class 3 violation, the Division Chief shall report the apparent violation to the Executive Officer.

(d) Prior to pursuing any enforcement action under the provisions of Government Code Sections 8670.65 through 8670.67, the following preliminary procedures shall be followed:

(1) The Division Chief shall provide written notice to the cited party containing the following:

(A) A description of the Class 3 violation or the lesser violations making up the Class 3 violation;

(B) A statement that enforcement proceedings may be initiated; and

(C) Notification that the cited party may, within ten working days after receipt of the notice, submit a request in writing to the Chief for a preliminary meeting.

(2) If the cited party requests a preliminary meeting with the Chief, that meeting shall be held prior to any further enforcement actions and may include any discussions relating to the apparent violation or violations in question, including, but not limited to, the question as to whether a violation had in fact occurred, what evidence there was for the apparent violation, and what classification should apply for each violation.

- (3) If the cited party so requests and agrees to pay for all costs, the preliminary meeting shall be recorded and a transcript shall be prepared.
- (4) The preliminary meeting shall be scheduled at the Division Chief's discretion, but shall in no event be scheduled more than thirty (30) calendar days after the request for the meeting is received by the Division Chief.
- (5) Within ten (10) working days after the preliminary meeting, the Division Chief shall provide written notice to the cited party of the decision as to whether enforcement action is to proceed.
- (6) (A) Within ten working days after receipt of the notice regarding the decision of the Division Chief following the preliminary meeting, the cited party may appeal the decision to the Executive Officer of the Commission.
- (B) Any appeal to the Executive Officer shall be submitted in writing.
- (C) If the decision of the Division Chief is appealed to the Executive Officer, no enforcement action shall be taken unless and until the Executive Officer directs the Division Chief to proceed.
- (e) If, after the preliminary procedures under subsection (d) of this section are followed, it appears to the Executive Officer that the cited party has committed a Class 3 violation of any provision or provisions of this Article 5 or 5.3 the Executive Officer may take any or all of the following actions:
- (1) The Executive Officer may request that the Administrator do one or more of the following where appropriate:
- (A) Issue an order under Government Code §8670.69.4 requiring that person to cease and desist;
- (B) Take whatever legal action that is necessary and appropriate, to obtain an order from the court enjoining the apparent or threatened violation; or
- (C) Initiate and pursue proceedings under Government Code §§8670.66 or 8670.67 to subject the cited party to statutory penalties.

(2) The Executive Officer may do one or more of the following:

(A) Take whatever legal action is necessary and appropriate to obtain an order from the court enjoining the apparent or threatened violation; or

(B) If appropriate, take whatever action is necessary and appropriate to initiate and pursue proceedings under Government Code §8670.66 to subject the cited party to statutory penalties.

(f) (1) The Executive Officer shall notify the U.S. Coast Guard of any apparent violation which may also constitute violation of federal law or regulation.

(2) The Executive Officer shall keep the Administrator fully apprised if any action is taken under subsection (e)(2).

Authority: Sections 8750, 8751, 8755 and 8760, Public Resources Code.

Reference: Sections 8670.66, 8670.67, 8670.69.4, Government Code; Sections 8750, 8751, 8755 and 8760, Public Resources Code.