

MINUTE ITEM

This Calendar Item No. 54 was approved as
Minute Item No. 54 by the California State Lands
Commission by a vote of 3 to 0 at its
21810 meeting.

CALENDAR ITEM

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02/08/00

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**CONSIDERATION OF EMERGENCY REGULATIONS REESTABLISHING THE FEE
USED TO FUND CALIFORNIA'S BALLAST WATER MANAGEMENT PROGRAMS
FOR CONTROL OF NONINDIGENOUS SPECIES**

PROPOSAL

The Commission's Staff proposes the adoption of emergency regulations to reestablish the fee required to fund California's new ballast water management programs for control of nonindigenous species. The fee would be set, as of April 30, 2000, at \$400 for each voyage by a vessel into California if, during that voyage, the vessel has traveled through any location outside the United States' Exclusive Economic Zone. Current regulations providing for a fee of \$600 per such voyage are due to expire on April 29, 2000.

BACKGROUND

On December 3, 1999, the Commission adopted emergency regulations setting a fee under Section 71215(b)(1) of the Public Resources Code, part of a new division in the Public Resources Code entitled, "Ballast Water Management for Control of Nonindigenous Species" (the Act). The purpose of the fee is to provide funding for all the State's new programs under the Act. That emergency measure was necessary, because the regular process for adopting regulations could not be completed in time to establish the funding mechanism by the time the programs were scheduled to begin. On the first day of January 2000, the program did begin as scheduled, and collection of the fee is underway.

At that time, the fee was set at \$600 for each qualifying voyage, defined as a transit by a vessel destined for any California port from a port or place outside the United States' Exclusive Economic Zone (the EEZ), including intermediate stops at a port or place within the EEZ. For the purposes of the Act, a transit by a vessel from a United States port to any other United States port, if at any time the vessel operates outside the EEZ or equivalent zone of Canada, is also a voyage. This definition of a voyage is identical to the definition contained in the Federal regulations found in 33 Code Federal Regulations Section 151.2025(b). The Act allows the Commission to set the fee at a level up to a maximum of \$1000 for each voyage.

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Staff previously recommended that the fee be set at \$600 per voyage. Given information provided at the time by the shipping community, Staff concluded that the amount recommended would be necessary to cover program costs of \$2,048,000 for Fiscal Year 2000/2001. Using 1998 figures, it was estimated that approximately 5,560 voyages into California would qualify for the fee. However, Staff does not believe that all those who are required to pay the fee will in fact do so. The Coast Guard indicated that compliance with its ballast water reporting program has not been good, amounting to less than 50% in Southern California. Furthermore, the Board of Equalization (BOE), the agency charged with collecting the fee, has historically found that the State has been unable to collect all required fees of this nature. Based upon these experiences and the recommendations of BOE, Staff applied a compliance rate of 70%. Consequently, Staff used a factor of only 3892 voyages in calculating the fee. Thus, the revenue expected from a \$600 was expected to be \$2,335,200, leaving a margin for error of \$287,200.

On January 12, 2000, Staff convened a Technical Advisory Group (the TAG) comprised of representatives from the shipping community subject to the Act. Along with Staff, those present were Mr. Kenneth Levin of the Pacific Merchant Shipping Association (PMSA), Mr. Jay Winter of the Steamship Association of Southern California, Ms. Meredith Endsley and Captain Lynn Korwatch of Matson Shipping, Captain Robin Lindsay of General Steamship Corporation, Mr. Bryan Dorsch and Ms. Meri Ng of Chevron Shipping Company L.L.C. and Mr. Robert Kliet of Evergreen Shipping. These parties represented companies that carry out the substantial majority of the voyages subject to the Act. Representatives from several cruise ship companies were also invited, but declined to attend. All of those named assured Staff that the number of voyages into California in 1998 was much lower than average and that the State can expect more than 6000 qualifying voyages in each of the coming years. Furthermore, the representatives in general and Mr. Levin and Mr. Winter in particular assured Staff that compliance rates would exceed 75% over the life of the program. Based upon these assurances, Staff agreed to calculate the fee based upon 6000 qualifying voyages a year, rather than 5560, and a compliance rate of 75%, rather than 70%, thus changing the multiplier for the fee from 3892 voyages to 4500 each year.

Given this new multiplier, the fee can be reduced to \$400 per voyage, but only if the current fee of \$600 remains in effect until the expiration of the existing emergency regulations on April 29, 2000. At \$400 per voyage, 4500 voyages would provide revenue of only \$1,800,000, an amount significantly below the fiscal needs for Fiscal Year 2000/2001. However, it is expected that funds will be left over from Fiscal Year 1999/2000. Since the current level of the fee is set at \$600 until the end of April, 2000, revenue of \$900,000 are expected during that four-month period. four months worth of voyages (2000) multiplied by a 75% compliance rate, leaving 1500 voyages to provide the fee. During the remaining two months of fiscal

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Year 1999/2000, the fee would drop to \$400. The total number of voyages for that two-month period, 1000, multiplied by the expected compliance rate, 75%, multiplied by \$400 means that revenue of \$300,000 would be expected for the last two-month period.

Thus, total revenue of \$1,200,000 are expected during Fiscal Year 1999/2000. Since implementation of the Act has just begun, though, and since the Act will have been in effect for only the last half of the current Fiscal Year, the budgetary needs for all the programs under the Act for the current Fiscal Year are only \$615,000. A surplus of \$585,000 is therefore expected. Part of this surplus can be used to cover the deficits expected in Fiscal Year 2000/2001, and the remainder can be used for the expected deficit in Fiscal Year 2001/2002.

As for the remaining 18-months of the program, from the beginning of Fiscal Year 2001/2002 until the expiration date of the Act on December 31, 2003, the budgetary needs for the program are expected to drop as required studies are completed. Thus, the \$400 per voyage fee is expected to provide sufficient revenue to cover the costs for this remaining 18-month period.

The TAG also requested that the regulations include a provision that the TAG is to be reconvened on or after July 1, 2000, to reevaluate the fee and the condition of the Exotic Species Control Fund. The TAG would therefore have opportunities in the future to make recommendations as to the fee.

All of the TAG participants agreed with the fee level here proposed. At the end of the January 12, 2000, TAG meeting, when Mr. Levin asked if any of the participants objected to the recommendation that the Commission adopt a \$400 per voyage fee and continuation of the TAG after July 1, 2000, none of those present dissented. In order to confirm the recommendations of the TAG, the Chief of the Commission's Marine Facilities Division, Mr. Gary Gregory, e-mailed a summary of the January 12, 2000, TAG meeting to all the participants and asked for comments and corrections. The summary expressly states that the TAG recommended a fee of \$400 per voyage and continuation of the TAG after July 1, 2000. The only comment or correction Mr. Gregory received was from Mr. Levin of PMSA with regard to a typographical error. Copies of Mr. Gregory's e-mail, the attached summary and Mr. Levin's response are attached as Exhibits A, B and C, respectively.

At the January 12, 2000, meeting, Staff also explained that, if there were not at least 6000 voyages a year in the future and if the compliance rate did not reach at least 75%, then the fee would have to be raised. The TAG indicated that they understood this.

Adoption of the new regulations are here proposed as emergency measures because the Commission will not have an opportunity to have new permanent regulations in place by the time the current emergency regulations expire on April 29, 2000. If new

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emergency regulations setting the fee are not in place at that time, then no funding will be available for the program to continue. The program would thereby be interrupted, and essential work already begun with regard to research, study, data collection and monitoring would be seriously disrupted. Under Public Resources Code Section 71215, all program costs are intended to be covered by the Exotic Species Control Fund, and the only means to provide for the Fund is through collection of the fee here set. Since Public Resources Code Section 71215 specifies that the Commission is to establish the fee, then nothing may be collected unless the Commission has in fact done so. At the expiration of the current emergency regulations, setting the fee at \$600 per voyage, the Commission must have in place new regulations setting the fee, or implementation of the Act must be suspended. As indicated in the Staff report for the initial adoption of the current emergency regulations, Staff believes that the regulations are necessary for the immediate preservation of the public health and safety and the environment by protecting State waters and other natural resources from the introduction and spread of nonindigenous species entrained in ballast water of marine vessels visiting the ports of California.

The Commission Staff considered alternatives to the proposed amendments, but found none that would be more effective in carrying out the purpose for which the action is proposed and less burdensome to those who would be affected.

STATUTORY AND OTHER REGULATIONS:

A. Public Resources Code Section 71200 through 71271

PERMIT STREAMLINING ACT DEADLINE

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 because the activity is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code Section 21084 and 14 Cal. Code Regs. 15300.

2. The proposed regulatory amendments do not affect small businesses as defined in Government Code Section 1342, sub. (h), because all affected businesses transportation and warehousing businesses having annual gross receipts of more than \$1,500,000, as specified in Government Code Section 11342, sub. (h)(2)(I)(vii).

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EXHIBITS:

- A. E-Mail from Mr. Gary Gregory to Ballast Water Fee TAG
- B. Ballast Water management Technical Advisory Group TAG Meeting for "Setting the Fee"
- C. E-Mail from Mr. Kenneth Levin to Mr. Gary Gregory
- D. Proposed Amendments.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15061 BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15378
2. FIND THAT THE REGULATIONS WILL NOT AFFECT SMALL BUSINESSES AS DEFINED IN GOVERNMENT CODE SECTION 11342(h), BECAUSE ALL AFFECTED BUSINESSES ARE TRANSPORTATION AND WAREHOUSING BUSINESSES HAVING ANNUAL GROSS RECEIPTS OF MORE THAN \$1,500,000, AS SPECIFIED UNDER GOVERNMENT CODE SECTION 11342(h)(2)(I)(VII).
3. FIND THAT AN EMERGENCY EXISTS AND THAT THE REGULATIONS ARE NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC HEALTH AND SAFETY AND THE ENVIRONMENT BY PROTECTING STATE WATERS AND OTHER NATURAL RESOURCES FROM THE INTRODUCTION AND SPREAD OF NONINDIGENOUS SPECIES ENTRAINED IN BALLAST WATER OF MARINE VESSELS VISITING THE CALIFORNIA PORTS.
4. FIND THAT THE REGULATIONS WILL NOT HAVE A SIGNIFICANT IMPACT ON THE CREATION OR ELIMINATION OF JOBS OR NEW OR EXISTING BUSINESSES WITH CALIFORNIA, NOR WILL THEY HAVE AN ADVERSE ECONOMIC IMPACT ON BUSINESS, INCLUDING THE ABILITY OF CALIFORNIA BUSINESSES TO COMPETE WITH BUSINESSES IN OTHER STATES.
5. FIND THAT NO ALTERNATIVE WOULD BE MORE EFFECTIVE IN CARRYING OUT THE PURPOSE FOR WHICH THE REGULATIONS ARE PROPOSED OR WOULD BE AS EFFECTIVE AND LESS BURDENSOME TO AFFECTED PRIVATE PERSONS THAN THE PROPOSED REGULATIONS.
6. ADOPT THE PROPOSED EMERGENCY REGULATIONS, ADD ARTICLE 4.5, INCLUDING SECTIONS 2270 AND 2271, TO TITLE 2,

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DIVISION 3, CHAPTER 1, OF THE CALIFORNIA CODE OF REGULATIONS, SUBSTANTIALLY IN THE FORM OF THOSE SET FORTH IN EXHIBIT "A", TO BECOME EFFECTIVE ON APRIL 30, 2000, AT THE TIME THE EXISTING PROVISIONS OF ARTICLE 4.5 WILL EXPIRE.

7. AUTHORIZE THE COMMISSION STAFF TO MAKE MODIFICATIONS IN THE REGULATIONS IN RESPONSE TO RECOMMENDATIONS BY THE OFFICE OF ADMINISTRATIVE LAW.
8. DIRECT THE COMMISSION STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO COMPLY WITH PROVISIONS OF THE GOVERNMENT CODE REGARDING ADOPTION OF REGULATIONS AND AMENDMENTS AND TO ENSURE THAT THE REGULATIONS BECOME EFFECTIVE.
9. DIRECT COMMISSION STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO IMPLEMENT THE REGULATION AT SUCH TIME AS THEY BECOME EFFECTIVE.

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EXHIBIT A

From: Gary Gregory
To: Ballast Water Fee TAG
Date: Fri, Jan 14, 2000 12:47 PM
Subject: Meeting of January 12, 2000

Greetings Exalted members of the Ballast Water Fee Technical Advisory Group.

Attached is a summary of the January 12 meeting. Please provide me with any comments or corrections so that I may formally submit this to you as members of the TAG and get it into our files and the regulatory record.

Thanks
Gary

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EXHIBIT B

**Ballast Water Management Technical Advisory Group (TAG)
Meeting for "Setting the Fee"
January 12, 2000
1000 - 1230**

Participants:

Gary Gregory, Maurya Falkner, John Kloman, Mark Meier (CSLC)
Meredith Endsley, Capt. Lynn Korwatch (Matson Shipping)
Jay Winter (Southern California Steamship Association)
Kenneth Levin (Pacific Merchant Shipping Association)
Capt. Robin Lindsay (General Steamship Corp.)
Brian Dorsch, Meri Ng (Chevron Shipping Company LCC)
Robert Kliest (Evergreen Shipping) by phone

Princess Cruises Lines was also asked to participate, but did not respond to the requests made by Jay Winter.

Synopsis:

Gary Gregory discussed the charter of this TAG for the new members, which is to determine a fee schedule (PRC Section 71215(b)) for qualifying voyages, as defined by PRC Section 71200(j).

Specifically, the TAG charter was to evaluate a flat rate scenario applied to all qualified voyages equally or an alternative(s) to a flat rate. Regardless of which type of fee schedule was adopted by the TAG, the fee would be set at a level to provide adequate funding for the program.

Gary discussed the overall cost of the program, as well as the cost of the program by year and by agency. The overall cost of the program, as SLC understands it, is approximately \$6.52 million for four (4) years, distributed to four (4) agencies, with the average cost of the program per year at \$1.67 million.

Lynn Korwatch and Meredith Endsley (Matson) proposed three alternatives to the current fee structure. First, they proposed a "tiered" fee schedule that would reduce the fee for those vessels engaged in trade with Alaska and Hawaii. Their second alternative considered "good players", which would result in a reduced fee for a subset of vessel voyages. Matson's final alternative proposed a 10 voyage maximum "cap" on the assessment of the fee.

CSLC staff developed a simple computer model in order to calculate revenue generated using any proposed alternative fee structure. The TAG rapidly realized that it did not have estimates of the potential voyages impacted by the alternatives proposed and therefore could not adequately assess the overall impact of implementing any of the alternatives.

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Meeting for "Setting the Fee"
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The TAG then looked at the total cost of the program (\$6.653 million*), the estimated number of qualifying voyages (assumed at 6000 annually), and a mutually agreed upon recovery rate (75%). Based on this calculation, the TAG determined that if the "Fee" was set at \$400/Qualifying voyage, adequate revenue would be generated to cover the cost of the program.

****Actual dollar amount used during the TAG meeting on 01/12/00 was \$6.52 million.***

The TAG recommended a \$400/qualifying voyage fee. The TAG requested that they reconvene in 6 months (July 2000) to re-evaluate the fee schedule and determine if the \$400 fee is adequate and/or if enough information was available to develop an alternative fee schedule. A alternative schedule might incorporate, if feasible, a tiered or capped fee schedule and would be based in part on a better estimate of the number of qualifying voyages and the actual fee recovery rate.

In Conclusion:

The TAG recommended that CSLC staff prepare and submit to the Commission, an emergency regulation to set the fee \$400/voyage.

It was also recommended that CSLC staff draft and submit the regular rulemaking package, incorporating the new lowered fee amount as soon as possible. The TAG requested that CSLC staff include a provision in the regular rulemaking package that called for the reconvening of the TAG on or after July, 2000 to reevaluate the fee and the fund condition.

Finally, due to some confusion over the interpretation and implementation of the law, the TAG recommended that CSLC meet with industry to clarify the issues. The focus of the TAG would be on the interpretation and implementation of the law. Gary Gregory has committed to reconvening the TAG for this purpose in one month (mid to late February) and will send out a letter to memorialize this decision.

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EXHIBIT C

From: <klevin@pmsaship.com>
To: "Gary Gregory" <GREGORG@slc.ca.gov>
Date: Mon, Jan 17, 2000 9:08 AM
Subject: Re: Meeting of January 12, 2000

Reviewed the attachment. Looks good except for second paragraph under "Synopsis", first sentence: "...applied applied..." should be "...applied...".

How does that synopsis fit in with your concerns of last Thursday's afternoon phone call re \$250K first year shortfall?

Kenny Levin
Pacific Merchant Shipping Association
550 California Street
Sacramento Street Tower, 113
San Francisco CA 94104
415 352 0710 fax 0717

CC: SLCDOMN.slcmarr(FALKNEM,KLOMANJ),SLCDOMN.slcsacto(M...

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Exhibit D

Title 2, Division 3, Chapter 1

Article 4.5. Ballast Water Management for Control of Nonindigenous Species

Section 2270. Ballast Water Management and Control; Definitions

For purposes of this Article, the following definitions apply.

- (a) "Voyage" means any transit by a vessel destined for any California port from a port or place outside the EEZ, including intermediate stops at a port or place within the EEZ. For the purposes of this section, a transit by a vessel from a United States port to any other United States port, if at any time the vessel operates outside the EEZ or equivalent zone of Canada, is also a voyage.
- (b) "EEZ" means exclusive economic zone, which extends from the baseline of the territorial sea of the United States seaward 200 miles.

Authority: Public Resources Code Section 71215(b)

Reference: Public Resources Code Sections 71200 and 71215

Section 2271. Fee Schedule for Exotic Species Control Fund

- (a) The fee required under Public Resources Code Section 71215 is four hundred dollars (\$400) per vessel voyage.
- (b)
 - (1) The Executive Officer of the California State Lands Commission shall invite representatives of persons and entities who must pay the fee required under Public Resource Code Section 71215 to participate in a technical advisory group to make recommendations regarding the amount of the fee, taking into account the provisions Public Resources Code Sections 71200 through 71216.
 - (2) The technical advisory group shall meet on a regular basis after July 1, 2000, as determined by the group.

Authority: Public Resources Code Section 71215(b)

Reference: Public Resources Code Sections 71200 and 71215