

**CALENDAR ITEM
38**

A Statewide

02/08/11

S Statewide

M. DeBernardo

PROPOSED LEGISLATION

INTRODUCTION:

State Lands Commission staff has been working on various legislative proposals for 2011. This report lists each legislative proposal with a brief summary and a recommendation from State Lands Commission staff for the Commission to consider.

LEGISLATIVE PROPOSALS:

1. Rent-Free Recreational Piers

Exhibit:

A. Minute Item from 10/24/68 Commission Meeting.

SUMMARY:

This legislative proposal would repeal the provision within Public Resources Code (PRC) Section 6503.5 that prohibits the State Lands Commission ("Commission") from charging an annual rental fee on private recreational piers. This proposal would generate additional revenue for the state.

IDENTIFICATION OF PROBLEM:

The Commission regularly approves lease applications to construct and maintain structures on lands under its jurisdiction. Public Resources Code section 6503 requires the Commission to fix an annual rent to these structures. PRC Section 6503.5 provides an exception by mandating "that no rent shall be charged for any private recreational pier constructed on state lands for the use of a littoral landowner." If this rent-free private recreational pier statute did not exist, the Commission would charge rent for private recreational piers and generate additional revenue for the state.

In a 1976 formal opinion (59 A.G. Ops. 521), the Attorney General opined that not charging rent for use of state property for private recreational piers leases

CALENDAR ITEM NO. 38 (CONT'D)

was a violation of the Constitution. The "Gift Clause" of the California Constitution (Article XVI, Section 6) states, in part, that "the Legislature shall have no power...to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever..."

The Legislature responded in 1977 by making a finding that "a substantial public benefit is derived from the construction and maintenance of private recreational piers on the waterways of the state...[including] the provision of a safe harbor for vessels which become disabled upon the waterways of this state; a safe anchorage for vessels which become distressed in times of severe weather conditions; the protection of the public from navigational hazards often found adjacent to shorelines along the waterways of this state; the elimination or retardation of erosion along the shoreline of rivers and streams; and the provision of navigational aids to members of the public utilizing the waterways of this state."

This legislative finding attempted to address the Gift Clause issue because property used for a public purpose is not a gift within the meaning of the Constitution. However, pursuant to the doctrine of necessity, the right of the public to use virtually any private property in times of emergency when necessary to protect life or property already exists. Therefore there is no additional public benefit by allowing the state to give state property to a private individual for their exclusive use without payment of just compensation to the State.

Enacted in 1978, current PRC Section 6503.5 expanded the rent-free recreational pier law to include not only natural persons, but associations and nonprofit corporations owning parcels of land zoned or used for a single-family dwelling "not more than one mile from" the recreational pier on littoral land owned by the association or nonprofit corporation. The section also provides that no rent is to be charged for private recreational mooring buoys as long as the lessee meets the classification above. The Commission does charge rent for the same type of piers and mooring buoys owned by LLCs, corporations, partnerships or jointly by more than one family. Serious questions exist as to whether PRC Section 6503.5 violates the Equal Protection Clauses of the United States Constitution and California Constitution and the Gift Clause of the California Constitution since the PRC Section 6503.5 only applies to a class of ownership of upland properties and not to the character of the piers or buoys involved. There does not appear to be a rational basis for treating these owners of recreational piers differently and providing them free use of state property while others pay fair market value. Given the State's fiscal situation, allowing use of state property for free raises not only issues of legality and fairness, but fiscal responsibility.

CALENDAR ITEM NO. 38 (CONT'D)

There have been at least three attempts to repeal the rent-free recreational pier provision first enacted in 1955. The first known attempt was in 1968 and was sponsored by the State Lands Commission (see Exhibit A). The Commission at that time, consisted of Ronald Reagan's Director of Finance, and the State Controller, all of whom were Republicans. The last known attempt was in 1991.

RECOMMENDED ACTION:

Staff recommends that the Commission sponsor legislation that amends or repeals PRC Section 6503.5 to direct the Commission to assess fair market value rent for all private pier leases and buoys on state-owned public trust lands.

2. Chula Vista Land Exchange

SUMMARY:

This legislative proposal would grant to the San Diego Unified Port District ("Port") public trust lands that were acquired by the state as a result of a land exchange agreement approved by the State Lands Commission on December 10, 2010. The granted lands would be held in trust by the Port subject to the Public Trust Doctrine and terms of San Diego Unified Port District Act.

IDENTIFICATION OF PROBLEM:

Pursuant to PRC Section 6307, the Commission may enter into an exchange of filled or reclaimed public trust lands for other lands if the Commission determines that the exchange would among other things enhance public access or preserve littoral habitat and open space. The lands the Commission receives in these exchanges are impressed with the public trust.

On December 10, 2010, the State Lands Commission approved an exchange of lands in Chula Vista, California pursuant to PRC Section 6307. As part of this exchange, the state received approximately 97-acres of new public trust land, which it leased to the Port for a term of 49 years. The Port will develop this land for a large ecological buffer to preserve and enhance the Sweetwater Marsh National Wildlife Refuge, an 18-acre park, bike path, pedestrian trails, open space areas, parking for the Chula Vista Nature Center and a hotel. The Commission's approval included support of legislation to include these new public trust lands in the Port District's trust grant.

CALENDAR ITEM NO. 38 (CONT'D)

RECOMMENDED ACTION:

The Port has proven to be a good and responsible steward of its public trust lands. Staff recommends that the Commission sponsor legislation granting the leased land to the Port subject to the Public Trust Doctrine and terms of San Diego Unified Port District Act.

3. Vessels and Ground Tackle

SUMMARY:

This legislative proposal would create an administrative process that gives the Commission the ability to remove and dispose of abandoned vessels, trespassing vessels, and trespassing ground tackle. Currently, the only recourse the Commission has to address this issue is to file an action in court, which is unnecessarily time consuming, and extremely costly to the state.

IDENTIFICATION OF PROBLEM:

There are a number of boat owners that are storing their vessels and/or ground tackle on state lands without permission. There are also boat owners that are dumping or abandoning their old or unseaworthy vessels on state lands without permission. The problem of trespassing and abandoned vessels is increasing in the state and there is evidence to suggest that it will only get worse in a down economy where the costs of vessel maintenance and storage become the first discretionary expenses to be eliminated. The problem is particularly acute in the Sacramento Delta, but is also evident throughout the state and nation's waterways.

The Commission's current recourse against these boat owners is limited to court action. This is usually a long and costly process that involves the Attorney General's office. Records from the Attorney General's office indicate that court action to remove abandoned and trespassing boats can easily cost the state over \$100,000 in legal services for each case—this figure does not reflect Commission staff's costs. There have been some situations where ship salvor have offered to take trespassing and abandoned ships at no cost to the state; however, since the ship salvors cannot obtain title without a court judgment, this remedy has not proven effective. There are sources of funding at, for example, the federal level that could be used to remove and dispose of these problematic vessels if the Commission were provided the necessary authority.

CALENDAR ITEM NO. 38 (CONT'D)

RECOMMENDED ACTION:

Staff recommends that the Commission sponsor legislation that creates an administrative process for the Commission to remove and dispose of abandoned vessels, trespassing vessels, and trespassing ground tackle.

4. Mining Leases and Quitclaims

SUMMARY:

This legislative proposal would prevent a quitclaim of a mineral extraction lease from taking effect until reclamation is complete and the Commission formally accepts the quitclaim. The effect of this bill would be that mining lessees would be bound to the terms of their leases and have to continue to pay rent to the state and comply with other lease terms during the reclamation process. Depending on the type of land being leased, the additional rent revenue would be deposited into either the General Fund or the California State Teachers' Retirement Fund.

IDENTIFICATION OF PROBLEM:

Current statutory provisions state that a state mineral lessee may quitclaim, at any time, a portion or all of a leasehold, and the quitclaim is effective upon the date of filing. The Commission's acceptance of the quitclaim is not expressly required for it to take effect. The quitclaim terminates the lessee's liability to pay rent and arguably its obligation to comply with the lease provisions during the period in which it restores the lease premises. The problem with the current state of affairs is that reclamation of sand and gravel pits and other mining operations may take several years. During this period, the lessee still has a presence on the land and, in some situations, actually uses the land for storage. Meanwhile, the Commission is unable to utilize the land for other revenue generating purposes and is potentially subject to liability for personal injury and property damage.

RECOMMENDED ACTION:

Staff recommends that the Commission sponsor legislation that would make a quitclaim effective only when accepted by the Commission and all production facilities have been removed and the lease premises restored to Commission satisfaction.

CALENDAR ITEM NO. 38 (CONT'D)

5. Marine Invasive Species

SUMMARY:

This legislative proposal would (1) make technical, clean-up amendments to the California Marine Invasive Species Act ("Act"), (2) extend the grandfathering date of experimental ballast water treatment systems, and (3) extend the sunset date that protects the Commission's Marine Invasive Species program from being compromised by conflicting requirements pertaining to the discharge or release of ballast water and other vectors of nonindigenous species from a vessel. This proposal is not intended to conflict with any portion of the federal Clean Water Act. This proposal is also not intended to conflict with the California State Water Resources Control Board's authority over discharges of oil, noxious liquids, or other pollutants that are not nonindigenous species.

IDENTIFICATION OF PROBLEM:

The Act needs technical and clean-up amendments to (1) make terminology consistent with International Maritime Organization terminology, (2) change the word "submerged" to "wetted," and (3) clarify when a vessel is required to comply with biofouling management requirements.

According to the Act, if an owner or operator of a vessel applies to install an experimental ballast water treatment system, and the Commission approves that application on or before January 1, 2008, the Commission shall deem the system to be in compliance with any future treatment standard adopted for a period not to exceed five years from the date that the interim performance standards take effect. Staff believes that extending the January 1, 2008 deadline will help with the research and development of ballast water treatment systems and will ensure that vessels engaged in promising federal testing programs, including the USCG Shipboard Technology Evaluation Program, will have the ability to operate their experimental systems in California waters.

The Commission has been regulating ballast water and hull fouling since its program to regulate marine invasive species discharges from vessels was created in 1999. The Commission has twenty staff made up of scientists and field inspectors who are experts in the subject of marine invasive species control. Staff meets regularly with scientists, environmentalist, industry representatives, and state, federal, and international agencies to develop practices to prevent invasion of nonindigenous species associated with the commercial vessel vector. Many of the Commission's scientists are invited to speak at national and international events to discuss the development of effective management

CALENDAR ITEM NO. 38 (CONT'D)

strategies, use of treatment technologies, and avenues of current and future research to prevent the introduction of nonindigenous species. The Commission has far more staff and resources dedicated to this issue than any other agency.

The Act contains a 2010 sunset date that protected the Commission's marine invasive species program from other state agencies, boards, commissions, and departments from imposing conflicting requirements. If this sunset date is not extended or deleted, the Act could be seriously compromised if another agency having jurisdiction were to adopt inconsistent or conflicting regulation. The Commission has established a history of interaction with the regulatory community and established set of regulations as directed by the law. Staff believes any additional actions that might be proposed by other agencies should be directed through the Commission to minimize confusion and conflict.

RECOMMENDED ACTION:

Staff recommends that the Commission sponsor legislation that (1) makes technical, clean-up amendments to the California Marine Invasive Species Act ("Act"), (2) extends the grandfathering date of experimental ballast water treatment systems, and (3) extends the sunset date that protects the Commission's Marine Invasive Species program from being compromised by conflicting requirements pertaining to the discharge or release of ballast water and other vectors of nonindigenous species from a vessel.

6. Sea Level Action Plan

SUMMARY:

This legislative proposal would require each local trustee of legislatively granted public trust lands to prepare a sea level action plan. A local trustee would not be required to prepare a plan if (1) it does not have trust lands threatened by sea level rise; (2) the financial burden of the plan substantially outweighs the benefit the plan would have in preventing the potential economic and environmental harms associated with sea level rise on the local trustee's granted public trust lands; or (3) the revenues derived from its granted public trust lands are not sufficient to pay for the cost of developing the plan.

IDENTIFICATION OF PROBLEM:

A local trustee of granted public trust lands has a legal duty under trust law to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property. Given the overwhelming scientific evidence that sea level rise will cause extraordinary damage to coastal property if no action is

CALENDAR ITEM NO. 38 (CONT'D)

taken, it is essential that local trustees take reasonable steps to preserve its trust property.

On August 10, 2009, Commission staff sent out 104 surveys regarding sea level rise to all of the state's local trustee/grantees and Commission's lessees of major facilities along the coast and San Francisco Bay. Of those 104 surveys, 40 responses were received. Based on the survey results, it became apparent to Commission staff that the majority of the respondents had not yet begun to comprehensively consider the impacts of sea level rise and therefore are failing to prudently consider future management challenges to their trust lands.

RECOMMENDED ACTION:

Staff recommends that the Commission support legislation that would require each local trustee of legislatively granted public trust lands to prepare a sea level action plan. A local trustee could apply for an exemption from the plan if (1) it does not have trust lands threatened by sea level rise; (2) the financial burden of the plan substantially outweighs the benefit the plan would have in preventing the potential economic and environmental harms associated with sea level rise on the local trustee's granted public trust lands; or (3) the revenues derived from its granted public trust lands are not sufficient to pay for the cost of developing the plan.

7. Trespass on State Lands

SUMMARY:

This legislative proposal would allow the Commission to administratively impose penalties against persons who construct, maintain, own, use, or possess unauthorized structures on state lands. This legislative proposal would be modeled after trespass laws and regulations used by the states of New York, Oregon, Texas, and Washington, as well as the California Department of Transportation. Currently, the only recourse the Commission has to address this issue is to file an action in court, which is time consuming, costly, and an ineffective deterrent against future trespasses.

IDENTIFICATION OF PROBLEM:

The Commission regularly deals with situations in which a person constructs, maintains, owns, uses, or possesses a structure on state lands without proper authorization from the Commission. This situation generally arises (1) when the Commission has not issued a lease for the structure, (2) when the Commission has issued a lease, but the structure was built beyond what was authorized, or (3) when the structure was authorized by a lease but the lease has not been

CALENDAR ITEM NO. 38 (CONT'D)

renewed and is not in a holdover status. The Commission's current recourse in these situations is generally limited to court actions in which the state seeks compensation for the use of state lands and/or an order for the structure to be removed. Litigation for these cases can be time consuming and expensive, especially when considering the value of the remedies sought. Additionally, this recourse provides no deterrent against future trespasses because the potential damages against a trespasser are more or less equal to the cost of paying rent under a valid lease.

RECOMMENDED ACTION:

Staff recommends that the Commission sponsor legislation that authorizes the Commission to impose fines and to order the removal of unauthorized structures through administrative action. The Commission would be required to provide due process protections to the affected party, which would include notice and an opportunity to be heard at a Commission hearing.

8. Oil Spill Prevention

SUMMARY:

This legislative proposal would increase the fees that support the Oil Spill Prevention and Administration Fund (OSPAPF) to levels that will support the Commission and the Office of Spill Prevention and Response's (OSPR) programs for next fiscal year and into the future.

IDENTIFICATION OF PROBLEM:

California's oil spill prevention and response programs are mostly managed by the Office of Spill Prevention and Response (OSPR) and the State Lands Commission and funded by the Oil Spill Prevention and Administration Fund. Recent accounting figures from OSPR show a projected deficit in OSPAPF for fiscal years 2011-12 (-\$2,327,252), 2012-13 (-\$10,837,194), and 2013-14 (-\$18,072,343). These projected deficits will most likely lead to substantial cuts in both OSPR and the Commission's programs.

The primary fee that supports OSPAPF is a \$0.05 fee that is imposed on each barrel of crude or petroleum product delivered to a marine terminal in the state. In the 20 year history of OSPAPF, this fee has only increased once—in 2002, the Legislature raised the fee from \$0.04 to \$0.05 when OSPR was faced with staffing reduction as a result of a declining reserve in the fund. In addition to the one cent increase in the per barrel fee, the Legislature also approved a fee not to exceed \$2,500 on non-tank vessels.

CALENDAR ITEM NO. 38 (CONT'D)

Without an increase in the fees or a new funding source, the projected deficits in OSPAF will force both the Commission and OSPR to cut positions essential to their respective programs. For fiscal year 2011-12, the estimated deficit is approximately 17% of the cost to operate the programs funded by OSPAF. As such, OSPR and the Commission will likely have to cut a significant number of staff positions, which could mean the loss of oil spill prevention specialists, environmental scientists, enforcement agents, engineers, marine safety specialists, and support staff. Since the deficit is estimated to continue after 2011-12, additional cuts will be required. These cuts will seriously jeopardize the protection the Commission's and OSPR's programs provide to the public and the environment in preventing and responding to oil spills.

To preserve the Commission and OSPR's oil spill prevention and response programs and to protect public health and safety and the environment, legislation is needed that would allow adjustment of the OSPAF fees to an amount that would be sufficient to carry out both the Commission's and OSPR's oil spill related programs.

RECOMMENDED ACTION:

Staff recommends that the Commission support legislation that would allow adjustment of the OSPAF fees to an amount that would be sufficient to carry out both the Commission's and OSPR's oil spill prevention and response programs for the next fiscal year and into the future.