

**CALENDAR ITEM
C59**

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**CONSIDER ADOPTION OF REGULATIONS TO AMEND REGULATORY
DEFINITIONS AND THE FEE USED TO FUND CALIFORNIA'S MARINE INVASIVE
SPECIES PROGRAM UNDER ARTICLE 4.5 OF TITLE 2, DIVISION 3, CHAPTER 1
OF THE CALIFORNIA CODE OF REGULATIONS**

PROPOSAL:

Commission staff proposes to amend sections 2270 and 2271 in article 4.5 of title 2, division 3, chapter 1 of the California Code of Regulations.

The proposed changes to section 2270 would amend the article 4.5 regulatory definitions to be consistent with the Public Resources Code. The proposed regulations make minor wording changes to align with the statute. AB 1312 (Stats. 2015, ch. 644) made minor amendments to the definition of the word "Voyage" (Pub. Resources Code, § 71200, subd. (r)).

Substantively, Section 2271 would amend the fee paid by vessels arriving at California ports (the Fee). The Fee is used for the Marine Invasive Species Control Fund under division 36 of the Public Resources Code titled, "Marine Invasive Species Act," established under Chapter 491, Statutes of 2003 (the Act). The proposed regulation would increase the Fee paid by vessels arriving at California ports from \$850 per qualifying voyage to \$1,000 per qualifying voyage.

BACKGROUND:

Public Resources Code section 71215 created the Marine Invasive Species Control Fund and requires the Commission to establish a reasonable and appropriate Fee to carry out the activities required by the Marine Invasive Species Act. It also states that the Fee may not exceed \$1,000 per vessel voyage; however, this amount may be adjusted for inflation every 2 years. Pursuant to Public Resources Code section 71215, subdivision (c), the State Board of Equalization shall collect the Fee from the owner or operator of each vessel that arrives at a California port or place from a port or place outside of California. The Fee may not be assessed on any vessel arriving at a California port or place if that vessel comes directly from another California port or place.

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The Fee was initially established at \$600 per qualifying voyage by emergency regulations that became effective on January 1, 2000. This initial Fee amount utilized very conservative assumptions about qualifying voyage numbers and compliance with Fee payment. Based on data gathered during the first quarter of 2000, Commission staff determined that the existing Fee amount exceeded the fixed programmatic budgets and should be reduced. The Fee was reduced by emergency regulation to \$400 per qualifying voyage effective April 30, 2000. That emergency regulation was replaced on August 29, 2000, with permanent regulations setting the Fee at \$400 per qualifying voyage. An assessment of the Fund conducted in early 2002 predicted a significant surplus through the end of 2003. Therefore, the Fee was further reduced by emergency regulation to \$200 per qualifying voyage, effective July 1, 2002. That emergency regulation was replaced on November 14, 2002, with permanent regulations setting the Fee at \$200 per qualifying voyage.

In 2003, the Governor and Legislature reauthorized, expanded, and renamed the authorizing statute (Marine Invasive Species Act; Stats. 2003, Ch. 491). As a result, Marine Invasive Species Program activities and budgets expanded, and the Fee was increased by emergency regulation to \$500 per qualifying voyage effective February 1, 2004. That emergency regulation was replaced June 3, 2004, with permanent regulations adopting the Fee at \$500 per qualifying voyage.

In 2006, the Governor and Legislature reauthorized and further expanded the Marine Invasive Species Program and removed the sunset date. As a result, programs and budgets expanded. In 2007 and 2008, the Governor and Legislature passed additional legislation requiring the Commission to collect information from vessel owners and operators on their biofouling management practices, develop regulations that govern biofouling management practices, and assess the availability of ballast water treatment systems. Consequently, the Marine Invasive Species Program budget increased, and the Fee was increased with permanent regulations resetting the Fee to \$850 per voyage, effective November 1, 2009.

The Fee amount is set based on a model that includes the current and projected Marine Invasive Species Program budget, estimated number of qualifying voyages, and the Fee payment compliance rate. A qualifying voyage, as defined in section 2271, is a vessel that arrives at a California port from a port outside of California. During an annual review of the fund status by staff in January 2016, several of the assumptions used to set the Fee at \$850 per qualifying voyage in

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2009 were reevaluated. Currently, the Fee payment compliance rate exceeds 98 percent; in 2009, a compliance rate of 95 percent was used in the Fee model. The number of qualifying voyages arriving in California annually has remained relatively constant at approximately 5,700, but projections provided by the maritime industry at a technical advisory group meeting on April 6, 2016, suggest further decreases in qualifying voyages to an estimated 5,300 voyages annually through year 2020. Based on the current Fee amount of \$850 per qualifying voyage, and the revised assumptions for compliance and number of qualifying voyages, revenues will not meet the costs of the Marine Invasive Species Program as of 2018. Utilizing the revised assumptions, Commission staff and the technical advisory group concluded that the Fee could be set at \$1,000 per qualifying voyage, beginning on or about January 1, 2017, to meet programmatic budgets and retain fund solvency through Fiscal Year 2019/2020.

The Fee amount may be modified in the future if the Commission finds that collection rates are higher or lower than anticipated or that qualifying voyages increase or decrease. If that action is necessary, the modification will be made as an amendment to these regulations.

SUMMARY OF NOTIFICATION AND RULEMAKING PROCESS:

The proposed regulations were published in the California Regulatory Notice Register (Register 2016, No. 39-Z) on September 23, 2016. A link to all rulemaking documents was posted on the home page of the Commission's website. A Notice of Proposed Rulemaking was mailed to all 196 physical addresses in the Marine Invasive Species Program's mailing list and distributed electronically to all 256 email addresses in the same list.

The public comment period for the proposed regulations spanned 45 days, from September 23, 2016, through November 7, 2016. Because the adoption of this regulation was not deemed to be controversial, a public hearing was not scheduled, and no hearing was requested by a member of the public.

Commission staff received two letters containing a total of 17 comments during the public comment period. In addition to opposition to the Fee increase and any expansion of the Marine Invasive Species Program, the public comments covered a number of topics including claims that:

- Recent advances in the federal and international invasive species programs have made the Commission's Marine Invasive Species Program redundant

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- Many of the Commission's ballast water management and recordkeeping/reporting requirements are duplicative with federal requirements
- The state ballast water discharge standard cannot be met and should be removed from the statute
- The maritime industry is facing intense economic pressures and is not in a position to shoulder additional expenses
- The increased arrival fee may decrease California ports' competitiveness with other ports
- The Commission should work with federal partners to provide input on implementing an effective federal program

Staff disagrees with the statement that the State's efforts are redundant and duplicative and provide little or no added protection. Staff believes that the State's efforts exceed the federal government's efforts in terms of success in protecting California's waters.

Staff acknowledges that in some instances the Marine Invasive Species Act and associated regulations require preparation of the same documents as federal agencies. However, staff must review many of these documents pursuant to Public Resources Code section 71205, and the proposed rulemaking does not affect these reporting requirements.

Staff considered impacts to California's competitiveness and the potential negative economic impacts to California businesses in the Notice of Proposed Regulatory Action, Initial Statement of Reasons, and STD. 399. In these documents, staff acknowledges that raising the Fee may impact California's competitiveness and cause negative economic impacts. However, based on a comparison of regulatory costs in other states, the costs of doing business in California would remain competitive against the other West Coast states after the Fee increase. Additionally, the proposed Fee increase of \$150 per qualifying arrival is relatively low and unlikely to deter vessels from calling on California's ports.

Staff made no changes to the proposed regulations in response to these comments. The proposed regulations are intended to become effective in early 2017 after approval by the Office of Administrative Law.

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STAFF ANALYSIS AND RECOMMENDATION:

Authority:

Public Resources Code sections 71201.7 and 71215.

Public Trust and State's Best Interests Analysis:

The proposed regulations will further the interests of the Public Trust by providing greater protection to Public Trust resources. Currently, the introduction of nonindigenous species to California's waters threatens Public Trust resources and values including ecosystem preservation and the promotion and protection of fishing, water related recreation, maritime commerce, and water-dependent tourism. Although the proposed Fee increase could serve as a minor deterrent to navigation to California ports, the increase is necessary to protect these other Public Trust principles and values and provide sufficient funding for the Marine Invasive Species Program to protect California from the introduction of nonindigenous species from vessels that arrive at California ports. These regulations satisfy the purpose of the Marine Invasive Species Act (Pub. Resources Code, § 71201, subd. (d)) "to move the State expeditiously toward elimination of the discharge of nonindigenous species into the waters of the State." Additionally, the amendments to the regulatory definitions to mirror statutory definitions will ensure clarity of the law for the regulated community. Thus, staff believes that adoption of the proposed regulations would further enhance and protect Public Trust uses and resources and are in the State's best interests.

OTHER PERTINENT INFORMATION:

1. The proposed regulations would implement, interpret, and make specific Public Resources Code sections 71200 and 71215, which require the Commission to establish a reasonable and appropriate Fee to carry out the activities required by the Marine Invasive Species Act.
2. Staff recommends that the Commission find that this activity is exempt from the requirements of the California Environmental Quality Act (CEQA) as a categorically exempt project. The project is exempt under Class 8, Actions by Regulatory Agencies for Protection of the Environment; California Code of Regulations, title 14, section 15308.

Authority: Public Resources Code section 21084 and California Code of Regulations, title 14, section 15300.

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3. This action is consistent with Strategy 1.1 of the Commission's Strategic Plan to deliver the highest levels of public health and safety in the protection, preservation, and responsible economic use of the lands and resources under the Commission's jurisdiction; and Strategy 2.3 to align budget and policy initiatives and staff resources with the Commission and State priorities, including securing stable funding sources and resources to fulfill the Commission's mission and vision.
4. No alternatives would be more effective in carrying out the purposes for which the regulations are proposed, or would be as effective as and less burdensome, or would lessen any adverse economic impact on small businesses or affected private persons, than the proposed regulations.
5. The proposed regulatory amendments are not considered a "major regulation" as defined by the California Department of Finance in California Code of Regulations, title 1, section 2000, subdivision (g).

EXHIBIT:

- A. Text of the proposed regulations

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a categorically exempt project, Class 8, Actions by Regulatory Agencies for Protection of the Environment; California Code of Regulations, title 14, section 15308.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

Find that adoption of the proposed regulations, or regulations substantially in the same form, will not substantially interfere with the public rights to navigation or the Public Trust needs and values at this time, is consistent with the common law Public Trust Doctrine, and is in the best interests of the State.

AUTHORIZATION:

1. Find that no alternatives would be more effective in carrying out the purposes for which the regulations are proposed, or would be as effective as and less burdensome, or would lessen any adverse

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economic impact on small businesses or affected private persons, than the proposed regulations.

2. Adopt the amendments to the California Code of Regulations, title 2, division 3, chapter 1, article 4.5, sections 2270 and 2271 substantially in the form as set forth in the attached Exhibit A.
3. Authorize staff to make minor, non-substantive modifications to the proposed regulations in response to recommendations by the Office of Administrative Law.
4. Authorize staff to take whatever action is necessary and appropriate to comply with provisions of the Government Code regarding the lawful adoption and publication of the regulations and to ensure that the regulations become effective.
5. Authorize staff to take whatever action is necessary and appropriate to implement the regulations at such time as they become effective.

EXHIBIT A

Title 2, Division 3, Chapter 1 Article 4.5. Marine Invasive Species Control Fund Fee

Section 2270. Definitions.

For purposes of this Article, the following definitions apply.

- (a) "Voyage" means any transit by a vessel destined for ~~any~~ a California port from a port ~~or place~~ outside of the coastal waters of the state.
- (b) "Waters of the state" means any surface waters, including saline waters, that are within the boundaries of the state.

Authority cited: Section 71215(b), Public Resources Code.

Reference cited: Sections 71200(o), 71200(~~qr~~), and 71215, Public Resources Code.

Section 2271. Fee Schedule for Marine Invasive Species Control Fund.

- (a) The Fee required under Public Resources Code Section 71215 is ~~eight hundred fifty dollars (\$850)~~ one thousand dollars (\$1,000) per vessel voyage.
- (b) The Commission may establish lower levels of fees and the maximum amount of fees for individual shipping companies or vessels. Any fee schedule established, including the level of the fees and the maximum amount of fees, shall take into account the impact of the fees on vessels operating from California in the Hawaii or Alaska trades, the frequency of calls by particular vessels to California ports within a year, the ballast water practices of the vessels, and other relevant considerations.
- (c) The fee shall be collected from the owner or operator of each vessel that arrives at a California port or place from a port or place outside of California. That fee may not be assessed on any vessel arriving at a California port or place if that vessel comes directly from another California port or place and during that transit has not first arrived at a port or place outside California or moved outside the EEZ prior to arrival at the subsequent California port or place.
- (d) (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 of 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 cited: Section 71215(b), Public Resources Code.

Reference cited: Sections 71200 and 71215, Public Resources Code.