

# Staff Report 52

## **PROPOSED ACTION:**

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Consider proposing amendments to the federal Vessel Incidental Discharge Act (33 U.S.C. 1322(p)) to improve states' access to vessel discharge data and to address impacts to the Marine Invasive Species Control Fund.

## **BACKGROUND:**

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The California Marine Invasive Species Program (MISP) is a multi-agency program designed to reduce the risk of introducing nonindigenous species (NIS; i.e., non-native species) into State waters from vessels 300 gross registered tons or greater that are capable of carrying ballast water. The Legislature established the Program in 1999 when it enacted the Ballast Water Management for Control of Nonindigenous Species Act and expanded it in 2003 when it enacted the Marine Invasive Species Act. The purpose of MISP is to move the State expeditiously toward elimination of the discharge of NIS into State waters based on the best available technology that is economically achievable.

Staff works closely with other MISP agencies, including the California Department of Fish and Wildlife, the State Water Resources Control Board, and the California Department of Tax and Fee Administration. Staff also works closely with state, federal, and foreign entities; technical advisory groups; non-governmental organizations; scientists and researchers; and the shipping industry. This collaboration, a hallmark of MISP, improves protection of California waters from NIS introductions by creating regional and international consistency and a forum to share successes and challenges.

For years, the shipping industry advocated for enactment of uniform national standards for ballast water discharge to replace the perceived patchwork of state and federal ballast water management requirements. The legislation sought by the shipping industry became law in late 2018 when the Vessel Incidental Discharge Act (VIDA), included as Title IX within S.140, the Frank Lobiando Coast Guard Reauthorization Act of 2018, was signed into law. The law:

- Designates the U.S. Environmental Protection Agency (U.S. EPA) as the lead authority to establish national performance standards for vessel discharges, including ballast water.
- Designates the U.S. Coast Guard (USCG) as the lead authority to implement and enforce the national standards set by the U.S. EPA.
- Will preempt state authority, once fully implemented, to adopt or implement state-specific management requirements or standards for vessel discharges, including ballast water, that are stricter than the federal standards.

Certain provisions were included in VIDA that protect states from some of the impacts to their authority, including:

- Individual states retain authority to inspect vessels and enforce the federal ballast water management requirements.
- Individual states retain authority to collect fees (with a cap) and Ballast Water Management Reports from vessels arriving at state ports.
- Individual states may, through their governors, petition U.S. EPA for stricter discharge standards.

State law is not preempted until U.S. EPA and USCG adopt regulations to establish discharge standards and implement enforcement procedures. The combined rulemaking process, which is under way now, could take four years or more from the time VIDA was signed into law.

Unless changes are made to the federal law, California will be preempted from proceeding with the State's interim and final ballast discharge performance standards in 2030 and 2040, respectively. States retain the ability to petition U.S. EPA for stricter discharge standards. The process, however, is complicated and it is unclear what data and information would need to be provided for a petition to be approved. USCG holds the best available data on ballast water treatment system performance as part of the documentation associated with the current ballast water treatment system type approval process. USCG refuses to release those data to the public through the Freedom of Information Act, stating that the data include trade secrets and commercial or financial information that is exempted from release. These end-of-pipe discharge data, however, can be separated from proprietary information and are critical to identifying appropriate discharge standards.

When VIDA is fully implemented, there will be a cap on state fees that qualifying voyage arrivals must pay when they arrive at state ports to support ballast water management programs. The fee cap under VIDA is \$1,000 per qualifying voyage and may be adjusted for inflation once every five years. California's fee is set at \$1,000, so the Commission will be restricted from raising the fee due to fiscal need.

VIDA sets an additional cap of \$5,000 on the total amount of state fees that may be assessed per year on each U.S. flagged vessel. As a result, the Marine Invasive Species Control Fund is projected to lose between \$300,000 and \$500,000 in revenue each year. This revenue loss would push the Marine Invasive Species Control Fund toward insolvency by 2024. COVID-related impacts to the shipping industry have compounded the potential fiscal impacts from VIDA; budget projections completed in October 2020 show that the Marine Invasive Species Control Fund may reach insolvency as soon as 2022.

The Commission has previously taken steps to limit federal action that would preempt state authority to regulate vessel discharges, including:

- Opposing VIDA in February 2017 ([Item 66, February 7, 2017](#)).
- Directing staff to work with the California Legislature to develop a resolution to oppose federal preemption of California's authority to protect State waters, memorialize California's commitment to preserve and strengthen its world-leading program to reduce the risk of aquatic nonindigenous species introductions into State waters, and to consider appropriate actions to overturn or curtail the federal preemption ([Item 97, June 28, 2019](#)).

### **PUBLIC TRUST AND STATE'S BEST INTERESTS:**

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. Staff believes that requesting federal action to amend VIDA would enhance and protect Public Trust resources and is in the State's best interests.

NIS threaten water-borne commerce, public recreation, and natural ecosystems dependent on California's waters. If the Commission encounters budget shortfalls due to the low fee cap, it may be unable to protect California's waters and robust Public Trust uses and resources. An increase in the cap on State fees would provide California with the ability to raise the fee, by regulatory amendment, if necessary, to ensure sufficient resources are available to inspect vessels, assess vessel compliance with management requirements, and enforce against violators. With the resources needed to implement and enforce the law, the Commission would be better suited to protect California's waters and Public Trust uses and resources.

The USCG ballast water treatment system type approval data will be used by staff to assess the performance of available ballast water treatment systems. This information could help inform a petition to the U.S. EPA to strengthen the federal

ballast water discharge standards if the data support such a conclusion. Stricter ballast water discharge standards would help further protect California waters from the introduction of NIS, thus enhancing Public Trust uses and resources.

Staff believes that these small, but significant, amendments could have significant benefits for States when it comes to: 1) assessing the performance of approved ballast water treatment systems relative to the federal ballast water discharge performance standard; and 2) ensuring that fee collection is sufficient to support state programs to inspect vessels and enforce the provisions of VIDA.

### **RECOMMENDED ACTION:**

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Staff recommends that the Commission authorize staff to engage in discussions with Congressional staff about potential amendments to VIDA. The focus of those discussions would be: 1) the release of ballast water treatment system type approval data by the USCG; and 2) an increase of the cap on state fees that support ballast water management programs. Staff believes that these small, but important, amendments could have significant benefits for States when it comes to: 1) assessing the performance of approved ballast water treatment systems relative to the federal ballast water discharge performance standard; and 2) ensuring that fee collection is sufficient to support state programs to inspect vessels and enforce VIDA. Staff further recommends that the Commission find that supporting federal action to amend VIDA will help further the interests of the Public Trust and is in the best interests of the State.

### **AUTHORIZATION:**

1. Direct staff to work with Congress to amend the Vessel Incidental Discharge Act to address the Commission's concerns regarding vessel arrival fee caps and access to data held by the USCG.