

Staff Report 57

PARTY:

California State Lands Commission

PROPOSED ACTION:

Consider approval of proposed emergency rulemaking amendments to sections 2292 and 2293 of the California Code of Regulations, Title 2, Division 3, Chapter 1, Article 4.7.

AREA AND LOCATION:

San Francisco Bay area east of, and including, the port of Rodeo, extending to the Ports of Stockton and Sacramento.

BACKGROUND:

The California Marine Invasive Species Program (MISP) is a multiagency program designed to reduce the risk of introducing nonindigenous species (NIS) into State waters from vessels 300 gross registered tons or greater and that are capable of carrying ballast water. The MISP was established by the Ballast Water Management for Control of Nonindigenous Species Act of 1999 and reauthorized and expanded by the Marine Invasive Species Act of 2003. The purpose of the MISP is to move the State expeditiously toward elimination of the discharge of NIS into the waters of the state. (Public Resources Code, § 71201, subd. (d).)

Nonindigenous species are organisms that have been transported by humans to locations where they do not naturally or historically occur. Once established, NIS can have adverse economic, ecological, and public health consequences. To prevent species introductions in state waters, the Marine Invasive Species Act and associated regulations govern ballast water and biofouling management, recordkeeping, and reporting for oceangoing vessels arriving at the state's ports.

Existing regulations require vessels discharging ballast water in state waters to meet ballast water discharge performance standards. Ballast water discharge performance standards set limits on the allowable concentrations of living organisms that can be discharged into state waters. Vessels typically comply with these standards by treating ballast water with onboard ballast water treatment systems. These performance standards replaced earlier requirements for vessels to exchange ballast water in the ocean at or beyond specific distances from land to reduce the concentration of living organisms. Ballast water exchange was replaced by ballast water treatment to satisfy discharge performance standards as the primary management method at the state, federal, and international levels because of the variable efficacy of ballast water exchange to decrease the likelihood of introducing NIS.

On October 17, 2024, the golden mussel (*Limnoperna fortunei*), an invasive, freshwater mussel native to China and Southeast Asia, was discovered in the Port of Stockton. Soon after, golden mussels were found at additional sites within the Sacramento-San Joaquin Delta (Delta) and the State Water Project. This species poses a significant, immediate threat to the ecological health of the Delta, California's water infrastructure, and California's freshwater and brackish (i.e., less than full marine salinity) environments.

The golden mussel introduction in California exposed a critical gap in existing regulations, specifically for vessels carrying fresh or brackish ballast water and discharging it into California's fresh or brackish water environments. The transition from ballast water exchange to discharge performance standards was intended to result in more reliable and consistent ballast water management to reduce the likelihood of introducing NIS. This is true for vessels discharging marine (i.e., high salinity) ballast water, where the concentration of organisms allowed by discharge performance standards is much lower than what would be expected for exchanged marine ballast water. However, for fresh or brackish ballast water discharges, the addition of high salinity ocean water during an exchange is an effective means of killing fresh or brackish water organisms. Transitioning away from exchange and toward discharge performance standards likely results in higher organism concentrations of fresh or brackish water organisms than would be expected with exchange, resulting in a greater likelihood of introducing NIS. This gap can be filled by adding an exchange requirement to the discharge performance standards for vessels carrying fresh or brackish ballast water into California's fresh or brackish water environments.

PROJECT DESCRIPTION:

The purpose of the proposed emergency rulemaking is to amend Article 4.7 of Title 2, Division 3, Chapter 1 of the California Code of Regulations (Article 4.7) to address a critical gap in the management of fresh or brackish ballast water prior to discharge in California's fresh and brackish water environments. These proposed regulatory amendments would require vessels carrying ballast water with a salinity less than 18 parts per thousand to exchange their ballast water at or beyond 50 nautical miles from land prior to discharging it into California's fresh or brackish water ports, in addition to complying with existing discharge performance standards.

Based on historical arrival data, approximately ~~3663~~ - 79 vessel arrivals per year would be ~~affected by~~ **subject to** the proposed **emergency** amendments, ~~all~~ **most** of them **bulk, tank, and articulated tug-barge** vessels. These vessels will not need to alter or install any equipment to comply with the proposed regulations, as vessels are already capable of conducting ballast water exchange.

SUMMARY OF PROPOSED AMENDMENTS

The proposed regulatory action would:

- Amend section 2292 to adopt new or amend existing terminology included within Article 4.7 to improve clarity.
- Amend section 2293 to adopt a requirement for vessels with ballast water with a salinity less than 18 parts per thousand to carry out ballast water exchange at least 50 nautical miles from land and in waters at least 200 meters deep prior to discharging at California ports in the San Francisco Bay area east of, and including, the port of Rodeo, extending to the Ports of Stockton and Sacramento. The final salinity of discharged ballast water must be at or above 30 parts per thousand.

These proposed amendments, if authorized by the Commission, will be submitted to the Office of Administrative Law (OAL) as an emergency rulemaking action. Before submitting the rulemaking action to OAL, however, the Commission must provide at least five working days of notice to the public. Unlike traditional rulemakings, this notice does not start the public comment period; instead, it alerts the public that the Commission is beginning the emergency rulemaking process. Once the five-day notice period has elapsed, the emergency rulemaking action will be submitted to OAL for review, and OAL will post the Commission's notice on its website.

OAL must then review the rulemaking action within 10 calendar days of receiving the proposed emergency regulations. OAL will accept public comment during the first five calendar days of its 10-day review period. OAL will consider public comments if: (1) they are in writing; (2) they are received during the public comment period; (3) they note they are related to an emergency regulation review and the topic of the emergency regulation; and (4) OAL confirms the Commission received the comment. (1 Cal. Code Regs., §§55(b), (c).) Relevant comments received must be provided to the Commission within one working day, and the Commission must have an opportunity to respond. Additionally, any public commenters must copy both OAL and the Commission when submitting comments on the proposed emergency regulations.

If OAL approves the rulemaking action, it will file the regulations with the Secretary of State, and the regulations will become effective immediately upon filing, unless the Commission requests a later effective date. Emergency regulations are only effective for 180 days, with up to two 90-day extensions. If OAL approves the emergency rulemaking action, Commission staff will immediately prepare for a regular public rulemaking action, complete with a full 45-day public comment period, to make the requirement permanent. Alternatively, OAL may disapprove the action. More information about the Emergency Rulemaking process can be found on the Office of Administrative Law's website at https://oal.ca.gov/emergency_regulations/Emergency_Regulation_Process/.

A complete copy of the proposed regulations is included as Exhibit A.

STAFF ANALYSIS AND RECOMMENDATION:

AUTHORITY:

Public Resources Code sections 71201.7, 71204.3, and 71204.5; Government Code sections 11342.545, 11346.1, and 11349.6; California Code of Regulations, title 1, section 50.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

The proposed amendments will further the interests of the Public Trust by providing greater protection of Public Trust resources. The introduction of NIS 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. The proposed regulations are

expected to benefit both the State's environment and the health and welfare of the public.

The proposed amendments satisfy the purpose of the Marine Invasive Species Act (Public Resources Code, § 71201, subd. (d)) "to move the State expeditiously toward elimination of the discharge of nonindigenous species into the waters of the State." Thus, staff believes that adoption of the proposed regulations would further enhance and protect Public Trust resources and is in the State's best interests.

CONCLUSION:

For these reasons, staff believes that the proposed amendments would benefit existing Public Trust uses and resources and are in the best interests of the State.

OTHER PERTINENT INFORMATION:

1. Approval or denial of the proposed amendments is a discretionary action by the Commission.
2. The proposed amendments interpret, implement, and make specific the provisions of Public Resources Code sections 71201.7, 71204.3, and 71204.5.
3. The proposed regulatory action is not a major regulation as defined by Government Code section 11342.548.
4. Staff recommends that the Commission find that approval of the proposed regulatory amendments 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 15061.

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 amendments, or amendments 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. Approve the amendments of sections 2292 and 2293 of the California Code of Regulations, Title 2, Division 3, Chapter 1, Article 4.7, substantially in the form as set forth in the attached Exhibit A.
2. Authorize staff to respond to and resolve public comments in a manner aligned with the implementation of the proposed regulation amendments, in addition to making nonsubstantive modifications to the proposed amendments in response to recommendations by the Office of Administrative Law.
3. 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.
4. Authorize staff to take whatever action is necessary and appropriate to implement the regulations at such time as they become effective.

Exhibit A

Article 4.7

§ 2292. Definitions.

(a) “Ballast Water Capacity” means the total volumetric capacity of any tanks, spaces, or compartments on a vessel used for carrying, loading or discharging ballast water, including any multi-use tank, space or compartment designed to allow carriage of ballast water.

(b) “Ballast Water Sample” means a unit of ballast water that may be collected for compliance assessment or research purposes.

(c) “Ballast Water Treatment System,” also referred to as a “Ballast Water Management System,” means any system that processes ballast water to remove, kill, or render nonviable organisms in ballast water prior to discharge or to avoid the uptake or discharge of organisms

(d) “Colony Forming Unit” means a measure of viable bacteria in a sample.

(e) “Commission” means the California State Lands Commission.

(f) “Detailed Analysis” means a direct measurement of the organism's concentration in a representative sample to assess compliance with the discharge standards.

(g) “Exchange” means to replace the water in a ballast tank using either of the following methods:

(1) “Flow through exchange,” which means to flush out ballast water by pumping three full volumes of near-coastal water through the tank, continuously displacing water from the tank, to minimize the number of original coastal organisms remaining in the tank.

(2) “Empty/refill exchange,” which means to pump out, until the tank is empty or as close to 100 percent empty as is safe to do so, the ballast water taken on in ports, or estuarine or territorial waters, then to refill the tank with near-coastal waters.

~~(g)~~(h) “Functionality Monitoring” means monitoring of the applicable operational performance parameters to verify that the ballast water treatment system is operating according to the manufacturers' specifications.

~~(h)~~(i) “Indicative Analysis” means a rapid preliminary assessment of the organism concentration in a representative sample of the ballast water volume of interest using biological, chemical, or physical parameters.

(j) “Land” has the same meaning as “land” in Public Resources Code section 71200(i).

~~(i)~~(k) “mL” means milliliter.

(l) “Near-coastal waters” means waters that are more than 50 nautical miles from land and at least 200 meters (656 feet, 109 fathoms) deep.

(m) “Port” has the same meaning as “port” in Public Resources Code section 71200(n).

~~(j)~~(n) "Public Water System" is defined the same as in Title 40 of the Code of Federal Regulations, section 141.2 (7-1-20 Edition), which is hereby incorporated by reference.

~~(k)~~(o) "Sampling Port" means the equipment installed in the ballast water piping through which representative samples of the ballast water being discharged are extracted.

~~(l)~~(p) "System Design Limitations" or "SDLs" are the physical or operational parameters important to the proper operation of the ballast water treatment system and designed to achieve the discharge performance standards (for example, minimum and maximum flow rates, time between ballast uptake and discharge, water quality limitations, operating environmental conditions, filter pressure, or ultraviolet transmittance).

~~(m)~~(q) "Vessel" has the same meaning as in Section 71200, Public Resources Code, subdivision (r).

§ 2293. Performance Standards for Ballast Water Discharges.

The provisions under this Section apply only to vessels that discharge ballast water in California waters.

(a) Federal Performance Standards for Ballast Water Discharges.

(1) Notwithstanding section 2296, the owner or operator of a vessel shall not discharge ballast water in California waters unless the ballast water discharge performance standards set forth in Section 151.2030(a) of Title 33 of the Code of Federal Regulations, or as that regulation may be amended, are met.

(2) The performance standards in Section 2293, subdivision (a)(1), must be met according to the implementation schedule in Section 151.2035(b) of Title 33 of the Code of Federal Regulations, or as that regulation may be amended, unless either of the follow conditions are met:

(A) The owner or operator of a vessel has been granted an extension to the vessel's compliance date by the United States Coast Guard pursuant to Section 151.2036 of Title 33 of the Code of Federal Regulations, or as that regulation may be amended;
or

(B) The vessel is using water from a Public Water System as ballast water pursuant to Section 2296.

(b) This subdivision applies only to vessels with ballast water sourced from waters with a measured salinity of less than 18 parts per thousand and arriving at ports in the San Francisco Bay area east of, and including, the port of Rodeo, extending to the Ports of Stockton and Sacramento. In addition to meeting the ballast water discharge performance standards incorporated in subdivision (a), the master, operator, or person in charge of a vessel subject to this subdivision must:

(1) Conduct a ballast water exchange in near-coastal waters; and

(2) Ensure that the salinity of discharged ballast water is equal to or greater than 30 parts per thousand.

~~(b)~~(c) Interim California Performance Standards for Ballast Water Discharges.

No later than January 1, 2030, the owner or operator of a vessel must comply with the interim California performance standards for the discharge of ballast water. The interim performance standards for the discharge of ballast water in California require that ballast water discharged will contain:

(1) No detectable living organisms that are greater than or equal to 50 micrometers in minimum dimension;

(2) Fewer than 0.01 living organisms per mL that are less than 50 micrometers in minimum dimension and greater than or equal to 10 micrometers in minimum dimension;

(3) For living organisms that are less than 10 micrometers in minimum dimension:

(A) fewer than 1,000 bacteria per 100 mL;

(B) fewer than 10,000 viruses per 100 mL;

(C) concentrations of microbes that are less than:

1. 126 colony forming units per 100 mL of *Escherichia coli*;

2. 33 colony forming units per 100 mL of Intestinal enterococci; and

3. 1 colony forming unit per 100 mL or 1 colony forming unit per gram of wet weight of zoological samples of Toxicogenic *Vibrio cholerae* (serotypes O1 and O139).

~~(e)~~(d) Final California Performance Standards for Ballast Water Discharges.

No later than January 1, 2040, the owner or operator of a vessel to which this Article applies, must implement and meet the final performance standards for the discharge of ballast water. The final performance standards for the discharge of ballast water in California waters require that the ballast water discharged must have zero detectable living organisms for all organism size classes.

Note:

Authority: Public Resources Code sections 71201.7, 71204.3 and 71205.3

Reference: Public Resources Code sections 71204.3 and 71205.3