

## **EXPRESS TERMS**

### **TITLE 2. ADMINISTRATION DIVISION 3. STATE PROPERTY OPERATIONS CHAPTER 1. STATE LANDS COMMISSION ARTICLE 4.9. MARINE INVASIVE SPECIES ACT ENFORCEMENT AND HEARING PROCESS**

*Staff has illustrated changes to the original text in the following manner:*

- Originally proposed language is underlined; deletions from the original text are shown in strikeout using a "-".*
- Modified proposed additions after comment consideration are double underlined; modified proposed deletions after comment consideration are shown in double strikethrough.*

**California State Lands Commission staff proposes to amend Article 4.9 of Chapter 1, Division 3 of Title 2 of the California Code of Regulations, to read as follows:**

#### **Section 2299.01 Purpose and Applicability**

- (a) The purpose of the regulations in Title 2, Division 3, Chapter 1, Article 4.9 of the California Code of Regulations is to establish policies and procedures ~~the Executive Officer~~ staff of the California State Lands Commission shall undertake in assessing and commencing administrative enforcement actions pursuant to California Public Resources Code section 71216.
- (b) This article shall govern the enforcement and procedures related to violations of any of the provisions of Division 36 of the Public Resources Code and Title 2, Division 3, Chapter 1, Articles ~~4.5, 4.6, 4.7, and 4.8~~ of the California Code of Regulations.
- (c) The provisions of this article apply to all vessels, United States and foreign, carrying, or capable of carrying, ballast water into the ~~coastal~~ waters of the state after operating outside of the ~~coastal~~ waters of the state as well those vessels operating exclusively within the pacific coast region, except those vessels described in section 71202 of the Public Resources Code.

Authority Cited: Sections 71201 and 71201.7, Public Resources Code.

Reference: Section 71201, Public Resources Code.

## Section 2299.02 Definitions

- (a) ~~"CCR" means the California Code of Regulations.~~
- (b)(a) "Cited Party" means the master, owner, operator, agent, or person in charge of a vessel that has violated a provision or provisions of the California Marine Invasive Species Act (codified as ~~Cal. California Pub. Public~~ Resources Code § 71200 et seq.) or title 2, California Code of Regulations, Articles ~~4.5, 4.6, 4.7, and 4.8.~~
- (c)(b) ~~"Coastal waters" means estuarine and ocean waters within 200 nautical miles of land or less than 2,000 meters (6,560 feet, 1,093 fathoms) deep and rivers, lakes, or other water bodies navigably connected to the ocean.~~
- (d)(e)(b) "Commission" means the California State Lands Commission.
- (e)(d)(c) "Exchange" means to replace the water in a ballast tank using, ~~and strictly complying with,~~ either of the methods described in Division 36, Chapter 1, of the California Public Resources Code section 71200, subdivision (h).
- (f)(e)(d) "Executive Officer" means the Executive Officer of the California State Lands Commission.
- (g)(f)(e) ~~"Incorrect Incomplete exchange"~~ means an exchange that is not performed ~~in full compliance with~~ using either of the methods described in ~~Division 36, Chapter 1 of the California~~ Public Resources Code section 71200, subdivision (h).
- (h)(e)(f) "Land" means the material of the earth, whether soil, rock, or other substances that sit landward of, or at an elevation higher than the ocean's mean high-tide line. Land includes rock outcroppings or islands located offshore.

(g) "Waters of the state" has the same meaning as "waters of the state" in Public Resources Code section 71200.

(h) ~~"PRC" means Public Resources Code.~~

Authority Cited: Sections 71201 and 71201.7, Public Resources Code.

Reference: Sections 71200 and 71216, Public Resources Code.

### **Section 2299.03 Classification of Violations**

A violation of any provision within Division 36, Chapter 2 (comprising sections 71203 through 71207), of the Public Resources Code-PRC or Title 2, Division 3, Chapter 1, Articles 4.6, 4.7, and 4.8 of the ~~CCR~~ California Code of Regulations shall be considered within one of three classes:

(a) Class 1 (management violations): Class 1 violations shall be issued to a cited party when a vessel fails to comply with applicable ballast water or biofouling management requirements, discharges ballast water in the coastal waters of the state without first complying with the appropriate ballast management practices identified in section 71204.3 of the PRC or 2 CCR, section 2284.

(1) Class 1 violations will be considered to be:

(A) Minor:

(1) if a vessel subject to section 71204.3, subdivision (c) of the Public Resources Code-PRC, prior to discharging ballast water into the ~~coastal~~ coastal waters of the state, performs an ~~incorrect~~ exchange of ballast water in an area less than 200 nautical miles and equal to or greater than 180 nautical miles from land; or

(2) if a vessel subject to ~~2-California Code of Regulations, title 2, CCR~~ section 2284, prior to discharging ballast water into the ~~coastal~~ waters of the state, performs an ~~incorrect~~ exchange of ballast

water in an area less than 50 nautical miles and equal to or greater than 45 nautical miles from land.

(B) Moderate:

- (1) if a vessel subject to section 71204.3, subdivision (c) of the ~~PRC~~ Public Resources Code, prior to discharging ballast water into the ~~coastal~~ waters of the state, performs an ~~incorrect~~ exchange of ballast water in an area less than 180 nautical miles and equal to or greater than 100 nautical miles from land;
- (2) if a vessel subject to ~~2~~ California Code of Regulations, title 2, CCR section 2284, prior to discharging ballast water into the ~~coastal~~ waters of the state, performs an ~~incorrect~~ exchange of ballast water in an area less than 45 nautical miles and equal to or greater than 25 nautical miles from land; or
- (3) if any additional Class 1 Minor violations are committed on a subsequent voyage ~~committed within twelve (12) months of a preceding Class 1 Minor violation shall be considered a Class 1 Moderate violation.~~

(C) Major (I):

- (1) if a vessel subject to section 71204.3, subdivision (c) of the ~~Public Resources Code-PRC~~ Public Resources Code, prior to discharging ballast water into the ~~coastal~~ waters of the state, performs an ~~incorrect~~ exchange of ballast water in an area less than 100 nautical miles from land;
- (2) if a vessel subject to ~~2~~ California Code of Regulations, title 2, CCR section 2284, prior to discharging ballast water into the ~~coastal~~ waters of the state, performs an ~~incorrect~~ exchange of ballast water in an area less than 25 nautical miles from land; or
- (3) if a vessel subject to section 71204.3 of the Public Resources Code, discharges ballast water into the ~~coastal~~ waters of the state after conducting an incomplete exchange;

- (4) if a vessel violates California Code of Regulations, title 2, section 2293, subdivision (a);
- (5) if a vessel violates California Code of Regulations, title 2, section 2295, subdivisions (a), (b), or (c);
- (6) if a vessel fails to notify the Commission, as soon as practicable, that the vessel's ballast water treatment system has stopped operating properly, as required by section 71205.3, subdivision (b)(1) of the Public Resources Code, and discharges ballast water into the ~~coastal~~ waters of the state or fails to employ an alternative identified by the Commission in consultation with the United States Coast Guard pursuant to section 71205.3, subdivision (b)(3) of the Public Resources Code; or
- ~~(3)~~(7) if any additional Class 1 Moderate violations are committed on a subsequent voyage ~~committed~~ within twelve (12) months of a preceding Class 1 Moderate violation ~~shall be considered a Class 1 Major (I) violation.~~

(D) Major (II):

- (1) if a vessel, subject to section 71204.3, subdivision (c) of the ~~Public Resources Code PRC~~ or ~~2~~California Code of Regulations, title 2, ~~CCR~~ section 2284, prior to discharging ballast water into the ~~coastal~~ waters of the state, fails to perform a ~~any~~ ballast water exchange during its voyage;
- (2) if a vessel subject to California Code of Regulations, title 2, section 2298.6 fails to manage or document management of biofouling as required under California Code of Regulations, title 2, section 2298.6, subdivision (b);
- (3) if a vessel subject to California Code of Regulations, title 2, section 2298.6 fails to manage or document management of biofouling as required under California Code of Regulations, title 2, section 2298.6, subdivision (c);

- (4) if a vessel subject to California Code of Regulations, title 2, section 2298.7 fails to manage or document management of biofouling as required under California Code of Regulations, title 2, section 2298.7, subdivision (c);
  - (5) if a person knowingly and with intent to deceive the Commission falsifies any ballast water or biofouling records, reporting forms, or information; or
  - (6) if a vessel restricts the Commission's access to any sampling ports for compliance assessment sample collection, as required in California Code of Regulations, title 2, section 2294, subdivision (a).
- (b) Class 2 (recordkeeping violations): Class 2 violations shall be issued to a cited party when a vessel fails to properly maintain on board the vessel, as required:
- (1) a ballast water management plan pursuant to section 71204, subdivisions (h) ~~and (i)~~ of the Public Resources Code-PRC;
  - (2) a ballast water log pursuant to section 71205, subdivision (d) of the Public Resources Code-PRC; ~~or~~
  - (3) any other information that is required to be carried or maintained on board a vessel pursuant to sections 71204 and 71205 of the Public Resources Code-PRC;
  - (4) documentation of ballast water treatment system functionality monitoring as required under California Code of Regulations, title 2, section 2297;
  - (5) a biofouling management plan pursuant to California Code of Regulations, title 2, section 2298.3; or
  - (6) documentation of biofouling management as required under California Code of Regulations, title 2, section 2298.7, subdivision (d).

- (c) Class 3 (reporting violations): Class 3 violations shall be issued when a cited party fails to submit the following information to the Commission, as required:
- (1) the ballast water reporting information required by section 71205, subdivision (c) of the Public Resources Code ~~PRC~~;
  - ~~(2) the "Ballast Water Treatment Supplemental Reporting Form" as required by 2 CCR section 2297.1, subdivision (b);~~
  - ~~(3) the "Hull Husbandry Reporting Form" as required by 2 CCR section 2298;~~
  - ~~(4) the "Ballast Water Treatment Technology Annual Reporting Form" as required by 2 CCR section 2297.1, subdivision (a); or~~
  - (2) the "Marine Invasive Species Program Annual Vessel Reporting Form (SLC 600.12)" as required by California Code of Regulations, title 2, section 2298.5;
  - ~~(5)(3) any other forms required pursuant to section 71205 of the Public Resources Code ~~PRC~~; or~~
  - (4) notification, as soon as practicable, that the vessel's ballast water treatment system has stopped operating properly, as required by section 71205.3, subdivision (b)(1) of the Public Resources Code.

Authority Cited: Sections 71203, 71204, 71204.3, 71205, 71205.3, 71206 and 71201.7, Public Resources Code.

Reference: Sections 71207 and 71216, Public Resources Code.

#### **Section 2299.04 Penalties**

The cited party shall be assessed a penalty for each violation issued pursuant to this article. The penalty structure for each class of violation, as described in section 2299.03 of this Division, shall be as follows:

(a) Class 1 violations

- (1) Class 1 violations are subject to penalties in the amount listed in the following table:

Minor	Not to exceed \$5,000 per violation
Moderate	Not to exceed \$10,000 per violation
Major (I)	Not to exceed \$20,000 per violation
Major (II)	Not to exceed \$27,500 per violation

- (2) Every ballast tank involved in a ballast discharge violating this Division shall be deemed a separate Class 1 violation.
- (3) Violations of California Code of Regulations, title 2, section 2298.6 or 2298.7 shall be subject to penalties only after completion of the 60-day grace period described in California Code of Regulations, title 2, sections 2298.3, subdivision (c) and 2298.4, subdivision (c).

(b) Class 2 violations

- (1) Ballast water recordkeeping

~~(1)(A)~~ Upon the first occurrence of a Class 2 violation of section 71204 or 71205 of the Public Resources Code or California Code of Regulations, title 2, section 2297 by a vessel, in lieu of a penalty, a letter of noncompliance shall be sent to the cited party explaining the violation.

~~(2)(B)~~ Subsequent occurrences by a vessel of the same type of Class 2 violation within a period of 2 (two) years after the letter of noncompliance issuance date shall be subject to a penalty ~~of not to exceed~~ \$10,000 per violation.

- (2) Biofouling recordkeeping



(A) Any Class 2 violation of California Code of Regulations, title 2, section 2298.3 by a vessel after the expiration of the 60-day grace period shall be subject to a penalty not to exceed \$20,000 per violation.

(B) A violation of California Code of Regulations, title 2, section 2298.7, subdivision (d) by a vessel after the expiration of the 60-day grace period shall be subject to a penalty not to exceed \$10,000 per violation.

(c) Class 3 violations

(1) Upon the first occurrence of a Class 3 violation, in lieu of a penalty, a letter of noncompliance shall be sent to the cited party explaining the violation.

(2) Subsequent occurrences of the same type of Class 3 violation within a period of 2 (two) years after the letter of noncompliance issuance date shall be assessed a penalty of ~~\$1,000~~ \$2,000 per violation. Every thirty (30) day period that a required form or forms remain unsubmitted after the letter of noncompliance issuance date ~~original period for submission identified in section 2299.03(c) of this Division~~ shall be deemed a separate violation.

Authority Cited: Sections 71201.7, and 71216, Public Resources Code.

Reference: Sections 71207 and 71216, Public Resources Code.

### **Section 2299.05 Preliminary Actions**

(a) Prior to pursuing any enforcement action under the provisions of this article, the following preliminary procedures shall be followed.

(1) ~~The Executive Officer~~ Commission staff shall provide a written notice of a violation to the cited party containing the following:

(A) a description of the violation;

- (B) a statement that enforcement proceedings may be initiated; and
  - (C) notification that the cited party may, within ~~ten (10)~~ thirty (30) ~~working calendar~~ days after receipt of the notice, submit a request in writing to ~~the Executive Officer~~ Commission staff for a preliminary meeting.
- (2) If the cited party requests a preliminary meeting with ~~the Executive Officer~~ Commission staff, that meeting shall be held prior to any further enforcement actions and may include any discussions relating to the violations in question, including, but not limited to, whether a violation had in fact occurred, what evidence exists for the violation, and what classification should apply for each violation.
  - (3) If the cited party so requests and agrees to pay for all costs, the preliminary meeting shall be recorded and a transcript shall be prepared.
  - (4) The preliminary meeting ~~shall be scheduled at the Executive Officer's discretion, but~~ shall in no event be scheduled more than ~~thirty (30)~~ forty-five (45) calendar days after the request for the meeting is received by ~~the Executive Officer~~ Commission staff.
  - ~~(5) Within ten (10) working days after the preliminary meeting, the Executive Officer shall provide written notice to the cited party of the decision as to whether enforcement action is to proceed.~~
- (b) If, after the procedures within subdivision (a) are followed, the Executive Officer finds that the cited party has committed a violation of any provision referred to in this article, the Executive Officer may take any or all of the following actions:
    - (1) initiate proceedings pursuant to section 71216 of the Public Resources Code and the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code ~~PRC~~ against the cited party to administratively impose civil penalties;

- (2) take whatever legal action is necessary and appropriate to obtain an order from the court enjoining the violation;
  - (3) notify the appropriate federal agency of any violation which may also constitute a violation of federal law or regulation; or
  - (4) refer the violation to the local district attorney for prosecution pursuant to section 71217 of the Public Resources Code~~PRC~~.
- (c) It is unnecessary for the Executive Officer to comply with the procedures of this section when issuing an order for a vessel to depart the waters of the state pursuant to section 71207, subdivision (d) of the Public Resources Code~~PRC~~.

Authority Cited: Sections 71201.7, 71207, and 71216, Public Resources Code.

Reference: Section 71207, 71216 and 71217, Public Resources Code.

#### **Section 2299.06 Hearing Procedures Imposition of penalties**

- (a) Civil penalties shall be administratively imposed for violations of the provisions of Division 36, Chapter 2 (commencing with section 71203) of the Public Resources Code and Title 2, Division 3, Chapter 1, Articles 4.6, 4.7, and 4.8 of the California Code of Regulations.
- (b) ~~Except as otherwise specified in this article, the~~ The process to impose civil penalties shall be conducted in accordance with the Administrative Procedure Act, as provided under Chapter 5 located within Title 2, Division 3, Part 1, Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and section 71216 of the Public Resources Code~~PRC~~. ~~The Executive Officer and the cited party may agree to settle the violation before, during, or after the commencement of proceedings to impose civil penalties.~~
- (c) A civil penalty shall be determined by Commission staff based upon the following factors:

- (1) the nature, circumstances, extent, and gravity of the violation, taking into account the harm to the environment and ecology;
- (2) the cited party's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health and safety of the environment; and
- (3) the cited party's ability to pay the proposed civil penalty.
- (d) Nothing in this Article shall limit the ability of the Executive Officer and a cited party from entering into a settlement agreement to resolve any assessed violations before, during, or after the commencement of proceedings to impose civil penalties.

Authority Cited: Sections 71201.7 and 71216, Public Resources Code.

Reference: Section 71216, Public Resources Code.

### **Section 2299.07 Complaint**

- (a) After following the preliminary actions described in section 2299.05 of this article, the Executive Officer may commence proceedings to impose civil penalties by issuing and serving a complaint to the cited party.
- (b) The complaint must contain all of the following:
  - (1) a brief statement of the violation alleged, including the acts or failures to act that constitute a basis for liability;
  - (2) the amount of the civil liability;
  - (3) a statement that the cited party has the right to request a formal hearing, ~~upon request~~, at which they may be represented by counsel; and
  - (4) a statement that the cited party's right to a hearing will be deemed waived if the cited party fails to file a notice of defense with the Executive Officer within thirty (30) days from the date the complaint

was served on the cited party, or their agent for service. A notice of defense is deemed to be filed within the 30-day period if it is postmarked within the 30-day period.

- (c) A copy of the complaint shall be served upon the cited party either personally or by registered mail. Complaints served by registered mail shall be deemed served as of the postmark date.

Authority Cited: Sections 71201.7 and 71216, Public Resources Code.

Reference: Section 71216 Public Resources Code.

### **Section 2299.08 Notice of Defense**

- (a) The cited party may, no later than thirty (30) days after service of the complaint, ~~submit file~~ a notice of defense ~~to the Executive Officer~~ at the principal office address identified in section 1901 of this Division.
- (b) The notice of defense shall be in the form and include the content described in section 11506 of the Government Code.
- (c) If, within the notice of defense, the cited party requests a hearing on the merits, such a hearing shall commence within thirty (30) days after the Executive Officer receives the notice of defense. The Executive Officer and the cited party may stipulate to commence the hearing date later than thirty (30) days.
- (d) If the Executive Officer does not receive a notice of defense within thirty (30) days after service of the complaint, the Executive Officer shall issue an order setting liability in the amount of the complaint.
  - (1) If the Executive Officer and cited party have reached a settlement of the violation, the Executive Officer shall issue an order setting liability in the amount of the settlement.
  - (2) An order setting liability shall not be subject to review by a court or agency.

Authority Cited: Sections 71201.7 and 71216, Public Resources Code.

Reference: Section 71216, Public Resources Code; Section 11506, Government Code.

### **Section 2299.09 Hearing**

- (a) ~~The process to initiate formal proceedings and conduct a~~ A-hearing shall be ~~conducted by an independent hearing officer~~ in accordance with section 71216 of the Public Resources Code and the Administrative Procedure Act, as provided under Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code ~~procedures specified in Title 2, Division 3, Part 1, Chapter 5 (commencing with section 11500) of the Government Code, except as otherwise specified in this section.~~ In making a determination, the hearing officer shall take the following into consideration:
- (1) the nature, circumstances, extent, and gravity of the violation, taking into account the harm to the environment and ecology;
  - (2) the cited party's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health and safety of the environment; and
  - (3) the cited party's ability to pay the proposed civil penalty.
- (b) At the Executive Officer's discretion, the venue for the hearing shall be in either Sacramento County or Los Angeles County, unless the Executive Officer and the cited party stipulate to an alternate location.

Authority Cited: Sections 71201.7 and 71216, Public Resources Code.

Reference: Section 71216, Public Resources Code.