

# JAPAN P&I NEWS

No.917-17/09/05

To the Members

Dear Sirs,

## **US - Effective Dates of California's Modified Biofouling Management Regulations Announced**

We have obtained the news of the Californian Biofouling Management Regulations from our correspondent in USA, Keesal, Young & Logan. Please see the following information and the notice issued by the California State Lands Commission ("SLC") on August 15, 2017.

### **Introduction**

With respect to the prevention of non-indigenous marine invasive species ("NIS") introductions, the regulation of ballast water management has garnered the lion's share of attention. However, there is another front to the regulators' war against NIS introductions: biofouling of the wetted surfaces of vessel hulls and niche areas such as sea chests, thrusters and propeller shafts. For example, in March of this year, New Zealand authorities ordered a bulk carrier to leave its waters upon discovering dense fouling of barnacles and tube worms on the vessel's hull.

Unsurprisingly, California (by and through the SLC) regulates biofouling of all vessels of 300 gross registered tons or more arriving at California ports which carry, or are capable of carrying, ballast water. The SLC has authority to regulate biofouling pursuant to California's Marine Invasive Species Act, or "MISA." (California Public Resources Code §§ 71200 – 71271). The SLC announced on August 15, 2017 that modifications to its biofouling regulations will come into effect on October 1, 2017. These "Biofouling Regulations" will be codified at 2 Cal. Code Reg. §§ 2298.1 - 2298.9.1 (the "Biofouling Regulations").

### **The Biofouling Management Regulations' new reporting, recordkeeping, and management requirements**

Highlights of the Biofouling Regulations (available here:

[http://www.slc.ca.gov/Laws-Regs/Article4.8/Prop\\_Reg\\_Txt\\_Rev\\_Jan17.pdf](http://www.slc.ca.gov/Laws-Regs/Article4.8/Prop_Reg_Txt_Rev_Jan17.pdf)), include:

- **Reporting requirements:** Beginning October 1, 2017, vessels should no longer use the SLC's separate Hull Husbandry, Ballast Water Treatment (Annual), and "Ballast Water Treatment (Supplemental) reporting forms. Vessels must now use the SLC's "Marine Invasive Species Program Annual Vessel Reporting Form," which essentially consolidates the foregoing forms into a single report. This form must be submitted at least 24 hours in

advance of a vessel's first arrival at any California port each calendar year.

- **Recordkeeping & Management requirements:** These requirements take effect on a vessel-by-vessel basis. For existing vessels, the requirements apply after the first dry-docking on or after January 1, 2018. The requirements also apply to vessels delivered on or after January 1, 2018.
  - **Recordkeeping Requirements.** The following records must be made available to the SLC's inspection and review upon request. Vessels which do not maintain records consistent with the Biofouling Regulations' requirements will have 60-day "grace period" to develop compliant records.
  - **Biofouling Management Plan.** The Biofouling Regulations incorporate by reference the IMO's 2011 guidance on minimizing biofouling. Vessels must have onboard a written biofouling management plan that is at least consistent with the IMO's guidelines and which discuss certain information depending on the biofouling management practice employed by the vessel (e.g., anti-fouling coatings, anodes, injections systems, or electrolysis).
  - **Biofouling Record Book.** Vessels must have onboard a biofouling record book that is at least consistent with the IMO's guidelines for such records and which contains details of all inspections and biofouling management measures undertaken on the vessel since the vessel's most recent dry docking, or since the beginning of a newly-delivered vessel's service.
- **Mandatory biofouling management requirements:** Vessels employing anti-fouling coatings must ensure the coating shall not be aged beyond its effective lifespan. Vessels which do not employ anti-fouling coatings must demonstrate how they have adhered to their Biofouling Management Plan. With respect to niche areas, the anti-fouling practices used by a vessel should be listed in its Biofouling Management Plan. There are additional requirements for vessels remaining in any port for 45 days or more. All instances of biofouling management must be recorded in a vessel's Biofouling Record Book. Furthermore, the Biofouling Regulations expressly permit propeller cleaning in California.

### **Enforcement & penalties**

The Biofouling Regulations are silent on how SLC will enforce them and what penalties arise from their violation. However, MISA requires the SLC to annually inspect 25% of all California arrivals. In its "Final Statement of Reasons" for the Biofouling Regulations, the SLC advised: "[SLC] inspectors will add biofouling management enforcement to their existing inspection regime ... the [SLC] recently adopted related **enforcement regulations** that include a framework for violations and penalties."

The referenced “enforcement regulations,” which are found at 2 Cal. Code Reg. §§ 2209.01 - 2299.09, took effect on July 1, 2017. The enforcement regulations primarily pertain to penalties for violations of the SLC’s ballast water exchange, reporting and recordkeeping requirements.

Under the enforcement regulations, violations of the Biofouling Regulations’ recordkeeping requirements are likely “Class 2” violations and violations of the reporting requirements are likely “Class 3” violations, which are penalized accordingly:

Recordkeeping Violations	Reporting Violation
<ul style="list-style-type: none"> <li>• First Class 2 Violation = Letter of Noncompliance</li> <li>• Subsequent Class 2 Violation = \$10,000 penalty</li> </ul>	<ul style="list-style-type: none"> <li>• First Class 3 Violation = Letter of Noncompliance</li> <li>• Subsequent Class 3 Violation = \$1,000 penalty</li> </ul>

Whether the enforcement regulations provide penalties applicable to violations of the Biofouling Regulations’ management requirements is not so clear. However, the enforcement regulations’ penalties for violations of the SLC’s ballast water exchange requirements indicate that the agency takes violations of management requirements far more seriously than recordkeeping and reporting requirements. Under the enforcement regulations, SLC may pursue penalties ranging from \$5,000 to \$27,500 per tank for discharges of improperly exchanged ballast water. \$27,500 is the maximum “per violation” penalty the MISA authorizes the SLC to collect.

In its Final Statement of Reasons the SLC observed that “...the enforcement regulations may be amended to include penalties associated with [violations of the California Biofouling Regulations].” Thus, perhaps the SLC is taking a “wait and see” approach to determining what it believes is an appropriate penalty dollar amount for violations of the Biofouling Regulations’ management requirements.

Yours faithfully,

**The Japan Ship Owners' Mutual Protection & Indemnity Association**

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Attachment: Notice issued by the California State Lands Commission on August 15, 2017.

**CALIFORNIA STATE LANDS COMMISSION**

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August 15, 2017

**Re: Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at California Ports, Effective October 1, 2017**

Dear Shipping Agents and Interested Parties:

On April 20, 2017, the California State Lands Commission approved Article 4.8, Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at California Ports. These biofouling management regulations have also been approved by California's Office of Administrative Law and are now set to become effective on October 1, 2017.

The provisions that will become effective on October 1, 2017, are:

- Repeal of the reporting requirements for the Hull Husbandry Reporting Form, the Ballast Water Treatment Supplemental Reporting Form and the Ballast Water Treatment Annual Reporting Form
- Adoption of the Marine Invasive Species Program Annual Vessel Reporting Form

The remaining requirements will be applicable after a vessel's first regularly scheduled out-of-water maintenance (i.e. dry dock) after January 1, 2018, or upon delivery on or after January 1, 2018, including requirements for:

- Developing and maintaining a Biofouling Management Plan [see section 2298.3]
- Developing and maintaining a Biofouling Record Book [see section 2298.4]
- Mandatory biofouling management of the vessel's wetted surfaces [see section 2298.6]
- Mandatory biofouling management for vessels that undergo an extended residency period (i.e., remain in the same location for 45 or more days) [see section 2298.7]

Commission staff anticipates many questions about the upcoming implementation of the biofouling management regulations and is developing a series of Customer Service meetings in northern and southern California and an internet-based webinar to provide outreach and answer any questions that may arise from the implementation of these

regulations. These meetings will be held in mid-late September; information about them will be distributed soon.

Relevant rulemaking documents are located on the Commission's website at <http://www.slc.ca.gov/Laws-Regs/Proposed-MISP.html>. If you have any additional questions, please contact Chris Scianni at [Chris.Scianni@slc.ca.gov](mailto:Chris.Scianni@slc.ca.gov) or (562) 499-6390 or refer to the Commission's web page at [www.slc.ca.gov](http://www.slc.ca.gov).

Sincerely,

A handwritten signature in black ink that reads "Nicole Dobroski". The signature is written in a cursive, flowing style.

Nicole Dobroski  
Assistant Chief  
Marine Environmental Protection Division