

This Calendar Item No. C56 was approved as Minute Item No. 56 by the California State Lands Commission by a vote of 3 to 4 at its 10/20/03 meeting.

CALENDAR ITEM
C56

A: Statewide

S: Statewide

10/20/03
W 9777.234
G. Gregory
M. Falkner
M. Meier

CONSIDERATION OF SETTLEMENT PROPOSAL WITH REGARD TO COMPLIANCE QUESTIONS ARISING FROM BALLAST WATER PRACTICES BY CARNIVAL CORPORATION AND ITS SUBSIDIARIES

PROPOSAL:

The Staff of the California State Lands Commission proposes that the Commission, acting as Trustee for the Kapiloff Land Bank Fund ("the Fund"), accept funds in the amount of \$200,000 from Carnival Cruise Lines, a division of Carnival Corporation, (collectively referenced here as "Carnival") to be deposited in the Fund as settlement for certain questions regarding compliance with ballast water management requirements under Public Resources Code Sections 71200 *et seq.* ("the Act"). In addition, Staff recommends that the Commission accept payment in the amount of \$24,284 as settlement of claims for costs incurred in this matter.

BACKGROUND:

The Act establishes a program for the management and control of ballast water carried into the State. Its purpose is to curtail the introduction of nonindigenous species into California waters through the discharge of ballast water taken on board vessels in other parts of the world. Among its provisions are direct controls on the discharge of ballast water.

Under Section 71204(a) of the Public Resources Code ("P.R.C."), the master, operator or person in charge of a vessel must employ one of several specified management practices for ballast water carried into the waters of the state from

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areas outside the United States Exclusive Economic Zone ("the EEZ"). The five specified practices include the following:

1. Exchange ballast water outside the EEZ, from an area not less than 200 nautical miles from any shore, and in waters more than 2000 meters deep, before entering the waters of the state;
2. Retain the ballast water on board the vessel;
3. Use an alternative environmentally sound method of ballast water management that has been approved by the Commission before the vessel begins the voyage, and that is at least as effective as ballast water exchange in removing or killing nonindigenous species.
4. Discharge ballast water to an approved reception facility;
5. Under extraordinary conditions, conduct a ballast water exchange within an area agreed to by the Commission at the time of the request.

There is an exemption from the Act provided under Public Resources Code Section 71202(d), which states that the Act does not apply to the following:

A vessel that discharges ballast water or sediments only at the location where the ballast water or sediments originated, if the ballast water or sediments do not mix with ballast water or sediments from areas other than mid-ocean waters.

Prior to March 1, 2003, the Commission Staff believes that Carnival engaged in ballast water practices that were not in compliance with these requirements. Carnival disagrees. Carnival believes its ballast water practices were in full compliance with the Act.

In settlement of any questions regarding past compliance with respect to past voyages by Carnival vessels, Carnival has agreed to donate the amount of \$200,000 to the Kapiloff Land Bank Fund. The funds would be used for as-yet-unspecified projects carried out by the Commission pursuant to the Act. Carnival has also agreed to reimburse the Commission for its costs in this matter, in the

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amount of \$24,284. In return, the Commission would agree to release Carnival from any claims the Commission may have for potential violations of the Act prior to March 31, 2003.

STATUTORY AND OTHER REFERENCES:

- A. Public Resources Code, Division 7 (Sections 8600 *et seq.*)
- B. Public Resources Code, Division 36 (Sections 71200 *et seq.*)

PERMIT STREAMLINING ACT DEADLINE:

N/A

OTHER PERTINENT INFORMATION:

Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (14 California Code Regulations 10561), the Commission Staff has determined that this activity is exempt from the requirements of the CEQA because the activity is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code Section 21084 and 14 California Code Regulations 15300.

EXHIBIT:

Exhibit A: Settlement Agreement

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15061 BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15378.

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2. ACCEPT THE TERMS OF THE SETTLEMENT AGREEMENT ATTACHED AS EXHIBIT A.
3. ACTING AS TRUSTEE FOR THE KAPILOFF LAND BANK, ACCEPT A DONATION OF \$200,000 FROM CARNIVAL CORPORATION TO BE DEPOSITED IN THAT BANK FOR UNSPECIFIED PROJECTS TO PROVIDE FOR THE IMPROVEMENT OF REAL PROPERTY HELD BY THE COMMISSION TO PROVIDE HABITAT FOR PLANTS AND ANIMALS IN CONJUNCTION WITH THE COMMISSION'S RESPONSIBILITIES RELATING TO BALLAST WATER MANAGEMENT UNDER PUBLIC RESOURCES CODE SECTIONS 71200 THROUGH 71271 AND SUCCESSOR STATUTES.
4. ACCEPT FUND IN THE AMOUNT OF \$24,284 AS REIMBURSEMENT FOR ALL COSTS INCURRED BY THE STATE IN MATTERS RELATING TO PAST COMPLIANCE WITH PUBLIC RESOURCES CODE SECTIONS 71200 THROUGH 71271 BY CARNIVAL CORPORATION AND ITS SUBSIDIARIES WITH RESPECT TO THE OPERATION OF THE CRUISE SHIPS, *M/V ECSTASY* AND *M/V ELATION*.
5. DIRECT STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO IMPLEMENT THE TERMS OF THE AGREEMENT AS SET FORTH IN EXHIBIT A.

EXHIBIT A

SETTLEMENT AGREEMENT

California State Lands Commission (hereafter, "State Lands"), and Carnival Cruise Lines, a division of Carnival Corporation (hereafter, "Carnival"), (State Lands and Carnival are collectively referred to herein as the ("Parties")) each having consulted with legal counsel, stipulate to the following facts and terms in settlement of disputed matters ("Settlement Agreement"):

A. FACTS:

1. Between January 1, 2000 and March 2003 Carnival operated cruise ships out of the Ports of Los Angeles and Long Beach.
2. State Lands believes that some of the ballasting operations conducted by Carnival's vessels in California during the period from July 1, 2002, to March 31, 2003, may have been in violation of the Ballast Water Management for Control of Nonindigenous Species, California Public Resources Code section 71200 *et seq.* ("the Act"), whereas Carnival believes that it did not conduct ballasting operations in violation of the Act during that period.
3. No proceedings have been initiated by State Lands against Carnival regarding any potential violations of the Act.
4. During the month of March 2003, Carnival changed the manner in which it conducted its ballasting operations for the vessels that operated out of the Ports of Los Angeles and Long Beach. The vessels either ceased conducting ballasting operations in California or limited the operations to an area between the Carnival berth and Long Beach Harbor Breakwater ("New Ballast Water Management Practices").
5. State Lands agrees that the New Ballast Water Management Practices comply with the Act as of the date such practices commenced.

B. TERMS

In that both Carnival and State Lands wish to resolve the matter arising from and relating to the above described Facts and any other matter relating to Carnival's compliance with the Act as of January 1, 2000, Carnival and State Lands have agreed as follows:

1. Carnival shall deliver a check to State Lands, and State Lands agrees to accept a check in the sum of \$200,000, to be deposited in the Kapiloff Land Bank Fund. This money is to be used for unspecified projects to provide for the improvement of real property held by the Commission to provide habitat for plants and animals in conjunction with the Commission's responsibilities relating to ballast water management under Public Resources Code Sections 71200 through 71271 and successor statutes. State Lands shall consult with the Ballast Water Technical

Advisory Group to determine the best use of the settlement funds and, following such consultations, any expenditure of the settlement funds shall be approved by State Lands.

2. Carnival shall pay to State Lands the sum of \$24,284 for the costs incurred by State Lands in connection with this matter.
3. State Lands agrees to release Carnival and its owners, parent corporations, sister corporations, subsidiaries, officers, employees, agents, representatives, successors, predecessors, insurers, attorneys, affiliated entities, principals, assignors, and assignees from any and all actions, causes of action, claims, liens, attorney's fees, costs, and liabilities of any kind whatsoever, whether known or unknown, which it now has, ever had or hereafter may have which are related to or in any way connected with compliance with all provisions of the Act from January 1, 2000, to March 31, 2003, including but not limited to the provisions of the Act that relate to the above described Facts, and agrees that it will not initiate any inquiry or proceedings regarding Carnival's compliance with the Act from January 1, 2000 to March 31, 2003.
4. In doing so, State Lands expressly waives all rights under Section 1542 of the Civil Code of California and similar laws of any state or territory of the United States or foreign jurisdiction. Section 1542 of the Civil Code provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

State Lands warrants that it understands the terms of Section 1542 and recognizes that it may discover facts or claims in addition to or different from those presently known or believed to be known. Nonetheless, State Lands intends this to be a full, complete and final release of State Lands' claims regarding Carnival's compliance with the Act from January 1, 2000, to March 31, 2003 notwithstanding any such later discovered facts or claims arising from this matter except the discovery of facts that reflect that the ballast water management practices set forth on the ballast water reporting forms submitted to State Lands by Carnival for all voyages that occurred during the period from July 1, 2002-March 31, 2003, were materially false, in which case State Lands' remedy shall be a civil action for breach of this agreement.

5. In further consideration of the aforesaid payment, the Parties warrant that they are the sole owners of all claims related to this matter as described herein and do hereby agree and undertake to indemnify and hold each other harmless from any and all claims, demands, liens or suits (including reasonable attorneys fees and costs incurred in the defense thereof) which may hereafter be asserted by any other entity, claiming any interest in the subject matter of the actions listed herein.

6. NO ADMISSION OF LIABILITY

Carnival and State Lands expressly recognize and understand that the sums referred to herein are paid in accord and satisfaction of this matter and that neither said payments nor the acceptance thereof represents an admission of liability or responsibility on the part of Carnival. State Lands agrees not to take any position or make any statements contrary to this understanding.

7. The undersigned hereby warrant that they are the Parties legally entitled to settle and to release every claim herein referred to. Further, the undersigned representative of State Lands warrants that they are entitled to receive the sums in the form and amount hereinabove referred on behalf of State Lands.

8. State Lands understand that the terms of this Settlement Agreement are contractual and not a mere recital. It is executed without reliance upon any oral representation of either party or their attorneys.

9. This Settlement Agreement shall not be construed against any party due to that party's participation in the drafting of the document.

10. This Settlement Agreement shall be interpreted in accordance with and governed in all respects by California Law. If any provision, or any part of any provision, of this Settlement Agreement shall for any reason be held to be invalid, unenforceable or contrary to public policy or any law, then the remainder of this agreement shall not be affected thereby.

11. The advice of legal counsel has been obtained by State Lands prior to signing this Settlement Agreement and they execute it with full knowledge of its significance and with the express intention of causing its legal consequences.

DATED: October ___, 2003

STATE LANDS COMMISSION

BY _____
Paul D. Thayer
Executive Officer

DATED: October ___, 2003

CARNIVAL CRUISE LINES,
A DIVISION OF CARNIVAL CORPORATION

BY _____

Name & Title

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