

CALENDAR ITEM

44

A Statewide

02/01/10

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CONSIDER SUPPORTING AB 634 (HARKEY), WHICH WOULD IMMUNIZE PUBLIC ENTITIES AND EMPLOYEES FROM LIABILITY FOR DAMAGES AND INJURIES ARISING OUT OF SCUBA DIVING.

Summary:

The California Ships to Reefs (Ships to Reefs) organization is the sponsor of AB 634 (Harkey), which would immunize public entities and public employees from liability for damages and injuries arising out of SCUBA diving on public property. Ships to Reefs' official vision is to "establish a regional system of reefed ships along the California coast for purposes of an international dive destination, to enhance the tourism industry centered on fishing and diving, and to improve and enhance the California fish populations." Ships to Reefs is asking the State Lands Commission (Commission) to officially support AB 634 because it would allow the Commission to judge ship reefing proposals "on [their] merits, not fear of possible future legal action."

AB 634:

Under current law, "[n]either a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity." (Government Code Section 831.7(a).)

Under current law, a "hazardous recreational activity" is defined as a recreational activity conducted on property of a public entity that creates a substantial risk of injury to a participant or spectator. Hazardous recreational activity also means, among other things, diving into water where diving is prohibited, animal riding, archery, bicycle racing or jumping, boating, skiing, hang gliding, kayaking, gun shooting, rock climbing, surfing, waterskiing, white water rafting, and windsurfing. (Government Code Section 831.7(a).)

AB 634 would add SCUBA diving to the meaning of hazardous recreational activity.

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California Ships to Reefs and the HMCS Yukon:

According to its website (www.cs2r.org), Ships to Reefs was originally a committee of the San Diego Oceans Foundation, a nonprofit organization focused on enhancing ocean habitat and encouraging sustainable use of oceans resources. Ships to Reefs' current chief advisor, Dick Long, is a former chairman of the San Diego Oceans Foundation. In 2007, Ships to Reefs was incorporated as its own 501(c)(3) non-profit public benefit corporation. As stated above, Ships to Reefs' vision is to "establish a regional system of reefed ships along the California coast for purposes of an international dive destination, to enhance the tourism industry centered on fishing and diving, and to improve and enhance the California fish populations."

In 2000, the Sand Diego Oceans Foundation was involved in the reefing of the HMCS Yukon (Yukon), a 366-foot long former Canadian Naval vessel, which was sunk off the coast of San Diego near Mission Beach and Pacific Beach on granted sovereign lands.¹ Holes were cut into the vessel to make it more accessible to divers. Oil, paint, wires and other potential hazards were removed from the ship before it was introduced into the ocean. The city of San Diego prepared an environmental impact report for the project and concluded that no significant adverse environmental effects are expected. The report also stated that the project is "expected to result in potential environmental benefits resulting from the placement of more hard substrate on the seafloor, which is expected to favor many reef species."

According to the Ships to Reefs website, the reefing of the Yukon has injected approximately \$4.5 million per year into the local economy, with \$450,000 going into the city of San Diego's tax revenues.

In June 2005, a SCUBA diver died while exploring the Yukon. The diver's body was found tangled in pipes located in the vessel's boiler room. Access to the boiler room was welded shut when the vessel was reefed but was pried open at some subsequent point.

¹ The Commission was not required to approve this project since the Yukon was sunk on granted sovereign lands, which is under the administrative control of the local grantee, the city of San Diego.

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Ship Reefing at the State, Federal, and International Level:

Florida

The state of Florida has reefed several ships off of its coast over the last decade, including the USS Spiegel Grove, USS Oriskany, and USS Vandenberg. In 2008, Florida created a grant program to reef US Maritime Administration (MARAD) and US Navy decommissioned vessels. For reefing in state waters, the state requires permits from the US Army Corps of Engineers and the Florida Department of Environmental Protection. Due to liability issues, permits have only been issued to local coastal governments, not to private individuals or clubs. With regard to liability, Florida has statutorily waived its sovereign immunity for tort liability; however, its liability has several limitations, including a limit on damages that can be awarded.

Federal Government

Since 1974, MARAD has been involved with the reefing of obsolete military vessels. MARAD's reserve fleet, which includes ships in the Suisun Bay, is often considered for potential reefing projects. In May 2006, MARAD and the US Environmental Protection Agency published a document outlining the environmental best management practices to be used in the preparation of vessels for use as artificial reefs.

The Navy has been authorized by Congress to reef inactive vessels when other disposal and storage options are not viable. The reefing of the USS Oriskany in Florida, which was completed in 2006, was the Navy's artificial reef pilot project. A report from the University of West Florida explains that the sinking of the USS Oriskany generated nearly \$4 million for Pensacola and Escambia County in 2007. The Navy spent \$20 million to clean the USS Oriskany; however, it left an estimated 700 pounds of polychlorinated biphenyls (PCBs) on the ship, mostly in the form of wire and fiberglass insulation. The subsequent reefing of the USS Vandenberg included a more thorough cleaning of PCBs.

International Maritime Organization

The International Maritime Organization, through the *London Convention and Protocol*, published the "Guidelines for the Placement of Artificial Reefs," which contains general information on ship reefing. Countries such as Australia, Canada, and the United Kingdom are actively engaged in ship reefing.

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Environmental Arguments Regarding Ship Reefing:

Arguments in Favor

Reefed vessels create a vertical profile that intercept currents and attract and promote various types of fish species.

Reefed vessels can decrease the pressure on other natural and artificial reefs in the area, which can be damaged over time from boat anchors and other forms of human contact.

As stated above, the environmental impact report for the HMCS Yukon reefing concluded that there are no expected significant adverse environmental effects associated with the project. The report also stated that the project is “expected to result in potential environmental benefits resulting from the placement of more hard substrate on the seafloor, which is expected to favor many reef species.”

In the case of the USS Vandenberg reef, the struggling long-spined sea urchin, which had been decimated by disease in the early 1980s, has been discovered all over the reefed ship to the surprise of conservationists.

Arguments Against

Some scientists believe that all an artificial reef does is pull marine life from surrounding communities as opposed to creating an environment to build its own community.

Many of the vessels that are targeted for ship reefing contain PCBs, hydrocarbons, and heavy metals. In animals, PCBs are known to cause cancer as well as a number of serious non-cancer health effects, including effects in the immune system, reproductive system, nervous system, and endocrine system. Studies in humans provide supportive evidence for potential carcinogenic and non-carcinogenic effects of PCBs. Humans who ingest fish may be exposed to PCBs that have been bioaccumulated in the fish. There are items (e.g. cable insulation, oil-based paint, electronic equipment) that are generally known to contain PCBs on older vessels. However, PCBs are not always easily identifiable or readily accessible on a vessel, which makes it very difficult to clear all PCBs from a ship before reefing. In Florida, a study is being conducted on fish found on the reefed USS Oriskany. While the study has not been completed, PCBs have been found in some of the collected fish. This study could ultimately lead to the implementation of a fish advisory in the area.

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In 2001, a California Department of Fish and Game publication on artificial reefs in Southern California reported that reefed vessels do not provide “enough small hiding places as do quarry rock or broken concrete rubble.” As such, the Department of Fish and Game has abandoned ship reefing.

Artificial vessels can cause damage to natural habitats during their sinking and can displace naturally occurring species and habitats. Artificial reefing also tends to concentrate fish unnaturally, making them more vulnerable to overfishing.

Environmental organizations, such as the Ocean Conservancy, are worried that ship reefing is motivated by the need to dispose of obsolete vessels inexpensively. These organizations generally oppose reefing when the sole purpose is for fishing or tourism.

SCUBA Diving and the Public Trust Doctrine:

The California Supreme Court has stated that the public trust embraces the right of the public to use the navigable waters of the state for bathing, swimming, boating, and general recreational purposes. It is sufficiently flexible to encompass changing public needs, such as the preservation of the lands in their natural state for scientific study, as open space and as wildlife habitat.

The general concept of SCUBA diving, including SCUBA diving on ship-based artificial reefs, is consistent with the Public Trust Doctrine as it is a form of water recreation.

RECOMMENDED ACTION:

Staff recommends that the Commission adopt a neutral position on AB 634. The Commission generally requires that the state be protected from liability for projects on state lands. The majority of the leases issued by the Commission require that a lessee not only indemnify the state, but also provide insurance and a performance bond. AB 634 would immunize the state from claims for any damage or injury to property or persons arising out of SCUBA diving. Ships to Reefs argues that the immunity created in AB 634 would allow the Commission to judge ship reefing “on its merits, not fear of possible future legal action.” However, any “fear of possible legal action” could also be addressed by indemnification, insurance, and bonding. Therefore, AB 634 is not dispositive on whether the Commission could judge a ship reefing project on its merits.

AMENDED IN ASSEMBLY JANUARY 7, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 634

Introduced by Assembly Member Harkey

February 25, 2009

An act to amend Section 831.7 of the Government Code, relating to liability.

LEGISLATIVE COUNSEL'S DIGEST

AB 634, as amended, Harkey. Hazardous recreational activities.

Under existing law, public entities and public employees are generally not liable to any person who participates in various hazardous recreational activities, as defined, including, but not limited to, certain water contact and diving activities, kayaking, surfing, waterskiing, white water rafting, and windsurfing. ~~These provisions do not limit liability that would otherwise exist for damage or injury suffered in any case where permission to participate in the hazardous recreational activity was granted for a specific fee.~~

~~This bill would include any form of self-contained underwater breathing apparatus (SCUBA) diving among these hazardous recreational activities. The bill would provide that the exception to this provision allowing liability where a specific fee is charged does not include a fee or surcharge levied, charged, or collected for SCUBA diving access to an artificial reef created or placed in cooperation with the state or any political subdivision thereof, and operated by a 501(c)(3) nonprofit public benefit corporation. The bill would provide that any person participating in those SCUBA diving activities does so at their own risk.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 831.7 of the Government Code is
 2 amended to read:
 3 831.7. (a) Neither a public entity nor a public employee is
 4 liable to any person who participates in a hazardous recreational
 5 activity, including any person who assists the participant, or to any
 6 spectator who knew or reasonably should have known that the
 7 hazardous recreational activity created a substantial risk of injury
 8 to himself or herself and was voluntarily in the place of risk, or
 9 having the ability to do so failed to leave, for any damage or injury
 10 to property or persons arising out of that hazardous recreational
 11 activity.
 12 (b) As used in this section, “hazardous recreational activity”
 13 means a recreational activity conducted on property of a public
 14 entity that creates a substantial, as distinguished from a minor,
 15 trivial, or insignificant, risk of injury to a participant or a spectator.
 16 “Hazardous recreational activity” also means:
 17 (1) Water contact activities, except diving, in places where, or
 18 at a time when, lifeguards are not provided and reasonable warning
 19 thereof has been given, or the injured party should reasonably have
 20 known that there was no lifeguard provided at the time.
 21 (2) Any form of diving into water from other than a diving board
 22 or diving platform, or at any place or from any structure where
 23 diving is prohibited and reasonable warning thereof has been given.
 24 (3) Animal riding, including equestrian competition, archery,
 25 bicycle racing or jumping, mountain bicycling, boating,
 26 cross-country and downhill skiing, hang gliding, kayaking,
 27 motorized vehicle racing, off-road motorcycling or four-wheel
 28 driving of any kind, orienteering, pistol and rifle shooting, rock
 29 climbing, rocketeering, rodeo, *self-contained underwater breathing*
 30 *apparatus (SCUBA) diving*, spelunking, sky diving, sport
 31 parachuting, paragliding, body contact sports, surfing,
 32 trampolining, tree climbing, tree rope swinging, waterskiing, white
 33 water rafting, and windsurfing. For the purposes of this subdivision,
 34 “mountain bicycling” does not include riding a bicycle on paved
 35 pathways, roadways, or sidewalks. For the purpose of this

1 paragraph, “body contact sports” means sports in which it is
2 reasonably foreseeable that there will be rough bodily contact with
3 one or more participants.

4 ~~(4) Any form of self-contained underwater breathing apparatus~~
5 ~~(SCUBA) diving including, but not limited to, recreational diving,~~
6 ~~technical diving, deep water diving, wreck diving, and penetration~~
7 ~~diving. SCUBA diving is recognized as an inherently hazardous~~
8 ~~activity involving risks of decompression sickness, embolism, or~~
9 ~~other hyperbaric injuries that may require treatment in a~~
10 ~~recompression chamber and diving on shipwrecks or overhead~~
11 ~~environments involves further possible hazards related to drowning~~
12 ~~or entrapment. Any person SCUBA diving on any vessel placed~~
13 ~~as an artificial reef in cooperation with the state or any political~~
14 ~~subdivision thereof, and operated by a 501(c)(3) nonprofit public~~
15 ~~benefit corporation does so at his or her own risk.~~

16 (c) (1) Notwithstanding subdivision (a), this section does not
17 limit liability that would otherwise exist for any of the following:

18 (A) Failure of the public entity or employee to guard or warn
19 of a known dangerous condition or of another hazardous
20 recreational activity known to the public entity or employee that
21 is not reasonably assumed by the participant as inherently a part
22 of the hazardous recreational activity out of which the damage or
23 injury arose.

24 (B) Damage or injury suffered in any case where permission to
25 participate in the hazardous recreational activity was granted for
26 a specific fee. For the purpose of this subparagraph, a “specific
27 fee” does not include either of the following:

28 (i) ~~A~~ a fee or consideration charged for a general purpose such
29 as a general park admission charge, a vehicle entry or parking fee,
30 or an administrative or group use application or permit fee, as
31 distinguished from a specific fee charged for participation in the
32 specific hazardous recreational activity out of which the damage
33 or injury arose.

34 (ii) ~~A~~ a fee or surcharge levied, charged, or collected for SCUBA
35 diving access to an artificial reef created or placed in cooperation
36 with the state or any political subdivision thereof, and operated by
37 a 501(c)(3) nonprofit public benefit corporation.

38 (C) Injury suffered to the extent proximately caused by the
39 negligent failure of the public entity or public employee to properly
40 construct or maintain in good repair any structure, recreational

1 equipment or machinery, or substantial work of improvement
2 utilized in the hazardous recreational activity out of which the
3 damage or injury arose.

4 (D) Damage or injury suffered in any case where the public
5 entity or employee recklessly or with gross negligence promoted
6 the participation in or observance of a hazardous recreational
7 activity. For purposes of this paragraph, promotional literature or
8 a public announcement or advertisement that merely describes the
9 available facilities and services on the property does not in itself
10 constitute a reckless or grossly negligent promotion.

11 (E) An act of gross negligence by a public entity or a public
12 employee that is the proximate cause of the injury.

13 (2) Nothing in this subdivision creates a duty of care or basis
14 of liability for personal injury or damage to personal property.

15 ~~(d) Except as provided in paragraph (4) of subdivision (b),~~
16 ~~nothing~~ *Nothing* in this section limits the liability of an independent
17 concessionaire, or any person or organization other than the public
18 entity, whether or not the person or organization has a contractual
19 relationship with the public entity to use the public property, for
20 injuries or damages suffered in any case as a result of the operation
21 of a hazardous recreational activity on public property by the
22 concessionaire, person, or organization.