

SAN DIEGO UNIFIED PORT DISTRICT

ORDINANCE _____

ORDINANCE AMENDING SAN DIEGO UNIFIED PORT DISTRICT CODE SECTION 4.14, REGULATION OF IN-WATER HULL CLEANING

WHEREAS, the San Diego Unified Port District (District) is a public corporation created by the Legislature in 1962 pursuant to Harbors and Navigation Code Appendix I (Port Act); and

WHEREAS, Section 21 of the Port Act authorizes the Board of Port Commissioners (Board) to pass all necessary ordinances and resolutions for the regulation of the District; and

WHEREAS, water quality monitoring has documented that dissolved copper concentrations in elevated amounts are prevalent in marina areas in California, including in specific areas of San Diego Bay, such as, for example, Shelter Island Yacht Basin (SIYB); and

WHEREAS, on February 9, 2005, the California Regional Water Quality Control Board, San Diego Region, adopted Resolution No. R9-2005-0019, which established a Total Maximum Daily Load (TMDL) and implementation plan to address dissolved copper concentrations in SIYB; and

WHEREAS, the TMDL for SIYB identifies copper-based antifouling paints or coatings on vessel hulls as a significant source of the dissolved copper concentrations in SIYB; and

WHEREAS, on July 12, 2011, the Board approved Ordinance 2645 adopting in-water hull cleaning (IWHC) regulations that required all businesses engaging in IWHC of vessel hulls to obtain a permit to conduct IWHC activities on District tidelands; and

WHEREAS, on August 14, 2012, the Board made certain clarifying amendments to the IWHC regulations through the adoption of Ordinance 2681; and

WHEREAS, effective July 1, 2018, the California Department of Pesticide Regulation (DPR) promulgated new regulations on the permissible release rates for copper-based antifouling paints or coatings, which regulations are intended to

support compliance with water quality standards, as measured by the chronic criterion for copper found in the California Toxics Rule, under certain conditions and in certain locations; and

WHEREAS, DPR found that achieving the release rates in DPR's new regulations requires implementation of best management practices for IWHC of vessels whose hulls contain copper-based antifouling paints or coatings; and

WHEREAS, in September of 2019, the District completed a TMDL Conceptual Model Review for SIYB that included a comparative analysis of models for copper loading from copper-based antifouling paints and IWHC, including a review of the 2005 TMDL Instantaneous Model and the Best Available Science Life Cycle Conceptual Model (Earley et al. 2013); and

WHEREAS, the TMDL Conceptual Model Review found that the frequency of IWHC is correlated with the amount of copper released from IWHC activities; and

WHEREAS, the painting and coatings on vessel hulls, including copper-based antifouling paints or coatings, non-copper antifouling paints or coatings, and non-biocide coatings, are applied in boatyards and boat maintenance and repair facilities, and it is difficult to identify the type of painting or coating on a vessel's hull by sight; and

WHEREAS, knowledge of the type of painting or coating on a vessel's hull is critical to ensuring that IWHC is effective and is done in a manner that helps reduce copper loading; and

WHEREAS, based on DPR's new regulations, the TMDL Conceptual Model Review, staff's experience with implementing the IWHC regulations, and the other information summarized above, staff has determined that the IWHC regulations should be amended to require the use of DPR recommended best management practices, and to implement new or expanded tracking, disclosure and record keeping requirements, including for hull cleaners, facilities, boatyards and boat maintenance and repair facilities and for individual vessel owners, and

WHEREAS, many of the permit and record-keeping provisions proposed herein require businesses and persons to complete specific administrative processes which may take time prior to implementation, therefore specific timelines will be provided for such changes to occur.

NOW THEREFORE, the Board of Port Commissioners of the San Diego Unified Port District does ordain as follows:

SECTION 4.14- REGULATION OF IN-WATER HULL CLEANING

Section 1.

(a) Purpose

California law empowers the San Diego Unified Port District (District) to protect, preserve and enhance the quality of water in San Diego Bay (San Diego Unified Port District Act, Harbors and Navigation Code, Appendix I) and prohibits the discharge of waste to waters of the state in a manner causing, or threatening to cause, a condition of pollution, contamination or nuisance (California Water Code section 13050). The in-water hull cleaning (IWHC) of vessels whose hulls contain copper-based antifouling paints or coatings has been identified as a source contributing to copper loading in San Diego Bay. Recently, the California Department of Pesticide Regulation (DPR) promulgated regulations that adjusted the maximum leach rates for copper-based antifouling paints or coatings and identified mitigation measures, including best management practices, for IWHC. Studies conducted by the District support the need for less frequent IWHC, as well as the need to foster easy identification of the type of paint or coating that is on a vessel's hull. Therefore, the District is adopting this Section to implement its statutory responsibilities, to incorporate DPR's recommended mitigation measures, and to help facilitate implementation of these regulations by fostering the easy identification of the type of paint or coating that is on a vessel's hull.

(b) Definitions

For purposes of this Section, certain words and phrases not otherwise defined in District Code Section 0.03 shall be defined as follows:

1. "Ablative Paint" means a copper-based antifouling paint or coating that is designed to wear away over time to provide a fresh biocide at the surface of the paint or coating and are denoted as ablative on the manufacturer-produced label.

2. "Best Management Practices" or "BMPs" means the specific IWHC methods and frequencies defined in this Section.

3. "Boatyards and Boat Maintenance and Repair Facilities" means yards or defined areas where boats are built, repaired and stored and often sold or rented. Activities conducted at Boatyard and Boat Maintenance and Repair Facilities may include but are not limited to exterior or interior surface coating, application or removal, such as vessel hull painting and sanding.

4. "Business" means any Person other than an Independent Contractor involved in, engaged in, or that provides IWHC services for compensation. As used in this Section, a Business must maintain direct control and oversight of employees who perform IWHC under the direction of the Business, and cannot operate through Independent Contractors. Business does not include any Federal, State, Municipal, or other government agency activities.

5. "Copper-Based Antifouling Paint or Coating" means any Hull Paint formulated with cuprous oxide or other copper compounds as the active biocide

ingredient. Unless there is documentation sufficient to establish that the hull of a vessel is not painted or coated with Copper-Based Antifouling Paint or Coating, all vessels shall be presumed to be painted or coated with Copper-Based Antifouling Paint or Coating.

6. "Facility" means marinas, moorings, yacht clubs, piers, wharfs, and any other discrete area within the District's jurisdiction in which IWHC may be conducted in accordance with all applicable laws and regulations.

7. "Hull Paint or Coating" means any paint or coating applied as the outer (outboard) layer to the hull of a vessel.

8. "Independent Contractor" means a natural person who performs IWHC services for compensation for another Person and who is not subject to the other Person's control, or right to control, the manner and means of performing the IWHC service.

9. "Individual Vessel Owner" means a natural person who is the owner of an individual vessel.

10. "In-Water Hull Cleaning" or "IWHC" means the cleaning of the underwater portions of the hull of a vessel painted or coated with Hull Paint while the vessel is in the water. IWHC does not include underwater dive services used for other activities, including but not limited to, regular servicing of zinc anodes, underwater maintenance and repair of drive shafts, through-hull components and other maintenance-related efforts, which may be governed by other laws and regulations.

11. "In-Water Hull Cleaning Permit" or "IWHC Permit" means a permit issued to a Business or Independent Contractor by the District for IWHC.

12. "Non-Biocide Paint or Coating" means a paint or coating that seeks to protect the vessel's hull from fouling by creating a slick surface or hard protective layer, and does not contain active biocide ingredients or other antifouling chemicals.

13. "Paint Sticker" means the District-required sticker affixed to every vessel by the Boatyard and Boat Maintenance and Repair Facilities identifying the type of Hull Paint applied to the vessel, including Copper-Based Antifouling Paint or Coating, Non-Biocide Paint or Coating or non-copper antifouling paint or coating. All Ablative Paint shall be clearly denoted by use of a Paint Sticker. All Paint Stickers shall include the Boatyard or Boat Maintenance and Repair Facility's name, date of application, the name of the product applied, including the EPA registration number where applicable, and the type of Hull Paint applied. Paint Stickers shall be placed on the transom of the vessel near the VIN number and must be visible for Permittee or Facility operator.

14. "Person" means natural person, Independent Contractor, Business, joint venture, joint stock company, partnership, association, club, company, corporation, business trust, organization, or the manager, lessee, agent, servant, officer or employee of any of them.

15. "Permittee" means the Person who holds the IWHC Permit.

16. "White Pad" means a cleaning pad made of non-woven polyester fiber designed for use for light cleaning with minimal dulling of finish. As used in this

Section, White Pads must have a grit technical specification equivalency of 1200 or finer.

(c) Prohibitions and Requirements Applicable to IWHC, Including Specific Prohibitions Applicable to IWHC of Vessel Having a Copper-Based Antifouling Paint or Coating

The following prohibitions apply to IWHC, including, as indicated, specific prohibitions applicable to IWHC of any vessel having a Copper-Based Antifouling Paint or Coating:

1. No Person, other than an Individual Vessel Owner, shall perform IWHC within the District's jurisdiction without an IWHC Permit from the District.
2. No Person shall perform IWHC that results in a visible paint plume or cloud.
3. No Person shall perform IWHC in a manner that causes or contributes to a condition of nuisance or water quality impairment.
4. No Person shall perform IWHC in a manner that would violate any applicable law or regulation.
5. No Person shall perform IWHC on a vessel that is painted or coated with Copper-Based Antifouling Paint or Coating identified as an Ablative Paint or Coating.
6. No Person shall use rotary or mechanical means to perform IWHC on a vessel that is painted or coated with Copper-Based Antifouling Paint or Coating.
7. No Person shall cause or allow IWHC to be performed on a vessel having a Copper-Based Antifouling Paint or Coating more than once per month per vessel.
8. No Person shall perform IWHC for the first ninety (90) days following a new application of a Copper-Based Antifouling Paint or Coating.
9. No Person shall perform IWHC on a vessel having a Copper-Based Antifouling Paint or Coating without complying with the following Best Management Practices:
 - (i) IWHC must employ the least abrasive methods to clean the hull of the vessel and consider only spot-cleaning, when and where applicable.
 - (ii) Except as provided below, IWHC on vessels having Copper-Based Antifouling Paint or Coating may only be performed by hand using soft pile carpet, microfiber cloth or a White Pad as the cleaning material;
 - (iii) IWHC on vessels having Copper-Based Antifouling Paint or Coating may only occur once per month per vessel; and

(iv) Limited use of a plastic scraper may be utilized for excessive, hard fouling on vessels having Copper-Based Antifouling Paint or Coating. Limited use of a plastic scraper is only allowed if applied gently along the paint surface to release, or loosen, attachment of the organisms, without damaging the Copper-Based Antifouling Paint or Coating or creating a paint plume.

(d) IWHC Permit Required

1. No Person, other than an Individual Vessel Owner, may perform IWHC without first obtaining an IWHC Permit from the District. An Individual Vessel Owner is not required to obtain an IWHC Permit to clean his/her own vessel but must otherwise comply with the prohibitions and requirements of this Section. All Businesses and Independent Contractors performing IWHC must obtain and maintain in good standing an IWHC Permit from the District. An employee of a single Business may perform IWHC under the IWHC Permit of the single Business for whom the employee works, and does not need to separately obtain an IWHC Permit. All Persons intending to conduct IWHC following adoption of this Ordinance must apply for and receive a new Permit from the District by April 1, 2020.

2. Any Person, other than an Individual Vessel Owner, performing IWHC must have available for inspection a copy of the IWHC Permit and make that document available to any District official who requests to inspect the Permit.

3. In addition to any separate requirements imposed by the Facility operator, Permittees shall comply with each and every provision of their IWHC Permit, and any and all applicable laws and regulations. Failure to comply with the IWHC Permit or any and all applicable laws and regulations may result in the immediate suspension or revocation the IWHC Permit, the assessment of penalties authorized by this Section and other enforcement actions.

4. As a mandatory condition of obtaining an IWHC Permit, Permittees must submit and maintain proof of liability and property damage insurance in the minimum amount of One Million Dollars (\$1,000,000) per occurrence. Permittees who have employees must also submit and maintain proof of worker compensation coverage for its employees.

(e) Tracking and Record Keeping for IWHC Activities

1. Permittees: All Permittees must demonstrate compliance with the following tracking and record keeping requirements:

(i) All Permittees must keep a log of all the vessels on which they conduct IWHC. IWHC logs must be able to demonstrate not more than monthly cleaning frequencies of vessels with a Copper-Based Antifouling Paint or Coating.

(ii) IWHC logs should include the vessel name, marina and slip number, as well as any other information Permittee deems necessary to validate adherence to this Section. Starting April 1, 2020, all IWHC logs must also include the type of Hull Paint on the vessel and Hull Paint application date.

(iii) All records should be kept on file for the life of the Permit and for no less than ninety (90) days after the expiration of the Permit.

(iv) All records must be made available to the District upon request.

2. Facility Operators. All Facility operators must demonstrate compliance with the following tracking and record keeping requirements:

(i) Facility operators shall require any Person, other than an Individual Vessel Owner, it admits to perform IWHC to show proof that the Person is operating pursuant to a valid IWHC Permit before any IWHC is conducted within that Facility.

(ii) Facility operators shall maintain a copy of a valid IWHC Permit for each Person, other than an Individual Vessel Owner, it admits to perform IWHC.

(iii) Facility operators shall maintain a log of Persons entering their Facility to conduct IWHC. The log shall include the slip numbers, the names of vessels, and the Person conducting IWHC. Starting April 1, 2020, all logs shall also include the type of Hull Paint that has been applied to the vessels and Hull Paint application date.

(iv) Copies of these hull cleaning records shall be kept on the premises for no less than one (1) year.

(v) The District shall have the right to inspect and copy, or require the submittal of the Facility's IWHC logs during normal business hours, upon request.

(vi) Any Facility operator that becomes aware that IWHC is being or has been conducted within its Facility without an IWHC Permit or, for vessels having a Copper-Based Antifouling Paint or Coating, at a frequency per vessel that is greater than monthly, shall notify the District within one business day of discovery.

(f) Tracking and Disclosure of Hull Paint Applications

1. Boatyard or Boat Maintenance and Repair Facilities. Boatyard or Boat Maintenance and Repair Facilities must demonstrate compliance with the following requirements:

(i) Boatyard and Boat Maintenance and Repair Facilities must keep a log of the vessels painted annually by paint type. Such a log shall include vessel name, date of application, the name of the product applied including the EPA registration number where applicable, and the type of Hull Paint applied.

(ii) Boatyard or Boat Maintenance and Repair Facilities must affix a Paint Sticker to every vessel they paint identifying the type of Hull Paint applied to the hull. The Paint Sticker shall include the Boatyard or Boat Maintenance and Repair Facility's name, date of application, the name of the product applied including the EPA registration number where applicable, and the type of Hull Paint applied. Such a sticker shall be placed on the transom of the vessel near the VIN number. The Paint Sticker must be visible for Permittee or Facility operator. All Ablative Paint must clearly be denoted with a Paint Sticker.

(iii) Copies of annual paint logs shall be submitted to the District by January 15 of every year starting January 2021 and must be kept on the premises for no less than one (1) year following submittal to the District. The District shall have the right to inspect and review the Boatyard or Boat Maintenance and Repair Facility's annual paint logs onsite during normal business hours, upon request.

2. Individual Vessel Owners. Individual Vessel Owners must demonstrate compliance with the following requirements.

(i) Individual Vessel Owners having the hull of their vessel painted following the effective date of this Ordinance must have the Boatyard or Boat Maintenance and Repair Facility affix a Paint Sticker to their vessel

(ii) Individual Vessel Owners who knowingly apply or have applied Ablative Paint on a vessel must ensure the Paint Sticker clearly indicates that the vessel possesses Ablative Paint and must not be subjected to IWHC.

(g) Federal or State Preemption; Compliance with More Restrictive Federal or State Laws

In addition to the requirements of this Section, all Persons must comply with any Federal or State law that is more restrictive than the requirements of this Section.

(h) Penalties for Violation of Section 4.14

1. A violation of this Section shall be punished in accordance with District Code Section 2.0.11.

2. Violations of this Section also may be grounds for suspension or revocation of any District permit, license or approval.

3. Violations of this Section may be grounds for the refusal to issue or renew an IWHC Permit.

4. Penalties and remedies under this Section may be cumulative and in addition to other administrative, civil or criminal remedies. Nothing in this Section shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

(i) Appeals

1. A Person subject to enforcement for a violation of this Section may appeal that violation in accordance with the provisions of District Code section 0.11(i)(9).

Section 2. This ordinance shall take effect on the 31st day from its passage by the Board of Port Commissioners.

PASSED AND ADOPTED by the Board of Port Commissioners of the San Diego Unified Port District, this ____ day of _____, by the following vote:

- AYES:
- NAYS:
- EXCUSED:
- ABSENT:
- ABSTAIN: