



## Legislation Text

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**DATE:** October 12, 2021

**SUBJECT:**

**ORDINANCE AMENDING SECTION 4.14 OF THE SAN DIEGO UNIFIED PORT DISTRICT CODE, REGULATION OF IN-WATER HULL CLEANING, TO IMPLEMENT A MANDATORY PAUSE OF IN-WATER HULL CLEANING OF VESSELS WITH COPPER-BASED ANTIFOULING PAINT IN SHELTER ISLAND YACHT BASIN STARTING DECEMBER 19, 2021, AND CONTINUING THROUGH FEBRUARY 9, 2022**

**EXECUTIVE SUMMARY:**

For this item District staff recommends that the Board of Port Commissioners (Board) adopt an amendment to District Code Section 4.14 Regulation of In-Water Hull Cleaning (Draft Ordinance Amendment) that would temporarily pause in-water hull cleaning of vessels with copper-based antifouling paint in the Shelter Island Yacht Basin (SIYB) for an approximately eight-week period. This item is being brought forward pursuant to direction from the Board during the September 14, 2021 Board meeting. A draft of the Board presentation is included as Attachment A. The September 2021 Board Meeting agenda sheet which contains important background information on the recommend Draft Ordinance Amendment is included as Attachment B. The Draft Ordinance Amendment is included as Attachment C.

In 2005, the San Diego Regional Water Quality Control Board (Regional Board) set a Dissolved Copper Total Maximum Daily Load (TMDL) for the SIYB based on dissolved copper levels in SIYB exceeding water quality objectives. While efforts to reduce copper loading into the basin have had some success, annual water quality testing shows that dissolved copper concentrations remain elevated above the 3.1 µg/L water quality objective in SIYB. In-water hull cleaning has been identified as a likely source of the elevated levels of dissolved copper in SIYB and modeling suggests that inputs of copper from in-water hull cleaning may be greater than the loading originally identified in the TMDL.

At the September 2021 Board meeting, District staff provided an informational presentation about an In-Water Hull Cleaning Pause (Hull Cleaning Pause), including the proposed timeline and methodology for water quality testing that will occur before, during, and after the pause. The Hull Cleaning Pause is appropriate and necessary to reduce copper inputs into the basin and thereby improve water quality, and to assess the relationship between in-water hull cleaning activities and water quality conditions in SIYB. California regulatory agencies including the Regional Board and the Department of Pesticide Regulation have provided input on and comments in support of the Hull Cleaning Pause.

Staff also presented and received Board direction on amending District Code Section 4.14 as the

mechanism to implement the Hull Cleaning Pause during the September 14, 2021 Board meeting. The Board directed staff to move forward with the Draft Ordinance Amendment as the mechanism to implement the Hull Cleaning Pause. Additionally, staff received direction from the Board to shorten the length of the Hull Cleaning Pause by three days to accommodate boater requests to conduct in-water hull cleaning prior to a regatta scheduled to take place in February, and to set fines for violation of the Draft Ordinance Amendment at \$1,000 due to the importance of this matter. The Board's feedback has been incorporated into the Hull Cleaning Pause approach as presented herein and the Draft Ordinance Amendment included as Attachment C.

The Board also provided feedback regarding potential cleaning locations outside of SIYB which is addressed herein and will be discussed in more detail at the October 12, 2021 Board meeting.

Staff recommends that the Board adopt the Draft Ordinance Amendment. Upon adoption of the Draft Ordinance Amendment, staff would conduct public engagement to disseminate information about the Hull Cleaning Pause to help ensure that the SIYB boating community is aware of the regulation. District staff would also conduct frequent inspections in SIYB during the pause period and issue citations as appropriate.

### **RECOMMENDATION:**

Adopt an ordinance amending Unified Port District Code Section 4.14 Regulation of In-Water Hull Cleaning to implement a mandatory pause of in-water hull cleaning of vessels with copper-based antifouling paint in Shelter Island Yacht Basin starting December 19, 2021, and continuing through February 9, 2022.

### **FISCAL IMPACT:**

Funds for work associated with the implementation of Hull Cleaning Pause and technical work in this item are identified in the Planning and Environment budgets for FY 2022 within the Professional Services expense account (#620100).

### **COMPASS STRATEGIC GOALS:**

This agenda item supports the District's strategic goals by seeking copper reductions throughout San Diego Bay and working to improve water quality, with an emphasis on SIYB.

This agenda item supports the following Strategic Goal(s).

- A Port that the public understands and trusts.
- A Port with a healthy and sustainable bay and its environment.

### **DISCUSSION:**

#### **Background**

In 2005, the Regional Board set a Dissolved Copper TMDL for the SIYB. In establishing the SIYB TMDL, the Regional Board found that dissolved copper levels in SIYB exceeded water quality

objectives and thereby threaten and impair the designated beneficial uses of marine habitat and wildlife habitat in this area. The Regional Board attributed approximately 98 percent of all copper loading to SIYB to copper-based antifouling paints applied to the hulls of recreational boats. The Regional Board required a 76 percent overall reduction of residual copper loading to SIYB by December 1, 2022, and named the District, SIYB marina owners and operators, underwater hull cleaners, and boat owners as dischargers responsible for meeting copper reductions set forth in the TMDL.

Since the initiation of the TMDL monitoring program, multiple copper load reduction strategies have been developed and implemented. While these strategies have resulted in a copper load reduction that has met TMDL interim compliance targets, annual water quality monitoring has not shown a corresponding decrease in dissolved copper levels. Annual water quality monitoring and reporting conducted by the District has documented that dissolved copper concentrations remain elevated above the 3.1 µg/L water quality objective in SIYB. Recent modeling studies also suggest that inputs of copper from in-water hull cleaning activities may be greater than originally anticipated. Additionally, a recent study conducted by the California Department of Pesticide Regulation found that higher concentrations of dissolved copper in the water is likely linked to in-water hull cleaning.

The implementation of a pause is expected to improve water quality by addressing an identified source of copper and will provide additional data from which to determine next steps in load reduction and water quality improvements. As such, it is necessary and appropriate to move forward with implementing the Hull Cleaning Pause.

California regulatory agencies support the Hull Cleaning Pause. The Regional Board has been participating on the development of the Hull Cleaning Pause and demonstrated its support by participating with District staff on the presentation at last month's meeting. Regional Board staff have expressed that the Hull Cleaning Pause is necessary and important. The Department of Pesticide Regulation also supports the Hull Cleaning Pause and believes the data collected from the contemplated water quality testing will be valuable to its efforts to improve water quality and understand the impact of the recently implemented leach rates for copper-based antifouling paints.

At the September 2021 Board meeting, the Board directed staff to move forward with the Hull Cleaning Pause and the Draft Ordinance Amendment and provided specific feedback on proposed pause scheduling and fines for violations of the pause related code provisions.

### **Draft Amendment to District Code Section 4.14, Regulation of In-Water Hull Cleaning**

As directed by the Board, the Hull Cleaning Pause will be implemented through an amendment to District Code Section 4.14, Regulation of In-Water Hull Cleaning. An early version of the Draft Ordinance Amendment was distributed to stakeholders on August 27, 2021, and was described in detail in the September 2021 Board Agenda Sheet.

The Draft Ordinance Amendment has been updated to incorporate Board feedback received during the September 2021 Board meeting regarding the proposed time frame and fines associated with citations. The original eight-week pause period was set to begin on December 19, 2021, and extend through February 12, 2022. To accommodate boater requests related to racing schedules, the temporary pause period is now proposed for December 19, 2021, through February 9, 2022. Further, the Draft Ordinance Amendment now sets a minimum fine of \$1,000 per violation of the provisions

enacting the temporary pause. These changes are shown below and are included in Attachment C.

Updated language in the Draft Ordinance Amendment sub-section (e) incorporating the Board's direction are shown in underlined text below:

(e) Temporary Pause of In-Water Hull Cleaning of Copper-Based Antifouling Paint or Coating Within the Shelter Island Yacht Basin

The following provisions apply exclusively to the In-Water Hull Cleaning of vessels within Shelter Island Yacht Basin during an approximately eight-week pause beginning on December 19, 2021, and extending through February 9, 2022, and to no other area within the District's jurisdiction.

1. No Person shall perform In-Water Hull Cleaning of any vessel having a Copper-Based Antifouling Paint or Coating within the Shelter Island Yacht Basin.
2. No Person shall contract for, authorize, or allow entry to a Facility for a Person to perform In-Water Hull Cleaning of any vessel having a Copper-Based Antifouling Paint or Coating within the Shelter Island Yacht Basin.
3. No Facility shall contract for, authorize, or allow entry to a Facility for a Person to perform In-Water Hull Cleaning of any vessel having a Copper-Based Antifouling Paint or Coating within the Shelter Island Yacht Basin.
4. In addition to any other penalties and remedies authorized by the District Code, the minimum civil penalty imposed pursuant to District Code Section 0.11 for any violation of sub-section 4.14(e)(1)-(3) shall be \$1,000. The District shall have the right to impose and collect this minimum civil penalty for any violation of sub-section 4.14(e)(1)-(3) occurring within the pause, in addition to any other penalties and remedies authorized by the District Code, even after the expiration of sub-section 4.14(e)(1)-(3) pursuant to sub-section 4.14(e)(5).
5. Sunset. Sub-sections 4.14(e)(1)-(4) of this Section shall automatically expire on February 10, 2022; provided, however, that the District's authority to impose and collect civil penalties and to impose other remedies for violations in accordance with sub-section 4.14(e)(4) shall survive this automatic expiration.

The Draft Ordinance Amendment also includes definitions for the terms Copper-Based Antifouling Paint or Coating and Shelter Island Yacht Basin, clarifies that any person subject to enforcement for violation of the District's In-Water Hull Cleaning Ordinance may appeal the violation in accordance with the provisions of Section 0.11(i) of the District's Code, and provides limited clarifications of existing provisions. These provisions remain unchanged from the version of the Draft Ordinance Amendment distributed to stakeholders on August 27, 2021, and described in the September 2021 Board Agenda Sheet.

### **Alternative Cleaning Locations**

As directed by the Board, staff analyzed locations outside of SIYB to determine where in-water hull cleaning of boats located within SIYB painted with copper-based antifouling paint could be performed

during the temporary pause. Locations were evaluated for proximity to SIYB, safety, dockside and parking accessibility for both divers and boaters, and general feasibility. Staff evaluated both District and tenant operated facilities including the Police Dock, moorings off Shelter Island Shoreline Park, the floating dock at Shelter Island Pier, the Shelter Island launch ramp, and tenant docks. Staff has also reached out to tenants, including boatyards, to understand slip availability and access. This effort is ongoing. Staff will provide an update at the meeting on October 12, 2021.

### **Next Steps**

Staff recommends implementation of the Hull Cleaning Pause through adoption of the Draft Ordinance Amendment. If the Draft Ordinance Amendment is adopted, the District will move forward with preparing for weekly water quality testing starting in mid-November. The water quality testing will continue for a 16-week duration, including four weeks pre-pause, eight weeks during the pause, and four weeks post-pause. The District will also conduct frequent inspections in SIYB during the pause period and issue citations, when applicable. Following completion of the Hull Cleaning Pause and water quality testing, staff would return to the Board later in 2022 to present the results and will post the findings on the District's website.

### **General Counsel's Comments:**

The General Counsel's Office reviewed this agenda and the Draft Ordinance Amendment as presented to it as to form and legality.

### **Environmental Review:**

The proposed Board action for an informational presentation and direction on a proposed amendment to District Code 4.14 to implement a temporary pause of in-water hull cleaning and conduct subsequent water quality sampling in the Shelter Island Yacht Basin is Categorically Exempt pursuant to California Environmental Quality Act (CEQA) Guidelines Sections 15301 (Existing Facilities), 15304 (Minor Alterations to Land), 15306 (Information Collection), and 15308 (Actions by Regulatory Agency for Protection of the Environment), because it would involve no expansion of use beyond that previously existing and would not result in a significant cumulative impact due to the continuation of the existing use, would result in no permanent effects on the environment, would not involve the removal of mature, scenic trees, is for the purpose of basic data collection/research/experimental management/resource evaluation activities which would not result in a serious or major disturbance to an environmental resource, and includes actions taken by regulatory agencies to assure the maintenance, restoration, enhancement, or protection of the environment. The District has determined none of the six exceptions to the use of a categorical exemption apply to this project (CEQA Guidelines Section 15300.2). No further action under CEQA is required.

In addition, the proposed Board action complies with Section 87 of the Port Act, which allows for the establishment, improvement, and conduct of small boat harbors, marinas, aquatic playgrounds, and similar recreational facilities, and for the construction, reconstruction, repair, maintenance, and operation of all works, buildings, facilities, utilities, structures, and appliances incidental, necessary, or convenient for the promotion and accommodation of any of those uses, including, but not limited to, snack bars, cafes, restaurants, motels, launching ramps, and hoists, storage shed, boat repair facilities with cranes and marine ways, administration buildings, public restrooms, bait and tackle

shops, chandleries, boat sales establishments, service stations and fuel docks, yacht club buildings, parking areas, roadways, pedestrian ways, and landscaped areas. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action is consistent with the Public Trust Doctrine.

Finally, the proposed Board action is considered an “excluded development” pursuant to 8.a (Existing Facilities), 8.d (Minor Alterations to Land), and 8.e (Information Collection) of the District’s Coastal Development Permit (CDP) Regulations because it would involve negligible or no expansion of use beyond that previously existing, would not involve the removal of mature, scenic trees, and would not result in a serious or major significant disturbance to an environmental resource. Therefore, issuance of a CDP is not required.

**Diversity, Equity, and Inclusion:**

This agenda item has no direct DEI impact.

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Attachment(s):

- Attachment A: Draft Presentation
- Attachment B: September 2021 BPC Agenda Sheet
- Attachment C: Red-Lined Version of Amendment to District Code Section 4.14, Regulation of In-Water Hull Cleaning