Comments of
The American Waterways Operators
Chamber of Shipping of America
Cruise Lines International Association, Inc.
International Association of Independent Tanker Owners
World Shipping Council

Submitted to the
California State Lands Commission

In the matter of
Proposed Amendments to Article 4.8 Biofouling Management Regulations for Vessels Operating in California Waters

Fourth Round Comments
June 26, 2012
The American Waterways Operators (AWO), Chamber of Shipping of America (CSA), Cruise Lines International Association (CLIA), International Association of Independent Tanker Owners (INTERTANKO), and World Shipping Council (WSC or the “Council”) file these comments in response to the revised proposed rules on hull fouling released by the Commission on June 12, 2012. The World Shipping Council filed comments on November 21, 2011, on the Commission’s original proposal and on January 30, 2012, on the first revision to that proposal. Those earlier comments and the associated attachments are incorporated herein by reference.

The above listed maritime industry organizations together represent over 90 percent of all commercial vessels calling at California ports, in both the domestic and international trades. (A description of each organization is provided in Appendix 1.) The types of vessels owned and operated by our combined members include oceangoing and coastwise containerships, tankers, roll-on/roll-off vessels, bulk carriers, passenger vessels, and tug/barge units which operate in oceangoing, coastwise and inland waters.

The most recent revisions do nothing to cure the fundamental problems associated with earlier versions of the proposed rule. Specifically, the unrealistic numeric “percentage cover” standards coupled with the overly aggressive inspection and in-water hull cleaning schedule in the revised proposed rule would, if adopted, cause early deterioration of hull coatings and would therefore lead to more, not less hull fouling. That likely result is a symptom of the fact that the proposed rules are not – contrary to the underlying statute – based on a scientifically valid analysis of what constitutes “best available technology economically achievable.” None of the four iterations of the rule so far published by the Commission provides a science-based explanation of the choices made and the standards proposed. There is no peer-reviewed science in the rulemaking record that even hints that a “percentage cover,” numeric approach to hull fouling management would be valid. Thus, as WSC has explained at length in earlier comments, the rule as proposed is both scientifically and legally insupportable.

Although the one-size-fits-all numeric standard and frequent cleaning model cannot work, there are elements of the revised rule that could form the basis of a workable hull fouling management system. Specifically, the “presumed compliance” provisions in Section 2298.3 contain elements that could be incorporated into a management plan based regulation that would be environmentally protective and operationally feasible. The commenters wish to be very clear at the outset with respect to this point, however. If the “presumed compliance” elements of the revised rule were to form the basis of a workable final rule, both of the following amendments to the proposed rule must be made:

a. The numeric standards and arbitrary cleaning frequencies must be eliminated entirely.

b. Those sections that prescribe the type and placement of specific vessel equipment must be deleted.

We discuss these two points in greater detail below.
1. **Elimination of the Numeric Standards.**

If the “presumed compliance” features of the revised rule were to form the basis for a final rule, those features would have to be evaluated as stand-alone provisions, and the numeric standards must be deleted. There are three reasons why this is the case.

First, the numeric standards are legally and scientifically unsupported and insupportable on the rulemaking record here. Period. The fact that there is a compliance alternative (e.g., the “presumed compliance” option) does not change that fact. If there is no basis for these numeric provisions on a stand-alone basis – and there is none – then having them paired with another avenue for compliance does not make them valid.

Second, the revised rule is vague with respect to the relationship between the numeric standards and the conditions for “presumed compliance.” “Presumptions,” as a legal matter, are typically considered to be rebuttable. That is, the presumed fact is taken as true until proven otherwise. The current version of the proposed rule does not explain in any way the conditions (if there are any) under which the “presumption” could be rebutted. For example, for non-niche areas, is the vessel operator compliant if it demonstrates that it has properly applied an antifouling coating that is appropriate for the vessel’s operational profile, but only until the Commission shows that the vessel’s percentage cover of macro-fouling is “significantly in excess of one percent”? Or is the vessel in compliance if it demonstrates proper coating no matter what the hull condition is, so long as the percentage cover is not over the “gross exceedence” amount? The proposed rule does not say.

In light of the fact that the “presumed compliance” option is the only option that is operationally feasible, the ambiguity regarding any limits to the presumption may be removed by deleting the numeric option altogether, and having the “presumed compliance” provisions re-stated as being the direct and final conditions for compliance. Because the numeric “option” is not in fact a feasible means of compliance, deleting it will not change the level of environmental protection provided by the rule.

Third, and related to the second concern above, because the “presumed compliance” provisions have been introduced on top of the numeric standards and the prescribed cleaning interval (6 month) requirement, it is unclear how the various cross-referenced provisions fit together. As an example, Section 2298.3(a)(3) requires inspection and cleaning to “ensure compliance with subparts (1) and (2) of this section.” Subsections (1) and (2), however, contain both the unrealistic numeric conditions and the “presumed compliance” provisions. WSC discussed implementation of the 6-month inspection and cleaning requirement in the context of the numeric standard in its two prior sets of comments. The result of following that approach would be excessive cleaning, causing hull coating degradation and increased fouling over the life of the coating between dry-dockings.

What is left unanswered in the current iteration of the proposed rule is any explanation of how the inspection and cleaning requirement at Section 2298.3(a)(3) is supposed to work in the context of the “presumed compliance” options under subsections (1) and (2). If a vessel is proceeding under the “presumed compliance” approach (i.e., the only operationally possible approach), what are the
protocols for determining what action should be taken following a required inspection? This is an issue that vessel operators answer today using a number of related factors such as fuel consumption, nature of observed fouling, nature and condition of the coating in use, time until next dry-docking, vessel itinerary, availability of suitable cleaning services on scheduled routes, etc. The proposed rule, however, requires an inspection without specifying what an operator is to do thereafter. As such, the one provision that is common to both the numeric standards option and the “presumed compliance” option is completely undefined for the latter option. Because that latter option is the only feasible path to compliance, the failure of the proposed regulation to make clear how the inspection requirement applies to the presumed compliance option is a fundamental failing of the current proposal.¹

2. **The Requirements for the Use and Placement of Specific Equipment Must be Deleted.**

The presumed compliance provisions in subsection 2298.3(a)(1) (niche areas) include specific requirements for MGPS systems and grating bars for sea chests and thrusters. In contrast to the antifouling coating requirements in subsections (a)(1) and (2), the equipment requirements in subsection (a)(1) are highly prescriptive and leave no flexibility to the operator in terms of how to comply. The proposed regulations literally, for example, dictate the shape of the metal on the grates covering sea chests and bow and stern thrusters. Even if it were determined after a full scientific analysis² covering not only fouling prevention, but also vessel operational and structural integrity, that the requirements were appropriate, the State of California has no authority to impose such requirements.

As discussed at pages 5-7 of the World Shipping Council’s January 30, 2012 (second round) comments, the Commerce Clause of the U.S. Constitution prohibits individual states from imposing requirements on vessels in international and interstate commerce when those requirements impose significant operational impacts on vessels when they are outside of state waters. Where such requirements dictate what equipment the vessel will use, and how and where that equipment will be installed (as is the case with respect to MGPS systems, and sea chest and thruster gratings), they are preempted by the federal government’s interest in uniformity and the need for the federal government to be able to address such issues through international agreements without interference by the states.

¹ The problem is easily corrected by replacing the arbitrary 12 month (new coating)/6 month (in service) inspection intervals with a management plan based requirement that the vessel be inspected as indicated by coating manufacturer recommendations and operational criteria defined by the vessel operator at the time of management plan adoption, with a maximum period between inspections of eighteen months.

² The CSLC has not, of course, done any such analysis, and it has demonstrated no inclination or ability to do so. It is in part because the Commission lacks the technical competence to evaluate the implications of its ill-considered foray into vessel system design that it must withdraw these provisions. As the text following this footnote explains, however, the Commission would have no legal authority in this area even if it did develop the technical expertise to analyze the effects of its actions.
It is obvious why states are prohibited from enacting requirements dictating the design details of permanent parts of vessels in international and interstate commerce. The California proposed rule requires that MGPS, for example, be installed in the sea chest rather than in the sea strainer. If Washington State took the opposite approach, requiring MGPS in sea strainers but not in sea chests, then a vessel could not call in both states and be in compliance with the law. Similarly, and perhaps more stark, the California proposed rule requires that sea chest and thruster grates be “rounded rather than sharply angled.” Again, if Washington determined that angled grating bars were preferable, then the vessel could not call and comply in both states. That would place a burden on commerce that the Constitution does not allow. To be clear, it is no answer that California is moving first, and no other state has yet issued conflicting guidelines. The point, instead, is that states are precluded from engaging in this sort of regulation at all.

The problem is not confined to the potential for directly conflicting requirements in different jurisdictions. In addition to that possibility, vessels in international trade are routinely moved from one trade route to another. There are many operational reasons for this, including the need to match vessels of the correct size, speed, draft, and efficiency to the cargo demand and cost characteristics of a given route. Therefore, a ship calling in California this month might cease to do so next month, and a vessel that is not calling today may start calling tomorrow. Under the Commission’s latest proposal, vessels that might call at a California port at any time before their next drydocking would have to have made structural changes simply in order to have the option of calling in California. That would impose significant burdens on interstate and international commerce in two ways. The most obvious is the expense and disruption of making the necessary vessel modifications. Less obvious, but of even greater operational significance, is the fact that vessel operators would lose flexibility in terms of the compliant vessels that they have available to send to California. Paradoxically, that loss of flexibility means that the vessels that call California may in some cases be less efficient and less environmentally protective than they would be without the proposed regulations. In short, in the interstate and international trades, there is no such thing as a “California vessel,” and the U.S. Constitution and common sense say that there should not be any such thing.

3. **Suggested Amendments to the Proposed Rule.**

Beginning with comments on the initial proposed rule, the Council, the Pacific Merchant Shipping Association (PMSA), and other commenters have urged the Commission to replace the proposed numeric standards approach with a more flexible regulatory system based on the use of mandatory

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3 The MGPS placement issue is a good example of the fact that the proposed regulations have not been carefully thought through. The proposal at Section 2298.3(a)(1)(A)(i)(i.2) would mandate placement of the MGPS in the sea chest (“not in a sea strainer”), but at the same time the proposed rule considers internal piping as part of the “wetted portion of vessel” subject to the numeric macrofouling standards. See Section 2298.2(s). It is precisely in order to keep that internal piping clean that MGPS are sometimes placed in the sea strainer rather than in the sea chest. This sort of fundamental failure to consider the operational implications of the proposed language is characteristic of the entire proposed rule.
biofouling management plans and reporting requirements. Such an approach would be consistent with the guidelines recently adopted by the International Maritime Organization. Even more important, such an approach would be more consistent with how the best operators manage hull husbandry today and would provide the flexibility for vessel operators and technology providers to work together to find solutions to challenges that are different for every vessel. The one thing that the rulemaking record clearly demonstrates is that the factors that influence the risks for biofouling accumulation, transport, and release are numerous and varied. The technology that is available today simply does not provide a basis through which vessel operators can comply with arbitrary numeric standards at very low tolerances (such as those proposed here). Instead, this is a situation in which the best environmental results will come from allowing vessel operators some flexibility to manage the overall hull fouling challenge during the periods between dry-dockings.

Consistent with the comments above and those that the Council has filed before, we attach as Appendix 2 a redlined copy of the proposed rule showing specific changes that could be made to the current proposal in order to implement a mandatory regulation based on vessel biofouling management plans and recordkeeping requirements. All of these suggested changes are supported by the record and are a logical outgrowth of the proposed rule. As such, these suggestions are in a form that could be adopted by the Commission at its next public meeting without the need for additional notice and public comment.

The trade organizations filing these comments appreciate the opportunity to submit these comments in response to the Commission’s latest version of its proposed vessel biofouling regulations.

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Appendix 1

The American Waterways Operators (AWO) is the national trade association representing the owners and operators of tugboats, towboats, and barges serving the waterborne commerce of the United States. Its mission is to promote the long term economic soundness of the industry, and to enhance the industry's ability to provide safe, efficient, and environmentally responsible transportation, through advocacy, public information, and the establishment of safety standards. (www.americanwaterways.com)

The Chamber of Shipping of America (CSA) represents 36 U.S. based companies that own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. CSA member companies regularly call in California ports and would be severely impacted if this proposed regulation were to be made final in its current form. (www.knowships.org)

The nonprofit Cruise Lines International Association (CLIA) is the world’s largest cruise industry trade association. CLIA represents the interests of 26 member lines and participates in the regulatory and policy development process while supporting measures that foster a safe, secure and healthy cruise ship environment. (www.cruising.org)

The International Association of Independent Tanker Owners (INTERTANKO) represents oil and chemical tanker owners. The organization has 230 members in over 41 countries, whose combined fleet comprises some 3,200 tankers totaling 280 million deadweight tons. INTERTANKO is committed to working for safe transport, cleaner seas and free competition. (www.intertanko.com)

The World Shipping Council (WSC) is a non-profit trade association that represents the liner shipping industry – primarily operators of containerships, vehicle carriers, and roll-on/roll-off vessels. Together, the Council’s members carry approximately 90% of the world’s containerized trade. Vessels operated by Council members make frequent calls in California ports, and the Council’s members would be directly and substantially affected by this proposed rule. (www.worldshipping.org)