Comments of the

World Shipping Council

Submitted to the

California State Lands Commission

In the matter of

Proposed Amendments to Article 4.8. Biofouling Management to Minimize the Transfer of Nonindigenous Species from Vessels Operating in California State Marine Waters

June 16, 2015
The World Shipping Council files these comments in response to the Notice of Proposed Regulatory Action published on May 1, 2015 (the “Notice”). The Notice proposes to amend Article 4.8 of Title 2, Division 3, Chapter 1 of the California Code of Regulations (CCR). The new title of Article 4.8 would be Biofouling Management to Minimize the Transfer of Nonindigenous Species from Vessels Operating in California Waters.

The World Shipping Council (WSC or the Council) 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 over 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 the proposed rules.1 The Council appreciates the opportunity to comment on the proposed rules. These comments include the attached statements of two shipping company supervisors with extensive experience in hull husbandry. Those statements inform the discussion in section 1 of these comments.

The Council understands the challenge of protecting California waters from the transfer of aquatic species, as well as the difficulties of drafting regulations absent sufficient analysis of what current antifouling technologies can achieve on various vessel types and over what time periods. The Council commends the Commission for its willingness to engage all interested parties through a Technical Advisory Group and through informal discussion with stakeholders.

The current proposed regulations more appropriately reflect the current best practices in hull husbandry than did earlier proposals. However, there are aspects of the proposal, especially with respect to “niche areas,” that remain unworkable. These comments focus primarily on those aspects of the proposal. In addition, we address and suggest a change to the proposal that a vessel may be found in violation for a first exceedance of the “obviously excessive biofouling” standard if it remains in California waters for more than 96 hours. Finally, we address three instances in which proposed definitions should be amended to better reflect what we understand is the intent of the regulations.

1. **The Proposed Standards for “Obviously Excessive Biofouling” as they Apply to Certain Niche Areas Are Not Feasible and Are Not Based on the Best Available Technology Economically Achievable as Required by the Governing Statute**

   Proposed section 2298.2(u) would define “obviously excessive biofouling” in relevant part as “macrofouling percentage cover significantly in excess of fifteen percent of the wetted surface

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1 A full description of the Council and a list of its members are available at [www.worldshipping.org](http://www.worldshipping.org).
under investigation, as determined using the biofouling compliance assessment protocols.”

The language of proposed section 2298.6(c)(2), which defines when certain conditions trigger violations and the potential imposition of penalties, excludes sea chests, sea chest gratings, and bow and stern thrusters from the application of the penalty provisions for exceedance of the “obviously excessive biofouling” standard. That exclusion is appropriate because those listed niche areas cannot safely or effectively be cleaned while a vessel is in the water. If vessel operators could be found in violation for exceedances with respect to those areas notwithstanding the fact that the vessel operator has no way to correct such exceedances while the vessel is in the water, such an outcome would plainly violate the governing statute’s requirement that the Commission’s regulations be based on the “best available technology economically achievable...” See Section 71204.6 of the California Public Resources Code. Thus, the exclusions for sea chests, sea chest gratings, and thrusters are both technologically appropriate and legally necessary. The Commission’s rationale for those exclusions begins on page 65 of the Initial Statement of Reasons (ISOR).

There are additional niche areas that should also be excluded from the description of conditions that may be found to be in violation of the “obviously excessive biofouling” standard. The rationale for these additional exclusions is the same as that for the exclusions that are already included in the draft regulation; that is, these areas cannot safely and/or effectively be cleaned while the vessel is in the water. Thus, penalizing vessel operators for exceedances with respect to these uncleanable areas would violate the statutory mandate that the regulations be based on “best available technology economically achievable,” and such penalties would be inconsistent with the rationale for the niche area exclusions that the proposed regulation already recognizes.

The three additional niche areas that should be excluded from application of the “obviously excessive biofouling” violation provisions are: fin/stabilizer recesses, rope guards, and rudder recesses. We discuss the structure and function of each of these features separately below in order to demonstrate why they cannot be subject to a standard that effectively requires

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2 The definition of “obviously excessive biofouling” qualifies the numeric standard with the phrase “of the wetted surface under investigation, as determined using the biofouling compliance assessment protocols.” Similarly, the five percent “clean-to” provision at proposed section 2298.6(c)(3)(B), as well as other references to these numeric standards, contains that same qualifier. Proposed section 2298.2(e), which defines “biofouling compliance assessment protocols,” states that “[t]hese protocols will be adopted in future revisions of the regulations contained within this article.” Because there is no current Commission proposal establishing those compliance assessment protocols, the Council’s current comments do not address the particulars of what might be contained in such protocols. For now, the Council simply observes that the outcome of that future rulemaking may change the meaning of the regulations proposed in the current proceeding, and that any such changes would be subject to comment in the later rulemaking.
them to be cleaned underwater, under threat of penalty for failing to do so. That discussion of additional niche areas that should be excluded from the provisions of proposed section 2298.6(c)(2) is supported by the attached statements of Gavin van Poppering of Maersk Line and Per Tunnel of Wallenius Marine AB, both of whom have extensive practical experience in vessel hull husbandry. Those statements include pictures of the structures at issue. The Council encourages the Commission to carefully review those statements for factual details about the structure of these additional niche areas and the safety and access impediments to cleaning those areas while the vessel is in the water.

a. Fin/Stabilizer Recesses

Fin/stabilizer recesses allow fins / stabilizers to be retracted so that they are nearly flush with the plane of the main hull surface. Depending on the size of the fin/stabilizer, the recess may or may not theoretically be accessible by a diver. Whether or not a fin recess can physically be entered by a diver, however, having a diver enter such a confined space is highly dangerous. In addition to the fact that a diver could become trapped or hung up in that space, if the fin were retracted while the diver was in the recess space, the diver would be crushed to death. Sending a diver into such a confined space for the purpose of underwater cleaning is not recognized as a safe practice in the industry – just the opposite is true – and such a practice cannot be considered “best available technology” within the meaning of section 71204.6 of the California Public Resources Code.

Because there is no safe means of cleaning fin/stabilizer recesses while the vessel is in the water, these niche areas must be excluded from the violation provisions of proposed section 2298.6(c)(2)(A) and (B) in the same way that sea chests, sea chest gratings, and bow and stern thrusters are already excluded.

b. Rope Guards

Rope guards are structures attached to the propeller shaft that are designed to prevent submerged ropes and lines from becoming wrapped around the shaft and hampering vessel propulsion or damaging running gear. By design these structures have openings to allow measurement of the main stern bearing, and the combination of these openings with inaccessible enclosed spaces makes the interior of these structures susceptible to fouling. Rope guards are not specifically mentioned in the draft regulations, but the Commission should understand how these structures are configured and should address their regulatory treatment in the final rule. Specifically, the interior of rope guards should be excluded from the violation provisions at proposed section 2298.6(c)(2) in the same manner as other niche areas that cannot safely and effectively be cleaned while the vessel is in the water.
Rope guards have internal spaces that can harbor marine organisms, but there is no means while the vessel is in the water to clean those spaces to the five percent cover that would be mandated by the regulation as proposed. Therefore, if these areas become fouled in excess of 15% of their area, and that fouling is detected, the vessel would, under the proposed regulations, be subject to penalties even though there is nothing that the vessel operator can do to remove the fouling before the next drydocking.

c. Rudder Recesses

The proposed regulations identify rudders as a niche area. It is possible to clean rudders while the vessel is in the water, and this is done when conditions warrant that procedure. Associated with some rudder designs is a separate area, the rudder recess, which includes a curved area within which the forward end of the rudder/rudder shaft fits as well as spaces between fixed and moving parts of the rudder structure. Rudder recesses present two problems with respect to in-water cleaning. First, there is an access and safety issue depending on the precise size and configuration of the structure on any given vessel. The space may be too small for a diver to safely enter or extend an arm to use a cleaning tool. Second, and equally problematic, to the extent that rudder recesses can be reached by divers, the only tools that can typically be fitted into those spaces are hard tools that would remove the antifouling coating along with any marine growth that might be removed. Thus, cleaning of these areas in-water, even where safe and possible, is likely to lead to increased fouling after the antifouling coating is damaged.

Penalizing operators for “excessive biofouling” of rudder recesses would put a vessel operator in a position of either: (1) being penalized for a condition that the operator cannot correct, or (2) requiring the operator to conduct a cleaning operation that would damage the antifouling coating and thereby lead to worse fouling in the immediate future. Neither situation would reduce fouling (indeed the second situation would lead to increased fouling), and rudder recesses should therefore also be excluded from the proposed provisions on “excessive biofouling.”

For the reasons stated above, the additional niche areas of fin/stabilizer recesses, rope guards, and rudder recesses should be added to the existing exclusions for sea chests, sea chest gratings, and bow and stern thrusters in section 2298.6(c)(2).³

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³ We note that the fact that certain niche areas (e.g., rope guards and rudder recesses) are not included in the niche area list at proposed section 2298.6(b)(1) does not mean that fouling in those areas cannot trigger a violation under proposed section 2298.6(c)(2). The language in section 2298.6(c)(2) defines a violation as being triggered by the “detection of obviously excessive biofouling for any wetted surface
In the event that the Commission does not choose to exclude fin/stabilizer recesses, rope
guards, and rudder recesses from the violation trigger in proposed section 2298.6(c)(2), then the
Commission must furnish its “best available technology economically achievable” analysis with
respect to management options available for those areas and take public comment on that
analysis before including those areas in the penalty provisions. The current ISOR explains
(starting at page 65) the diver access and safety issues that caused the Commission to exclude
sea chests, sea chest grates, and bow and stern thrusters from the niche area “obviously
excessive biofouling” penalty provisions. That analysis and its conclusions are correct and
appropriate. However, there is absolutely no analysis of what constitutes “best available
technology economically achievable” with respect to the management options available for
other niche areas for which there are diver access and safety issues and substantial questions
about the availability of effective options for in-water cleaning. The governing statute requires
that the Commission do that analysis if it is going to attach regulatory consequences to the
management and condition of those niche areas.

Section 71204.6 of the California Public Resources Code does not define “best available
technology economically achievable,” but the term is a well-known one from the federal Clean
Water Act. For the purposes of implementing its delegated National Pollutant Discharge
Elimination System (NPDES) program, California adopts the U.S. Environmental Protection
1314(b)(2)(B), requires that the agency shall consider the following factors when applying a best
available technology economically achievable standard:

“Factors relating to the assessment of best available technology shall take into
account the age of equipment and facilities involved, the process employed, the
engineering aspects of the application of various types of control techniques,
process changes, the cost of achieving such effluent reduction, non-water quality
environmental impact (including energy requirements), and such other factors as
the Administrator deems appropriate.”

EPA’s regulations at 40 C.F.R. § 125.3(d)(3) list the same factors.

No single factor is dispositive, and the agency has discretion to put different weight on
the various factors. Notwithstanding that flexibility, if an agency is going to promulgate a rule
based on best available technology economically achievable, it must first conduct a credible

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except sea chests, sea chest gratings, and/or bow or stern thrusters. . . .” (emphasis added). Thus, all
wetted surfaces are included unless expressly excluded.
review of what the available technology can do. Here, the question of what constitutes best available technology is not even acknowledged in the ISOR.

The World Shipping Council does not challenge the primary requirement that the non-niche areas of the hull employ antifouling coatings that are within the manufacturer’s recommended lifespan. However, to the extent that the Commission wishes to apply the “obviously excessive biofouling” standard to niche areas (whether included in the proposed section 2298.6(b) list or not), the Commission is statutorily required to conduct an analysis of what management measures constitute “best available technology economically available.” The Commission has not even attempted that analysis, notwithstanding the fact that the Council raised this issue at length in its comments filed on November 21, 2011, over three and a half years ago.

**d. Known niche areas should be added to the list at proposed section 2298.6(b)**

In addition to the need to exclude additional niche areas from the violation trigger in proposed section 2298.6(c)(2), known niche areas that are not currently included on the list at proposed section 2298.6(b)(1) should be added. This will increase clarity with respect to management expectations.

As the proposed regulation is structured, listed niche areas are subject to a different regime for purposes of biofouling management planning, execution, and recordkeeping than are other parts of the hull. Specifically, the management requirements in proposed section 2298.6(a) apply to “the wetted surfaces of the vessel, except those niche areas described in subdivision (b) of this section . . . .” (emphasis added) Management requirements for niche areas are set forth at proposed section 2298.6(b). Accordingly, the additional niche areas discussed above that are not already on the section 2298.6(b)(1) list (i.e., rope guards and rudder recesses) should be added to that list. Otherwise there will be substantial ambiguity as to what is expected of vessel owners and operators with respect to the management of these areas.

Related to the fact that there are known niche areas whose treatment is not covered by the proposed regulation, it is also true that there will be changes in vessel design details that create new niche areas whose treatment under the regulation will have to be determined. The proposed regulation’s definition is itself a functional one, with a non-exclusive list of examples. Presumably the Commission chose this approach precisely because the universe of niche areas is almost certain to change. The Council understands the need for this flexibility, but that flexibility should also extend to a recognition that some currently unidentified or future niche areas may not be accessible for safe or effective in-water cleaning. Accordingly, it would be consistent with the existing structure of the proposed rule to address those situations in a functional way in the operative portion of proposed section 2298.6(c), just as that section already
deals with known niche areas that cannot be cleaned in-water, as discussed above. This could be done by amending proposed section 2298.6(c)(2)(A) to read as follows (also incorporating the addition of the named niche areas discussed above; suggested additional language is underlined):

“A. Current detection of obviously excessive biofouling for any wetted surface except sea chests, sea chest gratings, bow or stern thrusters, stabilizer/fin recesses, rope guards, rudder recesses, and/or other niche areas that are not accessible for safety reasons or where effective in-water cleaning is not feasible. . . .”

Depending on how the Commission chooses to address the issues raised immediately below with respect to subsection 2298.6(c)(2)(B), a conforming change to the same effect would need to be made to that subsection.

2. **The 96-Hour Provision in Proposed Section 2298.6(c)(2)(B) Should be Modified**

Proposed section 2298.6(c)(2)(B) states that a violation occurs if:

“The vessel exhibits obviously excessive biofouling for any wetted surface except sea chests, sea chest gratings, and/or bow or stern thrusters and remains in State waters for 96 hours or more.” (emphasis added)

This subsection (c)(2)(B) is in addition to proposed subsection (c)(2)(A), which provides that a violation occurs if a vessel displays obviously excessive biofouling on non-excluded areas on a second or subsequent visit to California waters since the most recent out-of-water maintenance. As explained in the ISOR starting on page 66, the general approach is to provide a vessel with a warning of “obviously excessive biofouling,” and to allow that vessel to correct that condition without penalty before the vessel makes its next California call. We understand that proposed subsection (c)(2)(B) is designed to provide a mechanism to address vessels that call California ports or places very infrequently, and therefore for which “[t]here would be no incentive to manage biofouling for the owners of these vessels given a scenario where a vessel receives a warning on their first occurrence of ‘obviously excessive biofouling.’” ISOR at 66.

The proposed provision that a vessel may be penalized on its first visit during which it displays “obviously excessive biofouling” if it remains in California waters for more than 96 hours is over-broad for its stated purpose of providing adequate incentives/deterrence for vessels that call infrequently.

The ISOR at page 66 states the Commission’s Hull Husbandry Reporting Form (HHRF) data shows that only 18 percent of regularly calling vessels had port stays exceeding 96 hours, whereas
approximately 48 percent of vessels that called only once in five years had port stays exceeding 96 hours. The Council does not question the conclusion that there may be a difference in average length of port stay between regularly scheduled vessels (which make up the Council’s membership) and infrequent callers. However, the 96-hour provision is likely to include more regularly calling vessels than the Commission intends. There are three reasons for this.

First, the instructions for answering what is currently question 10.d of the HHRF (requiring a list of the previous 10 ports called and the dates of arrival and departure) are imprecise with respect to when arrival and departure should be defined. Without knowing the full range of interpretations that vessel operators may reasonably be employing, anecdotal information suggests that vessel operators may most commonly be reporting their arrival and departure dates based on when they arrive and depart the berth. The proposed regulation, in contrast, would measure the 96 hours as covering the time in California waters. A vessel will by definition spend more time in California waters than it does at berth, simply because it must steam through California waters in order to reach the berth on arrival and to clear State waters after departing the berth. Because of this mismatch in the length-of-visit measured by the HHRF data and the relevant time for the proposed regulation, it is highly likely that a greater percentage of vessels are remaining in California waters for over 96 hours per port call than the Commission calculates at page 66 of the ISOR.

Second, in addition to the fact that HHRF data likely measures vessel presence against a different geographic scope than would the proposed regulation, the HHRF is imprecise in its time measurement. The HHRF requires only the date of arrival and departure, not the hour and minute. Because the increment of measurement (a day) is 24 hours, there is up to 47 hours and 58 minutes of variation in the actual port stay between two vessels that both report arriving and departing on the same days. For example, one vessel could arrive at 12:01 a.m. of day one and leave at 11:59 p.m. of day three, while a second vessel could arrive at 11:59 p.m. of the same day one and depart at 12:01 a.m. of the same day three. Both vessels will show a stay of three days on the HHRF, but one will have stayed for 71 hours and 58 minutes, while the other will have stayed for 24 hours and two minutes. The lack of precision is clear, and this lack of precision renders the HHRF data on which the Commission relied inappropriate for setting a regulatorily significant time period that is only 96 hours long.

Third, the Commission’s data, which covers 2010 through 2014, likely does not fully reflect the fact that vessels of increasing size are visiting California ports. These vessels typically take longer to load and unload than smaller vessels, and indeed there are services using large container ships that have scheduled stays at berth of 96 hours. For example, according to service information provided in the latest Drewry Container Forecaster Report (issued April 1, 2015), there are five liner services currently calling at the Southern California ports of Los Angeles and
Long Beach utilizing vessels of 10,000 twenty-foot equivalent units (TEU) or larger. Of those, two have a scheduled at-berth time of 96 hours or more and the other three have scheduled at-berth times between 72 and 96 hours. A number of California services utilizing ships between 8,000-10,000 TEU are also showing scheduled at-berth times of 72 or more hours. Cargo volume is expected to grow, and as it does more large ships will likely be deployed. It is reasonable therefore to assume that more ships will require at-berth times of at least 72 hours in Southern California ports, with the largest ships requiring 96 or more hours at berth. These large container vessels operate almost exclusively on regularly scheduled services, and may call California roughly six to eight times a year on a service to Asia, for example. These frequent callers are expressly not the vessels that the Commission hoped to capture with its 96-hour provision, but they would clearly fall within it.

For all of these reasons, which can independently and collectively skew the analysis behind the 96-hour provision, the Commission’s proposal at section 2298.6(c)(2)(B) is likely to apply more broadly than it was intended. There are two ways to correct this. First, the Commission could extend the 96-hour number to 168 hours, seven days instead of four days. That would provide some allowance for vessels to steam through California waters on the way to and from the berth, and it would provide some buffer if a vessel had to anchor to wait for an open berth. With respect to this last point, we note that vessels were anchored in California waters for far in excess of 96 hours during the recent port congestion associated with longshore labor negotiations on the West Coast. There are also other causes for congestion that can periodically require vessels to wait for a berth. Almost by definition, if a large containership has to anchor to await a berth, the combination of that waiting and the time needed for cargo operations will push its stay in California waters well beyond 96 hours.

The second way that the Commission could more precisely tailor its proposal to cover the intended “infrequent caller” vessel population is to qualify the application of proposed section 2298.6(c)(2)(B) to exclude vessels that regularly call California ports. This could be done, for example by adding the following phrase at the beginning of proposed section 2298.6(c)(2)(B): “Except for a vessel that is part of a regularly scheduled liner service calling California ports or places, . . . .” That formulation would still permit a finding of violation if 2298.6(c)(2)(A) were applicable, but it would prevent the application of (c)(2)(B) to vessels that call frequently.

The two proposals above for revising section 2298.6(c)(2)(B) are not mutually exclusive, and they could be adopted together. However the Commission chooses to address the issue, a conforming change must also be made to proposed section (c)(1)(B)(ii), which also contains the 96-hour reference.

Finally with respect to proposed section 2298.6(c), the Council requests that clarifying language be inserted in section 2298.6(c)(3)(B)(iii)(iii.1) to make it clear that non-availability of
cleaning services (for the purposes of the requirement that “obviously excessive biofouling” be corrected before the next California port call) includes situations in which weather and/or sea state prevent cleaning service vendors from working on the vessel during a particular port call. This could be achieved by inserting the parenthetical “(including because of weather or sea state)” after the word “available” in the second line of proposed section 2298.6(c)(3)(B)(iii)(iii.1).

3. **Definitional Clarifications**

There are three instances in which the wording of the proposed rule should be clarified to better reflect what we understand is the Commission’s intent.

First, the definition of the term “wetted portion of a vessel” (proposed section 2298.2(cc)) could be read to extend the management requirements of the proposed regulation to a vessel’s internal piping. That is not workable, and we do not believe that it is intended. That definition includes “all parts of a vessel’s hull and structures that are . . . associated with internal piping structures in contact with water taken onboard.” The definition is critical both because it defines the scope of the application of the proposed regulation and also because it functions within proposed section 2298.6(a) to distinguish between niche areas and all other parts of the hull. The difficulty with the phrase quoted above is that it is ambiguous with respect to whether it is intended to apply the management provisions of the proposed regulation to internal piping within the vessel. There is no mention of the inclusion of such piping within the vessel (which could run to hundreds or thousands of linear feet on a single vessel) in the Initial Statement of Reasons. Nor has inclusion of such piping been discussed in any of the formal or informal consideration of the regulation since discussions began almost five years ago.

Our understanding is that there is no intention to cover internal vessel piping within the scope of the regulation. That understanding appears to be reflected in the use of the phrase “associated with” before the phrase “internal piping.” The Council respectfully suggests that the Commission replace the language at proposed section 2298.2(cc) that begins “or associated with” with language such as “, including piping inlets and outlets that are directly exposed to seawater on the outer surface of the vessel’s hull.”

Second, we request that the definition of “out-of-water maintenance” at proposed section 2298.2(v) be revised to reflect the fact that not all drydockings are for the purpose of or can accommodate antifouling management processes such as application of an antifouling coating. For example, a vessel may have a casualty such as striking an underwater object or incurring damage to its propeller such that it may have to undergo an emergency drydocking for the purpose of inspection or repairs. In another example, a vessel may enter drydock for hull and machinery upgrades. In such situations, actions such as applying an antifouling coating may not
be included in the services included in that drydocking. The point is important because the performance of “out-of-water maintenance” is the trigger for the commencement of requirements for management plans and antifouling measures, as well as logbook requirements. See, e.g., §§ 2298.3(a), 2298.4(a), 2298.6(a). The definition could be improved by inserting the phrase “a regularly scheduled” between the words “means” and “removal” in the definition at section 2298.2(v).4

Third, we request that the Commission consider deleting the phrase “susceptibility to coating system wear or damage” from the definition of “niche area” at proposed section 2298.2(s). There are two related reasons for the requested deletion.

First, we are unaware of any niche area that would typically be thought of as such based solely on considerations of coating wear or damage, so it is unclear what situation the proposed language is seeking to address. Second, and perhaps of greater concern to both the Commission and the regulated industry, using the criterion of susceptibility to coating wear or damage to designate niche areas would create substantial uncertainty with respect to the distinction between niche areas and all other portions of the “wetted portion of a vessel.” For example, if there were below-the-waterline damage to the antifouling coating on the main body of a ship’s hull caused by a fender rubbing against the hull at berth, does that damage cause that section of the hull to be a niche area? If the answer is “yes,” then the approach is unworkable, because the proposed regulation’s management requirements for niche areas and non-niche areas are different, and management measures must be put in place at the time of out-of-water maintenance, not some later, unpredictable date. If the answer to the question of whether a designation from non-niche to niche can change is “no,” then what does the phrase in question mean? Neither regulators nor regulated parties can rationally or consistently address a situation in which the niche or non-niche designation of a portion of the hull can change based on the happenstance of damage to the antifouling coating on that part of the hull. Accordingly, we request that the phrase “susceptibility to coating system wear or damage” be removed from the proposed definition of “niche area” at proposed section 2298.2(s).5

4 We note, for example, that the U.S. Coast Guard uses the term “scheduled drydocking” in describing compliance dates for ballast water treatment systems in its regulations at 33 C.F.R § 151.2035; table 151.2035(b).

5 The Council is aware that the proposed definition is borrowed from the IMO Guidelines. Those guidelines are not part of a binding regulatory regime, much less one that includes numeric percentage fouling coverage limits. In the guideline context, therefore, the over-breadth of the definition is not problematic. In the context of the proposed CSLC regulation, where the distinction between niche and non-niche areas is a critical aspect of the regulatory structure, the same imprecision is unworkable.
4. **International Consistency**

Because many vessels calling California trade internationally, calling ports all over the world, the most sensible solutions for hull fouling will be those adopted through the International Maritime Organization (IMO). The Commission has reflected this reality to a substantial degree in taking a hull husbandry plan-based approach that incorporates the IMO Guidelines. That portion of the proposed regulation reflects current best operating practices and is unlikely to cause substantial conflicts with other jurisdictions.

The provisions in the proposed regulation setting numeric standards for “obviously excessive biofouling” and for the level to which a vessel’s hull must be cleaned after a finding of obviously excessive biofouling, however, run the risk of creating conflicts with other jurisdictions, thus putting vessel operators in a position in which they may have to be out of compliance in one jurisdiction in order to be in compliance in California, or vice versa.

Put differently, by focusing on the hull condition only when the vessel is in California waters, the numeric standards portions of the proposed regulations effectively transfer the problem to other jurisdictions. Because the proposed regulations require compliance with the hull cleanliness standards with respect to an “occurrence in California,” any required hull cleaning must by definition be completed at a prior port call in another jurisdiction. California is, in essence, telling other jurisdictions that they must accept a biological risk that California itself will not accept.

These potential conflicts with other jurisdictions, and the very difficult situations that such conflicts can cause for vessel owners and operators seeking to comply with all applicable regulations, can be substantially ameliorated by removing the remaining “percentage cover” standards in the proposed regulations, at least unless and until there is international agreement that such standards are appropriate. As matters stand now, there is no record evidence (other than reference to standards recently adopted in New Zealand) or analysis in the ISOR that supports the percentage standards that are proposed, and as noted in footnote 2 of these comments, those numeric standards cannot be understood or applied in any event until the Commission completes a rulemaking establishing its “biofouling compliance assessment protocols.”

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6 See discussion above on the statutory mandate that the regulations be based on a “best available technology economically achievable” analysis.
5. **Conclusion**

The Council appreciates the opportunity to provide these comments for the Commission’s consideration. The Commission’s current proposal is a substantial improvement over prior proposals in that it adopts a comprehensive management approach that is consistent with the IMO guidelines. To the extent that the proposal retains backstop numeric standards, especially those applicable to niche areas that cannot be cleaned safely and effectively while the vessel is in the water, however, it remains problematic. At a minimum those niche areas must be excluded from the penalty provisions, and the 96-hour dwell time trigger for violations must be eliminated or revised.

We stand ready to work with the Commission to improve the proposed rule so that it meets both the letter and the spirit of the governing statute, and so that it fits better with the realities of vessels engaged in international trade.

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