

To: Moorage Tenants Union (MTU) Members

From: Executive Committee

Subject: Moorage Tenants Union Position and Concerns Over Legislation Known as **Senate Bill 5436: Reducing copper in antifouling paints used on recreational water vessels.**

Date: February 11, 2011

The Bill: The Moorage Tenants Union has recently learned of legislation to ban the use of copper bottom paint in recreational boats. Text of the bill, currently proposed in the State Senate and called SB 5436, can be found here:

<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5436&year=2011>

As of late January 2011 there was language proposing to restrict the definition of “recreational vessel” in this bill to mean only boats under 65 feet in length. This would mean all vessels of all types over 65 feet, including recreational, would still be allowed to use copper bottom paint. As of February 10, the bill’s name was changed to “*Reducing copper in antifouling paints used on recreational water vessels.*” However, language that proposes to target only recreational boats under 65 feet is buried in another document. The Moorage Tenants Union will monitor this bill for alterations in language and intent.

A quick summary of the bill as it currently stands is as follows: *According to a 2007 study, the Department of Ecology has conducted research measuring copper concentrations in marinas and found the primary source of copper to be from the antifouling paints found on boat hulls. Research has shown copper to be highly toxic to aquatic life. As of January 1, 2013, no new recreational boat may be sold with copper in the bottom paint. After January 1, 2018, any recreational water vessel being sold must have been stripped of copper paint or sealed. And after January 1, 2020, no antifouling paint containing more than 0.5 percent copper may be sold in Washington. The Department of Ecology must monitor and certify compliance with the requirements. A civil fine is set for up to \$10,000 per day per violation.*

Note: A link to the 2007 study, which sampled two marinas, can be found in the Appendix.

The Reasoning: The Moorage Tenants Union wholeheartedly supports the goal of being a participant in smart strategies toward a cleaner Sound. Many people would agree that paying a little more to have cleaner water is worth it. The sooner an effective non-toxic alternative to antifouling is developed, the better it will be for the health of the Sound’s ecosystems. But alternatives as effective and economical as copper antifouling paint are not yet available. In 2010 Practical Sailor magazine said, “...*the right formula for an eco-friendly paint remains elusive. While paint manufacturers could potentially save a bundle by reducing the copper content in their paints, the costs associated with bringing*

an effective alternative biocide to the market are a big impediment. (No, simply adding cayenne to a cheap bottom paint doesn't work.) If there is to be any motion in a green-paint direction, government policy will be the prime mover."

The Moorage Tenants Union will compile and distribute information on alternative antifouling technology to its members as it becomes available.

What we did: Several members of the MTU researched the issue and contacted some of the major players, including: State Senator Jim Hargrove, Rep. Kevin Van de Wege, Rep. Steve Tharinger, The Department of Ecology, The Puget Soundkeeper Alliance, the Northwest Marine Trades Association, and the Northwest Yacht Brokers Association. We asked several questions of each and expressed concern with regard to the way this bill is being created. As of February 11, 2011, responses have been received only from The Northwest Marine Trades Association and the Puget Soundkeepers Alliance.

The First Problem: Who says recreational vessels are only 65 feet or less? An early version of the bill included all recreational vessels, regardless of size. Later, language was proposed to exclude large yachts over 65 feet, and the title of the bill became "*The Proposed Ban Of Copper Antifouling Paint For Recreational Boats Under 65 Feet.*" Shortly after we wrote to the Legislature, the language proposing this size limit then disappeared from the supporting materials that had been posted on the Senate's web site. The title of this bill was changed to: "*Reducing copper in antifouling paints used on recreational water vessels.*" However, language proposing the 65-foot limit has reappeared and can be found on the Senate web site URL listed above, under the small link called "[Senate Bill Report \(Orig\)](#)". This language, which is far down in the document, says: "*There are amendments that we would like to offer to change the definition of recreational vessel to be consistent with the federal Clean Boating Act of 2008. The definition should include boats 65 feet or less. A three-year timeframe from January 1, 2012, to January 1, 2015, is sufficient time for the paint industry to adapt.*"

Nowhere in the Clean Boating Act does specific language appear that restricts the definition of a recreational vessel to 65 feet or less. The federal definition, which can be found in the Appendix of this paper, includes ALL recreational boats. Therefore, size does not determine the status of a vessel as recreational, and ALL recreational vessels should legally be included, regardless of size.

The Second Problem: What about non-recreational vessels? Missing from this bill and from legislative language or anecdotal evidence is any intent to reduce the contributions of copper from other types of vessels, such as commercial and military. To illustrate the point, imagine this picture: a couple of small power and sailboats are docked in the Boat Haven commercial basin, surrounded by fishing boats, some large yachts, a Coast Guard cutter, and commercial vessels of all sizes also moored there. Imagine the tanker, freighter and military ship traffic passing by or through Port Townsend Bay. Now draw a red circle around every vessel that will be banned from using copper antifouling, for the purpose of cleaning up the Sound. The only ones are the small boats. The word "scapegoat" has been raised by more than one MTU member.

The Third Problem: Where's the incentive for boatyards to reduce copper? If this bill becomes law, you could eventually find yourself walking through a boatyard where copper paint would still be legally applied to all vessels except for recreational boats under 65 feet, for whom fines of ten thousand dollars a day would be levied if they tried. Try to find the language in this proposed legislation that addresses boatyard compliance in reduction of copper. There is none. Now ask yourself: How will the ban be enforced? Where are the incentives to reduce copper except on boats under 65 feet? Will this proposed new law accomplish the goal of cleaning up copper from Puget Sound waters? What about large commercial shipyards? Is it truly a reduction in the use of copper antifouling paint, or merely a ban on its use by a targeted and powerless user group? Cleaning Puget Sound means addressing all sources.

The Fourth Problem: Wooden boat hulls are more vulnerable than other hull materials to fouling damage. Anecdotal evidence suggests there are no unbiased scientific studies (only industry-sponsored reviews) to substantiate the effectiveness of alternate antifouling coatings. Available information suggests that these new products are not as effective as copper-based paints, and using them requires more frequent haulouts or bottom scrubs. Although the Northwest Marine Trades Association claims in a news article to have “evidence that will be a cost-saver for boaters,” the Moorage Tenants Union has not seen such evidence, in spite of requests for it from several sources. It stands to reason that if a viable non-toxic alternative existed, most people would use it. So with no adequately effective or economical antifouling technology existing to replace copper, how will wooden boats avoid damage by destructive boring organisms?

Puget Sound is a haven for wooden boats and wooden boat building. Seattle has the Center for Wooden Boats. Port Townsend is renowned for its Wooden Boat Festival, and the Northwest School of Wooden Boat Building in Port Hadlock plays a significant role in preserving and developing our thriving maritime heritage and economy. The Northwest Maritime Center is a national as well as regional magnet for traditional boats and education. Valuing this heritage requires thoughtful compromise.

The Port: Recently, the Port of Port Townsend Commissioners indicated their unanimous support for SB 5436, but the recording of the meeting where this endorsement was given reveals only a superficial discussion being held. It has become questionable as to whether the Port has fully examined this issue. According to news articles, the Port of Port Townsend would be the first port in the State of Washington to “ban” copper paint. The State of Washington is the first in the nation to consider legislation to do this. Therefore, the Port of Port Townsend would literally be at the tip of the spear. Yet the segment of the public about to be regulated, which regularly attends Port meetings, has never been consulted.

If the Commissioners and Port Directors are serious about cleaning up Puget Sound, they will join us in supporting an across-the-board copper paint ban on ALL recreational boats, not just the small ones. If they are serious about granting exemptions, then they will join us in advocating not for large yachts but for wooden boats of all sizes, whose

hulls are at greater risk of being damaged by marine borers. Wooden boats are part of our unique maritime heritage, and protecting them via a temporary exemption until effective alternatives to copper paint are developed and economically accessible should be a priority.

If the Port Commissioners are serious about leading the way, then they will join us in urging the Legislature to propose legislation to reduce the amount of copper on the vast hull surface areas of commercial vessels. This would require support for development of alternative antifouling technologies to avoid problems like excessive fouling, increased fuel use, and introduction of invasive species. Finally, if the Commissioners are serious about reducing copper in our waters, they will join us in urging the Legislature to work with its federal partners to reduce the copper footprint of military vessels, too. To ban the use of copper paint for one user group but not have a plan or even intent for reducing it in other types of vessels and marine activities will not only *not* solve the problem, it could mislead the public into thinking otherwise. When you understand the magnitude of the problem, SB 5436 is little more than greenwashed window-dressing. If we're all in this together, then we should act like it.

The *State House and Senate* will have similar bills this term. Although we have written to Senator Hargrove and Representatives Van de Wege and Tharinger, as of this date no replies have been received. The Moorage Tenants Union will update its members when we receive responses to our queries.

The Questions: The MTU has asked the major players for scientific reports and data that support the exclusion of recreational vessels over 65 feet and all commercial and military vessels from a ban on copper paint, but has received no responses from the Senate, the House, or the State Department of Ecology. We have asked for scientific data showing that copper leaching from small recreational boat hulls is a bigger problem than commercial vessels and ship and boatyard runoff, but have received no response. We asked about plans for phase-out in other types of vessels and have received no response. We asked who originated the bill and got a variety of responses.

The Other Players: The *Puget Soundkeeper Alliance* told us that the legislation “*originated through the recreational boating industry, primarily Northwest Marine Trade Association (NMTA) as well as the Dept of Ecology.*” They also said that the NMTA “*wanted to focus on what was achievable and to get something passed this year.*” Soundkeeper told us they were not involved in the introduction of the legislation, but would support extending this to commercial and transport vessels as well.

However, the Puget Soundkeeper Alliance has filed 150 lawsuits in five years. According to a recent news story, they have “*...a reputation for being one of the most litigious [environmental groups] in the nation.*” The *Northwest Marine Trades Association (NMTA)* and others say that they fear more lawsuits by the Puget Soundkeeper Alliance over Clean Water Act noncompliance, hence the proposed legislation. The NMTA also shared with us a letter they sent to the State Senate, in which they requested a 5-year phase-out period instead of the accelerated one being proposed.

“Please keep in mind,” their letter said, *“that boat yards and marinas only contribute 0.3% of all the copper discharged into our waters; brake pads, which were similarly phased out recently, contribute 40%. Therefore, a longer initial phase out period will have a negligible effect on the environment.”* NMTA also told the MTU in an email that... *“Northwest Yacht Brokers Association (NYBA) is letting us take the lead on this legislation.”* When we called NYBA, they directed us to speak to NMTA.

We have also written to the **Washington Department of Ecology** with our questions, but have received no reply yet. DOE’s 2007 study used by the State Senate to support SB 5436 measured copper in two marinas in Puget Sound. There is no scientific data in this study specific to the impacts of boats under 65 feet relative to larger ones, or to commercial vessels. We have asked for clarification. In an email, the Puget Soundkeeper Alliance said, *“The original intent of the legislation was to help boatyards by phasing out the paint that is making it difficult for them to stay in compliance with allowable copper levels under the permitting structure.”* The question it raises is this: How will targeting only recreational boats under 65 feet achieve that goal?

More Questions:

1. According to information from International Paint Ltd, EPA will complete a review of copper in antifoulings by 2015. Other states are working on phase-outs too, but acknowledge it will take time. Why does the Washington Legislature insist on such a rapid phase-out without the benefit of this data that could identify the most significant sources of copper contribution?
2. According to reviews, (see Appendix) current products on the market which decrease the amount of copper in antifouling paints do not show decreases in heavy metals being discharged. With 150 Clean Water Act lawsuits in 5 years by the Puget Soundkeeper Alliance resulting in more than \$1.4 million in settlements, why did PSA give the Northwest Marine Trades Association \$83,000 to fund 4 projects, none of which was used to address the need to develop viable alternatives to copper antifouling paint? Why does NMTA give PSA free booth space at the Seattle Boat Show?
3. The amount of money appropriated by the Legislature to Washington Ports for local toxics cleanup funding is \$38 million. The Navy spends \$3 billion every year to battle corrosion on its ships. An estimate for the amount of antifouling paint needed by the Navy is 6,750 gallons per ship. From 2007-2009, the State of Washington collected \$70.9 million in boating-related revenues from 31 different sources. Of that, \$41.6 million went into the State general fund. If the consensus is that government policy will be the prime mover in green paint technology, then why is there little to no funding being directed at developing safer antifouling alternatives?
4. Why are NMTA and NYBA represented and/or advised by an attorney whose main focus is large yachts over the size being proposed for the ban? In his brief profile on the web, (see Appendix) the word “superyacht” or yachts over 80 feet are mentioned 39 times.

5. If there are 168,374 recreational boats registered in counties bordering Puget Sound and if an “average” boat uses 1 to 3 gallons of bottom paint, then a generous estimate of the number of gallons of bottom paint on all recreational boats here (including boats on trailers) would be between 200,000 and 500,000 gallons. The number of times that Puget Sound Pilots board all oil tankers, cargo vessels and cruise ships that transit the Strait of Juan de Fuca and Puget Sound each year is 8,000. The number of tankers and container ships visiting Seattle and Tacoma is about 2,300 per year, with an average size of 57,520 tons each. The average number of gallons of antifouling used per ship is estimated at 2,290. Therefore, a conservative estimate for copper antifouling paint on tanker and container ship bottoms transiting the Sound would be at *least* 5,267,000 gallons. This is more than ten times the gallons used by recreational boats, and the estimate does not count tugs, barges, fishing vessels, commercial passenger, or any military vessels that either transit or are berthed in Puget Sound. Therefore, is it entirely truthful for news releases to say that levels of copper will be measurably reduced? Is it really a “ban” on copper paint?

6. Why have we not seen evidence that other marine pollution sources are being targeted for reductions in copper? For example, of bilgewater on commercial fishing and other non-recreational boats under 79 feet, EPA said this in a recent Report to Congress: *“Both total arsenic and dissolved copper concentrations in bilgewater were consistently above the most conservative screening benchmarks and total arsenic concentrations were nearly 1,000 times the safe human health standard.”* The report also said this: *“Dissolved copper was the analyte detected in vessel discharges at concentrations that consistently posed the greatest potential risk for local impacts and for contributing to exceedances of water quality standards in larger water bodies.”* Why is our Legislature not also proactively addressing these significant sources of contamination?

7. According to federal Bureau of Transportation statistics, the Port of Seattle broke its all-time cargo volume record in 2010. Business is improving. What are the projections for wetted surface area in tanker and container ship hulls for 2020, and what plans are being made to minimize the additional toxic contamination loads that more ships will bring?

8. Finally, EPA also issued a report in 2003 establishing leachate standards for copper antifouling paint on government (primarily military) vessels. The report can be summed up as follows:

Number of Department of Defense (DoD) Armed Forces vessels with copper antifouling that contribute to hull coating leachate worldwide:	3,104
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Number of vessels for which it was determined “feasible” to reduce the amount of copper in antifouling:	0
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Is this an acceptable answer for the future?

Conclusion: The “Low Hanging Fruit Analogy” means you pick the easiest, least challenging course of action first for a quick success. The Moorage Tenants Union recognizes that recreational boaters do not have as much standing as commercial mariners, and that commercial interests will likely challenge a ban on copper paint due to economic feasibility and other reasons mentioned earlier. We are also aware that the players involved in SB 5436, primarily the NMTA and Puget Soundkeeper Alliance, want to get something passed this year. However, it would be a mistake to call this a measurably significant reduction in copper without addressing the other sources. If the State of Washington and the Port Commissioners are serious about cleaning up the contamination in Puget Sound, they will not stop with recreational boats. They will work with all partners to persevere in doing the right thing.

In the meantime, the Moorage Tenants Union hopes that the “Golden Rule Analogy” will also be applied, which means all recreational boats, not just the small ones, will be included in legislation, with a temporary exemption for wooden boats until a reasonable and accessible alternative to the current antifouling technology is developed.

Without addressing the issues we’ve raised, it will be hard to call this bill a good faith effort to reduce copper in Puget Sound waters. Focusing on “*passing a bill that’s achievable this year*” raises questions about why the rush, unless the answer is litigation avoidance. Is piecemeal legislation for the sake of avoiding a lawsuit the best solution for the long-term health of Puget Sound? Wouldn’t supporting alternative technology development *before* banning the existing one be smarter and more equitable? It’s worth repeating: if we’re all in this together, then we should act like it.

APPENDIX of References and Sources:

Federal Clean Boating Act of 2008 Definition of a recreational vessel:

The term `recreational vessel' means any vessel that is--

- (i) manufactured or used primarily for pleasure; or
- (ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) EXCLUSION- The term `recreational vessel' does not include a vessel that is subject to Coast Guard inspection and that--

- (i) is engaged in commercial use; or
- (ii) carries paying passengers.'

Vessels subject to Coast Guard inspection:

<http://law.justia.com/us/codes/title46/46usc3301.html>

Definitions of vessel types, including "seagoing motor vessel": <http://cfr.vlex.com/vid/2-10-25-definitions-19846996>

Facts on recreational boats:

<http://www.discoverboating.com/resources/article.aspx?id=122>

and http://www.psparchives.com/puget_sound/psfacts.htm

Legislative positions on antifouling paints by country:

http://iyp.yachtpaint.com/Images/30_21761.pdf

Roundup on what other countries are doing:

http://www.csc.noaa.gov/cz/CZ05_Proceedings/pdf%20files/Savarese.pdf This brings up the serious issue of invasive species being brought in by ship, and the worldwide concern over it plus the extra greenhouse gases that would be produced if more fuel was used to push a fouled hull.

Washington Department of Ecology's 2007 study:

<http://www.ecy.wa.gov/biblio/0703037.htm>

Bureau of Transportation shipping statistics:

http://www.bts.gov/publications/americas_container_ports/2009/pdf/entire.pdf

Story on Puget Soundkeeper Alliance's frequent use of lawsuits:

http://www.seattlepi.com/local/394707_soundsuits05.html

and

<http://pugetsoundkeeper.org/programs/enforcement/citizen-lawsuits>

Effect on one small business: <http://threesheetsnw.com/blog/archives/8032>

Unexplained resignation of head of Puget Soundkeeper Alliance:

<http://olyopen.wordpress.com/2010/07/11/head-of-puget-soundkeepers-alliance-resigns/>

and

<http://threesheetsnw.com/blog/archives/10666>

Citation for “reputation for being one of the most litigious in nation:” Northwest Yachting magazine, February 2011.

Projects funded from legal actions by Puget Soundkeeper Alliance, including the 4 for Northwest Marine Trades Association:

<http://pugetsoundkeeper.org/programs/enforcement/2009-projects-funded-by-puget-soundkeeper-alliance>

WA Department of Ecology tells boatyard not to send in its required report, then fails to step in when boatyard is sued by Puget Soundkeeper Alliance for noncompliance:

<http://threesheetsnw.com/blog/archives/8032>

Attorney advising/representing NMTA and NYBA:

<http://www.carneylaw.com/people/attorneys/getProfile.asp?attorneyID=27>

Puget Sound Pilots number of boardings: Peninsula Daily News, July 7, 2010

<http://www.peninsuladailynews.com/article/20100711/news/307119984/david-g-sellers-on-the-waterfront-puget-sound-pilots-steer-big>

Ship dimensions: <http://www.globalsecurity.org/military/systems/ship/container-types.htm>

Antifouling estimates: Young, David R, et al; Marine Inputs of Polychlorinated Biphenyls and Copper from Vessel Antifouling Paints. Southern California Coastal Water Research Project, May 1974. *(This was the most recent research we could find)*
ftp://www.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/034_MarineInputs_PCBandCU.pdf

A thorough Sea Grant Report for the Port of Los Angeles on nontoxic antifouling strategies: http://www.portoflosangeles.org/pdf/Seagrant_Nontoxic_AntifoulingII.pdf

Practical Sailor magazine on environmentally friendly antifouling paint test:

<http://insidepracticalsailor.com/environmentally-friendly-antifouling-test/>

What’s happening elsewhere?

Maryland:

http://textonly.mde.state.md.us/programs/Permits/WaterManagementPermits/WaterDischargePermitApplications/Documents/Marina%20GP/10_MA_ResponseToComments.pdf

San Diego:

http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/watershed/docs/swu/shelter_island/port_sd08-13-07.pdf

Legal review newsletter by law firm, on “Increased Environmental Regulations on Vessels” (see page 5)

http://www.ssd.com/files/Publication/1ff0f8b0-96d7-41fc-8132-8ea502405927/Presentation/PublicationAttachment/a8995b85-85ad-496d-b100-935c39be88a2/Squire_Sanders_Update_Multimedia_-_Winter_2010.pdf

EPA "Discharge Assessment Report: Hull Coating Leachate" summary on government vessels:

http://water.epa.gov/lawsregs/lawsguidance/cwa/vessel/unds/upload/2006_08_07_oceans_regulatory_unds_hullcoating_HCL_DAR6_draft_summ-ref.pdf

EPA's "Report to Congress: Study of Discharges Incidental to Normal Operation of Commercial Fishing Vessels and Other Non-Recreational Vessels Less than 79 Feet" is at: <http://cfpub.epa.gov/npdes/vessels/reportcongress.cfm>

Another viewpoint: opposite take on copper by a paint company:

<http://www.chemet.com/file.asp?F=Q+%26++A+copper+Oct+1+2007.pdf&N=Q+%26++A+copper+Oct+1+2007.pdf&C=articles>