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April 1, 2025

Washington State Board of Pilotage Commissioners
Attn: Chair: Sheri Tonn
2901 Third Avenue, Suite 500
Seattle, WA 98121

Chair Tonn:

Introduction. This letter supersedes my previous March 7, 2025, letter to the Washington State Board of Pilotage Commissioners (Board) regarding whether Washington State law requires oil tankers on Haro/Boundary transits to employ a Washington State-licensed pilot while underway in Washington State pilotage waters. Since that date, I have been made aware of an important fact in the scenarios involving most of the oil tankers transiting the Haro/Boundary area. Specifically, I was previously under the impression that most of these oil tankers are ultimately bound to or coming from a port or place[1] in Washington State. I now know this is not the case. Based on my experience as a Coast Guard Judge Advocate (JAG) and counsel for the American Pilots' Association (APA), this fact changes my analysis and conclusion.

Short Answer. Under Washington State pilotage laws, as read in context with both international law of the sea and the federal statute that authorizes States to regulate pilotage (which I believe is relevant), large oil tankers on Haro/Boundary transits that are bound to or coming from a port or place in Washington State waters, must take a Washington State-licensed pilot when underway in State pilotage waters. Notwithstanding a multi-year practice of permitting Canadian pilots to have the conduct of some oil tankers in Washington State waters (a practice no doubt established in good faith by all parties), Washington State pilotage law does not exempt large oil tankers on Haro/Boundary transits that are bound to or coming from a port or place in Washington State waters from State compulsory pilotage when underway in State pilotage waters. The Washington State Attorney General adopted a similar conclusion that noted a nexus between compulsory pilotage in Washington State and a vessel transiting between ports in the State and another country's port.

Analysis. The legal analysis for this question on the application of Washington State compulsory pilotage law involves two steps. First, I am of the view that it is necessary to determine which vessels are properly subject to compulsory pilotage law under both international law and the broad federal law that authorizes States to

[1] Under both domestic and international maritime law, "port or place" is defined generally as any port or place to which a vessel is bound to anchor or moor. *See e.g.*, 33 C.F.R. § 160.310

regulate pilotage. After this analysis, we can then determine how Washington State's pilotage statute applies to the scenario involving oil tankers in the Haro / Boundary area.

1. Vessels subject to State compulsory pilotage. Based on my experience as a Coast Guard JAG and APA counsel, I believe the foundation of compulsory pilotage is port state authority, specifically valid conditions on foreign vessel port entry/departure.[2] The U.S. Supreme Court has weighed in on the establishment, for foreign vessels, of conditions on entry to and departure from U.S. ports. In Patterson v. The Bark Eudora, 190 U.S. 169 (1903), the Court, after emphasizing its prior opinion in The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812), (a foreign vessel's entry into/departure from a U.S. port is based on consent), explained that the consent for a foreign vessel to enter or depart a U.S. port "may be withdrawn, and if this…consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose."

Support can also be found in international treaties and customary international law for the principle that countries have the sovereign right to establish reasonable conditions related to access to their internal waters, harbors, and ports by all foreign vessels. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[3] "contains **no restriction** on the right of [a country] to establish port entry requirements…."[4] (emphasis added). Article 25 of UNCLOS states clearly, "In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, [a country]…has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters is subject."[5]

Among the many appropriate and widely accepted conditions on port entry/departure is complying with compulsory pilotage requirements.[6] The United States, like most countries around the world, conditions a foreign vessel's entry into and departure from its ports upon compliance with compulsory pilotage laws.[7] In a federal law that finds its origins in the First Congress of the United States, the Lighthouse Act of 1789,[8] pilotage and the laws governing the requirement to use pilots to enter or depart U.S. ports are principally[9] governed by applicable State laws, not federal statutes.[10] It is clear, based on the fact that the U.S. has had a "State pilot system" since its founding, that international law is not concerned with whether conditions on port entry/departure (such as pilotage, at least) are imposed by the national government or, through a delegation of authority, by one of its local political subdivisions, but defers to the internal domestic laws of a country.

The U.S. domestic law that delegates to the States the authority to regulate pilotage emphasizes this point about compulsory pilotage being based on port entry/departure authority. Section 8501 of Title 46 of the U.S. Code (State regulation of pilots) states, "Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States." Section 8501 contains the enabling authority for State pilotage regulation. Section 4 of the Lighthouse Act,

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[2] A vessel transiting through a nation's Territorial Seas (for the U.S. the Territorial Seas are 12 miles from the baseline) without calling at a port or place has the right of innocent passage. See UNCLOS Art. 17, 18, and 19. Coastal States may not hamper a vessel's innocent passage (see UNCLOS Art. 24), but under UNCLOS Art. 21 may adopt some measures related to navigation, traffic, resources, etc. It is important to note, however, that under UNCLOS Article 21.2., none of these Coastal State measures can apply to the "design, construction, equipment, or **manning**" of a vessel. (emphasis added). Compulsory pilotage is viewed as a measure impacting "manning."

[3] While the United States is not a party to UNCLOS, in 1994 the United States signed the "Part XI Agreement," which incorporates almost all of the provisions of UNCLOS. In addition, the United States has long considered the navigation-related principles contained in UNCLOS to reflect customary international law that is binding on all countries. *See* President Ronald Reagan, Statement on United States Ocean Policy, Mar. 10, 1983, 22 INTERNATIONAL LEGAL MATERIALS 464 (1983), reprinted in 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 619 (1983).

[4] Bernard H. Oxman, *The Territorial Temptation: A siren Song at Sea*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 830, 844 (2006) (footnote referring to 1982 UNCLOS arts. 25(2) and 211(3), omitted).

[5] 1982 UNCLOS, art. 25(2).

[6] William D. Baumgartner & John T. Oliver, *Conditions on Entry of Foreign-Flag Vessels into US Ports to Promote Maritime Security*, INTERNATIONAL LAW AND MILITARY OPERATIONS, 84 INT'L L. STUD. SER. 33, at 36 (Michael D. Carsten ed., 2008). *See also*, Glen Plant, *International Legal Aspects of Vessel Traffic Services*, 14 MARINE POLICY 71, 73 (1990). ("Compulsory pilotage requirements are among the accepted conditions of port entry to be imposed by a country.")

[7] 46 U.S Code §§ 8501-8503. *See also*, Glen Plant, *International Legal Aspects of Vessel Traffic Services*, 14 MARINE POLICY 71, 73 (1990). ("Compulsory pilotage requirements are among the accepted conditions of port entry to be imposed by a country.")

[8] Act of Aug. 7, 1789, ch. 9, 1 Stat 53, 54 (1789).

[9] The limited exceptions to State regulation of pilotage are pilotage for U.S. flag vessels sailing in the coastwise trade (e.g., sailing from a U.S. port or place to a U.S. port or place) and pilotage on the Great Lakes. 46 U.S.C. Chapters 85 and 93.

[10] "Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated **only** in conformity with the laws of the State." 46 U.S. § 8501(a). (emphasis added).

previously codified at 46 U.S.C. § 211, is now section 8501(a). The language of the provision was changed slightly in the recodification. The original 1789 text, "[u]ntil further legislative provision is made by Congress, all pilots in the bays, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States" became, "Except as otherwise provided in this subtitle,[11] pilots in the bays, rivers, harbors, and ports of the United States shall be regulated *only* in conformity with the laws of the States."[12] (emphasis added)

The House Report on the 1983 recodification bill explained that the new chapter "clearly spells out the preeminence of the State's role in regulating pilots for vessels operating on the bays, rivers, harbors, and ports of the United States" and also notes the importance of State pilotage laws being based on a vessel "entering or leaving a port in that State."[13] Relevant text from this Report includes:

> Section 8501 established the general proposition that the States regulate pilots on the bays, rivers, harbors, and ports of the United States, unless otherwise specifically provided by law.
>
> ….
>
> Subsection (a) states this general proposition and uses the word "only" for emphasis on this point. Further, except as specifically provided in law, the **Committee intends that this chapter not be construed to annul or affect any regulation established by the laws of a State requiring a vessel <u>entering or leaving a port in that State</u> to employ a pilot licensed or authorized by the laws of that State**.[14] (emphasis added)

As established above, a compulsory pilotage requirement for foreign vessels (and U.S. flagged vessel sailing on register and engaged in foreign trade) entering or departing a port or place in a U.S. State is an appropriate condition on port entry/departure under both U.S. and international law and are governed by the pilotage laws of the applicable State.

2. <u>Washington State pilotage laws</u>. Under the above analysis, foreign flag oil tankers transiting the Haro/Boundary that are bound to or coming from a port or place in Washington State waters are subject to Washington State compulsory pilotage when in State pilotage waters. Oil tankers on Haro/Boundary transits that are NOT bound to or coming from a port or place in Washington State waters should not be presumed to be lawfully subject to Washington State compulsory pilotage.

Under the Revised Code of Washington (RCW), Title 88, Chapter 88.16, Section 88.16.070, "Every vessel not exempt under this section that operates in the waters of the Puget Sound pilotage district…is subject to compulsory pilotage under this chapter." I am of the view that this section of applicability of Washington State pilotage law, like all State compulsory pilotage laws in the U.S., must be read in the context of both the international and federal law discussed above. Specifically, Washington State compulsory pilotage is appropriately applicable to foreign vessels (and U.S. flagged vessels engaged in foreign trade) entering or departing a port or place in Washington State waters.

Section 88.16.070 does exempt several categories of vessels from the State's compulsory pilotage requirement. First, U.S. flagged vessels operating exclusively on its coastwise, fisheries, or recreational endorsement, as well as U.S. and Canadian flagged vessels "engaged exclusively in the coasting trade on the west coast of the continental United States (including Alaska) and/or British Columbia" are exempt from Washington State compulsory pilotage.[15] Second, upon a written petition to the Board, certain small passenger vessels and yachts

[11] The word "subtitle" was substituted for "part" in a 1984 package of technical amendments, Pub. L.No. 98-557, § 29(e), Oct. 30, 1984, 98 Stat 2874 (1984).

[12] 46 USC §8501(a) (2008) (emphasis added).
[13] H.R. REP. NO. 98-338 at 183-4 (1983).
[14] H.R. REP. NO. 98-338 at 183.
[15] RCW 88.16.070(1)

may be granted an exemption from Washington compulsory pilotage provided the exemption is not "detrimental to the public interest in regard to safe operation preventing loss of human lives, loss of property, and protecting the marine environment of the state of Washington."[16] Finally, under RCW 88.16.070(3):

"…any vessel inbound to or outbound from Canadian ports is exempt from the provisions of this section, if said vessel actually employs a pilot licensed by the Pacific pilotage authority (the pilot licensing authority for the western district of Canada), and if it is communicating with the vessel traffic system and has appropriate navigational charts, and if said vessel uses only those waters east of the international boundary line which are west of a line which begins at the southwestern edge of Point Roberts then to Alden Point (Patos Island), then to Skipjack Island light, then to Turn Point (Stuart Island), then to Kellet Bluff (Henry Island), then to Lime Kiln (San Juan Island) then to the intersection of one hundred twenty-three degrees seven minutes west longitude and forty-eight degrees twenty-five minutes north latitude then to the international boundary."

In isolation, the final statutory exemption found in RCW 88.16.070(3) may seem to exempt oil tankers on Haro/Boundary transits that are bound to or coming from a port or place in Washington State waters while in Washington State pilotage waters from the requirement to employ a Washington State-licensed pilot. RCW 88.16.070 does not, however, sit in isolation but rather must be read in the full context of the complete Washington State pilotage statutory scheme, and I believe also of international law and the federal statute delegating pilotage oversight authority to the States. Specifically, for the questions currently before the Board, Section 88.16.070 must be read in conjunction with RCW 88.16.180, 46 U.S.C. § 8501, and UNCLOS.

Section 88.16.180, which is titled, "Oil tankers—State licensed pilot required," states that "Notwithstanding the provisions of RCW 88.16.070, any registered oil tanker [≥ forty thousand deadweight tons],[17] shall be required…To take a Washington state licensed pilot while navigating Puget Sound and adjacent waters." As with other sections of the Washington State pilotage laws (and, I believe, all State pilotage laws), RCW 88.16.180 must be read in light of the guiding international and federal legal regimes that compulsory pilotage is appropriate for foreign vessels (and U.S. flagged vessels engaged in international trade) entering or departing a port or place in Washington State waters. So, any registered oil tanker ≥ forty thousand gross tons or greater that is transiting the Haro/Boundary Water area and bound to or from a port or place in Washington State waters must take a pilot licensed by the State.

As noted at the outset, despite Washington State pilotage statutes requiring larger oil tankers underway in State pilotage waters along the Haro/Boundary area that are bound to/coming from a port or place in Washington State waters, a practice has existed for some time that may have permitted these oil tankers to employ Canadian pilots in these waters. It appears that the Canadian government has taken the view that Article I of the Oregon Treaty of 1846, which provides "That the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties," permits U.S. pilots and Canadian pilots to pilot ships in each other's waters. A 2015 article in the magazine "The Canadian Pilot" (attached) makes this point. Relevant excerpts from this article include:

On the West Coast, there has never been a specific treaty or agreement between the two countries as to how pilotage should be managed in cases where ships transit from one jurisdiction to the other. Instead, the practices in place are based on the principle of 'the right of free passage.'

The 'right of free passage' was a necessary feature of the 1846 treaty, given that the international boundary was established in such a way that, in some cases, travelling from one Canadian destination to another required transit through American waters, and vice versa. Given the treaty's explicit recognition of the right

[16] RCW 88.16.070(2)

[17] RCW 88.16.90(*c) essentially changes the applicability thresh hold from 5,000 gross tons to 40,000. ("A tanker assigned a deadweight of less than forty thousand deadweight tons at the time of construction or reconstruction as reported in Lloyd's Register of Ships is not subject to the provisions of RCW 88.16.70 and 88.16.180.."*

of free passage, no other formal agreement has ever been needed to provide the basis for bilateral arrangements to ensure the unimpeded flow of marine traffic. Instead, the Pacific Pilotage Authority, on behalf of Canada, has agreements with its American counterparts, creating a pragmatic approach to pilotage for vessels that transit between the waters of the two countries.

While the Canadian opinion about the Oregon Treaty's impact on pilotage operations along the U.S-Canadian border is no doubt reasonable under Canadian law and policies and was most certainly made in good faith, the State of Washington does not share the view that the Oregon Treaty relates directly to pilotage. In fact, the attached 1962 Washington State Attorney General Opinion (AGO) draws a different conclusion and provides the following findings: (1) "Under chapter 88.16 RCW pilots of Canadian citizenship (who may not be licensed as pilots in this state) may not engage in the piloting of vessels between British Columbia and Puget Sound ports through those portions of the Haro Straits lying within the boundaries of the state of Washington." (emphasis added); (2) "The State of Washington or any agency thereof may not enter into an agreement with officials of the Canadian government providing for the distribution of responsibility for pilotage in such waters between American and Canadian pilots."; and (3) "We find no treaty, compact or agreement presently in effect entered into by the governments of the United States and Canada regulating pilotage, except as it relates to the Great Lakes following opening of the St. Lawrence Seaway."

So, according to the 1962 Washington State AGO, a Canadian pilot may not pilot a ship that is "transiting between British Columbia and Puget Sound ports" (that is, bound to or coming from a port of place in Washington State waters) through those portions of the Haro Straits lying within the boundaries of the state of Washington State. This work must be done by a Washington State-licensed pilot.

3. Cooperative Vessel Traffic Management System for the Juan de Fuca Region. As a final note, the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTM), which was provided to the Board, does not play a meaningful role in the analysis of the applicability of State compulsory pilotage for oil tankers on Haro/Boundary transits. The CVTM does not mention or impact pilots or pilotage in any way. If the CVTM had intended to address pilotage, it would have stated so. Further, if the CVTM – an agreement entered into by the federal government through the U.S. Coast Guard – did address pilotage, it could only address pilotage for US flag coastwise vessels (e.g., federal pilotage not State pilotage), which would make no sense in this international agreement. As discussed in detail above, pilotage of foreign flag vessel is governed by State pilotage law and if the U.S. Coast Guard had tried to address State pilotage matters under the CVTM this would have been counter to 46 USC § 8501.

Conclusion. To comply with Washington State's compulsory pilotage laws large oil tankers underway in State pilotage waters along the Haro/Boundary area that are bound to or coming from a port or place in Washington State waters are subject to Washinton State compulsory pilotage laws and are required to employ a Washington State-licensed pilot. Washington State pilotage law, interpreted by the State Attorney General, does not exempt these oil tankers from requirements under Washington State compulsory pilotage laws.

I am available if you have any questions or wish to discuss further.

Sincerely,

Clayton L. Diamond

Clayton L. Diamond

Attachments:

- Article in the "The Canadian Pilot"
- 1962 Washington State Attorney General Opinion