



AMERICAN PILOTS' ASSOCIATION

INCORPORATED
499 SOUTH CAPITOL STREET, S.W., SUITE 409
WASHINGTON, DC 20003
PHONE: 202-484-0700
www.americanpilots.org

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OPERATIONS DIRECTOR

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

Sent via Executive Director, Jaimie Bever (Jaimie.Bever@wsdot.wa.gov)

Chair Tonn:

Introduction. This letter is in response to questions from the Washington State Board of Pilotage Commissioners (Board) regarding whether Washington State law requires oil tankers on Haro/Boundary transits to and from British Columbia ports to employ a Washington State-licensed pilot while underway in Washington State pilotage waters.

Short Answer. Under strict reading of the Washington State pilotage statutes oil tankers on Haro/Boundary transits to and from British Columbia ports must employ a Washington State-licensed pilot when underway in State pilotage waters. Notwithstanding the presence of 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, as currently written, does not exempt these vessels from State compulsory pilotage. The Washington State Attorney General adopted the same conclusion.

Analysis. 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." (emphasis added). 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.¹ Second, upon a written petition to the Board, certain small passenger vessels and yachts may be granted an exemption from Washington compulsory pilotage provided the exemption is not "detrimental to the public interest in regard to

¹ RCW 88.16.070(1)

safe operation preventing loss of human lives, loss of property, and protecting the marine environment of the state of Washington.”² 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 to and from British Columbia ports 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 context of the complete Washington State pilotage statutory scheme. Specifically, for the questions currently before the Board, Section 88.16.070 must be read in conjunction with both RCW 88.16.170 and 88.16.180.

RCW 88.16.170, which pronounces the State’s broad policy regarding oil tankers and pilotage, notes that “the transportation of crude oil and refined petroleum products by tankers on... Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources,” and “Puget Sound and adjacent waters are a relatively confined saltwater environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.” Section 88.16.170 concludes by stating that it is “the intent and purpose of RCW 88.16.180 and 88.16.190³ to decrease the likelihood of oil spills...on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ licensed pilots...while navigating on certain areas of Puget Sound and adjacent waters.” Section 88.16.180, which is titled, “Oil tankers—State licensed pilot required,” goes on to state clearly that “Notwithstanding the provisions of RCW 88.16.070, any registered oil tanker of five thousand gross tons or greater, shall be required...To take a Washington state licensed pilot while navigating Puget Sound and adjacent waters.”

As discussed, RCW 88.16.070(3) generally exempts vessels inbound to or outbound from British Columbia ports along the Haro/Boundary area from Washington State compulsory pilotage requirements if the vessel employs a Canadian-licensed pilot and meets certain other conditions. This general exemption, however, is overridden for oil tankers by the plain language of Section 88.16.180, which provides, “**notwithstanding**” the exemptions under 88.16.070, “**any registered oil tanker of five thousand gross tons or greater, shall be required...To take a Washington state licensed pilot** while navigating Puget Sound and adjacent waters.” (emphasis added). The most reasonable reading of the interplay between RCW 88.16.070(3) and RCW 88.16.180 is that while Washington State may be comfortable exempting some categories of large commercial vessels transiting Washington State pilotage waters along the Haro/Boundary area from State compulsory pilotage requirements, the State – through clear statutory language – has chosen not to make such an exemption from compulsory pilotage for oil tankers.

As noted at the outset, despite this clear legislative text requiring larger oil tankers underway in State pilotage waters along the Haro/Boundary area and bound to / coming from British Columbia ports to employ Washington State-licensed pilots, a practice has existed for some time that has permitted these oil tankers to employ Canadian pilots in these waters. It appears that the Canadian government has taken the view that Article

² RCW 88.16.070(2)

³ This Section restricts oil tankers from entering certain State waters without the express permission of the U.S. Coast Guard.

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 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 reasonable under Canadian law and policies and was most certainly made in good faith, the State of Washington does not appear to 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.”; (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.”

Conclusion. To comply with Washington State’s compulsory pilotage laws as currently drafted oil tankers underway in Washington State pilotage waters along the Haro/Boundary area and bound to or coming from British Columbia ports are required to employ a Washington State-licensed pilot. Despite a good faith arrangement that for some years has purported to permit Canadian pilots to have the conduct of some oil tankers in State waters, Washington State pilotage law, as currently written and interpreted by the State Attorney General, does not at present 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