

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second Street S.W.
Washington, DC 20593-0001
Staff Symbol: CG-55
Phone: (202)-372-3865
Stephen.DaPonte@uscg.mil

APR 20 2011

Mr. Charles G. Kelly
Attorney for Lakes Pilots Association, Inc.
627 Fort Street
Port Huron, MI 48060

Dear Mr. Kelly:

This letter is in response to your May 12, 2010, appeal of the Decision and Order (hereinafter "D&O") of the Director, Great Lakes Pilotage (hereinafter "Director"). For the reasons discussed below, your appeal is denied, and the Director's D&O is affirmed.

FACTS & PROCEDURAL HISTORY

By a D&O dated March 16, 2010, the Director determined that the dispatch of Western Great Lakes' Pilots' Association (hereinafter District 3) pilots is the exclusive responsibility of District 3 and ordered the Lakes' Pilots' Association (hereinafter District 2) to immediately cease and desist from dispatching District 3 pilots. The Director further ordered that District 2 continue to provide reliable and timely pilot boat service to District 3 pilots at Port Huron, and that District 2 provide District 3 with a detailed financial justification of the pilot boat fee charged to District 3.

On May 12, 2010, District 2 appealed the Director's D&O pursuant to the provisions set forth in 46 C.F.R. § 1.03-50.

BASES OF APPEAL

After a thorough review of District 2's appeal, the assignments of error are summarized as follows¹:

- I. *The Director erroneously categorized the dispatch services District 2 provided to District 3 as "vessel notifications," and abused his discretion by disregarding over forty years of practice and rules.*

¹ In pages 13-15 of the Appeal, District 2 argues that its dispatch charges are reasonable and explains why. The D&O never determined that the dispatch fees were unreasonable. As this matter was not addressed in the D&O, it is not properly a part of this appeal and will not be addressed here.

- II. *The Director's order requiring District 2 to continue to provide pilot boat services to District 3 is inconsistent with his dispatch order.*
- III. *The Director violated the Administrative Procedure Act when he approved the amendment of District 3's working rules without notice and comment.*

FINDINGS

- I. *The Director erroneously categorized the dispatch services District 2 provided to District 3 as "vessel notifications," and abused his discretion by disregarding over forty years of practice and rules.*

Both the D&O and the District 2 appeal contain a substantial amount of discussion regarding the nature of the service that District 2 had been providing to District 3 pilots. District 2's appeal devotes over five pages to explaining the complexities of how Great Lakes pilotage service has been historically provided. However, this case is not about how Great Lakes pilotage has been provided in the past but, rather, how it will be provided moving forward from March 16, 2010 - the date of the Director's D&O.

A. Notifications, dispatches, and pilot boat service.

At the outset, it is necessary to define three separate and distinct terms in order to resolve this appeal: 1) vessel notification; 2) pilot dispatch; and 3) pilot boat service.²

- 1) Vessel notification is a communication *from* a vessel (master or agent), the pilot currently onboard the vessel, or the pilot dispatch office for the district in which the vessel is currently located, *to* the pilot dispatch office for the district that the vessel will be entering. The purpose of this communication is to provide the next pilot district's dispatch office with notice of pilotage service requirements for an incoming vessel so that pilot dispatch can be arranged efficiently.³
- 2) Pilot dispatch is an order *from* a pilot dispatch office, *to* a member of that pilot dispatch office's pilotage pool, directing that pilot to report to a specific location at a specific time to provide pilotage service to a vessel for which a vessel notification has been received.
- 3) Pilot boat service is a transportation service provided by a pilot boat, to a pilot registered with *either* the District 1, District 2, or District 3 pilotage pools, or the Canadian Great Lakes Pilotage Association, for the purpose of transporting that pilot

² I note that none of these terms are defined in regulation, and it is therefore necessary that I define them here in order to be able to properly analyze the issues on appeal. These are only working definitions derived out of necessity for the limited purpose of this appeal. I am advising the Director to consider proposing a rulemaking that will update the existing regulations to include providing additional definitions for terms such as the ones discussed here.

³ Pilots are required to provide pilotage service to *vessels* that provide notice in accordance with 46 C.F.R. §§ 401.320(d)(1) and 401.710(c). Therefore, the actual requirement to provide vessel notification is on the vessel itself. However, pilots and pilot dispatch offices are *encouraged* to provide vessel notifications to the next pilot dispatch office in the interest of efficient pilotage service.

from a pilot boat station (or other agreed upon location) to a pilot change point, or from a pilot change point to the pilot boat station (or other agreed upon location).

Using the definitions provided above, it is difficult to discern from the record whether the services District 2 historically provided to District 3 were “vessel notifications” or “pilot dispatches.” In his D&O at 5 (section I. c.), the Director determined that “...the only service actually provided to District 3 is vessel notifications, which consist of making a single telephone call...” On appeal, District 2 describes the service it provided as “much more – advising District 3 pilots where to go, when and how – whether over land, by car, train and airplane – and arranging for drivers, taxis, hotel reservations and train and airplane reservations.”⁴

I find that, based on the record before me and using the terms as defined above, District 2 has historically provided District 3 with something more than “a single telephone call” vessel notification, but probably less than an actual pilot dispatch. Thankfully, resolution of this appeal does not require an exact classification of what District 2 historically provided District 3. Assuming, *arguendo*, that District 2 has historically dispatched District 3 pilots at Port Huron and charged a fee for such service, District 3 received that service (whatever its scope) and paid the fee. The record shows that District 3 has now complained that the fees charged were excessive for the service being provided and notified industry that commencing with the 2010 season all vessels requesting pilotage service would be required to provide a notice of arrival directly to District 3.⁵ Whatever the nature of the disputed service (whether dispatch, notification, or something in between), District 3 has paid the fees for the services it received, and has now assumed those duties for vessels transiting from District 2 into District 3.

B. The Director is not bound by historic practice when exercising judgment to ensure continued efficient pilotage service.

The issue then becomes whether District 3 is *required* to use what I will call “the services formerly provided by District 2.” I am aware of no such requirement. District 2 relies on “the forty plus year reality of the dispatch services provided and the true nature and extent of those services”⁶ to attempt to lock the Director into the pilotage pool status quo. However, the role of the Director is not the maintenance of the pilotage pool status quo, but rather the maintenance of pilotage pools “...to provide such arrangements and facilities as may be necessary or desirable for the efficient dispatching of vessels and rendering of pilotage services required under the provisions of...” the Great Lakes Pilotage Act of 1960.⁷ In maintaining the pilotage pools, the Director may, among other things, “... establish such rules and regulations for the operation of a pool or pools as he may deem necessary.”⁸

⁴ Appeal at 4.

⁵ D&O at 1.

⁶ Appeal at 3.

⁷ Section 4(e) of Pub. Law 86-555. While originally vested in the Secretary of Commerce, this authority passed to the Secretary of Transportation and currently resides with the Secretary of Homeland Security. The Secretary of Homeland Security has delegated this authority to the Commandant of the Coast Guard in DHS Delegation No. 0170.1. The Commandant has delegated these functions to the Director, Great Lakes Pilotage through the regulations contained in 46 C.F.R. Parts 401, 402, 403, and 404.

⁸ *Id.*

Federal regulations prescribed in 1964 require that voluntary associations agree to "...submit working rules for approval" and "...be subject to such other provisions as may be prescribed by the Director governing the operation of and the costs which may be charged in connection with the pools."⁹ Neither historic practice nor the letters of previous Directors tangentially addressing the current issue¹⁰ prohibit the current Director from exercising sound judgment in determining appropriate provisions and approving amendments to working rules to ensure the continuation of adequate and efficient pilotage service. The record shows¹¹ that District 3 complained to the Director regarding the increased fees that District 2 was charging for services. The record also shows that these fees threatened the economic viability of the District 3 pilots' association. It is true that reasonable minds may differ as to the burden of the charges and as to the best solution to the situation. However, it is nonetheless well within the Director's discretion to exercise his judgment in approving District 3's amendments to its working rules in order to alleviate some of the strain on District 3's finances and to ensure the continuation of adequate and efficient pilotage service.¹²

In short, District 2's arguments that historic practice has somehow established a perpetual right to receive compensation from District 3 for services that District 3 no longer wants, needs, or feels it can afford, are unpersuasive. The Director, in reviewing the issues in this case, determined that there was no legal requirement for District 3 to continue to receive dispatch or notification services from District 2. After reviewing the record, I agree that there exists no legal requirement for District 3 to continue to receive dispatch services from District 2. Indeed, it is unconscionable that District 3 is somehow legally bound to accept unwanted services from District 2; is legally required to pay ever increasing fees for those unwanted services; and that the Director, Great Lakes Pilotage, is somehow powerless due to historic practice to approve amendments requested by District 3 to *their* working rules.

II. The Director's order requiring District 2 to continue to provide pilot boat services to District 3 is inconsistent with his dispatch order.

On this point, District 2 looks to the language of the Memorandum of Arrangements (MOA) between the United States and Canada, which the Director also refers to in his D&O, and contends that there is an inherent inconsistency in the D&O for the following reasons:

⁹ 46 C.F.R. § 401.320(d)(2) and (5).

¹⁰ District 2 refers to two Coast Guard letters in the record, one dated August 17, 1967, and the other dated March 20, 1969, in support of their argument that District 3 is obligated to use the District 2 dispatch service. I will not spend much time discussing these letters for two reasons: first, the D&O at pages 2 and 3 adequately explains why these letters are inapplicable to the present situation and, secondly, even if those letters had been 100% on point, they would not bind the current Director from making rules or promulgating regulations deemed necessary to ensure continued adequate and efficient pilotage service.

¹¹ Email from Mr. Don Willecke of the District 3 pilots' association to Mr. Paul Wassermen, Director, Great Lakes Pilotage dated July 10, 2009.

¹² 46 C.F.R. § 401.320 requires that a pilotage pool "establishes that it possesses the ability, experience, *financial resources*, and other qualifications necessary to enable it to operate and *maintain an efficient and effective pilotage service*." (Emphasis added). It is essential that associations maintain the financial viability to continue in operation. The Director is correct to be concerned with this given his authority and responsibility under 46 C.F.R. § 401.720(b): "When pilotage service is not provided by the association authorized under 46 U.S.C. § 9304 because of physical or *economic inability to do so*... the Director may order any U.S. registered pilot to provide pilotage service." (Emphasis added).

As indicated, the Director's dispatch Decision is completely inconsistent with his pilot boat order. As with its dispatching of District 3 pilots, Lakes Pilots [District 2] has for over forty years been providing pilot boat services in the waters involved to District 3. If however providing dispatch services in the same waters is a "violation of pilotage regulations" because of the MOA, so too must Lakes Pilots' providing pilot boat services since the MOA grants both dispatch and pilot boat authority to Western in District 3. This inconsistency exemplifies the error in the Director's dispatch decision.¹³

However, careful examination of the MOA and the D&O shows that District 2 is mistaken and, in fact, there is no inconsistency.

A. The MOA.

Page 4 of the MOA is entitled "Dispatching and Pilot Boats." It is important to note here how the MOA describes the purpose of this section:

The Secretary and the Minister will establish and maintain, or cause to be established and maintained, facilities for the dispatching of pilots and for related services, including pilot boats. **To avoid the cost of redundancy, services for shared participation shall be provided on a cooperative exchange basis as follows...** (emphasis added).

The MOA then goes on to describe the responsibilities for providing services in this way:

In District 2:

- 1) Dispatching - upbound is handled by Canada; downbound is handled by the U.S.'s District 2 pilotage pool.
- 2) Pilot Boat – at Port Colborne and Port Weller it is handled by Canada; at Detroit and Port Huron it is handled by the U.S.'s District 2 pilotage pool.

In District 3:

- 1) Dispatching – handled by the U.S.'s District 3 pilotage pool.
- 2) Pilot Boat – handled by the U.S.'s District 3 pilotage pool.

Upon reviewing the above information in the MOA and noting that 46 C.F.R § 401.710 requires pilotage associations to comply with the MOA, the Director properly determined that "it is a violation of the pilotage regulations for District 2 to provide pilot dispatch services to up bound vessels from Port Huron."¹⁴

¹³ Appeal at 11-12.

¹⁴ D&O at 3. In the Appeal at 3-7, District 2 describes how the Great Lakes Pilotage System is actually coordinated and carried out, and explains that this differs in several ways from what is described in the MOA - "...a coordination inconsistent with the literal reading of the MOA's designation of authority." *Id.* at 6. "If the Director deems Lakes Pilots [District 2] providing these dispatch services as contrary to the MOA and a violation of the pilotage

B. There is no inconsistency.

District 2 misreads the MOA. Note that when discussing *dispatching* in District 2, the MOA is not concerned with where the vessel is located, but rather where it is *headed* (i.e. upbound or downbound). Contrast this with the responsibility for pilot boat service in District 2. Here, as to pilot boat service, the MOA is *not* concerned with where the vessel is headed, but rather, where the vessel is *located* (i.e. a vessel located at Port Huron shall have pilot boat service provided by District 2, irrespective of whether the vessel is heading upbound or downbound).

This distinction makes perfect sense as a practical matter. With telephones and radios, pilot dispatch can be conducted from anywhere. The important factor in deciding which association's dispatch office is responsible for dispatching a pilot is where the vessel is headed. Pilot boat service is different. The important factor in determining which association is responsible for pilot boat service is location since, if it were heading, pilot associations would need to operate *costly and redundant* pilot boat stations located in close proximity to each other. Such a scenario would run contrary to the MOA's purpose of avoiding the "*cost of redundancy*."

When properly understood, the MOA is clear and the Director's D&O is consistent with it. Under both the MOA and the Director's D&O, District 2 is responsible for pilot dispatch for downbound vessels in District 2 and for pilot boat service for all vessels at Port Huron. Also under both the MOA and the Director's D&O, District 3 is responsible for pilot dispatch for vessels upbound from Port Huron, since the pilot change point at Port Huron is located at approximately the District 2 / District 3 line. District 3 is also responsible for pilot boat service at all pilot change points located within District 3. In summary, District 2 misreads the MOA, and there is no inconsistency between the D&O and the MOA. In fact, the MOA supports the Director's determination that it is a violation of the MOA and pilotage regulations for District 2 to dispatch pilots to vessel upbound from Port Huron.

III. *The Director violated the Administrative Procedure Act (APA) when he approved the amendment of District 3's working rules without notice and comment.*

District 2 argues that "[T]he decision to eliminate the forty plus year dispatching policy is a substantive rule subject to notice and comment requirements (as opposed to an interpretive rule, which is exempt from the APA requirements)."¹⁵ District 2 goes on to cite two court cases for

regulations, then the other instances of similar MOA inconsistent coordinated dispatch and pilot boat services between districts and the U.S. and Canada throughout the system as described earlier will also be unlawful." *Id.* at 7. On this last point, District 2 is absolutely correct. Where aspects of the system differ from what is described in the MOA, that is a violation of both the MOA and the pilotage regulations. If District 2 feels aggrieved by a violation of the MOA on the part of one of the other pilotage associations, District 2 should seek to resolve the matter with that association. If the matter cannot be resolved between associations, District 2 is encouraged to bring the matter to the attention of the Director for resolution. The Director will apply the terms of the MOA as written. To the extent that there exists ongoing coordination that differs from the MOA, so long as all the involved associations are satisfied, there is no issue to be resolved. It is best to think of the MOA as a dispute resolution document in the event that a dispute arises between the U.S. or Canada, or between any of the associations of pilots (such as the subject of this appeal).

¹⁵ Appeal at 12.

the proposition that “[S]ubstantive rules are those which grant rights, impose obligations, or effect a change in existing policy.”¹⁶ The argument goes on to conclude that because “...the Director proposes a change that undeniably would take away long established rights from Lakes Pilots [District 2], ‘grant rights’ to District 3 and ‘effect a change in existing policy’.... This is a substantive rule and cannot be imposed without notice and comment rulemaking.”¹⁷

District 2’s argument has 3 fundamental flaws: 1) it misconstrues the actions of the Director as a “rule” subject to the APA; 2) it incorrectly assumes that District 2 has a “right” in the content of District 3’s working rules and that the Director has “granted rights” to District 3; and 3) it incorrectly classifies the actions of the Director as a change in existing (*Coast Guard*) policy.

A. The actions of the Director were not a “rule.”

In a rush to analyze whether the actions of the Director were a substantive rule or an interpretive rule, District 2 skips the fundamental first step in the analysis: were the actions of the Director a rule? That question must be answered *first* and, only if answered in the affirmative, do we reach the next step of analyzing whether the rule is substantive or interpretive.

The APA defines a rule as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or valuations, costs, or accounting, or practices bearing on the foregoing;¹⁸

Not all agency actions are rules under the APA, and “determining whether an agency action is a *rule* is often vexing and has been the subject of much litigation.”¹⁹ The actions of the Director in approving District 3’s proposed amendments were not “an agency statement... designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements” of the Coast Guard. The Director simply received a request from the District 3 pilots’ association for the approval of amendments the District 3 pilots made to *their own* working rules. It is also worth noting that the District 3 pilots’ association (like all of the voluntary associations of Great Lakes pilots) is NOT an agency of the United States under the APA.

While the *action* of the Director in approving District 3’s proposed amendments to their working rules is not a rule, the *requirement* that pilotage associations submit their working rules to the Coast Guard for approval *is a rule*. 46 C.F.R. § 401.320(d)(2) requires that voluntary

¹⁶ *Id.* at 13.

¹⁷ *Id.*

¹⁸ 5 U.S.C. § 551(4).

¹⁹ JEFFREY S.LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 51 (4TH ed. 2006).

associations agree to "...submit working rules for approval of the Commandant." There is no requirement in the Coast Guard's regulations that working rules be published for notice and comment before the Coast Guard may approve them. These regulations establishing the Coast Guard's requirements for submitting working rules for approval were published as a notice of proposed rulemaking on March 19, 1964. A public hearing was held on April 13 and 14, 1964, in Detroit, Michigan. Interested persons submitted data and views, both oral and written, at the public hearing and during the comment period. After consideration of all relevant matter the regulations were adopted, and the process by which pilotage associations submit their working rules to the Coast Guard for approval, without further notice and comment, was properly established.²⁰ If District 2 feels that the Coast Guard's process for the approval of working rules should be amended to require notice and comment, then District 2 is encouraged to submit a petition for rulemaking in accordance with 33 C.F.R. § 1.05-15. Until such time as the current process is amended, notice and comment is not part of the approval process of a pilotage associations' own working rules.

It is worth noting at this point that, whether viewed as an amendment to the working rules to streamline the dispatch process and alleviate a financial burden, or as a necessary amendment to bring the working rules in line with the MOA,²¹ it was proper for District 3 to submit the amendment and for the Director to approve it.

B. District 2 has no "right" stemming from the content of District 3's working rules, and no "rights" have been granted to District 3.

Assuming, *arguendo*, that the act of the Director in approving District 3's requested amendments to their working rules was itself a rule, District 2 has no rights at stake and the Director did not "grant rights" to District 3. District 2 has been providing a service to District 3 and charging a fee for that service for many years. That is not disputed. It is, however, difficult to imagine how that translates into a "right" of District 2 to continue to provide that service and receive a fee for it.

District 2 also contends that by approving the amendments to District 3's working rules, the Director has "granted a right" to District 3 and therefore his action is subject to notice and comment. District 2 fails to realize and/or appreciate that the provision of pilot dispatch by District 3 is not a "right" but rather a *requirement* under both the MOA (as discussed above in section II) and the applicable regulations.

46 C.F.R. § 401.320(a)

Requirements and qualifications for authorization to establish pools.

No voluntary association shall be authorized to establish a pool unless...

The Director determines that a pool is necessary for the efficient *dispatching of vessels and providing of pilotage services in the area concerned.*

²⁰ 29 FED. REG. 10464.

²¹ 46 C.F.R. § 401.320(d)(6) requires pilot associations to operate pursuant to the MOA. As discussed above in section II, District 3's working rules were inconsistent with the MOA.

The provision of pilot dispatch for vessels heading upbound from Port Huron into District 3, which District 2 would like to characterize as a newly bestowed “right” on District 3, is actually a requirement that District 3 has to fulfill under both the MOA and 46 C.F.R. § 401.320(a). The act of the Director in approving District 3’s amendments to their working rules has not granted a right to District 3. In fact, if any “right” of dispatch was granted, it may have been back in 1977 when the current MOA was promulgated, or perhaps in 1991 when Western Great Lakes Pilots Association was designated as the authorized pilotage pool for District 3. It was not in 2009 when the Director approved District 3’s amendments.

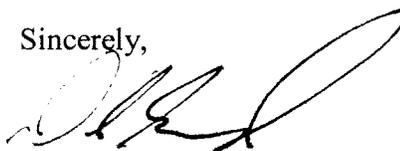
C. The actions of the Director did not effect a change in existing Coast Guard policy.

Assuming again, *arguendo*, that the act of the Director in approving District 3’s amendments to their working rules was itself a rule, this did not effect a change in *Coast Guard* policy. The Coast Guard’s policy is that “voluntary associations of U.S. Registered Pilots authorized to establish pilotage pools agree to submit Working Rules for the approval of the Director.”²² That policy has remained unchanged. What has changed is *District 3’s* policy of utilizing the service that District 2 had been providing. As stated above, District 3 is a voluntary association of pilots and *not* an agency under the APA. Therefore, a decision by District 3 to amend *its own* working rules is not subject to notice and comment.

CONCLUSION

For the reasons discussed above, District 2’s appeal is denied and the Director’s D&O is affirmed. This letter constitutes final agency action on your appeal.

Sincerely,



D. A. GOWARD
Director, Marine Transportation Systems Mgmt.
U.S. Coast Guard

²² 46 C.F.R. §§402.320(a) and 401.320(d)(2).