

June 22, 2011

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**Hand Delivered**

Mr. D.A. Goward  
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Dear Sir:

In a letter dated May 24, 2011, the Chief of the Office of the Marine Transportation System, CG-552, ("OMTS") issued a final determination that the Lakes Pilots Association, Inc. ("LPA") had "overbilled" for certain pilotage services provided during the 2006 and 2007 shipping seasons. The May 24 determination followed on an earlier February 3, 2009 letter (together, the "OMTS Letters" or "Letters"), and stated that it could be appealed in writing to you on or before June 23, 2011. This letter constitutes that timely appeal on behalf of the LPA.

***Introduction***

This matter began with a gross overreach by the Director of the Coast Guard's Office of Great Lakes Pilotage. Misinterpreting Coast Guard regulations after the fact, and ignoring historical and approved practices, the Director not only sought to force the LPA to repay hundreds of thousands of dollars in properly billed charges, but also sought to pressure the LPA into agreement by suggesting the charges were criminal misconduct and possible grounds for decertification of the association.

The LPA appreciates that OMTS's May 24 determination reduces the charges in dispute from the Director's original \$652,032 to \$237,919.50; accepts the LPA's position on several issues; offers a rough compromise on another, and includes no hint that the differences of opinion on these matters constitute some kind of criminal misconduct. While the May 24 determination is an improvement from the Director's initial position, this does not reflect its reasonableness or accuracy but rather confirms the extreme nature of the initial charges against the LPA. The LPA respectfully submits that it would be arbitrary,

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capricious, contrary to prior rulings and practices, and contrary to law to require reimbursement of these monies by the LPA.

The OMTS's adverse rulings fall into three categories, and we discuss each below:

***1) Overcarriage Near Port Colborne***

*Allegation*

OMTS states that LPA improperly billed for overcarriage in the area of the Port Colborne change point. Although the Director estimated overcharges in the Port Colborne area to be \$229,553 for 2006-2007, the OMTS "[took] into account the possible confusion that may have existed regarding the applicable pilot change point during the 2006 and 2007 seasons"<sup>1</sup> and reduced the amount by half.

*General Background*

A Great Lakes pilotage "change point" is a location where one pilot comes aboard a ship and relieves another, who usually then departs the vessel. There are a series of pilot change points on the Great Lakes that are identified in various official documents, including the Code of Federal Regulations.<sup>2</sup>

The change point on the eastern end of Lake Erie is located near Port Colborne, Canada. Port Colborne is located where Lake Erie and the Welland Canal come together. American and Canadian pilots share duties on Lake Erie and Lake Ontario, but only Canadian pilots move ships through the Welland Canal.

*Background to the Dispute*

The May 24 determination refers to "possible confusion" over the location of the pilot change point near Port Colborne in 2006 and 2007. This reference misstates the matter. The understanding and practice of the American and Canadian pilots were clear and accepted in the industry. The applicable Coast Guard regulation in effect at the time listed a plainly erroneous change point, but this offers no basis for the OMTS's present conclusion that the LPA engaged in improper billing.

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<sup>1</sup> Second OMTS letter at 2.

<sup>2</sup> 46 C.F.R. § 401.450.

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For many years until September 29, 2008, and thus at all times material to this appeal involving the 2006 and 2007 shipping seasons, Coast Guard regulations listed “Lock No. 7, Welland Canal” as the local change point.<sup>3</sup> That location was wrong because “Lock No. 7, Welland Canal” is completely in Canada and in Canadian pilotage territory, making a change by an American pilot there impossible.<sup>4</sup>

Despite the error in the Coast Guard regulation, there was no confusion among the American and Canadian pilots about the location of the change point near Port Colborne. The designated change point on eastern Lake Erie was specifically defined at “an arc drawn one mile to the southward of the outer light on the western breakwater at Port Colborne,” as set out in the formal written Memorandum of Arrangements between the U.S. and Canada on Great Lakes pilotage (“Memorandum of Arrangements”).<sup>5</sup> The Memorandum of Arrangements is the principal document governing U.S. and Canadian pilotage, and Coast Guard regulations specifically require each American pilotage association to follow its terms and conditions.<sup>6</sup> As the Memorandum of Arrangements explains, the one mile arc at Port Colborne is not only the change point but also the beginning of the Welland Canal, which is reserved exclusively for Canadian pilots.

Great Lakes navigational charts also include a specific character designating the change point at the one mile arc,<sup>7</sup> and the *Coastal Pilot*, a document prepared pursuant to federal law to supplement navigational charts, includes a similar reference at the one mile

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<sup>3</sup> The error was contained in the Code of Federal Regulations before September 29, 2008 at 46 C.F.R. § 401.450(d).

<sup>4</sup> At one point decades ago Lock 7 was in American pilotage territory. Apparently, the Coast Guard failed to update the regulations when the Welland Canal became exclusively Canadian pilotage territory.

<sup>5</sup> *Memorandum of Arrangements, Great Lakes Pilotage, between the Secretary of Transportation of the United States of America and the Minister of Transport of Canada*, effective July 7, 1970, as amended.

<sup>6</sup> 46 C.F.R. § 401.710(b).

<sup>7</sup> The relevant area of a typical nautical chart for Port Colborne is attached at Attachment A. The entrance to the Welland Canal from Lake Erie is at the top of the attached chart. The symbol for the pilot change point, a diamond, along with the word “Pilots” appears at 1 mile arc on the chart and is highlighted in this attachment in yellow.

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arc.<sup>8</sup> Likewise, Canadian pilotage regulations establish the change point in the same place -- “an arc drawn 1 mile southward of the outer light on the western breakwater at Port Colborne.”<sup>9</sup>

Although the change point was located on Lake Erie at the one mile arc, westbound LPA pilots often boarded vessels at a location within the more protected final portion of the Welland Canal. The Canadian pilot who had directed the vessel through the Canal would depart, and the LPA pilots would then pilot the ship from within the Canal through the change point at the one mile arc and across Lake Erie. Pilot changes occurred without controversy under these arrangements for many years.

Vessel agents and industry officials understood the benefits of changing pilots inside the Welland Canal. A letter from “Doc” Mahoney, then the president of the Great Lakes Shipping Association, an association of vessel agents, explained the rationale for changing pilots inside the Canal rather than at the designated change point as follows:

[Should the LPA always change at the regular change point] that would mean every inbound [westbound] ship would be subject to potential delays and additional expense. Weather circumstances such as fog and wind certainly do not always allow for the Pilot boat to operate on the open lake. Additionally all inbound ships would potentially incur a minimum of say 30 minute transit delay awaiting the pilot to board at anchor along with say a 45 minute delay in getting the Canadian canal pilot back off the ship.

-- Mahoney correspondence to Capt. Bob Muir, agent for  
*Gresco Lte., August 9, 2006*

An email from LPA to the Pilotage Office similarly explained the rationale for changing inside the Canal rather than at the normal change point:

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<sup>8</sup> *United States Coastal Pilot*, 2008 (38<sup>th</sup> edition) at 212.

<sup>9</sup> *Regulations Within the Great Lakes Pilotage Authority Region* at 2.

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We have emphasized to you that the LPA's decision to make pilot changes inside the harbor was solely to avoid ship delays. The protected nature of the harbor is desirable at Port Colborne, which is the worst change point in District 2 because of the prevailing westerly winds.

-- *Capt. Dan Gallagher, president, email to Paul Wasserman, August 30, 2006*

Because boarding inside the Canal, which was for the benefit of the vessels, required a pilot to be on board beyond the designated change point, in 2006 the LPA began charging an overcarriage fee for the portion of the trip from inside the Canal to the change point at the one mile arc. Overcarriage is a specific pilotage charge that is authorized by the Code of Federal Regulations when a pilot "is carried beyond the normal change point or unable to board at the normal change point."<sup>10</sup> LPA's decision to charge overcarriage came after it received a new interpretation letter from the Pilotage Office in January, 2006 that, among other things, clarified when a pilot association could charge overcarriage.<sup>11</sup>

One vessel agent complained about the overcarriage charge -- Capt. Robert F. Muir, an agent for Gresco Shipping. For reasons unclear to LPA, and which remained unexplored by the Pilotage Office and OMTS, Capt. Muir became antagonistic to LPA and lodged many allegations against it. His antagonism was so extreme that at one point he wrote, in "all caps" style, to Mike Broad of the Shipping Federation of Canada, copied to Director Wasserman of the Pilotage Office, that "[LPA] SEEMS TO LIKE PAYING LAWYERS[.] MAY BE WE SHOULD ENCOURAGE THEM TO SPEND MORE[.] AT LEAST THEY WILL HAVE LESS TAKE HOME PAY."<sup>12</sup> Capt. Muir did not explain how requiring LPA to incur excessive legal fees would further an efficient, businesslike and responsible pilotage system.

Captain Muir filed a formal complaint with the Pilotage Office objecting to assessment of an overcarriage charge from the Canal to the change point, and the Pilotage Office opened an investigation into the complaint on July 20, 2006. Shortly thereafter, the

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<sup>10</sup> 46 C.F.R. § 401.428.

<sup>11</sup> *Ruling letter from Paul M. Wasserman, Director, Office of Great Lakes Pilotage, to Capt. Robert F. Muir, Gresco, Lte, and Capt. Dan Gallagher, president, LPA, January 18, 2006.*

<sup>12</sup> Email from Muir, June 26, 2006, 11:48 a.m., Attachment B.

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President of the Great Lakes Shipping Association sent the letter quoted above explaining the rationale for boarding inside the Canal.<sup>13</sup>

The wisdom of boarding within the Canal became apparent later in the summer of 2006. The Great Lakes Pilot Association of Canada thought the American Pilotage Director was considering moving the Port Colborne area change point to Lock 8 in the Welland Canal.<sup>14</sup> In retaliation, the Canadians refused to allow westbound American pilots to board vessels inside the protected Canal and instead required all changes at the designated change point at the one mile arc on Lake Erie. In October 2006 a major storm on Lake Erie caused massive vessel delays that almost surely would have been avoided had the exchanges taken place within the protected confines of the Canal. By one estimate, the delays caused by the

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<sup>13</sup> In its initial unsigned charging document, the Pilotage Office asserted that Capt. Muir's complaints about charges for overcarriage near Port Colborne were "echoed by other members of industry and the Shipping Federation of Canada." The Pilotage Office has never provided LPA with any evidence to show that others besides Capt. Muir complained. LPA believes that in addition to the head of the Great Lakes association of agents, who is quoted above in the text, the shipping industry broadly supported the practice because it reduced ship delays.

In the same document the Pilotage Office also asserted that "at least one industry member informed me in a telephone interview that Captain [Dan] Gallagher told him that the only reason LPA was charging the overcarriage was to use it as a bargaining chip to force industry to continue paying a \$75 surcharge that this office had previously terminated." Again, nothing in the record supports the truth of this hearsay statement, and it is flatly contrary to fact. *See* Declaration of Dan Gallagher ("Gallagher Decl."), attached hereto, at C. Even assuming the Pilotage Office correctly understood this "informant" and that he was proceeding in good faith, it seems plain that he was mistaken as to what he may have understood Capt. Gallagher to be saying. Multiple hearsay is of course excluded as competent evidence for this very reason unless it falls within exceptions for each level of hearsay, and none are apparent here. *See* Fed. R. Evid. 805. In contrast, Capt. Muir's malicious desire to run up LPA's legal fees is evidenced by his own email.

<sup>14</sup> See series of emails between October 25 – 30, 2006 between Pilotage Office and Capt. Gallagher regarding the location of the change point near Port Colborne. Attachment D. In the exchange, Capt. Gallagher told the Director that the LPA was forbidden to board inside the Canal as result of the Director's suggestion that he might move the change point to Lock 8, which angered the Canadians. The Director responded that "[t]hat was just a trial ballon I shot up and ...I don't think I ever intended to change the change point."

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storm cost the shipping industry approximately \$500,000. Predictably, the Great Lakes shipping industry began urging that the pilot exchanges move back to the protected Canal to avoid future weather delays. Shortly after that, all misunderstandings were resolved and the LPA once again began boarding inside the Canal and charging overcarriage.

### *The Coast Guard Decisions*

The Pilotage Office spent the summer of 2006 trying to fully understand the change point situation at Port Colborne. At one point, the Pilotage Office appeared to think that American pilots were boarding at Lock 8 at Welland Canal.<sup>15</sup> At other times, the Director of Great Lakes Pilotage seemed to fully understand that, in his own words, the one mile arc in Lake Erie was the “regular change point.”<sup>16</sup> As late as December 2, 2008, a key Coast Guard official was still referring to the one mile arc as “some arbitrary and never used point in Lake Erie,” apparently unaware that all eastbound ships changed pilots at the arc.<sup>17</sup>

On October 30, 2006, the Pilotage Office emailed the LPA to say the issue of overcarriage “is a matter still under consideration” and “a decision will be rendered shortly.”<sup>18</sup> The Pilotage Office did not, however, render a decision shortly, but instead waited until March 21, 2008, and then ordered the LPA to stop the practice, offering no explanation whatsoever for this action. On May 16, 2008, the Pilotage Office issued the unsigned memo cited above, which contained unsupported and untrue allegations as to LPA’s motives in assessing the charge, neglected to reference any of the information before it as to why the vessels were being boarded inside the Canal, and simply pronounced that the overcarriage charges were not permissible and that LPA owed an estimated \$229,553 in refunds for 2006 and 2007.

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<sup>15</sup> Email exchanges between Wasserman and Capt. Daniel Trottier, director of the Great Lakes Pilotage Authority of Canada, the last on August 23, 2006. Among other things, Trottier responds that the change point is at the “1 mile radius from the Port Colborne piers light...” Attachment E.

<sup>16</sup> Email from Wasserman to Gallagher and Muir, August 21, 2006, Attachment F. Twice in this email Director Wasserman referred to the one mile arc as “the regular change point.” Director Wasserman even told Capt. Muir in this email that the location inside the Canal “is not at the regular change point.”

<sup>17</sup> Email from Coast Guard to LPA counsel, December 2, 2008, 3:02 p.m.

<sup>18</sup> Email from Wasserman to Gallagher, October 30, 2006, 12:59 p.m.

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The decision in the OMTS Letters turned on the location of the change point. The first Letter stated that “there are no discrete ‘change points’ but rather a general geographic area (Port Colborne) in which the pilots understand they will assume or relinquish their pilotage responsibilities.”<sup>19</sup> Therefore, OMTS ruled, no overcarriage could be charged because the trip began and ended within the general geographical region that was the change point.

The second letter reemphasized that “pilot change points are to be understood as geographic areas, and not specific geographic points.”<sup>20</sup>

The OMTS Letters ignore the fact that at the time of the alleged violations, the general geographic area “Port Colborne” was not listed anywhere as the change point. In fact, Port Colborne was not listed as the change point until September 29, 2008.<sup>21</sup> Nor did the Letters in any way address the fact that in 2006 and 2007 every legitimate governmental or other listing of the change point described it as “an arc drawn one mile to the southward of the outer light on the western breakwater at Port Colborne,” a description that is hardly that of a “general geographical area” but rather as precise a line as can be drawn. The documents that listed the one mile arc as the change point are the core documents of Great Lakes pilotage:

- The Memorandum of Arrangements, which is the principal agreement on Great Lakes Pilotage between the governments of the U.S. and Canada;
- Canadian pilotage regulations;
- Certified nautical charts;
- The *United States Coastal Pilot*, which “supplements the navigational information shown on navigational charts.”<sup>22</sup> The volume, produced by the National Ocean Service of the National Oceanic and Atmospheric Administration (NOAA), draws from “field inspections conducted by NOAA,

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<sup>19</sup> First OMTS Letter at 3.

<sup>20</sup> Second OMTS Letter at 2.

<sup>21</sup> The Coast Guard regulations still erroneously described the change point as “Lock No. 7, Welland Canal” throughout 2006 and 2007 and until September 29, 2008.

<sup>22</sup> *Coastal Pilot* at III.

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information published in Notices to Mariners, reports from NOAA Hydrographic vessels and field parties, information from other government agencies, State and local governments, maritime and pilotage associations, port authorities, and mariners.”<sup>23</sup> It is prepared pursuant to 33 U.S.C. 883a and b and 44 U.S.C. 1310.<sup>24</sup>

The OMTS also apparently did not fully appreciate that the one mile arc was not only the pilot change point but also the western border of the Welland Canal, which is reserved entirely for Canadian pilots. The Memorandum of Arrangements precisely defines the Welland Canal as all territory east of the Port Colborne one mile arc to Port Weller. Any territory east of the Port Colborne one mile arc is entirely in Canadian pilotage territory and could not be used as a change point. Therefore, the reasoning of the OMTS Letters that the change point was generally understood to be the entire, undifferentiated, general geographical area of Port Colborne cannot possibly be correct. Virtually all of that area is east of the arc, and no change point could be designated there as it is a territory limited exclusively to Canadian pilots.<sup>25</sup>

In fact, in an email to his Canadian counterpart in August, 2006, Director Wasserman inquired about the possibility of American pilots changing within the Canal at Lock 8. Wasserman was quickly informed that a change point at Lock 8 was not possible because “[t]he Memorandum of Arrangements stipulates that the Welland Canal is solely a Canadian Region and therefore only Canadian pilot could have the conduct of vessel subject to compulsory pilotage...”<sup>26</sup> The same point would apply to any attempt to suggest that the entirety of the Port Colborne area, essentially all in a solely Canadian pilot region, was the change point.

OMTS also cited the phrase “normal change point” in the regulations and offered this explanation:

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> The Canadians allow the American pilots heading west to board the vessel inside the Canal but emphasize that the change point remains “on the one mile radius from Port Colborne piers light.” See email from Trottier, director of the Canadian Great Lakes Pilotage Authority, to Wasserman, August 23, 2006, 9:45 a.m. at Attachment E.

<sup>26</sup> *Id.*

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[T]he dictionary's meaning of the word "normal" is "typical, usual and regular." In this context, "normal change point" is the one that the U.S. and Canadian pilots have habitually used whenever ships transit between Lake Erie and the Welland Canal. Indeed, so long as it was an agreed place where the change of pilots actually took place, any point in the Port Colborne environs would qualify as the "normal change point" for that area.<sup>27</sup>

Again, the OMTS Letters offered no explanation for the contradiction between this new interpretation of a "normal" change point (in exclusively Canadian waters) and the precisely defined location in the Memorandum of Arrangements and other government documents. Because the one mile arc is where most of the pilot changes occurred in 2006 and 2007,<sup>28</sup> it meets the definition of normal both in practice and in formal government documents, and Director Wasserman himself recognized as much in 2006.<sup>29</sup>

OMTS also contends that overcarriage is reserved for situations where "change at the regular point would be dangerous or impractical."<sup>30</sup> But such a requirement does not appear anywhere in Coast Guard regulations or policy interpretations of any kind. In any event, as set out above, when pilot changes were undertaken in the Canal, it was at the request of the vessel to avoid delay or safety issues at the regular change point.

The Letters also cite to language contained in 46 C.F.R. § 401.428 that additional charges "are not applicable if the ship utilizes the services of the pilot beyond normal change point and the ship is charged for these services" and suggests that this policy of preventing double charging for an assignment applies here.<sup>31</sup> But there is no double charging here. The LPA pilots charged overcarriage for the transit from inside the Canal and then began a new assignment with new charges once they reached the change point. The charges were fully consistent with 46 C.F.R. § 401.428. In fact, as the first OMTS Letter says, "[overcarriage may be charged] in addition to the fee the pilot is entitled to charge for that portion of the voyage when actively piloting the vessel."<sup>32</sup>

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<sup>27</sup> First OMTS Letter at 4.

<sup>28</sup> Virtually all of the pilot changes on vessels heading east occurred at the one mile arc.

<sup>29</sup> See note 16, *supra*, and accompanying text.

<sup>30</sup> First OMTS Letter at 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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Recognizing the weakness of the arguments against the overcarriage charges, the May 24 determination reduced the alleged overcharges by 50% in part because of “the possible confusion that may have existed regarding the applicable pilot change point during the 2006 and 2007 seasons.”<sup>33</sup> But, again, the confusion in 2006 and 2007 rested only in the Coast Guard. No Canadian pilot or official, American pilot, or shipping industry official was confused about the location of the change point at the one mile arc. Virtually all interested parties understood that the change point *could not possibly* be the entire geographical region of Port Colborne, an area reserved exclusively for Canadian pilots. Reducing the level of alleged overcharges by half does not serve to make the erroneous allegations as to overcarriage correct.

The plain language of the Coast Guard regulations set out guidance related to overcarriage. A pilot may charge overcarriage when a pilot “is carried beyond the normal change point or unable to board at the normal change point.”<sup>34</sup> Here the pilots’ activities in the Port Colborne area were directly related to the universal desire to limit ship delays, an action supported by the industry as a whole, save for a single agent, because for a relatively low cost it made Great Lakes pilotage more effective and efficient. There is no sound reason to require the pilots to refund a portion of these charges, as they were accepted at the time and were fully consistent with the Coast Guard’s regulations.

## 2) *Allegations of Overcharges West of Southeast Shoal*

### *Allegations*

OMTS states that the LPA improperly billed certain services in the designated waters west of Southeast Shoal, near Toledo, Ohio. The Pilotage Office originally estimated overcharges of \$274,466 in 2006 and 2007. The first OMTS Letter reduced the alleged overcharges to \$56,377 and the second letter reduced them further to \$44,558.

### *General Background*

This allegation involves a portion of the LPA’s pilotage district commonly referred to as “west of Southeast Shoal.” The area is located in designated waters near the Port of Toledo. American and Canadian pilots share the pilotage duties in this region.

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<sup>33</sup> Second OMTS Letter at 2.

<sup>34</sup> 46 C.F.R. § 401.428.

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By way of general background, Great Lakes pilotage rates are set by regulation of the U.S. Coast Guard but are paid by the commercial shipping industry that uses the services of the pilots. The shipping industry is represented by ship agents, who direct the specific movement of the vessels and work directly with pilots.

Pilot associations bill shipping companies directly for pilot services. Each source form – the document prepared by the pilot that outlines the vessel’s movements and sets the applicable charges – is reviewed through an elaborate nine-part review process that includes review by both the shipping industry, which has every incentive to keep rates to the bare minimum, and the Coast Guard, which regulates and oversees the process. This review process includes the following nine steps:

- 1) The pilot completes the vessel movement and contemporaneously completes the source form, outlining the vessel movements and related charges. A copy of a typical source form is included as Attachment G.
- 2) The source form is then forwarded to the LPA’s office, where it is reviewed for accuracy by the Association’s Office Manager. If there is any discrepancy, it is addressed with the pilot then.
- 3) A second LPA official receives and reviews the charges again for accuracy. If there are no issues, the second LPA official inputs the charges into the Coast Guard’s Klein System, which allows the Pilotage Office to review pilot charges on a real time basis. That second official then sends a formal invoice with the source form attached to the vessel agent.
- 4) The vessel agent reviews the invoice. Often the reviewer is the same ship agent who directs the ship, contemporaneously follows each movement of the vessel, and then reviews the invoice to make sure the charges reflect the actual activities of the pilot. If the agent wants to object to any charge by the pilots, he or she has two options: a) an informal call to the pilot association, a common occurrence that nearly always resolves any issues; or b) a formal appeal process to the Great Lakes Pilotage Office under 46 C.F.R. § 401.431.<sup>35</sup> Ship agents are consumers of pilotage services, and a principal element of their responsibilities is to scrutinize the source forms to ensure that they accurately reflect the rules and requirement of the Great Lakes pilotage ratemaking process.

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<sup>35</sup> “Disputed Charges.”

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- 5) The vessel agent then forwards the approved source form to the shipping company that used the pilot's services for final approval and payment. This represents another level of scrutiny by a private sector entity with every incentive to make sure it is not overbilled. Shipping companies that use the Great Lakes pilots' services do not hesitate to inquire when they feel a charge was questionable in any way.
- 6) A copy of each pilot source form is sent to the Pilotage Office for review. At the Coast Guard's request, the source forms are sent from the LPA to the Pilotage Office by Federal Express.<sup>36</sup> Each of the charges in dispute here is set out clearly and transparently in the source forms that have been in the hands of the Coast Guard since 2006 and 2007.
- 7) At the end of each shipping season, auditors for each pilot association review the association's financial information, including financial data taken directly from the source forms.
- 8) Auditors representing the federal government, acting on behalf of the Coast Guard, regularly review the audits by each local pilot association.
- 9) The Pilotage Office staff review the results of all audits as part of their preparation of subsequent ratemakings.

To illustrate the nine part review process, the first source form listed as an alleged overbilling in the spreadsheet attached to the second OMTS Letter involved a movement by the vessel OLYMPIC MIRACLE on April 10, 2006. After his activities were complete, the pilot aboard the vessel filled out a source form that was approved by two officials in the LPA, the ship's agent, and the shipping company, which eventually paid the invoice. A copy of the source form was Federal Expressed to the Pilot Office for review. The financial information from the source form was audited and audited again, and the results of the audit were reviewed by the Coast Guard near the end of 2006 or early 2007. It is difficult to imagine a more open, transparent and scrutinized system.

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<sup>36</sup> The fact that the Pilotage Office directed that all source forms be sent by Federal Express would suggest that the Pilotage Office was reviewing those forms when they arrived.

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*Background to the Dispute*

The primary issue here is when a ship pilot can charge for a new movement. The relevant legal authority is 46 C.F.R. § 401.407. Under the system established by the Coast Guard, a vessel movement is charged based on the chart below:

**Section 401.407 Basic rates and charges on Lake Erie and the navigable waters from Southeast Shoal to Port Huron, MI**

**(b) Area 5 (Designated Waters):**

Any point on or in	Southeast Shoal	Toledo or any point on Lake Erie west of Southeast Shoal	Detroit River	Detroit pilot boat	St. Clair River
Toledo or any port on Lake Erie west of Southeast Shoal.....	\$1835	\$1084	\$2382	\$1835	N/A
Port Huron Change Point.....	3195	3702	2400	1867	\$1327
St. Clair River.....	3195	N/A	2400	2400	1084
Detroit or Windsor or the Detroit River.....	1835	2382	1084	N/A	2400
Detroit Pilot Boat.....	1327	1835	N/A	N/A	2400

The chart describes vessel movements from “any point on or in” this area to another within the area. A charge for pilotage services is calculated by determining the starting point of a vessel movement along the left side of the table and identifying the destination point of the movement among the columns on the table (or vice versa). That point on the table where the column and the row intersect is the charge. LPA’s charging methodology is and always has been based on this table, which was adopted by notice and comment rulemaking decades ago (with periodic updates to the amount of the charges). The actual application of 46 C.F.R. § 401.407 is best explained through a series of examples.

Imagine a hypothetical vessel approaching Toledo southbound from the Port Huron change point. Imagine that the vessel is directed to anchor at the Belle Island anchorage in the Detroit River by the agent. 46 C.F.R. § 401.407 provides for a charge of \$2,400 for that vessel movement, as the chart below shows:

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Any point on or in	Southeast Shoal	Toledo or any point on Lake Erie west of Southeast Shoal	<b>Detroit River</b>	Detroit pilot boat	St. Clair River
Toledo or any port on Lake Erie west of Southeast Shoal.....	\$1835	\$1084	\$2382	\$1835	N/A
<b>Port Huron Change Point.....</b>	3195	3702	<b>2400</b>	1867	\$1327
St. Clair River.....	3195	N/A	2400	2400	1084
Detroit or Windsor or the Detroit River.....	1835	2382	1084	N/A	2400
Detroit Pilot Board.....	1327	1835	N/A	N/A	2400

Imagine that the next day the vessel continues to a position within the Toledo Harbor where it is anchored again at the direction of the agent, perhaps to wait for daylight for unloading. Again, § 401.407 provides for a charge of \$2,382 for that vessel movement, as the chart below shows:

Any point on or in	Southeast Shoal	Toledo or any point on Lake Erie west of Southeast Shoal	Detroit River	Detroit pilot boat	St. Clair River
Toledo or any port on Lake Erie west of Southeast Shoal.....	\$1835	\$1084	\$2382	\$1835	N/A
Port Huron Change Point.....	3195	3702	2400	1867	\$1327
St. Clair River.....	3195	N/A	2400	2400	1084
<b>Detroit or Windsor or the Detroit River.....</b>	1835	<b>2382</b>	1084	N/A	2400
Detroit Pilot Board.....	1327	1835	N/A	N/A	2400

Finally, imagine that the agent directs another movement from one point on the anchorage to the dock. Again, § 401.407 addresses that sort of vessel movement and provides for a charge of \$1,084, as the chart below shows:

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Any point on or in	Southeast Shoal	Toledo or any point on Lake Erie west of Southeast Shoal	Detroit River	Detroit pilot boat	St. Clair River
<b>Toledo or any port on Lake Erie west of Southeast Shoal.....</b>	\$1835	<b>\$1084</b>	\$2382	\$1835	N/A
Port Huron Change Point.....	3195	3702	2400	1867	\$1327
St. Clair River.....	3195	N/A	2400	2400	1084
Detroit or Windsor or the Detroit River.....	1835	2382	1084	N/A	2400
Detroit Pilot Board.....	1327	1835	N/A	N/A	2400

*The Coast Guard Decisions*

The original Pilotage Office decision alleged overcharges of \$277,466 in 2006 and 2007 west of Southeast Shoal. The first OMTS Letter reduced the proposed refund to \$56,377 and the second Letter further reduced it to \$44,558.

The original Pilotage Office decision was based on a flat misunderstanding of the chart at § 401.407. The Pilotage Office apparently believed a journey from one place to another (say, Port Huron to Toledo) represented a single vessel movement (and a single charge) no matter how many times the vessel anchored along the way. The first OMTS Letter corrected that misunderstanding, which was contrary to longstanding practice and the Coast Guard’s billing chart at § 401.407, including the chart’s reference to movements between “any point on or in” the geographical region west of Southeast Shoal. While LPA appreciates this correction, the LPA respectfully submits that there is no sound basis for requiring the remaining \$44,558 in refunds.

The OMTS Letters seek to define the distinction between those vessel movements that had ended (for ratemaking and other purposes) and those movements that were simply temporarily delayed in the middle of an ongoing movement. The first letter states:

To the extent that an agent for a vessel directs or requests pilotage services to take a ship from one port, place or point to another, the Coast Guard has no problem with charging the additional fee [for a new vessel movement] ... [E]ven an assignment to make an intra-harbor or river move at the request or

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direction of the agent for the benefit of the vessel may justify a separate charge.<sup>37</sup>

The letter goes on to state the contention that “the LPA and its pilots sometimes charged an entirely new point-to-point pilotage fee of several thousands in cases of only a brief delay during an existing assignment.”<sup>38</sup> Adding a new and unsupported gloss to the existing regulations, it states:

While it is appropriate to bill the vessel for a separate assignment to take a vessel from two points ...as directed by the agent for the convenience of the vessel, this principle does not extend to the normal interruptions, delays, minor detours, and other routine time-consuming activities that are commonly expected to occur during the multi-hour assignment that the pilot assumed when boarding the vessel and for which he is being appropriately compensated.<sup>39</sup>

The letter contends that those normal interruptions of service are more appropriately charged as delays or detention under 46 C.F.R. § 401.420. Those categories of charges are defined in the regulations:

- Detention occurs after a vessel movement is underway “whenever the passage of a ship is interrupted and the services of the pilot are retained during the period of the interruption...” Detention also can occur “when a U.S. pilot is detained on board a ship after the end of an assignment for the convenience of the ship...” With some caveats, the ship must pay “an additional charge of \$119 for each hour or part of an hour during which each interruption or detention lasts...”<sup>40</sup>
- Delay occurs before a ship departs where the vessel is delayed “for the convenience of the ship for more than one hour ...”, also with some caveats.

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<sup>37</sup> First OMTS Letter at 1-2.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.* at 2.

<sup>40</sup> \$119 is the current hourly charge. The charge was \$102 in 2006.

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LPA followed Coast Guard regulations, including the chart, in billing for vessel movements west of Southeast Shoal. Rates for vessel movements west of Southeast Shoal are set pursuant to 46 C.F.R. § 401.407, and shown in the chart set out above. Notably the chart allows charges for movements from “any point on or in” the general area west of Southeast Shoal.<sup>41</sup> As such, the regulations contemplate both longer movements and very short movements (e.g., from one part of Toledo harbor to another) within the area.

In ordinary understanding and in practice, a vessel movement ends when a ship stops. In the parlance of pilotage, a vessel movement ends when the pilot ceases to provide basic pilotage services. This has the administrative advantage of being a highly defined point because it is the moment in Great Lakes pilotage at which a pilot can no longer count his time aboard the ship as a “bridge hour.” This point – when the pilot ceases to provide basic pilotage service – is an essential and well-defined element of pilotage regulation.

When a LPA-piloted ship stops, the stop is for the convenience of the vessel. *LPA pilots do not stop ships for any reason except for the convenience of the vessel.* A vessel goes to an anchorage, stops and anchors because it cannot simply idle in the middle of a harbor. And when it departs that anchorage eventually for the harbor, it is moving at the direction of the agent for the convenience of the vessel from “any point on or in” the harbor to the dock, the standard set out clearly in 46 C.F.R. § 401.407.

For example, the first alleged violation listed on the spreadsheet supporting the May 24 determination (attached to the second OMTS Letter) involves the OLYMPIC MIRACLE on April 10, 2006. The vessel left Port Huron at a time specifically ordered by the ship agent. The vessel arrived near Detroit before linesmen at the dock were available. As such, the vessel proceeded to the anchorage, stopped, and anchored, ending the vessel movement. There the engine of the vessel likely was put on standby – the equivalent of an automobile driver turning off his car but leaving the keys in the ignition so he was ready to start up on short notice. The decision to proceed to the anchorage was for the convenience of the vessel – the vessel had to stop and anchor because no linesmen were available. The pilot was in regular communication and coordination throughout with the ship’s crew. The separate trip to the anchorage could have been avoided had the agent ordered the linesmen to the dock earlier. Or the agent could have delayed the original departure from Port Huron so the ship’s arrival would have coincided with the arrival of the linesmen, but he did not. The timing of the arrival is dictated not by the pilot but primarily by the agent. As a result, the LPA stopped at the anchorage and then properly charged for a separate movement from the anchorage to the dock when the linesmen became available.

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<sup>41</sup> Emphasis supplied.

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This example involving the OLYMPIC MIRACLE is consistent with numerous specific alleged overcharges on the spreadsheet. The vessel movements ended on these voyages for a variety of reasons – generally awaiting a berth, linesmen, or tugs – but the circumstances are generally the same. In most cases, the agent probably intentionally ordered the pilot to arrive early to ensure that a dock full of linesmen and stevedores were not left waiting for a delayed ship. The charges for these movements are in full accordance with the “any point on or in” language of 46 C.F.R. § 401.407. These charges are fully consistent with the position in the first OMTS Letter that “[t]o the extent that an agent for a vessel directs or requests pilotage services to take a ship from one port, place or point to another, the Coast Guard has no problem with charging the additional fee [for a new vessel movement].”<sup>42</sup> In fact, the OLYMPIC MIRACLE and other movements like it are so consistent with the standard laid out by the OMTS Letters that there is no apparent basis for their denial.

In addition, in each case where a vessel had ended its voyage as did the OLYMPIC MIRACLE described above, the pilot was entitled to charge detention when “detained on board a ship after the end of an assignment for the convenience of the ship.”<sup>43</sup> Again, it was for the convenience of the ship that the OLYMPIC MIRACLE pilot remained onboard the ship at the anchorage and was therefore available and ready to move the vessel to the dock when the linesmen became available. There are numerous cases in the spreadsheet attached to the second OMTS Letter where detention charges that meet that description were inappropriately denied even though the vessel movement had ended.

The LPA identifies below the cases contained in the spreadsheet where, as described above, the vessel was anchored for the benefit of the ship and both the new movement and the directly associated detention are indisputably allowable charges:

<b>Date</b>	<b>Invoice #</b>	<b>Vessel</b>	<b>Amount</b>	<b>Reason</b>
4/10/06	92968	Olympic Miracle	\$1,037	Stopped waiting for linesmen

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<sup>42</sup> First OMTS Letter at 1.

<sup>43</sup> 46 C.F.R. § 401.420.

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4/13/06	93007	Finex	\$715	Stopped waiting for linesmen
6/21/06	93292	Federal Maas	\$1,263	Stopped waiting for tugs plus detention
6/26/06	93302	Davikin	\$1,263	Stopped waiting for linesmen plus detention
8/9/06	93617	Federal Asahi	\$1,364	Stopped waiting for berth plus detention
9/5/06	93711	Federal Mackinac	\$1,161	Stopped waiting for fuel berth plus detention
11/7/06	93907	Federal Katsura	\$1,263	Stopped awaiting berth plus detention
11/16/06	93974	Pilica	\$1,002	Stopped waiting for lines at berth plus detention
11/5/07	94982	Warta	\$879	Stopped waiting for tugs
11/30/07	95086	Julietta	\$172	Detention after stopping at anchorage
12/04/07	95117	Julietta	\$172	Detention after anchoring ship

A similar but slightly different category of charges involves draw bridge closings. OMTS makes a special point of singling out these cases where the vessel stopped “because of a bridge opening...”<sup>44</sup> This refers to railroad draw bridges that sometimes are lowered and impede the path of vessels heading toward the Toledo Harbor. Again, a separate charge for a new vessel movement was assessed in those cases where the vessel was forced to stop and wait for a bridge to open. In each case the pilot stopped providing basic pilotage service. An LPA pilot does not stop a vessel *except for* the convenience of the vessel, and a pilot works in full coordination with the ship’s crew and agent in directing the vessel. These cases (below), and the detention charges associated with them, are also permissible charges:

<sup>44</sup> First OMTS Letter at 2.

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<b>Date</b>	<b>Invoice #</b>	<b>Vessel</b>	<b>Amount</b>	<b>Reason</b>
5/22/06	93200	Federal Miramichi	\$1,263	Stop plus detention
5/31/06	93223	Orsula	\$1,263	Stop plus detention
6/7/06	93250	Federal Rideau	\$1,263	Stop plus detention
6/23/06	93318	Federal Maas	\$1,263	Stop plus detention
6/30/06	93335	Federal Welland	\$1,263	Stop plus detention
6/30/06	93336	Federal Welland	\$1,263	Stop plus detention
7/13/06	93434	Ziemia Lodzka	\$1,263	Stop plus detention
7/26/06	93473	Federal Agno	\$1,263	Stop plus detention
8/3/06	93498	Olympic Miracle	\$1,364	Stop plus detention
8/4/06	93486	Pintail	\$1,263	Stop plus detention
8/6/06	93499	Pintail	\$1,263	Stop plus detention
8/29/06	93617	Federal Asahi	\$1,263	Stop plus detention
9/2/06	93590	Inchcape	\$1,263	Stop plus detention
10/6/06	93714	Federal Leda	\$1,263	Stop plus detention
10/20/06	93801	Federal Hunter	\$1,364	Stop plus detention
10/26/06	93837	Federal Sakura	\$1,263	Stop plus detention
11/14/06	93937	Federal Yoshino	\$1,263	Stop plus detention
11/14/06	93936	Federal Rideau	\$1,263	Stop plus detention
11/29/06	93999	Federal Nakagawa	\$1,263	Stop plus detention

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5/22/07	94275	Bright Laker	\$1,456	Stopped
6/15/07	94425	Irma	\$374	Detention
12/4/07	95104	Federal Seto	\$1,581	Stopped plus detention

Finally, OMTS seeks to disallow certain detention expenses, stating that “[d]etention [may be] charged only when [the pilot is] being detained for ‘convenience of the ship’ not due to issue outside the control of the vessel.”<sup>45</sup> OMTS asserts that pilots may not charge for detention “because of a slow tie up, awaiting customs, awaiting yard gate to be opened, or waiting for a launch to disembark where it was clearly neither the fault nor the convenience of the vessels.”<sup>46</sup> Apparently, OMTS has decided that certain circumstances listed on the spreadsheet involve detention that “was clearly neither the fault nor [for] the convenience of the vessel.”

Such a conclusion is completely unsupported by the record. Nothing in the source forms of record supports such a finding and OMTS cites no other evidence. In virtually every case below, the source form simply indicates a delay without indicating whether it is “for the convenience of the vessel” or who is responsible for the delay. Delays in detention can be caused by the ship for many reasons – a ship may be slow lowering its gangplank, an agent may have erred in the timing of ordering Customs agents, the vessel operators may have specific reasons for being in no hurry to complete the voyage or have misplaced documents necessary for inspection, and so forth. It is arbitrary and capricious for the OMTS to determine that these detentions are not for the convenience of the vessel or the fault of the vessel without any evidence. It is particularly arbitrary and capricious where, as here, the charges at issue were fully reviewed and accepted without objection by all interested parties, including the relevant vessel agents and shipping companies, and the source forms were sent to the Coast Guard for review. The following charges from the spreadsheet are thus fully permissible and cannot properly be disallowed:<sup>47</sup>

<sup>45</sup> Comments on spreadsheet attached to second OMTS Letter at last page (spreadsheet is unnumbered).

<sup>46</sup> First OMTS at 2.

<sup>47</sup> In addition to these charges, there were a number of instances where the LPA is alleged to have charged more than the allowable detention in a 24 hour period. In each of those cases, the pilot was acting at the request of and for the convenience of the vessel.

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<b>Date</b>	<b>Invoice #</b>	<b>Vessel</b>	<b>Amount</b>	<b>Reason</b>
6/3/06	93226	Vamand Wave	\$203	Detention
6/13/06	93258	Federal Asahi	\$203	Detention
6/16/06	93270	Stefania	\$203	Detention
7/3/06	93341	Federal Kivalina	\$203	Detention
7/22/06	93418	Seneca	\$203	Detention
7/27/06	93438	Olympic Miracle	\$102	Detention
8/29/06	93617	Federal Asahi	\$203	Detention
8/29/06	93564	Orsula	\$203	Detention
9/15/06	93631	Goviken	\$203	Detention
9/19/06	93673	Federal Agno	\$203	Detention
4/18/07	94150	Lake Superior	\$250	Detention
5/22/07	94278	Federal Yukon	\$250	Detention
6/15/07	94425	Irma	\$374	Detention
6/16/07	94419	Lake Superior	\$250	Detention
10/28/07	94944	Federal Kivalina	\$250	Detention
11/11/07	95008	Marlene Green	\$198	Detention
11/22/07	95097	Orna	\$198	Detention
11/23/07	95053	Gadwall	\$250	Detention
11/24/07	95068	Federal Danube	\$250	Detention

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11/28/07	95073	Federal Danube	\$250	Detention
11/29/07	95079	Daviken	\$250	Detention
12/5/07	95118	Julietta	\$172	Detention
12/5/07	95119	Julietta	\$172	Detention

In sum, vessel movements on the Great Lakes are driven by a complex array of factors, including traffic, timing, weather, berth availability and, perhaps most often, cost to the shipping company. To give just one of many examples, a vessel's agent must balance the cost of sending the pilot to an anchorage (relatively small) with the cost of paying overtime to four linesmen and 25 stevedores (relatively high) at a dock. Therefore, what might appear to be an unnecessary stop on the source form could just as easily be (and in light of the careful contemporaneous review process presumptively is) a carefully calibrated movement at the specific direction of the agent to avoid paying overtime to 29 dockworkers.

OMTS's denial of these charges based on unsupported after the fact speculations is arbitrary and capricious and lacks any rational basis in the record. OMTS has not attempted to determine to what extent the actions of the pilot in each particular instance were dictated and perhaps even specifically directed by the ship's crew, its agent or even the shipping company officials. None of that type of information appears on the source form,<sup>48</sup> an obvious deficiency when trying to reconstruct voyages that occurred up to five years ago. When reviewed contemporaneously by vessel agents and shipping companies, who were involved in the moves and have the opportunity to seek out additional information if they notice any discrepancies, the source forms work to protect the industry from unwarranted charges. But it is a misuse of the forms, and arbitrary and capricious decisionmaking, to rely on them to try to reopen the validity of charges accepted and paid long ago. They simply do not provide an adequate basis for the Pilotage Office or OMTS to determine that these amounts were improperly charged.

LPA has made clear that it does not undertake ship movements for any purpose except the convenience of the vessel and that those movements are made in full and absolute

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<sup>48</sup> The Coast Guard has never required the LPA or any pilots to memorialize specific discussions or directions from the ship agents on the source forms. Virtually all of the coordinating discussions between the pilots and the ship crew are informal, of course, and the pilots may not even be fully aware of the economic factors driving the shipping companies' decisions regarding vessel movements.

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coordination with the vessel's team. That careful coordination and cooperation is why the number of complaints about LPA vessel charges is minuscule even though the pilots are involved in vessel movements 24 hours a day, 7 days a week throughout the shipping season. In fact, LPA is aware of no case where the shipping industry has objected to any of the specific charges above. OMTS has no basis on which to assert that these voyages were other than for the convenience of the vessel – particularly since the vessel agents and owners reviewed these very charges and approved them without objection at the time they occurred.

### **3) *Allegations of Inappropriate Transportation Fees***

#### *Allegation*

OMTS alleged that LPA charged inappropriate transportation fees in 2006 and 2007.

#### *Background to the Dispute*

The number of pilots in the LPA has been dramatically reduced over the past two decades. In 1986 there were 22 pilots in District 2. Today, there are 12. In 1986 there were four tour-de-roles and today there are two. The reduced number of tour-de-roles means less localized traffic and more travel between ships by LPA pilots who are sometimes required to drive long distances across a large district to reposition themselves to pilot ships.

One of the unavoidable consequences of the approximately 50% reduction in the number of pilots in District 2 is ship delays. The LPA does everything within its power to avoid situations where ships must wait for pilots. But with fewer pilots, multiple ship visits, and, of course, occasional traffic surges, delays are inevitable.

The relatively small number of pilots frequently leaves the LPA scrambling to balance its primary two missions – to keep maritime commerce moving while doing so in a safe manner. The LPA, the other pilot associations, the shipping industry, and the Pilotage Office are always looking for ways to work within the Coast Guard regulations and safely facilitate commerce. One such approach is based on the LPA Working Rule G-2. Under G-2, a pilot who has driven himself from one station to another is entitled to six hours of rest before initiating further pilotage services. This rule is designed to ensure that a pilot is alert and rested before beginning another assignment, particularly since in many cases a pilot is driving himself in the middle of a night. However, a pilot who is driven by a driver in a vehicle to a station (rather than driving himself) may proceed without the six-hour rest.

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The “driver” portion of Rule G-2 is a “win-win” situation for Great Lakes pilotage. For the relatively small cost of the driver – between \$40 and \$95 depending on the distance of the drive – a ship avoids a six-hour delay and the pilot obtains his rest during the drive. Because ship delays cost a ship owner thousands if not tens of thousands of dollars, the driver portion of Rule G-2 is a sensible, common-sense way to address the inevitable ebbs and flows of pilotage scheduling.

A pilot may charge for transportation when he has begun traveling to undertake an assignment but the assignment is cancelled. 46 C.F.R. § 401.420(c)(2). In addition, travel charges are permissible in cases related to overcarriage. 46 C.F.R. § 401.428. Finally, 46 C.F.R. § 401.430 provides general authority to the Director of the Office of Great Lakes Pilotage to allow other charges.<sup>49</sup>

The Pilotage Office has taken two actions to permit the assessment of the transportation fees at issue here. First, in 2003, the Pilotage Office ruled that “an association may bill agents for transportation, hotels and subsistence when a pilot is retained for the convenience of the vessel.”<sup>50</sup> Each of the charges at issue here meets all elements of that standard – the drivers’ fees allowed the LPA to provide rested pilots at minimal cost for the convenience of the vessel.

Second, the Director of the Pilotage Office provided direct guidance to the LPA pilots that charging these specific fees was allowable as long as there was no objection from industry.<sup>51</sup> The Director specifically approved the exact charges that are disputed here.<sup>52</sup> The guidance was provided orally but explicitly in response to a direct inquiry about these transportation charges from the LPA’s president.<sup>53</sup> The shipping industry strongly supported the approach, which reduced ship delays. There was no confusion about the Director’s authorization – it was precise and direct.<sup>54</sup>

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<sup>49</sup> 46 C.F.R. § 401.430 prohibits certain charges “without the approval of the Director.” As such, such charges may be permitted with the approval of the Director.

<sup>50</sup> *Letter from Paul Wasserman to Capt. Dan Gallagher, August 13, 2003* (“Wasserman, August 13, 2003 Letter”), *Attachment H*. –

<sup>51</sup> Gallagher Decl. at 4.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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That authorization became acutely necessary in 2006 when vessel traffic surged throughout the Great Lakes, particularly in the areas served by the LPA. Virtually overnight, the number of foreign ships transporting grain into the Port of Toledo increased from approximately 10 – 15 vessels per season to a record-shattering 50-55 in 2006. Because trips into the designated waters of a port like Toledo are long and complex, the 400-plus percent increase in traffic placed enormous pressure on the Great Lakes pilotage system in that area. Facing the prospect of massive ship delays, the LPA sought and received the Director's explicit approval for the practice now at issue here and saved the shipping industry from massive ship delays.<sup>55</sup>

The Director's actions here – an oral approval to a pilot association allowing the charging of transportation expenses so long as the shipping industry did not object – were not atypical; in fact, he was doing the same thing at roughly the same time in another pilotage district. The Director has certain broad authorities to administer the Great Lakes pilotage system, and he frequently uses them. For example, in 2005, he wrote the St. Lawrence Seaway Pilots Association (“SLSPA”), another Great Lakes pilot association, directing that no transportation charges could be assessed for pilot travel for the voluntary night relief program on the St. Lawrence River.<sup>56</sup> His letter specifically ordered the pilot association to “cease billing for all ordinary travel to and from Iroquois lock related to the voluntary night relief program.”<sup>57</sup> Shortly after, he followed up that formal letter with an informal telephone call with the SLSPA authorizing the charging of those travel expense as long as the shipping industry did not object.<sup>58</sup> Attached are the original letter from the Director (dated July 6, 2005) ordering the SLSPA to “cease billing” for travel immediately<sup>59</sup> and a second later (dated April 3, 2006) stating that the very same practice would end as of April 3.<sup>60</sup> *The second letter would not have been necessary without the oral guidance allowing the practice that was given shortly after the first letter was sent.*

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<sup>55</sup> Id.

<sup>56</sup> Attachment I.

<sup>57</sup> Id.

<sup>58</sup> Gallagher Decl. at 6.

<sup>59</sup> Attachment H.

<sup>60</sup> Attachment J.

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Moreover, attached is a Federal Register notice indicating that transportation charges that had been prohibited in the July 6, 2005 letter but then authorized orally for voluntary night relief at Iroquois Lock were “reasonable and necessary” throughout 2005.<sup>61</sup> Attached also is an email from Director Wasserman to a shipping company executive in April, 2006 explaining that “the surcharge industry has been paying ... for travel associated with night relief in District One was added into the pilots’ expense base [in the 2006 rate] ... However, this is an artificial increase in the rate because industry has been paying this all along.”<sup>62</sup>

#### *The Coast Guard’s Decisions*

OMTS ruled that transportation fees cannot be added as an additional charge under Coast Guard regulations, arguing that only transportation fees specifically permitted in the Code of Federal Regulations could be charged. Although OMTS was made fully aware of the LPA’s position that these charges had been explicitly approved by the Director, it did not address that point in either of its Letters.

Charges may be assessed against a vessel owner by a pilot with the approval of the Director of the Office of Great Lakes Pilotage.<sup>63</sup> The assessment of these specific transportation costs was authorized by the Director of the Pilotage Office both through the Wasserman August 13, 2003 Letter<sup>64</sup> and through his explicit guidance to the LPA. Billing for the pilots’ transportation costs was a fair and reasonable approach to address a near crisis situation in a manner that did not enrich pilots and was supported by all interested parties.

The LPA did not enrich itself by this practice. The transportation charge was relatively small, and the LPA merely passed along the driver’s actual cost through the source form. The practice was duly noted on each source form that was sent to the Pilotage Office for review. The Director was already aware that the practice was occurring. Charging these fees was authorized by the Coast Guard and fully transparent in every way. The shipping industry, which pays such charges, was also fully aware of the charges – in fact, paying them for each voyage – and fully supportive of the practice.

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<sup>61</sup> Attachment K.

<sup>62</sup> Attachment L.

<sup>63</sup> 46 C.F.R. § 401.430.

<sup>64</sup> Attachment H.

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Agencies are generally given broad authority to interpret and apply their own regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In this case, the Pilotage Office authorized the charges based on good cause and always with the stipulation that the shipping industry agree to the authorized practice. The LPA believes that this has been a reasonable approach in dealing with the often difficult day-to-day issues that arise in pilotage. The Director knew what the pilots were doing and he also knew that charging transportation costs led to rested pilots, avoided ship delays and cost the shipping industry relatively little.

There is nothing nefarious about this practice. Under any analysis, the practice is a common-sense approach to avoiding ship delays in an era of fewer pilots. It is a practice that contributes to the reliability, efficiency and safety of the Great Lakes pilotage system.

The LPA would not have used the drivers in 2006 and 2007 without the Director's authorization. The benefits of the practice were entirely with the shipping industry. The LPA received no financial benefit as it merely passed along the actual cost of the driver, and the LPA pilots could have driven themselves to these assignments and, upon arrival, taken their Coast Guard-approved rest. Instead, the LPA worked with the Director and developed a solution that prevented delays that would have cost the shipping industry hundreds of thousands of dollars.

Finally, if the LPA's appeal on this practice is denied, many of these transportation charges should be approved for a different reason. Many of these disputed transportation charges are specifically related to overcarriage movements in the area of Port Colborne, and, as OMTS has specifically noted, transportation charges related to overcarriage are permitted under 46 C.F.R. § 401.428. Because OMTS has now allowed 50% of the disputed overcarriage charges near Port Colborne, then it follows that at least 50% of the *transportation charges* related to overcarriage there should also be allowed.

We very much appreciate your consideration of this matter.

Sincerely,



John Longstreth

Attachments

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-----Original Message-----

From: undeliverable@oceancalm.com [mailto:undeliverable@oceancalm.com] On Behalf Of Gresco Ltee  
Sent: Monday, June 26, 2006 11:49 AM  
To: Wasserman, Paul  
Subject: BM-0626.004 Incoming Fax

GRESKO LTEE

Tel:514-842-4051  
FAX:514-845-6055  
US TLX:(23) 149110  
Comtext:A610060  
AGENCY DEPT: AGENCY@GRESKO.NET  
CHARTERING DEPT: CHARTERING@GRESKO.NET

\*\*\*\*\*

TO : paul wasserman  
Our Ref:BM-0626.004 Jun-26-06 11:48 New york time

Incoming Fax  
TO SHIPPING FEDERATION OF CANADA ATT M. BROAD

CC. PAUL WASSERMAN USCG WASHINGTON.

IT APPEARS MR GALLAGHER WANTS ME TO GO TO WAR WITH HIM .(his words not mine ).

THIS IS THE THIRD INVOICE LIKE THIS . IT APPEARS BECAUSE DISTRICT THREE IS DOING THIS IN THE ST MARYS RIVER THEY CAN DO THIS IN DISTRICT TWO.

BECAUSE THEY BOARD THE SHIP AT LOCK 8 IN TH WELLAND AND DO NOT HAVE TO TAKE THE PILOT BOAT THIS IS CONSIDERED OVERCARRIED

IBN FACT I THINK IT IS HELPING THEM IN THE RESPECT THEY DID NOT HAVE TO TAKE THE BOAT OUT TO THE PILOT STATION AND THEY THINK THEY DESERVE OVERCARRIED CHARGES .

TO DATE I ALSO THINK THAT GRESKO IS THE ONLY ONE WHO HAS HAD THESE CHARGES ,

WE HAVE PAID THE PREVIOUS INVOICES TO AVOID ANY PROBLEMS WHILST WE AWAIT A RULING FROM THE USCG IN WASHINGTON. HOWEVER IF THIS IS JUST GOING TOP BE LEFT AND DISTRICT TRWO THINK THEY ARE GETTING AWAY WITH THIS MAYBE WE SHOULD RECOMMEND THIS BE TAKEN UP WITH LAWYERS . WHILST DISTRICT TWO SEEMS TO LIKE PAYING LAWYERS MAY BE WE SHOULD ENCOURAGE THEM TO SPEND MORE AT LEAST THEY WILL HAVE LESS TAKE HOME PAY. }\*

-----Original Message-----

From: undeliverable@oceancalm.com [mailto:undeliverable@oceancalm.com] On Behalf Of Gresco Ltee  
Sent: Monday, June 26, 2006 11:49 AM  
To: Wasserman, Paul  
Subject: BM-0626.004 Incoming Fax

GRESKO LTEE

Tel:514-842-4051  
FAX:514-845-6055  
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CHARTERING DEPT: CHARTERING@GRESKO.NET

\*\*\*\*\*

TO : paul wasserman  
Our Ref:BM-0626.004 Jun-26-06 11:48 New york time

Incoming Fax  
TO SHIPPING FEDERATION OF CANADA ATT M. BROAD

CC. PAUL WASSERMAN USCG WASHINGTON.

IT APPEARS MR GALLAGHER WANTS ME TO GO TO WAR WITH HIM .(his words not mine ) .

THIS IS THE THIRD INVOICE LIKE THIS . IT APPEARS BECAUSE DISTRICT THREE IS DOING THIS IN THE ST MARYS RIVER THEY CAN DO THIS IN DISTRICT TWO.

BECAUSE THEY BOARD THE SHIP AT LOCK 8 IN TH WELLAND AND DO NOT HAVE TO TAKE THE PILOT BOAT THIS IS CONSIDERED OVERCARRIED

IBN FACT I THINK IT IS HELPING THEM IN THE RESPECT THEY DID NOT HAVE TO TAKE THE BOAT OUT TO THE PILOT STATION AND THEY THINK THEY DESERVE OVERCARRIED CHARGES .

TO DATE I ALSO THINK THAT GRESKO IS THE ONLY ONE WHO HAS HAD THESE CHARGES ,

WE HAVE PAID THE PREVIOUS INVOICES TO AVOID ANY PROBLEMS WHILST WE AWAIT A RULING FROM THE USCG IN WASHINGTON. HOWEVER IF THIS IS JUST GOING TOP BE LEFT AND DISTRICT TRWO THINK THEY ARE GETTING AWAY WITH THIS MAYBE WE SHOULD RECOMMEND THIS BE TAKEN UP WITH LAWYERS . WHILST DISTRICT TWO SEEMS TO LIKE PAYING LAWYERS MAY BE WE SHOULD ENCOURAGE THEM TO SPEND MORE AT LEAST THEY WILL HAVE LESS TAKE HOME PAY.



## DECLARATION OF CAPTAIN DAN GALLAGHER

I, Captain Dan Gallagher, hereby declare the following under penalty of perjury:

1. I am the president of the Lakes Pilots Association, Inc. (LPA). I have been the president of LPA since 2003 and was the president at all times during 2006 – 2007. I have been a registered pilot on the Great Lakes since 1997. I have held a number of other leadership positions over the years, including serving as a regional vice president of the American Pilots Association, the national trade association for pilots.

2. In the position of president of the LPA, I work closely with the LPA pilots and the shipping industry on matters related to Great Lakes pilotage.

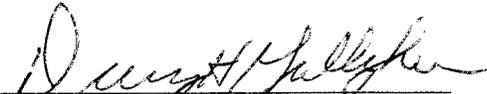
3. An undated and unsigned document from the Coast Guard's Great Lakes Pilotage Office repeats the statement of an unnamed person in the shipping industry who alleges that I said "the only reason LPA was charging the overcarriage [near Port Colborne] was to use it as a bargaining chip to force industry to continue paying a \$75 surcharge that this office [the Pilotage Office] had previously terminated." I do not recall ever having made any such statement, and it is not consistent with my views.

4. I personally discussed the issue of transportation costs with Paul Wasserman, the director of the Great Lakes Pilotage Office, in a telephone conversation. I directly raised the LPA's need to use a driver and bill shipping companies for the transportation costs in order to reduce the number of delays. Mr. Wasserman expressly stated that he did not object to the billing of the transportation costs as long as the shipping industry did not object. This was not a conversation about general matters, but rather an explicit conversation about charging the very transportation fees that the Great Lakes Pilotage Office later tried to challenge.

5. The shipping industry did not object to our charging these transportation fees, and in fact supported the use of the drivers and paid all relevant charges because use of the drivers reduced ship delays for a fraction of the cost of ship delays.

6. During the same conversation, Director Wasserman and I discussed his similar approval of the transportation charges for pilots participating in the voluntary night relief program at Iroquois Lock in Great Lakes pilotage District 1. The circumstances surrounding the Director's approval of transportation costs for the Iroquois Lock pilots were very similar to the circumstances surrounding the Director's approval of the LPA's transportation costs. The Director's oral approval of the travel costs at Iroquois Lock is confirmed by his letters that first prohibited the practice in 2005 and then stopped it again in April, 2006. His verbal authorization of the Iroquois Lock transportation charges occurred between those letters, which is the time that I had my conversations with him.

I declare under penalty of perjury pursuant to 28 U.S.C. 1746, on this 20<sup>th</sup> day of June, 2011, that the foregoing is true and correct.

  
\_\_\_\_\_  
Captain Dan Gallagher



----- Original Message -----

**From:** Wasserman, Paul

**To:** [captaindangallagher@msn.com](mailto:captaindangallagher@msn.com)

**Sent:** Monday, October 30, 2006 5:37 PM

**Subject:** RE: Port Colborne Pilot Exchange

That was just a trial balloon I shot up and, honestly, I didn't even remember writing it until after reading your e-mail. I don't think I ever intended to change the change point - just fishing around for a fix. About the hunting, regrettably it won't be this season. PMW

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**From:** [captaindangallagher@msn.com](mailto:captaindangallagher@msn.com) [mailto:[captaindangallagher@msn.com](mailto:captaindangallagher@msn.com)]

**Sent:** Monday, October 30, 2006 3:15 PM

**To:** Wasserman, Paul

**Subject:** Re: Port Colborne Pilot Exchange

Paul,

The reference of you considering changing the change point to lock #8 came from the Canadians. In your investigation you stated in an email to the Canadians that and I quote ( I can easily designate lock 8 as the change point and hence there would be no overcarriage charge.) The Canadian Pilots took that statement as a position that you were going to change the change point to lock 8, that is when they refused to allow the American Pilots to board inside. We are glad to see they have changed their position and will allow us to board inside. As I have stated all along by boarding inside we are saving Industry a great deal of unnecessary delays.

Sincerely

Dan Gallagher

President

District 2 Pilots

----- Original Message -----

**From:** Wasserman, Paul

**To:** [captaindangallagher@msn.com](mailto:captaindangallagher@msn.com)

**Cc:** [Eulitt, Paul](#) ; [Sakaio, Michael](#) ; [Richardson, Rodney](#) ; [Andrusiak, Daniel](#) ; [Great.Lakes.Pilotage.Authority.Ltd..Attn.Capt..D..Trottier.](#)

**Sent:** Monday, October 30, 2006 12:59 PM

**Subject:** RE: Port Colborne Pilot Exchange

We had been contacted by the GLPA and advised that they are now willing to board US pilots inside the harbor at Port Colborne as weather dictates. We were advised that the LPA had some objection to doing this. I am pleased that you have clarified the LPA position and will board inside the harbor when weather makes that necessary. I am copying the GLPA with this e-mail to advise them. As a matter of further clarification, I did not at any time seek to change the normal boarding point to lock 8. What I did do was investigate where boardings actually take place when the LPA charges overcarriage and I asked if there had been any boardings at the lock. I was advised that the boardings all take place either inside the harbor or just past the harbor entrance at Port Colborne. The issue of the propriety of charging over carriage when a pilot boards inside the harbor is a matter still under consideration and a decision will be rendered shortly.

Paul M. Wasserman  
Director, Great Lakes Pilotage  
US Coast Guard

By direction

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**From:** captaindangallagher@msn.com [mailto:captaindangallagher@msn.com]  
**Sent:** Monday, October 30, 2006 12:32 PM  
**To:** Eulitt, Paul; Wasserman, Paul  
**Cc:** captaindangallagher@msn.com  
**Subject:** Re: Port Colborne Pilot Exchange

Paul,

Lakes Pilots has not instructed its Pilots to refuse to board inside the harbor at Port Colborne. The Canadian Pilots are the ones that took the position to refuse to allow the American Pilots to continue to board inside the harbor. They took that position after the Director tried to change the change point to lock # 8. The Director stated that he could designate lock 8 as the change point and hence there would be no overcarriage charge. Captain Muir from Gresco Agency made a complaint to the Pilotage office in the middle of July. the Director took that complaint as a formal appeal and issued Lakes Pilots a letter asking us to respond within 30 days, that letter was dated July 26th 2006. The Director encouraged both sides to try and work the issue out and he would dismiss the complaint, both sides were unable to work the issue out and left it up to the Director to adjudicate the issue. In our response we claimed that by boarding inside the Harbor we were avoiding delays to the vessels. Captain Muir claims he does not care where we board that is to our benefit to board inside and he doesn't want to be charged the overcarriage charge.

The recent storm caused 286 hours of delays, the Canadian Pilots tied the ships up inside the canal because they would not let us board inside, then when the ships did move all the Canadian Pilots were on night cycle and did not have enough Pilots to perform the work inside the canal. This is the exact reason why we were boarding inside before to keep the ships moving with out delays. As a result of those delays I have herd through the grape vine that they are going to change there mind and allow us to board inside the Canal, when the director rules on this issue.

Lakes Pilots looks forward to resolving this issue and would be more than happy to board inside the harbor like we have always in the past, if this is the wishes of industry, however we feel we are justified in charging the overcarriage charge in Section 401.428 of Title 46 of Federal Regulations.

I look forward to your response.

Sincerely

Dan Gallagher  
President  
District 2 Pilots

----- Original Message -----

**From:** Lakes Pilots Association, Inc.  
**To:** Dan Gallagher  
**Sent:** Wednesday, October 25, 2006 12:59 PM  
**Subject:** FW: Port Colborne Pilot Exchange

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**From:** Paul.W.Eulitt@uscg.mil [mailto:Paul.W.Eulitt@uscg.mil]  
**Sent:** Wednesday, October 25, 2006 1:34 PM  
**To:** [captaindangallagher@lakespilots.com](mailto:captaindangallagher@lakespilots.com); [captaindangallagher@msn.com](mailto:captaindangallagher@msn.com)  
**Cc:** [lpa@arenet.net](mailto:lpa@arenet.net); Wasserman, Paul; Sakaio, Michael; Andrusiak, Daniel; Richardson, Rodney  
**Subject:** Port Colborne Pilot Exchange

Dear Captain Gallagher,  
Appreciate your commitment to getting the Klein System up and running with your district dispatchers. Your support is important. Hopefully you and your members are seeing the benefits the system has to offer.

The GLPA has brought to our attention that the LPA has instructed its member pilots to refuse boarding/disembarking vessels at all times inside the safety confines of Port Colborne Harbor even when the existing weather conditions make it safer to conduct a pilot exchange inside. It is alleged that District Two pilots have been instructed to only embark/disembark at the one mile mark outside Port Colborne Harbor contrary to past safety practices which left this decision up to the discretion of the individual pilot at the time. We would like to hear from you confirming your position on this issue, what has made you change your policy and why you have decided to take this action.

Firstly, we are very concerned about pilot safety especially during exchange times when the weather is less than favorable outside but when an exchange can be conducted safely as previously carried out for many years inside the harbor breakwater. Exposing two pilots, pilot boat crews and pilot boat to an unnecessary risk during unfavorable weather is not prudent. The decision whether to conduct a pilot exchange or not as well as where this will occur should be coordinated between the two pilots and pilot boat on a case by case basis with the weather a prime concern.

Secondly, we are concerned about an increase in delays to vessel traffic and pilot availability when pilots anchor vessels refusing a transfer that could be conducted safely inside. There will be times when inclement weather will preclude a transfer at either place but an all encompassing operational change of this nature does not facilitate cooperation and efficient pilotage service.

Your cooperation is appreciated and I look forward to your soonest reply.

Smooth Sailin',  
Paul Eulitt  
Deputy Director  
Office of Great Lakes Pilotage (G-PWM-2)  
U.S. Coast Guard Headquarters  
202-372-1537  
\*\* FILE \*\* 6.8 / 7.2.2 / 10.1



**Directeur de l'Exploitation / Director of Operations**  
**Administration de Pilotage des Grands Lacs**  
**Great Lakes Pilotage Authority**  
**tel. 613 933-2991 poste/ext. 209**

-----Original Message-----

**From:** Daniel Trottier [mailto:dtrottier@glpa-apgl.com]

**Sent:** August 23, 2006 11:39 AM

**To:** 'Paul.M.Wasserman@uscg.mil'

**Cc:** 'ilantz@shipfed.ca'; 'mhbroad@shipfed.ca'; 'agency@gresco.net'; 'Khandpur, Rajiv'; 'Sakaio, Michael'; 'Eulitt, Paul'; 'Richardson, Rodney'; 'Andrusiak, Daniel'; 'DGrieve@fednav.com'

**Subject:** RE: Overcarriage

Good morning again Paul,

Thank you for your email,

I confirm that at no time a US pilot boarded at lock No.8 nor any other point in the Welland canal to the exception of the Port Colborne pilot boat and we do not have any kind of documentation that would support what you are looking for, but the Canadian seaway (SLSMC), would have, I imagine, and in line with ISPS code some sort of log book for anyone that would enter or exit the lock No 8 safety area. The change point at lock 7 is solely for the Canadian pilot and separates the Canal tour from the 7 West tour. Despite the fact that Lock No.8 is not a changing point, the need for Port Colborne pilot boat will always be, because of weather(wind, fog), traffic congestion, vessel with deficiencies etc. etc.. When you make reference to Iroquois lock changing point being a place where US pilots board, it is necessary here to clarify that we are talking about an International District and nothing to compare with the solely Canadian Welland Canal portion. And finally, the Port Colborne (province of Ontario, Canada) pilot boarding station would be along the 1 mile radius line from the Port Colborne piers light as you have quasi omnidirectional traffic downbound or upbound to or from Port Colborne Piers on lake Erié.

Please do not hesitate if you need additional clarification. Also please take note that tomorrow and Friday I will be away from the office as I will be in the Welland canal area, but I could still be reached on my cell phone to which you have the number Paul.

Sincerely, Daniel

**Capitaine Daniel-René Trottier**  
**Directeur de l'Exploitation / Director of Operations**  
**Administration de Pilotage des Grands Lacs**  
**Great Lakes Pilotage Authority**  
**tel. 613 933-2991 poste/ext. 209**

-----Original Message-----

**From:** Paul.M.Wasserman@uscg.mil [mailto:Paul.M.Wasserman@uscg.mil]

**Sent:** August 23, 2006 10:32 AM

**To:** dtrottier@glpa-apgl.com

**Cc:** ilantz@shipfed.ca; mhbroad@shipfed.ca; agency@gresco.net; Khandpur, Rajiv; Sakaio, Michael; Eulitt, Paul; Richardson, Rodney; Andrusiak, Daniel; DGrieve@fednav.com; Wasserman, Paul

**Subject:** RE: Overcarriage

Just to confirm, did I read your e-mail correctly when you stated that no US pilot has boarded or disembarked a vessel at Lock 8 this entire season. If so, have the District 2 US pilots been boarding vessels exclusively from the Port Colborne pilot boat. To your knowledge, have US pilots been boarding at any

point other than the Port Colborne pilot boat and conducting overcarriage from some point in the Welland Canal to the pilot boat station or getting off ships at Lock 8 or any other location within the Welland Canal. And, if so, do you hold any documentation that I can use to prove this. I ask because the D2 source forms may not accurately reflect what has actually been happening out there this season. Also, pls give me the exact location of the pilot boat station and the point where the pilots board the vessel. It seems to me, having spent some time sitting on the bench in Port Colborne that the pilots are picked up in the channel just below the bridge, which is less than a mile from lock 8. I understand that the MOA states that a pilot boat will be stationed at Port Colborne, however, my regulations indicate that the change point is Lock 7. I also understand that the MOA led to some modifications in that area that changed arrangements relating to the Welland Canal, but my regulations permit me to establish in this case a change point other than the Port Colborne pilot boat – which is why I’m asking all these questions. Lock 8 is only a mile from where I think the pilot boat picks up the US pilot even though the exchange of pilots occurs further out in Lake Erie. The purpose of me bringing this up is only to point out that if Lock 8 was the change point, then there would be no need for a pilot boat at all and the transfer of pilots would be performed in a much safer environment and there would be no weather related delays. I understand and respect the Canadian view that the Welland Canal is exclusively the province of Canada, but in this case Lock 8 is the last lock in the Canal, accordingly, making lock 8 the change point does not impinge on Canadian exclusivity over the Welland Canal. It is analogous to the situation on the St. Lawrence River where Iroquois Lock is exclusively in Canadian territory but US and Canadian pilots board and take ships there. Because my regulations indicate that Lock 7 is the normal change point, I can easily designate lock 8 as the change point and hence there would be no overcarriage charge. I apologize with burdening you with all these questions; however, I think you understand the circumstances I am contending with in D2 this season. So, I sincerely appreciate your patience and assistance. I await your reply. PMW

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**From:** dtrottier@glpa-apgl.com [mailto:dtrottier@glpa-apgl.com]

**Sent:** Wednesday, August 23, 2006 9:46 AM

**To:** Wasserman, Paul; rlemire@glpa-apgl.com

**Cc:** ilantz@shipfed.ca; mhbroad@shipfed.ca; agency@gresco.net; Khandpur, Rajiv; Sakaio, Michael; Eulitt, Paul; Richardson, Rodney; Andrusiak, Daniel; DGrieve@fednav.com; Wasserman, Paul

**Subject:** RE: Overcarriage

Good Morning Paul,

Thank you for your email,

The **Great Lakes Pilotage Regulations** are defining International District No.2 (Welland Canal) as from 1 mile radius from Port Weller piers light to 1 mile radius from Port Colborne piers light. The Port Colborne pilot boarding station would be on the one mile radius from Port Colborne piers Light, and the distance from lock No.8 is approx. 3.0 miles. The **Memorandum of Agreement** stipulates that the Welland canal is solely a Canadian Region and therefore only Canadian pilot could have the conduct of vessel subject to compulsory pilotage in the above mentioned Region and thus explaining the pilot boat service at Port Colborne. There was no interruption of the Pilot boat service at Port Colborne since the opening of the 2006 season and at no time a US pilot boarded at lock No.8. To create a change point at Lock No 8, would translate to be an additionnal and lenghtly delay in lines handling in a tie up/ let go process, the Port-Colborne pilot boat exchange while the vessel is underway is definitely a lot faster.

If you need additionnal clarification, please communicate with the undersigned,

Sincerely, Daniel

***Capitaine Daniel-René Trottier***

***Directeur de l'Exploitation / Director of Operations***

***Administration de Pilotage des Grands Lacs***

***Great Lakes Pilotage Authority***

***tel. 613 933-2991 poste/ext. 209***

-----Original Message-----

**From:** Paul.M.Wasserman@uscg.mil [mailto:Paul.M.Wasserman@uscg.mil]

**Sent:** August 22, 2006 11:38 AM

**To:** dtrottier@glpa-apgl.com; rlemire@glpa-apgl.com

**Cc:** ilantz@shipfed.ca; mhbroad@shipfed.ca; agency@gresco.net; rkhandpur@comdt.uscg.mil; Sakaio, Michael; Eulitt, Paul; rrichardson@comdt.uscg.mil; dandrusiak@comdt.uscg.mil; DGrieve@fednav.com; pwasserman@comdt.uscg.mil

**Subject:** Overcarriage

**Importance:** High

Daniel and Robert, I am in the process of adjudicating a fee appeal between Gresco and the D2 pilot association. To do so in an accurate and impartial manner I am requesting your assistance. I need information concerning the transit between Lock 8 and the pilot boat station at Port Colborne.

Where is the pilot boat station at Port Colborne located in relation to Lock 8? I have the charts, so perhaps you can give me the lat and long of the station and I'll be able to locate it.

What is the distance from Lock 8 to Port Colborne?

Is there a time delay to vessels if instead of a US pilot boarding a ship at Lock 8 he boards at the Port Colborne pilot boat station?

Is there any objection by Canada to US pilots boarding at Lock 8?

Would boarding US pilots at Lock 8 instead of at the Port Colborne pilot boat station dispense with the need for a pilot boat at Port Colborne altogether?

This season to date, has there been any weather that would justify a pilot putting a boat to anchorage because of concern that a ship boarding would be too dangerous and, if so, how many such days have there been.

Has there been any pilot boat breakdowns this season at Port Colborne that would justify overcarriage from Lock 8?

District 2 pilots association claims that much time can be saved by boarding vessels at Lock 8 as opposed to boarding at the pilot boat station, do you agree or disagree? Pls explain.

Is there any history on this issue that I should know about in making my determination respecting the Gresco appeal: for instance, can you tell me whether the D2 pilots association have only been boarding Gresco ships at Lock 8 and boarding other vessels from the pilot station.

The Memorandum of Arrangements between Canada and the US indicates that there will be a pilot boat at Port Colborne, but my regulations list lock 7 as the change point and makes no reference to a pilot boat station at Port Colborne, do you have any history on this?

I'm sorry to burden you with all these questions, but it is critical that I have your views on the matter as quickly as you can possibly provide them. I am willing to meet with you in Cornwall the week of September 11<sup>th</sup>, which is my first available date and it coincides with a meeting I have with the Shipping Federation the next day. Perhaps on the 13<sup>th</sup> of September a trip up the Welland to lock 8 and Port Colborne would be beneficial to resolve the issue of where the proper change point ought to be. I look forward to your reply. Even though we may meet on the 11<sup>th</sup>, I will need your responses to these questions, if possible, by Thursday of this week. Best regards,

Paul M. Wasserman

Director, Great Lakes Pilotage

US Coast Guard

By direction



----- Original Message -----

**From:** Paul Wasserman

**To:** Dan Gallagher ; [agency@gresco.net](mailto:agency@gresco.net)

**Cc:** Khandpur, Rajiv ; Sakaio, Michael ; Eulitt, Paul ; [dandrusiak@comdt.uscg.mil](mailto:dandrusiak@comdt.uscg.mil) ; [richardson@comdt.uscg.mil](mailto:richardson@comdt.uscg.mil)

**Sent:** Monday, August 21, 2006 10:35 AM

**Subject:** Re: over carriage charges

For Captain Gallagher: Please provide in detail an explanation concerning how and why boarding vessels at the regular change point will delay traffic.

For Captain Muir: Have you in fact requested the District 2 pilotage association to continue boarding vessels at the Welland canal (that is not at the regular change point) and requested not to be charged for overcarriage.

Your responses must be received no later than Thursday, this week.

Paul M. Wasserman  
Director, Great Lakes Pilotage  
US Coast Guard  
By direction  
PMW



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 OVERALL LENGTH 23.78 MOULDED DEPTH  
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 LOCAL AGENT World Shipping  
 Fed Nav  
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 TIME CALLED 1200 WEIGHTING FACTOR 1.45

PORT/DOCK ITINERARY DATE AND TIME  
Nicholson Det 1700 SAILED Same  
Belle Isle Anchorage 1800 SAILED  
 ARRIVED SAILED  
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 ARRIVED SAILED 2/3/93

CAUSE OF DETENTION/DELAY - COMMENTS  
 POH  
 DET  
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 Windbound  
 Fog  
 Traffic  
 Grounding  
 Await Pilot, Relief  
 Pilotage Shortage  
 No Night Navigation  
 Cargo Operations  
 Trim Adjustment  
 Overdraft  
 Engine/Ship's  
 Equipment Problems  
 Seaway Inspection  
 DATE 1-3-93 REG. NO. 269

DESIGNATED WATERS	VESSEL NO. <u>116100</u>	OFFICE USE ONLY
UNDESIGNATED WATERS		
DETENTION		
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OTHER		
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PILOT'S SIGNATURE  
[Signature]  
 170400



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: G-MW-1  
Phone: (202) 267-2856  
Fax: (202) 267-1408

16637/D2  
August 13, 2003

Captain Dan Gallagher  
President  
Lakes Pilots' Association Inc.  
902 Fourth Street  
P.O. Box 610902  
Port Huron, MI 48061-0902

Dear Captain Gallagher:

This letter is in response to your correspondence of June 9, 2003, concerning surcharges for transportation, hotels and subsistence when a pilot is retained for the convenience of a vessel.

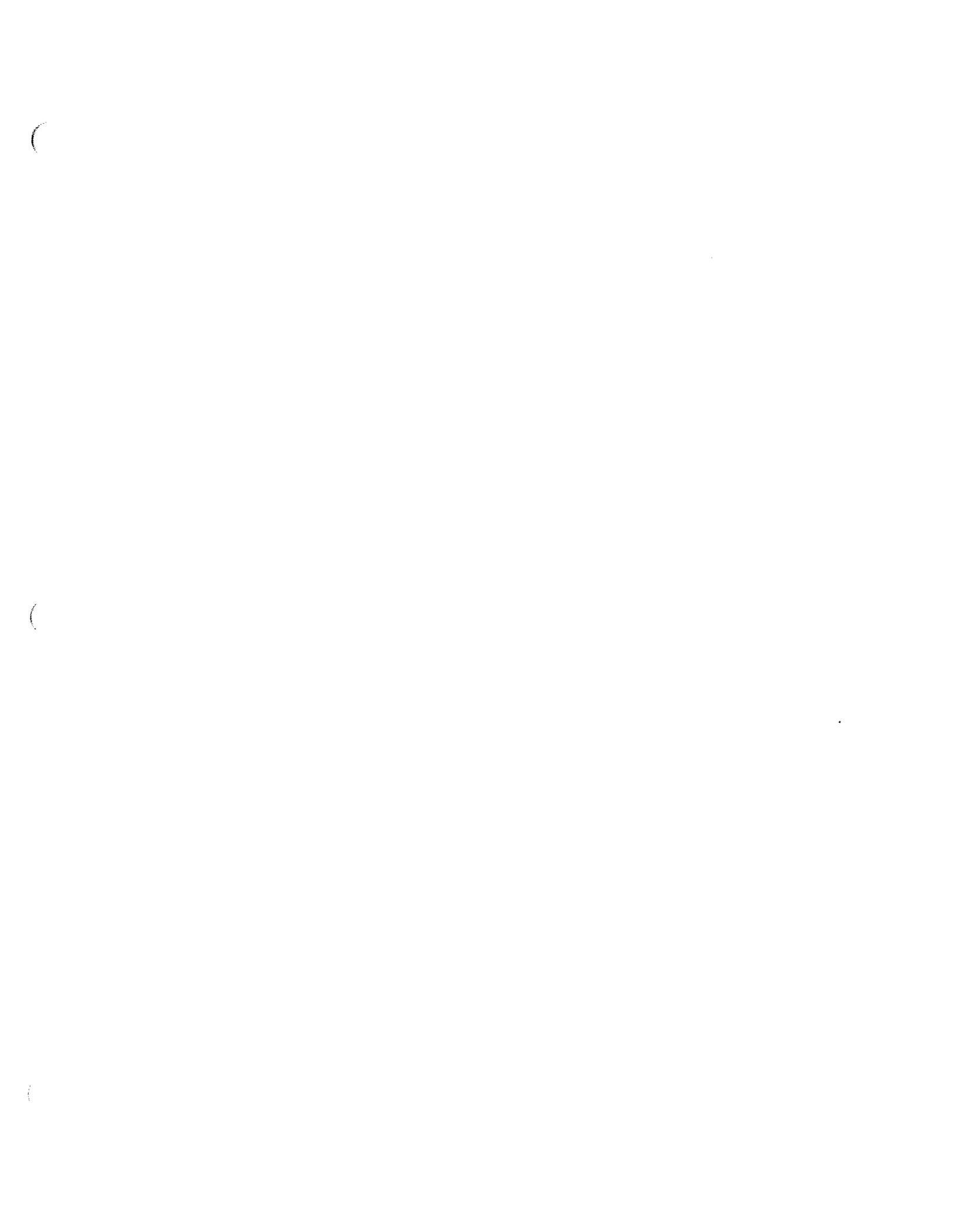
Coast Guard regulations do not address surcharges for transportation, hotels and subsistence when a pilot is retained for the convenience of a vessel. The regulations do address charges for delay, detention and interruption of pilotage services, which can be found in 46 CFR § 420. However, these circumstances are different and do not arise merely because a pilot is retained for the convenience of the vessel. As a result, and as a matter of policy we have held that an association may bill agents for transportation, hotels and subsistence when a pilot is retained for the convenience of a vessel. However, your association is not authorized to bill for these expenses in addition to delay and or detention charges as permitted by the Great Lakes Pilotage Regulations. Accordingly, you may bill for either one or the other, but not both. )★

If you have any further questions regarding this matter please do not hesitate to call me at 202-267-2856.

Sincerely,

*Paul M. Wasserman*

Paul. M. Wasserman  
Acting Director, Great Lakes Pilotage



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: G-MWP  
Phone: (202) 267-0407  
Fax: (202) 267-4826  
Email: pwasserman@comdt.uscg.mil

July 6, 2005

Captain Roger Paulus, President  
St. Lawrence Seaway Pilots' Assoc.  
P.O. Box 274  
Cape Vincent, NY 13618

Dear Captain Paul



This office has received several inquiries by industry concerning the St. Lawrence Seaway Pilots' Association's (SLSPA) practice of billing vessels for travel expenses in addition to the normal rate when night relief pilots are provided at Iroquois lock. We have spoken about this practice on a number of occasions, and I am aware of the views of the SLSPA on the subject. Those views are summarized below.

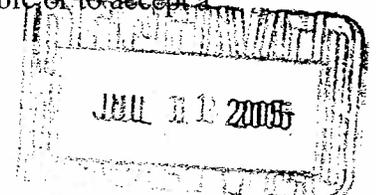
I have had an opportunity to fully review this matter and I find that the SLSPA's practice of billing vessels for travel expenses when performing night relief at Iroquois lock violates 46 CFR §401.430, which states:

No rate or charge shall be applied against any vessel, owner or master thereof, by a registered pilot which differs from the rates and charges set forth in this part, nor shall any rates or charges be made for services performed by a registered pilot, or for support services directly related to the provision of pilotage that a registered pilot requires a vessel to utilize, other than those for which a rate is prescribed in this part, without the approval of the Director.

Vessel interests have been billed for travel expenses without the approval of this office.

The SLSPA has interpreted 46 CFR §401.428 and 401.450 to allow travel expenses to be charged vessels for night relief at Iroquois lock because the pilot exchange does not occur "at the normal boarding point." 46 CFR §401.428 states, in pertinent part, that "if a U.S. pilot is . . . unable to board [a vessel] at the normal boarding point, the ship shall pay . . . reasonable travel expenses to or from the pilot's base." This section also states that "the change points to which this section applies are designated in §401.450." Because Iroquois lock is not included in the list of designated change points, the SLSPA has concluded that it is entitled to reimbursement for travel.

Both 46 CFR § 401.428 and 401.450 were promulgated prior to the institution of the night relief program at Iroquois lock. It is only for this reason that Iroquois lock does not appear in section 401.450. Upon instituting this trial program, however, Iroquois lock became the "normal change point" for night relief pilots. The work rule authorizing night relief effectively makes Iroquois lock the normal change point in situations where the work rule is invoked. Moreover, when a pilot avails himself for the work rule, the circumstances are not what the regulation contemplated in providing for travel expenses if a pilot is "unable to board at the normal change point." Under these circumstances, the pilot is not "unable to board at the normal change point" but rather has made a choice to either seek night relief to the extent a night relief is available or to accept a night relief assignment.

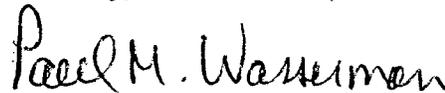


Iroquois lock is located between two change points recognized by section 401.450: Snell lock and Cape Vincent, and it bi-sects a full transit (which is why pilots only get half-trip credit for night relief). Under the night relief program, when it is invoked, the normal change point is Iroquois lock and travel associated with night relief is an ordinary expense. These ordinary expenses are reimbursable through the existing rate structure. The purpose for allowing a charge for travel from points other than a normal change point under the regulations is that such expenses are unexpected and not recompensable under the existing rate.

Therefore, the SLSPA is instructed to immediately cease billing for all ordinary travel to and from Iroquois lock related to the voluntary night relief program. Ordinary travel expenses reasonably incurred by pilots in the conduct of providing pilotage services should be part of your annual expense submission in your financial report. These travel expenses, in turn, are considered in the pilotage rate reviews and in the promulgation of the rates.

Should the association have some other basis for continuing this practice of billing shipping interests for travel in connection with night relief, and wish to seek approval from this office, I will be please to take those views into consideration.

Sincerely,



PAUL M. WASSERMAN  
Director, Great Lakes Pilotage  
U.S. Coast Guard  
By direction

Cc: Captain Don Willecke, President, Western Great Lakes Pilots Association  
Captain Dan Gallagher, President, Lakes Pilots Association, Inc.  
Ivan Lantz, Director, Marine Operations, Shipping Federation of Canada  
David Grieve, Vice President, Operations, FedNav Ltd.  
Helen Brohl, Executive Director, U.S. Great Lakes Shipping Association  
Robert Lemire, Chief Executive Officer, Great Lakes Pilotage Authority



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: G-PWM-2  
Phone: (202) 267-2856  
Fax: (202) 267-4826

16337

Captain Roger Paulus  
President, St. Lawrence Seaway Pilots Association  
P.O. Box 274  
Cape Vincent, NY 13618

2006-04-03 11:14

Dear Captain Paulus,

This is to inform you that commencing on the effective of the Final Rule, published in the Federal Register on April 03, 2006, surcharges for travel associated with the night relief program will be terminated. As discussed in the Final Rule, these costs have been absorbed into the rate.

If you have any questions, please contact Michael Sakaio at (202) 267-1241.

Sincerely,

A handwritten signature in cursive script that reads "Paul M. Wasserman".

PAUL M. WASSERMAN  
Director, Great Lakes Pilotage  
By direction

Copy: Captain Donald Willecke, President, Western Great Lakes Pilots Association  
Captain Daniel Gallagher, President, Lakes Pilots Association  
David Grieve, Vice President, Operations, FedNav Ltd.  
George H. Robichon, Senior Vice President, FedNav Ltd  
Michael Broad, President, Shipping Federation of Canada  
Ivan Lantz, Director, Marine Operations, Shipping Federation of Canada  
Helen Brohl, Executive Director, U.S. Great Lakes Shipping Association  
Robert Lemire, Chief Executive Officer, Great Lakes Pilotage Authority  
Jonathan Waldron, Blank Rome LLP  
Robert Muir, President, Gresco Ltee

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Homeland Security) and the Minister of Transport Canada, dated January 17 and 18, 1977(MOA). This MOA, according to the comments, requires that the United States and Canada set identical rates.

*Response:* We disagree. When the 2005 rate adjustment was first proposed, Canadian and U.S. pilotage rates were within a reasonable range of each other. To recast the rate now would require the Coast Guard to issue an additional interim rule or, more likely, a supplemental notice of proposed rulemaking (SNPRM). The current ratemaking process has been ongoing since January 23, 2003. This rulemaking process is now postured to proceed to a final rule. Issues relating to identical rates between the U.S. and Canada will be reviewed during the next ratemaking process.

### I. General Comments

*Comments:* Several comments of a general nature were received. One comment stated that by "rushing" to an interim rule, instead of providing adequate notice and public comment through a SNPRM, the Coast Guard has breached its obligation to maintain "a fair and efficient pilotage system" and to follow the statutory requirements to ensure rates accurately reflect the costs of providing pilotage services under the Great Lakes Pilotage Act.

An industry comment stated that the Coast Guard should give serious consideration to the rate making methodology, which it believes to be flawed.

*Response:* We disagree that we were "rushing" to an interim rule. We have fully met the requirements of the Administrative Procedure Act to provide public notice and comment in connection with modifications of existing regulations.

With regard to the comment that the Coast Guard should give serious consideration to the ratemaking methodology, we invite all interested parties to submit their suggestions to the Great Lakes Pilotage Advisory Committee.

### III. Discussion of the Rule

#### A. Ratemaking Process and Methodology

In the December 2003 (68 FR 69568) and March 2005 (70 FR 12082) interim rules, we described the analysis performed, and the seven-step methodology followed, in the development of the rate adjustment. We will not repeat this description here. The following shows the rate calculations for this final rule and provides explanations of the

adjustments made to the March 2005 interim rule based on the comments received.

#### B. Modifications to the Rate

The pilotage rates for Federal pilots on the Great Lakes contained in the March 2005 interim rule have been adjusted in accordance with the methodology appearing at Appendix A to 46 CFR part 404, based upon comments received in the public docket relating to that interim rule.

Based on the comments received, the March 2005 interim rule is being modified by rounding pilot numbers in each Area up to the next whole pilot. We are also increasing by one each the number of pilots serving the St. Lawrence Seaway and Lake Ontario, bringing the total number of pilots servicing District One to 11, instead of the current nine. We are also amending our computation of target pilot compensation by multiplying both the daily wage rate and the daily benefit rate by 270 days, to more accurately reflect compensation received by masters and mates on the Great Lakes. To effect these adjustments, we must adjust the expense bases of each association to reflect additional costs associated with increased pilots, and we are increasing the number of bridge hours necessary to round up and add the additional pilots. We are also adjusting projected revenues based upon the increase in bridge hours referred to above.

We have made adjustments to the District Two expense base to reflect costs associated with the operation of the Huron Maid, the pilot boat obtained to replace the Westcott II that sank in 2001. These adjustments are being made to include these costs in the rate and to end the current surcharge.

For the 2002 fiscal year, the Coast Guard's independent accountant reduced the District Two association's total reported pilot boat expense by subtracting revenues received in the form of surcharges from vessel owners and operators. These surcharges were used to defray the cost of operating the Huron Maid. This adjustment was necessary to avoid double charging for the pilot boat expense. If the surcharge remained in place, and the adjustment not made to the expense base, the costs would have been recovered twice: once in the form of the surcharge, and second by including that charge in the rate structure. Since we are ending the surcharge effective with this final rule, we are reversing this adjustment in an amount equal to the actual 2002 costs of operating this vessel.

In 2002, \$129,162 was paid to the District Two association in surcharges for the Huron Maid. The actual expense of operating the replacement pilot boat was \$121,865. As stated, the Coast Guard's independent accountant reduced the District Two association's total pilot boat expense by the full amount of the surcharge collected for the operation of the Huron Maid. For the purposes of this ratemaking, we are adding back to the total pilot boat expense the actual cost incurred by the District Two association to operate this vessel. The difference between the total fees collected as surcharges and the actual costs, totaling \$7,297, remains a reduction to expenses.

We have analyzed the District Two association's total pilot boat expense, both as reported by the association and as adjusted by the independent accountant, from 1999 through 2004. Average adjusted total pilot boat expense over that six-year period is \$130,205, annually. The 2002 adjusted total pilot boat expense calculated for inclusion in this final rule is \$121,865, which is below the six-year average. We have determined that these costs are both reasonable and necessary to the operation of pilotage service within the District. These costs were not included in the 2002 expense base because a surcharge was implemented to cover these costs. Effective with this final rule, the surcharge applied by the District Two association for the cost of operating the Huron Maid will cease.

As the tables in this final rule show, the percentage rate increase over the March 2005 interim rule, for Area 5 of District Two is 12 percent. Eight percent of that number reflects the adjustment made to include the surcharge that vessel owners and operators have been paying since 2002 to cover the cost of the Huron Maid. As a consequence, the effective rate increase for Area 5 is actually just 4 percent.

In addition, the costs of transportation incurred by District One in connection with the night relief program on the St. Lawrence River has similarly not been included within their expense base because these charges have been collected by a surcharge applied to the rates by the District One pilots' association. These costs are being added to the expense base and surcharges collected to recover these expenses will also end with the effective date of this final rule. We have determined that this additional travel cost is both reasonable and necessary for the safe, efficient, and reliable provision of pilotage service within District One.

As the tables in this final rule show, the percentage rate increase over the

March 2005 interim rule, for Area 1 of District One is 7 percent. Four percent of that number reflects the adjustment made to include the surcharge that vessel owners and operators have been paying since 2001 to cover the cost of transportation in connection with the night relief at Iroquois Lock. As a consequence, the effective rate increase for Area 1 is actually just 3 percent.

**C. Summary of Modifications to Expense Adjustments**

FICA and travel expense projections were increased by \$42,919 for District One, \$18,413 for District Two, and \$11,332 for District Three to account for additional bridge hours required to round up the fractionalized pilot numbers and for adding one additional

pilot each to the St. Lawrence Seaway and Lake Ontario. The projected dollar amounts were computed by taking the average expense figures for FICA and travel by Area, as reported in the "Independent Accountant's Reports on Applying Agreed Upon Procedures, Financial Statement Analysis, Supplementary Financial Information and Report of Findings and Recommendations, 31 December 2002" and computing a cost per bridge hour. We then multiplied this number by the increase in bridge hours to arrive at a revised projection of expenses for ratemaking purposes.

In addition, \$121,865 was added to the expense base of District Two to cover the costs of pilot boat operations occasioned by the loss of the Westcott

II that were not included within the association's expense base for 2002. We also included \$48,694 to the expense base of District One to cover the additional costs of transportation associated with the night relief program that has not previously been reported in that association's expense base. These amounts were generated by reference to the reports of the Coast Guard's independent auditor and the associations' financial statements, which are contained in the public docket. As mentioned, on the date this final rule goes into effect, surcharges for these expenses will end.

The following summarizes the expense adjustments made to the rate calculations to accommodate these modifications.

**SUMMARY OF MODIFICATIONS TO 2002 OPERATING EXPENSES**

	District one	District two	District three
1. Reported Expenses for 2002	\$658,913	\$1,295,595	\$1,242,847
Adjustments	(41,210)	(410,381)	93,526
Total Adjusted Expenses for 2002	617,703	885,214	1,336,373
2. Inflation Adjustments:			
(2003)—1.9%	11,736	16,819	25,391
(2004)—1.9%	11,959	17,139	25,874
3. 2005 Adjustments for Foreseeable Circumstances:			
a. Increased Travel and FICA expenses associated with additional bridge hours resulting from the rounding of pilot numbers and the addition of two additional pilots for Area 1 and Area 2	51,005	18,413	11,332
b. Increased Travel Expenses in connection night relief program	48,694		
c. Increased Pilot Boat operating costs in connection with sinking of Westcott II		121,865	
4. Total Adjustments to 2002 Expenses	741,097	1,059,450	1,398,970

**D. Summary of Modifications to the Projection of Operating Expenses**

The projection of operating expenses for this final rule is adjusted based upon

the modifications made to pilotage expenses in the entry titled "2005 Adjustments of Foreseeable

Circumstances," above, and appears, as follows:

District one	Area 1 St. Lawrence River	Area 2 Lake Ontario	Total district one	
Projection of operating expenses	\$368,186	\$372,911	\$741,097	
District two	Area 4 Lake Erie	Area 5 Southeast Shoal to Port Huron, MI	Total district two	
Projection of operating expenses	\$427,333	\$632,117	\$1,059,450	
District Three	Area 6 Lakes Huron and Michigan	Area 7 St. Mary's River	Area 8 Lake Superior	Total district three
Projection of operating expenses	\$693,924	\$271,563	\$433,484	\$1,398,971



**Dan Gallagher**

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**From:** "Grieve, David" <DGrieve@fednav.com>  
**To:** "Dan Gallagher (E-mail)" <captain dangallagher@msn.com>  
**Sent:** Tuesday, April 25, 2006 1:03 PM  
**Subject:** FW:

Dan - Here's what Paul has sent. Please read this and keep this confidential. I do not want this to come back to me from USCG.

Please let me have you explanations/comments

Kind regards

David  
 +++

Just to summarize for you:

1. By rounding up the fractionalized numbers of pilots to whole numbers, and increasing the number of pilots in Area 1 by one pilot and Area 2 by one pilot, the March 11, 2005 rate increase of 20% actually decreased to 16%. The decrease occurred because when we add pilots (fractionalized or whole) we must also raise our projections of revenues to be earned and expenses incurred by each additional pilot or fraction thereof. We do this by estimating additional bridge hours per pilot. Each additional bridge hour produces increased revenues over expenses for the association which has a dampening effect on the rate increase. The reason this happens is because projected revenue dollars accumulate faster than do expenses to support the marginal increase in pilots – pilot expenses have remained fixed for 10+ years.

2. The surcharges industry has been paying for pilot boat service in District 2 and for travel associated with night relief in District One was added into the pilots' expense base having the net effect of increasing the 16% Interim Rule increase by 2% for a total of 18%. However, this is an artificial increase in the rate because industry has been paying this all along. With the effective date of this Final Rule the surcharges stop and the two wash each other out.

3. It was the recalculation of pilot benefits from six months to nine months that explains the increase of 7%, which brings the total increase from March 11, 2005, to now to 26%. Subtract the 20% currently in effect and that yields the 5% increase that appears in the Final Rule. Note that if you subtract the 2% reflecting the surcharges, the increase was actually 3%.

Now, increased number of pilots:

Area 1 - St. Lawrence Seaway + 1  
 Area 2 - Lake Ontario + 1.3  
 Area 4 - Lake Erie + 0.5  
 Area 5 - Detroit River/Lake St Clare - 0.6  
 Area 6 - Lake Huron - 0  
 Area 7 - Lake Michigan + 0.1  
 Area 8 - Lake Superior + 0.7

Total Pilot Increase = + 4.2  
 Total Pilots = 44.0

That should sum it up. If you need more, give me a call.

PMW