



Mr. John L. Longstreth  
K&L Gates LLP  
1601 K Street, NW  
Washington, D.C. 20006-1600

OCT 21 2011

Dear Mr. Longstreth:

This letter is in response to your June 22, 2011, appeal of the determination of the Chief of the Office of the Marine Transportation Systems, CG-552, (hereinafter "CG-552"). For the reasons discussed below, your appeal is denied in part, and the CG-552 determination is affirmed in part.

### FACTS & PROCEDURAL HISTORY

By a letter dated February 03, 2009, CG-552 determined that your client, the Lakes Pilots Association, Inc. (hereinafter "LPA"), had engaged in several categories of overbilling practices for pilotage services during the 2006 and 2007 shipping seasons and ordered that the LPA repay industry \$260,163.50 in overcharges and requested that LPA provide the Coast Guard with written assurances that the practices the Coast Guard had identified as improper, be discontinued. Following a request for reconsideration from the LPA, CG-552 issued a letter dated May 24, 2011 revising the amount the LPA was ordered to repay industry for overcharges to \$237,919.50.

On June 22, 2011, the LPA appealed the CG-552 determination.

### BASIS OF APPEAL

After a thorough review of LPA's appeal ("Appeal"), the assignments of error are categorized as follows:

- I. *CG-552 erred in its determination of the location of the pilot change point in the vicinity of Port Colborne.*
- II. *CG-552 erred in its interpretation and application of Coast Guard regulations regarding basic rates and charges for designated waters west of Southeast Shoal.*
- III. *CG-552 erred in determining that the transportation fees LPA had charged industry were inappropriate.*

### OPINION

- I. *CG-552 did not err in its determination of the location of the pilot change point in the vicinity of Port Colborne.*

LPA began charging vessels a fee for over-carriage, in addition to the regular pilotage fee, in May 2006 and continuing throughout the 2007 shipping season, for changing pilots within the waters of Port Colborne, rather than a mile or so south of its harbor entrance in the waters of Lake Erie. The LPA's appeal attempts to justify these actions by asserting that the Port Colborne area pilot change point has been customarily recognized as a specific point indicated on the chart and listed in the US Coast Pilot. However, the scheme envisioned for change points in the Code of Federal Regulations is that change points are general geographic areas in which a pilot's assignment begins or ends, not specific points in the water.

LPA's argument as to the specific location of the pilot change point incorrectly interprets the language in the Memorandum of Arrangements Great Lakes Pilotage (MOA), Canadian pilotage regulations, nautical charts, and the Coast Pilot, as establishing a specifically defined pilot change point on eastern Lake Erie; and it erroneously concludes that it was proper to charge industry an over-carriage fee every time that LPA pilots were carried beyond the LPA (not United States Coast Guard) designated pilot change point during 2006 and 2007.

*The MOA, Canadian Regulations, and Coast Pilot*

In its appeal, the LPA maintains that there was a "designated change point on eastern Lake Erie...specifically defined at an arc drawn one mile to the southward of the outer light on the western breakwater at Port Colborne."<sup>1</sup> The LPA advances this argument by referencing several documents.<sup>2</sup> However, examination of these documents shows that they do not establish the pilot change points in the Port Colborne area (or, for that matter, anywhere else in the Great Lakes pilotage system).

Page 1 of the MOA is entitled "Definitions." It is important to note here how the MOA's language does not recognize a "designated change point" on eastern Lake Erie. Instead, the MOA identifies the boundaries of the Welland Canal as "all the waters of the Canal between the following: (1) in the southern approach, within an arc drawn one mile to the southward of the outer light on the western breakwater at Port Colborne; and (2) in the northern approach, within an arc drawn one mile to northward of the western breakwater light at Port Weller."<sup>3</sup>

Contrary to the LPA's assertion, the MOA makes no reference to a "designated change point." Rather, the MOA identifies the geographic constraints of the Welland Canal in the context of defining the boundaries of District 2. The MOA makes no mention of pilot change points. It is simply incorrect for the LPA to rely on the MOA for the establishment of any pilot change points on the Great Lakes.

LPA also refers to the Canadian pilotage regulations, nautical charts, and the *United States Coast Pilot*, claiming that they establish the pilot change point at the "one mile arc." However, contrary to LPA's claim that these represent "the core documents of Great Lakes pilotage,"<sup>4</sup> the fact of the matter is that these documents have nothing to do with establishing the pilot change point beyond which LPA may charge an over-carriage fee if its pilots are carried. I'd like to make the following two points perfectly clear: 1) while Canadian pilots may be regulated by Canadian pilotage regulations, LPA pilots are regulated by United States pilotage regulations (46 C.F.R. Parts 401, 402, and 403); and 2) while nautical charts and the *United States Coast Pilot* are valuable tools for mariners to use when navigating vessels, they have no role in determining the location of pilot change points and the assessment of over-carriage charges for pilots carried beyond those points. To the extent that Canadian regulations may or may not differ from U.S. regulations as to the pilot change point, that is a matter for the Director of Great Lakes Pilotage to resolve with his Canadian counterpart. To the extent that United States nautical charts and the *United States Coast Pilot* may or may not differ from United States regulations as to the location

---

<sup>1</sup> Appeal at 3.

<sup>2</sup> *Id.* at 8. LPA relies on the MOA, Canadian pilotage regulations, certified nautical charts, and the *United States Coast Pilot*.

<sup>3</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>4</sup> Appeal at 8.

of pilot change points, the regulations control, especially if the issue involves whether LPA may charge over-carriage fees in relation to the location of pilot change points.<sup>5</sup>

The LPA appeal is quite interesting in its dismissal of the controlling regulations as “erroneous.”<sup>6</sup> Contrary to LPA’s assertions, pilotage associations are not free to declare properly promulgated regulations “erroneous,” substitute in their place what they would like the regulations to be, and then proceed to charge the shipping industry fees according to their new interpretations. Indeed, such a scenario is difficult to imagine.

### *The Controlling Coast Guard Regulations*

On October 11, 1967, the U.S. Coast Guard announced that the United States and Canada had initiated an overall review of the existing pilotage system. Interested persons and organizations were invited to participate in developing new definitions and to assist with identifying pilotage issues in need of further refinement. This review resulted in the identification of five proposals for consideration, and on March 20, 1968, the Coast Guard published the proposals in the federal register for public review and comment.<sup>7</sup> After reviewing all of the comments, and after a public hearing held in Cleveland, Ohio, on April 3, 1968, the Coast Guard published the final rule on April 27, 1968.<sup>8</sup>

This final rule established, for the first time, two separate and distinct concepts relevant to the present issue: 1) pilot change points; and 2) a recommendation that Canada define the limits of the Welland Canal.

As to the pilot change points, the new regulation created ten:

- (1) Snell Lock
- (2) Cape Vincent
- (3) Port Weller
- (4) *Lock No. 7 Welland Canal*
- (5) Detroit/Windsor...
- (6) Port Huron/Sarnia
- (7) Detour
- (8) Gros Cap

---

<sup>5</sup> Although not particularly relevant to resolving the present issue, it is worth noting that LPA’s appeal misstates the content of both the *Coast Pilot* (Appeal at 3-4) and the Canadian regulations (Appeal at 4). The *Coast Pilot* actually states that “Pilot exchange points are 1 to 2 miles S of Port Colborne...” (*United States Coast Pilot*, 2007 (37<sup>th</sup> Edition) at 222. The Canadian pilotage regulations do not specify a pilot change point. Similar to what it attempts to do with the MOA language, the LPA takes the Canadian pilotage regulatory definition of Welland Canal (*Canadian Great Lakes Pilotage Regulations*, Chapter 1266.3(c)) and attempts to convert it into the definition of the pilot change point.

<sup>6</sup> Appeal at 2-3.

<sup>7</sup> 33 Fed. Reg. 4746

<sup>8</sup> 33 Fed. Reg. 6477

(9) Chicago...

(10) Duluth/Superior and Fort William/Port Arthur...

All ten of these pilot change points share one, crucial (for present purposes), thing in common: all ten are general geographic locations. Not a single pilot change point is expressed as a specific geographic point. In fact, in the entire regulatory history of Great Lakes Pilotage, there has never been a pilot change point expressed as a specific geographic point.

At all times during the 2006 and 2007 shipping seasons, the applicable regulation (46 C.F.R. § 401.450) listed the pilot change point for the area in question as “Lock No. 7 Welland Canal.” If LPA felt that this pilot change point was erroneous or impractical, then LPA should have submitted a request for rulemaking to the Director, Great Lakes Pilotage to amend the regulation. An amendment to 46 C.F.R. § 401.450 is the only way to modify pilot change points.<sup>9</sup> No one, including LPA, is free to ignore regulations they feel are “erroneous” and then substitute their own ideas in their place.

The second relevant proposal created by the 1968 final rule was for the Coast Guard to recommend that Canada define the southern limits of the Welland Canal. That proposal “...received no unfavorable comment. Accordingly, that recommendation [was] made and the Canadian Department of Transportation [had] advised that action [had] been initiated to fix definite limits at both ends of the Canal.”<sup>10</sup> The result of the Canadian action in response to the Coast Guard’s proposal was the “within an arc drawn one mile to the southward of the outer light on the western breakwater at Port Colborne” language which appears in the MOA, Canadian regulations, *Coast Pilot*, and various other documents. Thus, when properly understood, the “within an arc” language defines Welland Canal. It has nothing to do with establishing the pilot change point, which is clearly established in 46 C.F.R. § 401.450.

In short, LPA’s argument that the pilot change point in the Port Colborne area was at the “one mile arc” is wrong. If the Coast Guard were to adopt LPA’s position that the pilot change point was a specific location, this would permit LPA to charge over-carriage in every instance where a pilot relinquished his/her responsibilities at a point beyond the exact coordinates of the “one mile arc”. However, the fact is that the regulations governing Great Lakes Pilotage have never allowed for such a rigid and impractical pilot change-out process.

As to the amount of the charges to be refunded, I find it regrettable that CG-552 chose to not require FULL reimbursement to industry for all of LPA’s unauthorized over-carriage billing. I can only assume, based on the record before me, to include the two CG-552 letter determinations, that the decision to only require half of the over-carriage charges to be refunded was made in an effort to amicably resolve this matter. With that said, it is indeed disturbing that LPA continues to press for the retention of all unauthorized over-carriage charges in the vicinity of Port Colborne, rather than considering itself quite fortunate to have been able to retain half of these unauthorized charges. In any event, while I find that all of the over-carriage charges relating to the pilot change point in the vicinity of Port Colborne were unauthorized, I will not disturb CG-552’s prior determination as to the amount to be refunded to industry.

---

<sup>9</sup> On September 29, 2008, 46 C.F.R. § 401.450 was amended to replace “Lock No. 7, Welland Canal” with “Port Colborne.” At some point after the 1968 promulgation of 46 C.F.R. § 401.450, Canada assumed sole responsibility for piloting vessels in Welland Canal. Therefore, as a practical matter, pilots began changing at Port Colborne vice Lock No. 7 Welland Canal. The 2008 amendment brought the regulation in line with actual practice since no United States pilot could provide pilotage service in the canal. However, at no time was the pilot change point “within an arc drawn one mile to the southward of the outer light on the western breakwater at Port Colborne.”

<sup>10</sup> *Id.*

Therefore, because the applicable regulation (46 C.F.R. § 401.450) lists the location of the pilot change points, and because these change points are all expressed as general geographic locations and not as specific geographic points, I find that the charges for over-carriage were unauthorized. However, I will not disturb the prior determination on appeal here. LPA's appeal is denied on this point, and LPA must repay industry \$114,022.50.<sup>11</sup>

*II. CG-552 did not err in its interpretation and application of Coast Guard regulations regarding basic rates and charges for designated waters west of Southeast Shoal.*

LPA's appeal challenges CG-552's interpretation and application of the relevant Coast Guard regulations as to the basic rates and charges applicable in designated waters west of Southeast Shoal. Specifically, this issue turns on determining when a movement is complete and a new movement begins. Simply put, LPA misinterprets the applicable regulations in a way that converts vessel detentions, interruptions, and/or delays into entirely new movements.

LPA's error is best summed up by the following quote from its appeal:

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.<sup>12</sup>

The above quoted text is simply wrong. A movement (for the purpose of determining the rates and charges for pilotage services) does NOT end when a "ship stops." A movement in designated waters ends when the vessel arrives at the location the pilot was assigned to bring it. To be sure, a pilot knows his or her destination before the vessel ever gets underway. The rate and charge for a movement is determined by taking the vessel's point of departure and contracted-for point of arrival, and plugging those two locations into the chart contained in 46 C.F.R. § 401.407(b). With certain exceptions not applicable here, when the "ship stops" while in transit between those two points, what you may (depending on the circumstances) have is an interruption that may be charged in accordance with 46 C.F.R. § 401.420, and NOT the end of a movement and the start of a new movement to be charged in accordance with 46 C.F.R. § 401.407. Such creative billing practices by LPA are not in accordance with the applicable regulations and are not authorized.

The discussion of the OLYMPIC MIRACLE in the Appeal at 18-19 is a perfect example of how LPA is misinterpreting and misapplying the regulations. In that instance, the pilot was hired to take the vessel from Port Huron to Detroit. Port Huron to Detroit is the vessel movement. Upon arriving near Detroit the vessel's movement had to be interrupted due to an absence of available linesmen, so the vessel proceeded to the anchorage, stopped, and was anchored. This diversion to the anchorage to await linesmen represents an interruption to the Port Huron – Detroit movement, and NOT two separate movements (Port Huron – Detroit anchorage; Detroit anchorage – Detroit).

Bridge delays are another example of where the vessel's stopping and starting does NOT qualify as the completion of a movement and the start of a new movement. Just like a taxi driver does not bill for separate trips when stopping at a red light, the LPA may not bill for separate movements when a vessel must stop to allow a bridge to open. Furthermore, unlike the delay described above for linesmen, bridge delays do not meet the definition of interruptions under 46 C.F.R. § 401.420 because they are normal, routine, everyday occurrences that are part and parcel

---

<sup>11</sup> The original amount of \$114,776.50 has been corrected to \$114,022.50 after the discovery of an error in the original calculation of appropriate charges.

<sup>12</sup> Appeal at 18.

of the vessel's transit. Indeed, the pilot is being compensated to safely navigate the vessel, to include stopping to allow a bridge to open for safe passage. Again, such creative billing practices by the LPA are not authorized under the applicable Coast Guard regulations.

While I am immediately able to dismiss the LPA's interpretation of the applicable regulations as wrong, I am nonetheless concerned that the Coast Guard Great Lakes Pilotage Office has not always interpreted and applied 46 C.F.R. §§ 401.407 and 401.420 in a manner that is consistent with the proper interpretation that I have described above. Specifically, I am concerned that past source form reviews by the Great Lakes Pilotage Office may not have applied 46 C.F.R. §§ 401.407 and 401.420 properly. Therefore, this letter serves as fair notice to both the LPA and the Coast Guard's Great Lakes Pilotage Office as to the proper application of 46 C.F.R. §§ 401.407 and 401.420. Because I am not satisfied that these regulations have been properly interpreted and applied in the past (by both the LPA and the Coast Guard), I do not feel that it would be just to require the LPA to now repay industry. I am therefore reversing the CG-552 decision on this point. However, moving forward from the date of this letter, the LPA shall no longer bill vessel stops and delays as new movements under 46 C.F.R. § 401.407. Depending on the facts, stops and delays may be appropriate for billing under § 401.420, but separate billing for bridge delays is not authorized. The Coast Guard Great Lakes Pilotage Office will apply the regulations as interpreted here to all future source form reviews, and the LPA will be required to repay industry for any inappropriate charges.

### *III. Inappropriate Charging of Transportation Fees*

On numerous occasions in 2006 and 2007, the LPA included an additional "transportation" fee, ranging from \$40.00 to \$150.00, as a separate line item on the source forms. The LPA attempts to justify this practice by rationalizing that it was for the reasonable out-of-pocket expenses its pilots had to pay to hire drivers to permit them to quickly get to their assigned vessels with adequate rest for the performance of their duties. What the LPA fails to acknowledge in its appeal is that routine transportation costs are already factored into the rate the LPA charges industry for pilotage services.

Again, except for the two specific and unusual situations cited below, the billing of industry for a pilot's travel expenses is not authorized because such expenses are already incorporated into the rate structure. The two regulatory exceptions are:

46 C.F.R. § 401.420(c)(2)

**Cancellation, delay or interruption in rendition of service.**

When a U.S. pilot reports for duty as ordered and the order is cancelled, the ship shall pay a charge for reasonable travel expenses if the cancellation occurs after the pilot has commenced travel.

46 C.F.R. § 401.428

**Basic rates and charges for carrying a U.S. pilot beyond normal change point or for boarding at other than the normal boarding point.**

If a U.S. pilot is carried beyond the normal change point or is unable to board at the normal boarding point, the ship shall pay...plus reasonable travel expenses to or from the pilot's base.

In addition to the two inapplicable (to the presently disputed transportation charges) regulatory sections above, the LPA identifies the Director's "general authority" under 46 C.F.R. § 401.430 to allow for transportation charges.<sup>13</sup> LPA then identifies two prior instances where the Director

---

<sup>13</sup> Appeal at 26.

authorized transportation charges: a 2003 letter to LPA and a 2005 letter to the Saint Lawrence Seaway Pilots' Association (SLSPA). Presumably, LPA refers to these letters to support its contention that the Director authorized LPA to charge transportation fees during the 2006 and 2007 shipping seasons. However, both letters address specific situations not applicable to the transportation charges currently in dispute, and LPA offers no evidence to prove that the Director actually authorized LPA to charge industry for routine transportation fees during the 2006 and 2007 shipping seasons.

#### *The 2003 Letter from the Director, Great Lakes Pilotage*

In 2003 the Director wrote a letter declaring that an association may bill agents for transportation, hotels and subsistence *when a pilot is retained for the convenience of the vessel*. I find this letter to be both incorrect (associations may not bill for such expenses) and irrelevant to the present situation.

The 2003 letter addresses a situation in which a vessel seeks to retain a pilot while the vessel is in port conducting cargo operations etc., so that the pilot will be readily available once the vessel is ready to get underway. The letter erroneously concludes that in such situations charging for transportation, hotels, and subsistence is permissible. In fact, such charges are not authorized and the situation the letter attempts to address (the need for pilots to be retained while a vessel conducts cargo operations etc.) is already covered by 46 C.F.R. § 401.420. Therefore, I find that the 2003 letter from the Director is incorrect, and pilot associations shall no longer charge for transportation, hotels, etc. when a pilot is retained for the convenience of the vessel.

The 2003 letter is also completely irrelevant to the currently disputed charges. The transportation charges at issue on appeal deal with the routine transportation of LPA pilots to and from pilotage assignments, and NOT with situations in which an LPA pilot is retained beyond an existing assignment for the convenience of the vessel. Therefore, despite the fact that the 2003 letter erroneously authorized transportation charges in certain situations, I find that the letter is inapplicable to the current situation and offers no basis justifying the disputed LPA transportation charges during the 2006 and 2007 shipping seasons.

#### *The 2005 Letter to SLSPA*

LPA also references a 2005 letter from the Director to SLSPA discussing transportation charges relating to Iroquois Lock.<sup>14</sup> However, when placed into the proper context, the Iroquois Lock situation is consistent with the Coast Guard's position that routine transportation fees are unauthorized because they are already included in the rate structure.

On July 6, 2005, the Director sent a letter to SLSPA directing them to cease charging transportation fees associated with the night relief at Iroquois Lock because routine transportation fees were already included in the SLSPA rate structure. The last sentence of the 2005 letter stated that "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 pleased to take those views into consideration." As it turns out, SLSPA did, in fact, have a good reason to temporarily bill industry for transportation associated with the Iroquois Lock night relief program.

The night relief program was new in 2005, and as such, had not yet been built into the SLSPA's rate structure. Therefore, after further discussion and consideration, the Director allowed the SLSPA to continue billing industry for transportation fees, but only until those fees could be

---

<sup>14</sup> Appeal at 27.

properly included in the SLSPA's rate structure. With the April 03, 2006, effective date of the SLSPA's new rate (which included transportation fees for the Iroquois Lock night relief program), the Director correctly terminated his authorization for SLSPA to bill separately for transportation fees.<sup>15</sup> The scenario surrounding SLSPA's temporarily authorized billing for transportation fees in relation to the night relief program at Iroquois Lock is consistent with the Coast Guard's position that transportation fees are not allowed where such costs are already built into the rate.

The unique situation involving Iroquois Lock during the 2005 shipping season is entirely inapplicable to the LPA's charging for routine transportation fees during the 2006 and 2007 shipping seasons because at all times during those seasons, LPA's rate already took into account transportation fees.

*The Lack of a Documented Authorization from the Director to LPA*

After identifying two *documented* situations that are unrelated to the present dispute (the 2003 "retained pilots" letter and the 2005 Iroquois Lock night relief letter) where the Director, Great Lakes Pilotage authorized transportation fees, the LPA fails to offer any documentation from the Director to support its claim that its charges for routine transportation fees during the 2006 and 2007 shipping seasons were authorized. The only documentation the LPA offers on this point is the declaration of Captain Dan Gallagher that the Director authorized these specific transportation charges during a telephone conversation.<sup>16</sup> I find this declaration to be unpersuasive. The fact of the matter is that routine transportation charges were already built into LPA's rate during the 2006 and 2007 shipping seasons. It is therefore highly unlikely that the Director would authorize a separate charge to cover LPA's already accounted-for transportation expenses. Absent something in writing from the Director to the LPA authorizing what would amount to double-billing for transportation fees, I am unconvinced that such an authorization was actually granted.

Coast Guard staff experts have determined that the LPA billed industry \$78,860.00<sup>17</sup> for transportation fees during the 2006 and 2007 shipping seasons. Such billing is unauthorized because transportation fees are already included in the LPA's rate charged to industry for pilotage service. There is nothing in the administrative record, absent Captain Gallagher's stand-alone declaration, to show that the Director authorized these charges. Therefore, the LPA must repay industry \$78,585.00 for the improperly billed transportation charges.

---

<sup>15</sup> 71 Fed. Reg. 16507.

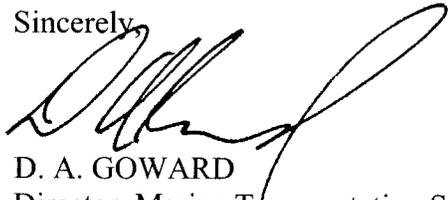
<sup>16</sup> Appeal enclosure C "Declaration of Captain Gallagher."

<sup>17</sup> The original amount of \$78,585.00 has been corrected to \$78,860.00 after the discovery of an error in the original calculation of appropriate charges.

## CONCLUSION

For the reasons discussed above, the LPA must repay industry the \$192,882.50<sup>18</sup> that was inappropriately charged during the 2006 and 2007 shipping seasons within 90 days of the date of this letter. The specific breakdown of the companies that were inappropriately charged and the amount of those charges is being provided to you via separate cover. The LPA must also modify its billing practices to fully conform with this letter. Furthermore, in order to avoid costly and time consuming disputes in the future, the LPA is highly encouraged to obtain written approval from the Director, Great Lakes Pilotage, *prior to* engaging in any creative and/or novel billing practices. This letter constitutes final agency action on your appeal.

Sincerely,



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

---

<sup>18</sup> The original amount of \$193,361.50 has been corrected to \$192,882.50. See Footnotes 11 and 17.