

COLUMBIA RIVER PILOTS

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House Committee on Transportation Policy
Attn: Ms. Danielle Ross, Legislative Policy and Research Office
Oregon State Capitol
900 Court Street NE, Room 453
Salem, Oregon 97301

By Regular Mail and Email

Re: Committee Q&A Regarding HB 2695

Dear Chair McKeown and Committee Members:

At your February 8, 2017, hearing regarding HB 2695 you posed a series of questions and asked interested parties to provide additional information in response to those questions. The Columbia River Pilots prepared the following responses with the assistance of its attorneys, both of whom have decades of experience in maritime law and its application to pilotage.

Q. Does the Oregon legislature have authority to enact laws regulating pilotage?

A. Yes, with exceptions. Although Congress has plenary authority over interstate commerce, since the first Congress in 1789, Congress has permitted state regulation of pilotage on some vessels in state waters. The current law is Chapter 85 of Title 46, US Code. It generally provides that the states shall regulate pilotage of vessels on voyages to or from another country. 46 USC § 8501. It further provides that the federal government shall regulate pilotage for certain U.S flag vessels that are not sailing to or from a foreign country ("not sailing on register"). 46 USC § 8502. To summarize and to describe the jurisdictional split in another way: States regulate pilotage on foreign flag vessels and U.S. flag vessels on voyages to or from foreign countries, and the federal government regulates pilotage on U.S flag vessels on voyages between ports within the United States. It is worth noting further that there is no overlap between state and federal authority---to the extent states regulate pilotage, it is exclusive of federal regulation. However, if a state chooses to not regulate pilotage on certain vessels, the federal government retains authority to step in and impose requirements of its choosing. See 46 USC § 8503.

Q. What, if any, recent changes in Coos Bay led to, or justify, HB 2695?

A. The Columbia River Pilots are not aware of a change in law or industry practice that calls out for legislative correction. To the extent that commercial towing vessels that arrive in Coos Bay (or any pilotage grounds in Oregon) directly from foreign ports are not engaging state pilots, they are violating existing law. The Oregon Board of Maritime Pilots discovered violations occurring in Coos Bay a few years ago and began enforcing the law. It may be that similar violations are occurring but have gone undetected on the Columbia River. If such violations are occurring on the Columbia River, we would expect the Oregon Board of Maritime Pilots to enforce the law there as well.

Q. What, if any, changes in Customs clearance procedures led to, or justify, HB 2695?

A. None that we are aware of, although others may be better situated to answer this question. It is our understanding that past practice required a vessel to actually enter a U.S port in order to clear Customs. In the context of the disputed vessels and Coos Bay, that U.S. port was Port Angeles or Gray's Harbor, Washington. There was then a brief period during which Customs was clearing vessels that were underway offshore. This "drive by" clearance method was terminated and the prior longstanding requirement for actually entering a U.S Port was reinstated.

Q. Is HB 2695 a permissible regulation of pilotage?

A. HB 2695 is not the regulation of pilotage at all, it is instead the abandonment of Oregon's existing regulation of pilotage for certain vessels. State law requires navigation by a state licensed pilot for tugs and tows arriving from or destined to all foreign countries including British Columbia (Canada). HB 2695 would allow those vessels to transit Oregon waters without a state licensed pilot so long as "the towing vessel is under the navigational control of a person holding the federal mariner license required for the towing vessel when operating under a coastwise endorsement." This is apparently an attempt to default to federal requirements, but there are currently no federal pilotage requirements for a 200 ton towing vessel operating as indicated. In addition, the language of the bill is confusing and inconsistent with standard legal definitions: It refers to "coasting trade" and to a U.S. flag "towing vessel when operating under a coastwise endorsement." A coastwise voyage occurs when a U.S. flag vessel sails "on a voyage between a port in one State and a port in another State (except an adjoining State)." See, e.g. 46 USC § 10501 (definition of "coastwise voyage" for purposes of shipping articles). A U.S. flag towing vessel operating under a coastwise endorsement would be sailing from one U.S. port to another, not from a foreign country.

Q. Would the Columbia River Pilots object to HB 2695 if revised to ensure it is a permissible regulation of pilotage?

A. HB 2695 is an attempt to eliminate an existing and proper regulation of pilotage by the State of Oregon. The Columbia River Pilots object to exemptions from state regulation of pilotage such as the exemption that would be created by HB 2695. The principal reason for pilotage laws is safety. See, e.g., ORS 776.115(2) (primary consideration for the Oregon Board of Maritime Pilots is public safety). Because a towing vessel arriving from British Columbia is not engaged in a coastwise voyage, and because there are no federal pilotage requirements applicable to the subject vessels even if they were on a coastwise voyage, there are no federal pilotage requirements that could apply. If state pilotage requirements are eliminated, HB 2695 would allow a properly licensed mariner who had never previously navigated in Oregon waters to cross the bars of Coos Bay, Yaquina Bay, and the Columbia River, and to transit the entire Columbia River, without a pilot. The demands of local knowledge and 150 years of piloting experience tell us that is contrary to protecting the public's interest.

Q. Is local knowledge adequately addressed by federal licensing of the master and other mariners operating tugs in Oregon waters?

A. No. The training, experience and certification requirements for masters, mates, and other credentialed mariners under federal law do not contain any local knowledge requirements. Minimal local knowledge requirements are set forth in the regulations dealing with federal pilotage endorsements, but as noted elsewhere in this letter, if HB 2695 were enacted, the only requirement for mariners aboard vessels within the ambit of the exemption that would be created by HB 2695 (that is, U.S. flag tugs up to 200 tons towing non-tank barges up to 10,000 tons) is that they have “the federal mariner license required for the towing vessel when operating under a coastwise endorsement.” The “federal mariner license” is not the same as the “federal first-class pilot endorsement,” nor could it be, because the federal first-class pilot endorsement is not issued for “tonnage limitations of 1,600 GRT or less.” 46 CFR 11.604. This issue is discussed in more detail in the letter submitted by the Columbia River Pilots on February 7, 2017.

Q. Is HB 2695 narrowly written to address the specific problem experienced by Coos Bay mills seeking to import logs from British Columbia?

A. No. As written, HB 2695 permits certain tugs with properly licensed crew who might have no experience in Oregon waters at all to enter all Oregon waters, not just Coos Bay. There is no safety rationale that would justify making HB 2695 applicable to just Coos Bay---it is as difficult and dangerous as any pilotage area in Oregon or elsewhere.

Q. Is HB 2695 narrowly written to avoid risks of significant environmental harm?

A. No, for three reasons. First, while HB 2695 excludes from the proposed pilotage exemption tank vessels as defined in ORS 468B.300, that statute defines tank vessels to cover only vessels designed for carrying petroleum as cargo in bulk: "'Tank vessel' means a ship that is constructed or adapted to carry oil in bulk as cargo or cargo residue." Thus, HB 2695 would not exclude barges carrying petroleum, chemicals, or hazardous substances as cargo in drums or other containers. Furthermore, HB 2695 would not exclude bulk carriage of large volumes of chemicals and other toxic substances, so long as they are in barges designed for them and not for oil. In other words, the exception to state pilotage laws created by HB 2695 would permit barges up to 10,000 tons carrying petroleum products, chemicals, and hazardous substances as cargo in drums or other containers, and also permit barges designed to carry toxic and hazardous materials (other than petroleum) in bulk, to enter Oregon waters without a pilot. Second, petroleum carried as fuel is not addressed by HB 2695. It should be kept in mind that the NEW CARISSA was not a tank vessel. It was a bulk carrier designed to carry wood chips. All oil spilled from the NEW CARISSA was fuel or lubricating oils, not cargo. All tugs exempted from pilotage by HB 2695 and many of their towed barges would have the potential for spilling fuel or lubricating oils into Oregon waters. Third, all traffic on Oregon pilotage grounds pose a potential hazard to all other vessels on the pilotage grounds. HB 2695 would expand the numbers of unpiloted tugs and barges on our waterways, increasing risks for ships and other piloted vessels that are traveling the same waterways carrying all manner of cargos.

Q. How is the problem addressed by HB 2695 handled in the State of Washington?

A. A partial answer to this question is that Washington generally permits U.S. and Canadian vessels operating on the U.S. West Coast (including Alaska) to enter Puget Sound or Grays Harbor without a Washington state pilot. See RCW 88.16.050, 88.16.070. However, that allowance was adopted by the Washington legislature in 1935. Considering the level of environmental protection deemed necessary and appropriate in the modern era, one must question whether a similar broad exemption would be adopted in Washington today.

Q. Why should Oregon handle the problem differently than Washington?

A. As pointed out above, the Washington exemption was adopted in 1935, when attitudes towards the environment and maritime safety were much different than they are today. In addition, there is little comparison between the Oregon pilotage grounds and the Puget Sound and Grays Harbor pilotage grounds with regard to the demands for local knowledge. The bars of Coos Bay, Yaquina Bay, and the Columbia River, and the entire length of the Columbia River, are particularly unlike the Puget Sound pilotage ground. They are smaller, narrower, shallower, and in many respects more difficult, where as Puget Sound is deep open water with fixed and regulated traffic lanes. As further evidence that the Oregon pilotage grounds are different, consider that although Washington has concurrent jurisdiction with Oregon to regulate pilotage at the Columbia River Bar and on the Columbia River, Washington does not exempt vessels from employing local pilots in those locations. Because it is an interstate boundary, Oregon and Washington have equal jurisdiction to regulate pilotage on the Columbia River Bar and Columbia River. Washington generally defers to Oregon regulation. See, e.g., RCW 90.56.568. By exempting Puget Sound and Grays Harbor but not the Columbia River or Columbia River Bar from some state pilotage laws, Washington treats the Columbia River and the Columbia River Bar pilotage grounds differently than it does the Grays Harbor and Puget Sound pilotage grounds.

Q. Does British Columbia require a B.C. pilot for vessels calling in B.C. waters?

A. Yes, with exceptions. Generally, the Pacific Pilotage Authority (PPA) administers pilotage rules in British Columbia. PPA rules exempt commercial vessels under 350 gross tons from most compulsory pilotage. Compulsory pilotage may be waived for vessels under 10,000 gross tons in certain regulated waters if the crew meets certain familiarity requirements in the waters in question consisting of four, six or ten round trips in the pilotage grounds in question, depending on area. (By comparison, HB 2695 would allow exempted vessels to be under the control of persons who had never been to Oregon.) Exceptions from the PPA generally must be requested in advance in writing. A complete description is beyond the scope of this letter, but the following resources on the Internet are relevant:

Pilotage Act: <http://laws-lois.justice.gc.ca/eng/acts/P-14/>

Pilotage Regulations: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2000-132/>

Pacific Pilotage Regulations:

http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._1270/index.html

Ships Subject to Compulsory Pilotage:

http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._1270/page-2.html#h-9

Waiver of Compulsory Pilotage:

http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._1270/page-2.html#docCont

Q. If British Columbia would waive pilotage to towing vessels of less than 200 tons towing barges under 10,000 tons, why should Oregon not do the same?

A. Respectfully, prudence dictates different rules for different pilotage grounds. Thus, the Pacific Pilotage Authority imposes different familiarity requirements for waivers for vessels transiting the area below the New Westminster Bridge than it does for vessels above the New Westminster Bridge, and different still for the Second Narrows Movement Restriction Area. See Waiver of Compulsory Pilotage link, above. For just this reason, the Columbia River Pilots oppose a blanket exception to pilotage requirements in all Oregon pilotage grounds. And more to the point, HB 2695 would allow exempted vessels to be under the control of persons who had never been to Oregon. Such a blanket exemption does not apply in British Columbia.

Q. Are pilotage rates charged for commercial tug and barge operators at Coos Bay onerous?

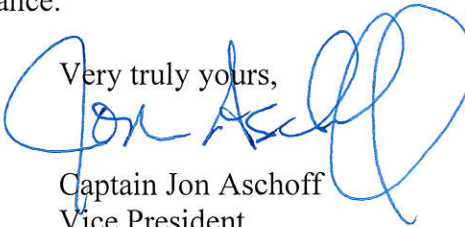
A. No. The Oregon Board of Maritime Pilots is charged with ensuring that all rates charged for pilotage in Oregon are reasonable and just. ORS 776.115(5)(a). Toward this end, pilotage rates are determined in part based on the size of the vessel in question, meaning small vessels typically pay less for pilotage than do larger ones. The charges for various vessels calling in Coos Bay and elsewhere can be determined by reference to the State tariff published at: http://www.puc.state.or.us/BMP/docs/Tariff_1-15-17.pdf. In the final analysis, application of pilotage fees proportionately is the fairest manner to ensure that no industry segment or specific business or geographic region enjoys a commercial advantage as a result of favorable legislative treatment. It should be kept in mind that pilotage rates are set by the State to recover the costs of maintaining a pilotage system. If there are exemptions from pilotage requirements, the costs of maintaining the system do not go down correspondingly. If there are exemptions, the system costs are simply shifted and must be recovered through increased pilotage rates that must be paid by others who are not exempted.

Q. In what other ways might the Oregon legislature address the problem affecting importation of logs at Coos Bay?

A. Two possibilities suggest themselves. First, and preferably, the legislature could authorize the Oregon Board of Maritime Pilots to issue waivers for certain classes of vessel (for example, towing vessels of less than 200 tons towing barges up to 10,000 tons carrying cargoes of logs or wood products in bulk) on a showing of adequate local knowledge and competence by the tug operators. See, for example, WAC 363-116-360. ORS 776.405(c)(C) already authorizes the Board to exempt certain small fishing and recreational vessels and an expansion of that authority for the subject tugs and tows upon a proper showing of safe manning is a viable alternative. The advantage is that the Board with its expertise could issue narrow exemptions that contain the risk to Oregon waters posed by a blanket exception to the state pilotage rules. Second, the legislature could require by statute certain minimum requirements of familiarity with local conditions not now required for holders of federal mariner licenses. Thus, although federal pilotage requirements include certification of local knowledge, HB 2695 as currently drafted has no similar provision. For example, the Legislature could require that the exemption only apply for the subject towing vessels if under command of a person holding a federal First Class pilot's license for the pilotage ground in question. This approach is not favored by the Columbia River Pilots because it would constitute a blanket (legislative) exception to pilotage in the notoriously hazardous Oregon pilotage grounds.

Please let us know if we can be of further assistance.

Very truly yours,



Captain Jon Aschoff
Vice President

cc: Tim Walker
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