



AMERICAN PILOTS' ASSOCIATION

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

CAPTAIN JORGE J. VISO
PRESIDENT

CAPTAIN W. CRAYTON WALTERS III
SECRETARY-TREASURER

BRENDAN P. O'SHEA
DEPUTY DIRECTOR-ASSOCIATE GENERAL COUNSEL

CLAYTON L. DIAMOND
EXECUTIVE DIRECTOR-GENERAL COUNSEL

LISA TOWNSEND
OPERATIONS DIRECTOR

COMMENTS OF AMERICAN PILOTS' ASSOCIATION ON LD 1477, "AN ACT TO PROVIDE AN EXEMPTION FROM PILOTAGE REQUIREMENTS FOR PASSENGER FERRY SERVICE BETWEEN BAR HARBOR, MAINE AND YARMOUTH, NOVA SCOTIA"

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INTRODUCTION

The American Pilots' Association (APA)¹ **strongly opposes** Legislative Document 1477 (LD 1477), "An Act to Provide an Exemption from Pilotage Requirements for Passenger Ferry Service Between Bar Harbor, Maine and Yarmouth, Nova Scotia." APA opposes LD 1477 because it is inconsistent with the basic tenants of State compulsory pilotage, well-established practices, and legal precedent and it would fail to provide the "maximum safety from the dangers of navigation for vessels entering or leaving [Maine pilotage waters]."² Among APA's primary focuses is to work closely with State legislatures and State and local oversight authorities to assist and support the continual improvement of the compulsory pilotage system in the United States. The comments below are submitted in the spirit of that focus.

A BREAK FROM TENANTS OF COMPULSORY PILOTAGE, WELL-ESTABLISHED PRACTICES, AND LEGAL PRECEDENT

Under current relevant Maine pilotage law, Title 38, Chapter 1, §86, "Every foreign vessel and every American vessel under register,³ with a draft of 9 feet or more, entering or departing from any port or harbor within [Maine pilotage waters] must take a pilot licensed under this chapter. Any master, owner, agent or consignee that fails to take a pilot licensed under this subchapter is subject to a civil penalty not to exceed \$15,000 per day, payable to the State. This penalty is recoverable in a civil action." LD 1477, if enacted, would amend State laws to exempt a certain U.S. flagged vessel, while sailing under "register" between Bar Harbor, Maine and Yarmouth, Nova Scotia, from the requirement to take a Maine-licensed pilot during most of its transits through State pilotage waters. While the intent of this legislation seems to be to provide

¹ The APA is a non-profit organization that has been the national association of the piloting profession in the United States since 1884. All of the State-licensed pilot groups in operation in the 24 coastal States, as well as the groups of U.S. registered pilots operating in the Great Lakes system under authorization by the Coast Guard are members of the APA. Pilots belonging to these APA-member pilots' associations handle over 90 percent of all vessels moving in international trade in the waterways of the United States. The role and official responsibility of these pilots is to protect the safety of navigation and the marine environment in the waters for which they are licensed.

² Maine Revised Statutes, Title 38, Chapter 1, § 85.

³ A vessel under register or sailing under a "registry endorsement" is a vessel that is authorized by the United States to sail between a U.S. and foreign port to engage in foreign trade (e.g., movement of good or passengers). See 46 CFR § 67.17

economic benefit to a particular vessel interest, since the vessel that would be exempted is 349 feet long; can transport 866 passengers, 20 large trucks/90 cars; and carry more than 83,000 gallons of fuel oil, the practical impact of LD 1477 would be to weaken Maine's pilotage laws and put passengers, the State's waterways, and the marine environment at enhanced risk.

LD 1477 is inconsistent with the Declaration of Policy for Maine's pilotage laws, which reads, "It is declared to be the policy and intent of the Legislature and the purpose of this subchapter to provide for a system of state pilotage in order to provide maximum safety from the dangers of navigation for vessels entering or leaving [Maine pilotage waters]" and "to maintain a state pilotage system devoted to the preservation and protection of lives, property, the environment and vessels entering or leaving these waters...."⁴ (Emphasis added.)

The pilotage system in the U.S. is a system of State regulation and State responsibility. This system reflects a judgment made by Congress in 1789 that due to the localized and unique nature of pilotage, its regulation is best left to the individual States.⁵ This judgment is now reflected in Title 46, Chapter 85 of the U.S. Code, which provides, in part, that pilotage of foreign flagged vessels, as well as U.S.-flagged vessels sailing between a U.S. port and a port in a foreign country (that is, sailing on register), is subject to State pilotage law and jurisdiction. It is in a State's environmental, marine safety, and economic best interest to maintain an effective compulsory pilotage system, and **no State should ever voluntarily weaken this critical authority delegated from Congress.**

FAILURE TO PROVIDE MAXIMUM SAFETY

A compulsory pilotage requirement is by far the most effective mechanism available to a State to protect its marine environment and maintain navigational safety, while also responsibly facilitating maritime commerce. It is effective because, unlike other laws or regulations that merely direct a ship to do or not do certain things, compulsory pilotage places on the bridge of a ship a State-licensed pilot to ensure ships are conducted safely in pilotage waters. This State pilot is a highly trained individual who is an expert in all aspects of local navigation, isolated from the economic pressures facing shipping companies, fully empowered to direct the navigation of the ship, and whose primary responsibility is to protect the interests of the State that issues the license.

When a State pilot boards a ship, she or he brings immense experience and in-depth familiarity with local conditions from *thousands* of transits gained over many years of service in a specific port. The pilot not only directs the navigation of the ship, but also handles communications and manages traffic, coordinating the ship's movement with other traffic in the harbor to avoid situations that lead to collisions and other marine accidents. Although a State pilot is not an employee of the government, the pilot does perform an important public service. A State pilot can exercise judgment that is independent from the economic interests of the ship owners, is answerable only to the State that licenses and regulates him/her and has as a sole objective to

⁴ Maine Revised Statutes, Title 38, Chapter 1, § 85.

⁵ See *In Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 32 S. Ct. 626, 56 L.Ed. 1047 (1912), Justice Hughes recounting the early history of pilotage legislation: "[w]hen the Constitution of the United States was adopted, each State had its own regulations of pilotage. While this subject was embraced within the grant of power 'to regulate commerce with foreign nations, and among the several States' (Art. 1, sec. 8 [U.S.C.A. Const.]), Congress did not supersede the state legislation." See also, *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 at 320, Congress looked at the nature of piloting and reached the conclusion that it is "best provided for" at the state, not federal, level.). See also, a detailed discussion of the history, including this decision being the ninth act of the first Congress and upheld by subsequent Supreme Court cases since 1789 by Paul G. Kirchner & Clayton L. Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulation in the United States*, 23 U.S.F. Mar. L.J. 168 (2011). This scholarly article, published in the University of San Francisco Maritime Law Journal, provides a detailed history and overview of the State pilotage system in the United States. The article is available at:

[www.americanpilots.org/document_center/Activities/Unique Institutions Indispensable Cogs and Hoary Figures Understanding Pilotage Regulation in the United States.pdf](http://www.americanpilots.org/document_center/Activities/Unique_Institutions_Indispensable_Cogs_and_Hoary_Figures_Understanding_Pilotage_Regulation_in_the_United_States.pdf)

protect State waters by preventing ships from engaging in unsafe operations. In that respect, the principal customer of the pilot's service is not the ship or ship owner, but rather the State and its public interests.

A large part of piloting is judgment. There is a natural conflict between a vessel owner's economic needs and the public interest in safe passage. It is in the public's best interests for the pilot's judgment to be absolutely free of economic consideration of the ship owner. A pilot often must decide between different courses of action that may put safety at odds with business interests. For example, whether a ship should proceed in heavy fog, whether a ship should wait for a particular tide or current, or whether one route or maneuver should be used rather than another that might take more time. State pilots are empowered and expected to exercise informed independent judgment in making these types of decisions and to resist any economic pressures the ship may be under.

If enacted, LD 1477 would establish a system in Maine that is inconsistent with these basic tenants of State compulsory pilotage. The priorities of the ferry captains that LD 1477 would elevate and empower are quite different from those of the Maine-licensed pilots. The captains' interests are understandably aligned with the ship owner and the economic success of the company, while Maine licensed pilots are accountable to the Board of Harbor Commissioners for the Port of Portland or the Maine Pilotage Commission, the State of Maine, and the public interest. While a Maine-licensed pilot can take actions and make decisions based solely on safety considerations, company-employed captains or masters are frequently under immense economic pressure which can lead to actions and decisions based more on the "bottom line" and less on safety.

The masters of this ferry are not accountable to any local or Maine authority for negligence, misconduct, or other substandard performance. On the contrary, these masters are primarily accountable to the ferry operator that pays them, and their performance will be judged, and their future employment will be dependent, upon how well they serve the ferry's economic interests. These ferries, which operate on a published annual schedule – with intense pressure to be on time all the time – are particularly sensitive to economic considerations.

PROPOSED LEGISLATIVE PROTECTIONS ARE NOT NEARLY ENOUGH

The proposed legislation includes two provisions that purport to provide some level of comfort with respect to the safety of this vessel's many transits through State waters. However, APA has serious concerns with the level of protection that both of these provisions would provide.

First, LD 1477 would require that the exempted vessel be under the direction and control of a Maine-licensed pilot on "one round trip per calendar week." Based on the published schedule for this vessel, it will make 132 roundtrips between Maine and Canada during 2025.⁶ If a Maine-licensed is only aboard once per calendar week, this means this vessel will only be under the protection of a State compulsory pilotage 17% of the time. Allowing this vessel, which is sailing on register and properly subject to Maine compulsory pilotage, to be without a pilot 83% of the time while in Maine pilotage waters is certainly not aligned the State's Declaration of Policy for its pilotage laws, which makes clear the legislative intent of Maine's system of pilotage is to provide "maximum safety from the dangers of navigation for vessels entering or leaving [Maine pilotage waters]" and "to maintain a state pilotage system devoted to the preservation and protection of lives, property, the environment and vessels entering or leaving these waters...."

The second feature of LD 1477 that supposedly provides some assurance is that the vessel's master must possess a "United States Coast Guard first class pilotage endorsement for the area of operation." This provision is troublesome for two reasons.

⁶ <https://www.ferries.ca/thecat/schedule>

To begin with, possessing a federal first class pilot endorsement (FCPE) while aboard this U.S. flagged vessel that is sailing on register has little relevance. The FCPE administered by the U.S. Coast Guard, applies directly only to individuals serving aboard the small number⁷ of U.S.-flag coastwise (e.g., transiting between U.S. ports) vessels operating in the U.S. domestic trade.⁸ The vessel that LD 1477 proposes to exempt from the protections of Maine compulsory pilotage is sailing on register between Maine and Canada and is therefore not subject to Coast Guard / federal pilotage requirements.

In addition, there is no comparison between what it takes to earn a State pilot license and a FCPE. All States require a formal apprentice program as the basis to certify candidates for eventual licensure. The length of apprentice programs can vary (i.e., 1-3 years for a mariner with an advanced credential or up to 7 years for an applicant with lesser maritime experience). Future pilots learn their craft under the tutelage of fully-licensed and experienced pilots. Since pilots must be intimately familiar with local waters, navigational peculiarities, and local regulations, as well as know how to handle different types/sizes of ships and be able to conduct themselves on ships with bridge teams coming from all over the world, an intensive “on-the-job” training program is vital. Pilot apprenticeship programs include numerous instructional trips through pilotage waters with an experienced pilot. Depending on the level of experience of the pilot trainee, the number of trips can range from hundreds to thousands. The number of trips must be enough to ensure the pilot trainee becomes proficient at all different pilotage runs, on all different types of vessels, and under all types of weather conditions. Time has shown that the skills required of a pilot are best developed, and then mastered, through locality-specific, “hands-on” apprentice training.

State training, certification, and recency standards are far more stringent than federal requirements, but the FCPE does provide some benefit in that it serves as a national *minimum* standard.⁹ In the State pilotage system, the FCPE is either an entry level requirement for selection to a State pilot apprentice program or obtaining it is one of the many steps in such a program. Unlike the comprehensive certification, training/apprenticeship, and licensing regimes of the States,¹⁰ the federal regulations on pilotage are very limited. Federal statutes and regulations¹¹ set out rudimentary requirements for a FCPE (i.e., minimum age of 21, annual physical exam, familiarity with electronic navigation, experience aboard a vessel in some capacity, small number of trips of the pilotage area, one-time exam and chart sketch, etc.), but a FCPE may be issued to an individual who has had no prior training as a pilot, has not demonstrated *any* piloting or even basic conning skills, and who holds no other merchant mariner credential (e.g., not even a third mate, let alone chief mate or master).¹² The regulatory requirement for federally-licensed pilots to maintain proficiency and a current working knowledge of the waters and routes to which the federal license applies is also extremely limited (the holder of a FCPE is required to transit the particular pilotage route just once every 5 years).¹³

⁷ According to the U.S. Maritime Administration (MARAD), the number of ocean-going commercial ships exceeding 1,000 gross tons in the U.S. merchant fleet is considerably less than two hundred vessels. MARAD estimates that only 1.5% of U.S. waterborne imports or exports are carried on vessels of domestic registry. By contrast, the International Chamber of Shipping estimates that there are over 50,000 merchant ships trading internationally.

⁸ See 46 U.S. Code § 8502 - Federal pilots required.

⁹ The U.S. Coast Guard's view of the role the federal pilot endorsement is intended to play was perhaps best summed up in comments by Rear Admiral Henry Bell, then Chief of the Coast Guard's Office of Merchant Marine Safety, at a 1979 conference. "This is precisely the philosophy behind the federal license. It is not intended to guarantee, in any way, that the holder can walk aboard, and perform like a first class pilot. It does not guarantee that he is capable of doing anything at all....[a]ll the license does is get a man in the door. It allows him to say, 'Yes, I have met the minimum standards.'" Admiral Bell went on to say, "To date, it has never been the government's intention to try to make the license reflect competence....The federal licensing program is not intended to achieve the ends that many of the state pilots' associations are designed to achieve for their own people in their own area." (Emphasis added) See pages 113-114 of the *Proceedings: Symposium on Piloting and VTS Systems*, September 12, 1979, The National Research Council, Marine Transportation Research Board.

¹⁰ See Clayton L. Diamond, "Certification, Licensing, and Recertification of Marine Pilots: A Perspective from the U.S. "State Pilot System" at: https://cms3.revize.com/revize/americanpilots/Certification,%20Licensing,%20and%20Recertification%20of%20Marine%20Pilots_March2014.pdf

¹¹ Specifically, Title 46, Chapter 71 of the U.S. Code (USC) and Title 46, Part 11 of the Code of Federal Regulations (CFR).

¹² 46 C.F.R. § 11.705(b)

¹³ 46 C.F.R. § 11.713.

Finally, to shipping companies, compulsory pilotage is often seen as an inconvenient business expense. The implied intent of LD 1477 certainly seems to express this shipping company view of pilotage and seems aimed at further reducing the pilotage fees to which this vessel is properly subject (which ironically due to a compromise by the Maine-licensed pilots are already *64% less than any other vessel transiting this route*). State compulsory pilotage, however, should never be viewed as just another expense to the shipping industry and any deliberations surrounding compulsory pilotage requirements should be based on the needs of the safety of life at sea, navigational safety, and marine environmental protection and not on shipping company profit margins.

CONCLUSION

If enacted, LD 1477 would serve a narrow special economic and business interest at the expense of safety of life at sea, environmental protection, and navigational safety. The proposed legislation would remove critical checks and balances by allowing an individual, with understandable allegiance to a shipping company's bottom line, to have absolute and complete control of a large vessel moving in Maine compulsory pilotage waters carrying large numbers of passengers and tens of thousands of gallons of fuel oil. This proposed legislation would certainly not provide "maximum safety," nor would it "maintain a state pilotage system devoted to the preservation and protection of lives, property, the environment and vessels." **Again, APA strongly opposes LD 1477.**

The APA has long been a public and forceful advocate of stringent State government oversight of compulsory pilotage. We believe it is vital for States to maintain their traditional role in preserving the efficient, environmentally responsible, and safe flow of waterborne commerce through this country's ports. We, therefore, respectfully ask that LD 1477 be rejected.

Respectfully,

Clayton L. Diamond

Clayton L. Diamond
Executive Director-General Counsel
American Pilots' Association