

SARAH S. KEAST (LEAD)
Trial Attorney
Aviation & Admiralty Litigation
Torts Branch, Civil Division
United States Department of Justice
P.O. Box 14271
Washington D.C. 20044-4271
Phone: (202) 616-4039
Fax: (202) 616-4159
Email: Sarah.Keast@usdoj.gov

Attorneys for Defendant

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

_____)	
LAKES PILOTS ASSOCIATION, INC.,)	
)	
Plaintiff,)	
v.)	Civ. No. 2:11-cv-15462-SJM-MJR
)	
UNITED STATES COAST GUARD,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S COMBINED BRIEF IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

This Administrative Procedure Act action seeks review of a final administrative decision affirming an order from the Coast Guard’s Great Lakes Pilotage (“GLP”) office. Relevant here, the final decision affirms the GLP’s finding that Plaintiff Lakes Pilots Association (“LPA”) overbilled the shipping industry for pilotage service during the 2006 and 2007 shipping seasons, and orders LPA to repay industry \$192,882.50 that was inappropriately charged during those seasons.¹ AR000005. This final decision should be upheld because it is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

¹ The Coast Guard has stayed the repayment portion of the order pending the outcome of this litigation.

BACKGROUND

I. The Statutory and Regulatory Background

A. *The Great Lakes Pilotage Act.*

The Great Lakes Pilotage Act (GLPA), codified at 46 U.S.C. §§ 9301-08, provides the statutory framework for pilotage on the Great Lakes. The GLPA mandates the use of a United States or Canadian registered pilot while navigating within the Great Lakes. 46 U.S.C. § 9302. The GLPA vests authority in the Secretary to set the standards and regulations for becoming a registered pilot and “the conditions of service” for pilots. 46 U.S.C. §§ 9303(a)-(e). Further, the GLPA expressly grants the Secretary authority to establish by regulation the “rates and charges for pilotage services.” 46 U.S.C. § 9303(f). The Secretary has delegated the authority for implementing and enforcing the GLPA to the Coast Guard pursuant to 46 U.S.C. § 2104(a).

In addition, the Secretary may enter into agreements with Canada to facilitate pilotage on the Great Lakes. 46 U.S.C. § 9305. These Memorandums of Arrangements have been included in the Administrative Record at AR002851-95, including the 1979 agreement that is the focus of LPA’s arguments. These agreements, amongst other things, divide pilot services between U.S. and Canadian pilots. *Id.* Along most routes, Canadian and U.S. pilots alternate providing services, either by alternating blocks of vessels or based on the vessel’s destination. *Id.* Only Canadian pilots provide services in Welland Canal.²

B. *Coast Guard Regulation under the Act.*

² The Welland Canal crosses Canada, connecting Lake Ontario and Lake Erie between Port Weller and Port Colborne. The area is just west of Buffalo, NY and Niagara Falls.

The Coast Guard is responsible for ensuring the provisions of the GLPA are implemented and followed by pilots on the Great Lakes. In furtherance of this delegation, the Coast Guard has promulgated regulations at Part 46 of the Code of Federal Regulations providing for the registration of U.S. pilots, the formation of pools by voluntary associations of U.S. pilots, and the establishment of rates, charges, and other term of service for U.S. pilots. 46 C.F.R. § 401.100. *See also* 46 C.F.R. Parts 401 - 404. Pilotage pools, such as Plaintiff Lakes Pilots Association, specifically agree to “be subject to such other provisions as may be prescribed by the Director governing the operation of and the costs which may be charged” as part a condition of their being authorized to form a pool. 46 C.F.R. § 401.320(d)(5). LPA is the certified American pilot pool for “District 2,” which is comprised of Lake Erie, the Detroit River, Lake St. Clair, and the St. Clair River to the mouth of Lake Huron, as further described in 46 C.F.R. § 401.300.

The Coast Guard, through its duly promulgated regulations, provides for the exact rates and charges pilots can charge for their services and the procedures to be followed when a charge is disputed. 46 C.F.R. §§ 401.400-50. The base rates that pilots may charge for operating in LPA’s area of operations are set forth in 46 C.F.R. § 401.407. The methods used for calculating the rates and charges are detailed in 46 C.F.R. Part 404. The regulations further provide the fees that can be charged for a cancellation or delay in service, retaining the services of an additional pilot, and charges on past due accounts. 46 C.F.R. § 401.420-427.

In 1968, the Coast Guard proposed a system of mandatory pilot change points and mandatory rest periods. 33 Fed. Reg. 4747 (Mar. 20, 1968). The purpose of this

proposal was to require “periods of rest between assignments and [prohibit] marathon assignments” in order to “enhance safety by insuring the availability of a well-rested and more effective pilot.” *Id.* This system was codified at 46 C.F.R. §§ 401.450 and 401.451. 33 Fed. Reg. 6477 (Apr. 27, 1968). The regulation designated the following places as pilot change points: Snell Lock; Cape Vincent; Port Weller; Lock No. 7, Welland Canal; Detroit/Windsor;³ Port Huron/Sarnia; Detour; Gros Cap, Chicago;⁴ and Duluth/Superior and Fort William/Port Arthur. *Id.* A fresh pilot is required to begin the next leg of the trip.

In 1974, the Coast Guard promulgated a regulation permitting U.S. pilots to charge a daily fee plus reasonable travel expenses if they were picked up before or carried beyond one of the change points listed in § 401.450. 39 Fed. Reg. 31,530 (Aug. 29, 1974), codified at 46 C.F.R. § 401.428. The Coast Guard explained that this provision was promulgated to address the lost “working time plus the cost of transportation to or from his base” in the unusual circumstance that extreme weather causes a U.S. pilot to be carried beyond his change point. *Id.* at 31,529.

The regulation, as amended by the time of this dispute, provides: “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 at [a specified rate] per day or part thereof, plus reasonable travel expenses to or from the pilot’s base.” 46 C.F.R. § 401.428. Further, “[t]he change points to which this section applies are [those] designated in § 401.450.” *Id.* Thus, a pilot may

³ The full regulatory language is: “Detroit/Windsor, other than assignments originating or terminating at a point on the Detroit River.” 46 C.F.R. § 401.450.

⁴ The full regulatory language is: “Chicago with respect to assignments originating at Detour or Port Huron Sarnia.” *Id.*

only charge this § 401.428 fee if he boards before or is carried beyond one of the points listed § 401.450. Between May 3, 2006 and March 25, 2007, overcarriage was charged at a daily rate \$424 for each day or part thereof, multiplied by up to 1.45, depending on the size of the ship. Between March 26, 2007 and March 20, 2008, the base fee was raised to \$520, subject to the same multiplier. 71 Fed. Reg. 16,518 (Apr. 3, 2006), codified at 46 C.F.R. § 401.428; 72 Fed. Reg. 8115 (Feb. 7, 2007), codified at 46 C.F.R. § 401.428.

After this dispute arose, the Coast Guard amended § 401.450, replacing the “Lock No. 7, Welland Canal” change point with “Port Colborne” since “Lock No. 7, Welland Canal” is in Canada, and therefore was not, in fact, being used as a change point. 73 Fed. Reg. 56,506 (Sept. 29, 2008).

The Coast Guard specifically prohibits pilots from charging vessels any fees other than those that have been expressly authorized in the regulations unless the pilot has “the approval of the Director” of the Coast Guard Great Lakes Pilotage office for the additional charge. 46 C.F.R. § 401.430. This is consistent with the statutory language of the GLPA which grants the Secretary the express authority for setting the rates and charges for pilotage on the Great Lakes. 46 U.S.C. § 9303(f). Further, any charge made by a pilot may be disputed following the specific administrative procedures in § 401.431.

III. Background of Dispute

The Coast Guard rendered three decisions in the course of this dispute. The third and final decision is found at AR000001-05. The prior decisions are found at AR000090-105 and AR000109-111. Only two of the issues addressed in these opinions—the overcarriage charges at Port Colborne and the transportation charges—remain at issue in this litigation.

The first issue in dispute is whether LPA was entitled to charge overcarriage fees for routine pilot change-outs in the Port Colborne area, at the southern end of Welland Canal. To understand the issue, a brief description of the pilotage services in District 2 is useful. In the example of an inland-bound trip, a Canadian or a District 1 U.S. pilot would provide pilot service on Lake Ontario until the vessel reached Port Weller at the north end of Welland Canal. At Port Weller, the inbound pilot would be changed out for a Canadian pilot to provide pilotage services south through the canal. Once the vessel transits the canal, either a Canadian or a U.S. pilot is assigned for the next leg of the vessel's journey.⁵

In 1968, U.S. regulations designated two change points in this area of Welland Canal—"Port Weller" and "Lock No. 7, Welland Canal"—as part of its proposal to improve safety by prohibiting marathon assignments. 33 Fed. Reg. 6477 (Apr. 27, 1968), codified at 46 C.F.R § 401.450. *See also* 33 Fed. Reg. 4747 (Mar. 20, 1968). Lock No. 7 is the seventh of eight locks (numbered from north to south) on Welland Canal.⁶ As a result, a fresh pilot always took the vessels through the majority of the locks on the canal.

In 1977, Welland Canal became exclusively Canadian pilotage territory by way of an agreement between the United States and Canada. AR002902. As a result, from 1977 on, U.S. pilots operating between Detroit and Welland Canal always boarded or disembarked in the general area of Port Colborne, rather than further inland at Lock No.

⁵ If the vessel is travelling through to Port Huron or beyond, the vessels are assigned a number in blocks of 8 based on arrival sequence at Port Colborne. Canadian Pilots serve some blocks and U.S. pilots serve other blocks. There is an additional pilot change point at Detroit along this trip. If the vessel is stopping at a port between Port Colborne and Port Huron, Canadian pilots are assigned to vessels stopping at Canadian Ports and U.S. pilots are assigned to vessels stopping at U.S. ports.

⁶ Although the Lock No. 7 is the second to last lock on the canal, it is geographically located in the middle of the canal.

7. This change actually shortened the length of the U.S. pilot's assignment by nearly 20 miles.

In May 2006,⁷ LPA began invoicing vessels for a § 401.428 overcarriage charge, in addition to the regular rates, when its pilots boarded or disembarked in the area of Port Colborne. AR001042-1173. LPA's argument for doing so begins with the assertion that the regulation designating Lock No. 7 was no longer correct since U.S. pilots had not gone that far into the canal since 1977. It next reasons that the change point for purposes of § 401.450 (and for charging fees under § 401.428) should be at exactly the same point as the southernmost boundary of the Welland Canal (which is defined in an agreement with Canada as an arc in the water one mile southward of the outer light at Port Colborne) because Welland Canal is Canadian pilotage territory.⁸ Yet, LPA's pilots actually routinely embark (for ships bound into Lake Erie) a mile or two north of the southern boundary and routinely pass a mile or two north of this southern boundary of the canal to disembark (for ships bound up the Canal), because it is a preferable place for pilots to embark and disembark. Having "substituted" the change point in the regulation, LPA reasons that it is entitled to charge for § 401.428 overcarriage for boarding "early" (on inland-bound ships) or disembarking "late" (from outbound ships).

GLP initially received a complaint about this practice from a vessel agent in May 2006. AR000369, 961-65. While reviewing source forms during investigation of this

⁷ LPA's brief to this Court suggests that its billings were "under long existing understandings that the regular change point was at the arc." Br. 26. *See also* Br. 2. The Coast Guard believes that this statement is an attempt to elide that these were newly-assessed charges (beginning in 2006), despite LPA's argument that such charges have been authorized since 1977. If LPA does not concede, however, that this billing practice began in 2006, the Coast Guard requests the opportunity to supplement the record on that point. Evidence of billings prior to 2006 was not included in the Administrative Record because the Coast Guard did not believe that this issue was in dispute.

⁸ The boundary of Welland Canal, as defined in the 1979 Agreement, bears no relation to the boundary between the United States and Canada.

complaint, GLP identified four other ways in which it concluded that LPA was overbilling ship operators: overcharges for pilotage west of Southeast Shoal, misapplication of surcharges, overcharges for double pilots in the Port of Lorain, and improper billing of transportation costs. AR000090-95. The improper billing of transportation charges is the second issue still in dispute, and it is a more straightforward question of whether LPA was authorized to charge for line-item transportation expenses. Finally, the Coast Guard received a complaint from the pilots of District Three (an adjacent district) that LPA was improperly charging them dispatch fees. AR000095.

GLP was concerned about the number of unusual billing practices and whether the shipping industry was being coerced into supporting them. AR000366-400. As a result, as noted in LPA's brief, the matter was referred to the Coast Guard Investigative Service ("CGIS"). *Id.* Following the investigation, CGIS referred the to matter to the Office of the U.S. Attorney for the Eastern District of Michigan, which declined to prosecute. CGIS is a separate part of the Coast Guard, and its investigation is not provided or used in the Administrative process. Therefore, the investigation is not a part of the Administrative Record, with the exception of a background letter and Declaration that the Director of GLP provided to CGIS, which are included because they were also utilized during the Administrative review.

The Coast Guard's initial decision ordered that LPA should repay industry \$260,163.50. AR000095. Prior to issuing its initial decision, GLP met with representatives of LPA to discuss overbilling issues, and this meeting was followed by GLP working with representatives of LPA to review various source forms⁹ as is reflected

⁹ The pilot associations are required to submit source forms to GLP documenting their work.

at AR000191-362, which resulted in lower overcharge figures than the initial summaries provided to LPA. The four areas of unauthorized charges besides the two areas at issue in this litigation were resolved in the administrative review process. As LPA is not challenging the Coast Guard's determinations on these issues, this Court is not asked to revisit any of the Coast Guard's other determination.¹⁰ The final repayment amount was \$192,882.50, with procedures provided for industry and District 2 pilots to request additional reimbursements in two other areas no at issue in this action. AR000001-6.

IV. Standard of Review

The United States agrees with the standard of review set forth in LPA's brief at pages 20-21, and will not restate the governing law here. The United States would only add the principle that a court "must defer to the agency's interpretation of its own regulations unless the text is unambiguous or the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.'" *InterModal Techs., Inc. v. Peters*, 549 F.3d 1029, 1031 (6th Cir. 2008) (quoting *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 474-75 (6th Cir. 2008)). *See also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504,

¹⁰ However, these other issues were not determined in LPA's favor, contrary to LPA's claim in its summary judgment brief that "more senior Coast Guard officials have rejected many of the Pilotage Office's initial assertions." Br. 2. Regarding charging for double pilots in the Port of Lorain, the Coast Guard determined that LPA failed to comply with the regulatory requirement that it seek GLP's pre-authorization for each case but decided to authorize repayment only for cases where the shipping company demonstrated that the double pilotage services were unwanted and unnecessary. AR000094. Regarding the issue of misapplication of surcharges, the Coast Guard did not find that the surcharges were appropriate. Instead, it concluded that it would not require repayment of surcharges due to possible confusion over the issue but that it would prohibit all future surcharges. AR000110. Regarding the dispatch charges, the Coast Guard issued a decision regarding when dispatch fees may be charged (i.e., only when dispatch services are actually provided) and authorized District 3 to request repayment from LPA for any cases that did not meet this criteria. AR000095. Lastly, regarding charges for services west of Southeast Shoal, the Coast Guard found that the LPA's "creative billing practices" were not in accordance with the applicable regulations; however, it found that it would not be just to require repayment because the relevant portion of regulation had not been consistently interpreted by the Coast Guard in the past. AR000003-3a. Certainly, the reasonable and nuanced approach taken regarding these issues is not evidence, one way or the other, regarding the propriety of the determinations being challenged in this lawsuit.

512 (1994), *Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839, 844 (6th Cir. 2010); *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000).

ARGUMENT

I. The Coast Guards' Final Decision Ordering Repayment of Overcarriage Charges at Port Colborne Was Neither Arbitrary, Capricious, Nor Otherwise Contrary to Law.

A. Introduction

The Coast Guard ordered LPA to repay industry \$114,022.50¹¹ in unauthorized overcarriage charges in the Port Colborne area during the 2006 and 2007 shipping season. Since these charges were not authorized by the regulations and LPA is prohibited from charging unauthorized amounts, the Coast Guard properly ordered its repayment to industry.

LPA pilots are picked up and dropped off by the Port Colborne pilot boat at a point onshore near a park bench near Wharf 16 at Port Colborne, near the southern end of the Canal. Br. 8; AR000136. From there, the Pilot Boat ferries them to the vessels transiting in that general vicinity. AR00034-36. In 2006, LPA began charging the § 401.428 overcarriage fees for boarding here, when (under its argument) it would not have asserted such a charge if the pilot boat had ferried the LPA pilots further out into Lake Erie to meet vessels along the one mile arc.

Under the regulations in place at the time, LPA was entitled to charge the § 401.428 overcarriage fee only if its pilots remained on the vessels past Lock No. 7 of Welland Canal, nearly 20 miles further up the canal than where they were transferring.

¹¹ This amount is the result of a prior Coast Guard decision which halved the amount of the repayment and of the correction of a slightly mathematical error. AR000002a-3. The final decision found “regrettable” the decision at a prior level of Coast Guard review to halve the reimbursement in what it believed to be “an effort to amicably resolve this matter” but did not overturn it. *Id.*

46 C.F.R. § 401.428, 401.450 (2006 ed.). It is undisputed that no LPA pilot boarded or was carried north of Lock 7. It is also undisputed that no overcarriage charge would be due, if the regulations are applied as they were written at the time.

LPA instead decided, without consulting the Coast Guard, that the Coast Guard's regulation designating the change point as Lock 7 was erroneous because U.S. pilots were no longer transiting that far up the canal, *and* that it was therefore no longer in effect.¹² It further decided—also without consultation with the Coast Guard—that the new, correct change point was a precise arc in the water one mile southward from the Port Colborne pier light. LPA derives this arc from the definition of the southern boundary of the Welland Canal in a Memorandum of Arrangements between the United States and Canada in effect since 1977. AR002895-907. LPA, based on this reasoning, began regularly charging the § 401.428 overcarriage fee for transfers at Port Colborne in 2006, since its pilots regularly boarded or disembarked north of this arc.

At no time prior to this dispute did LPA consult the Coast Guard about the “erroneous” regulation or its treatment of it for billing purposes, nor did it seek to have the Coast Guard revise the regulation. Further, nothing changed between 1977 (when LPA claims this fee was authorized) and 2006 (when LPA began charging it). As the Coast Guard's final decision explained, “[p]ilotage associations are not free to declare properly promulgated regulations ‘erroneous,’ substitute in their place what they would

¹² LPA points the Court (at Br. 18) to a line in the Coast Guard's initial determination referring to the version of § 401.450 in effect at the time as “incorrectly” listing Lock No. 7 as the change point. AR000092. Even were this the Coast Guard's final decision (and it is not), there is a difference between acknowledging that the regulation does not reflect where the change has been in fact occurring (Port Colborne) and agreeing that the regulation is somehow not in effect or *de facto* amended.

Fundamentally, the amendment of the regulation was a technical amendment with little or no practical effect. Pilots are not entitled to charge for overcarriage for transferring in the Port Colborne area under *either* the old or the new regulation.

like the regulations to be, and then proceed to charge the shipping industry fees according to their new interpretation.”¹³ AR000002.

B. The Coast Guard’s Final Decision Requiring Repayment of Overcarriage Charges Is Not Contrary to Law.

LPA’s primary argument in this action is that the Coast Guard’s final decision ordering repayment pursuant to the regulations was contrary to law because the 1979 Memorandum of Arrangements with Canada (AR002895-907) defined the change point and authorized its charging the overcarriage fee. To the contrary, the Memorandum between the United States and Canada does not purport to set out change points for purposes of § 401.450, nor does it address when overcarriage may be charged.¹⁴ Further, even if the Memorandum hypothetically did define the change point as argued by LPA, LPA still would not be able to charge the overcarriage fee given that the regulatory scheme employs change points as general geographic areas, not specific points in the water.

1. The Memorandum of Arrangements Does Not Identify Change Points for Purposes of United States Regulations.

The Memorandum of Arrangements upon which LPA relies (AR002895-2907) was concluded by an exchange of notes on March 29, 1979, but has an effective date of

¹³ LPA points the Court (at Br. 18) to a line in the Coast Guard’s initial determination referring to the version of § 401.450 in effect at the time as “incorrectly” listing Lock No. 7 as the change point. AR000092. Even were this the Coast Guard’s final decision (and it is not), there is a difference between acknowledging that the regulation does not reflect where the change has been in fact occurring (Port Colborne) and agreeing that the regulation is somehow not in effect or *de facto* amended.

Fundamentally, the amendment of the regulation was a technical amendment with little or no practical effect. Pilots are not entitled to charge for overcarriage for transferring in the Port Colborne area under *either* the old or the new regulation.

¹⁴ LPA also claims (Br. at 7) that is obliged to follow the Memorandum of Arrangements by regulations, citing 46 C.F.R. §§ 401.320(d)(6), 401.710(b). Rather, these regulations task LPA to “coordinate on a reciprocal basis its pool operations with similar [Canadian] pool arrangements” pursuant to the Memorandums. *Id.* The obligation to coordinate with the Canadian pools does not extend to reinterpreting 46 C.F.R. §§ 401.450 and 401.428.

January 18, 1977. *Id.* The Memorandum does not identify change points for purposes of determining when a U.S. pilot may charge for overcarriage under U.S. regulations. *See generally* AR002895-2907. LPA instead relies on the definition of “District 2” in the definitions section of the Memorandum. AR002898. Specifically:

“District 2” means the Welland Canal and the waters of Lake Erie westward of line running on a true bearing of approximately 026° from Sandusky Pierhead Light at Cedar Point, Ohio, to Southeast Shoal Light, the waters contained within the area of a circle of one mile radius eastward of Sandusky Pierhead Light, the Detroit River, Lake St. Clair, the St. Clair River and the northern approaches thereto *For purposes of this definition, “Welland Canal” includes 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*

AR002898.

Elsewhere in the Memorandum, where participation in pilotage services are divided between U.S. and Canadian pilots, “Welland Canal” is designated “Canadian pilots only,” and pilot services are split between U.S. and Canadian pilots “[b]etween Port Colborne and Port Huron, with no intermediate ports of call” based on 8-vessel blocks. AR0029092, at 4(b)(1), 4(b)(2). The Memorandum further delineates which country’s pilots will serve vessels stopping at ports within the District, other than Welland Canal. *Id.* at 4(b)(3).

Nothing in the Memorandum suggests that this general divvying up of the waters of “District 2” is intended to have any effect on when U.S. pilots can or cannot charge overcarriage fees. The Memorandum does not purport to establish “designated change points” for purposes of that regulation. And nothing in the inclusion of a definition for the Welland Canal for purposes of defining District 2 establishes that LPA is entitled to

charge the daily overcarriage rate anytime it does not make the change precisely on the one mile arc mentioned in that definition.

Further, LPA was charging this fee while providing pilotage services assigned to U.S. pilots under 4(b)(2), which speaks of services “[b]etween Port Colborne and Port Huron.” Yet, Port Colborne itself is certainly inside the one mile arc included in the definition on which LPA relies. *Id.* This seeming conflict also counsels against the interpretation advanced by LPA. Likewise, as set out in the same Memorandum, the pilot boat in use in this situation is to be stationed at Port Colborne. AR002901.

2. *The Coast Guard’s Permissible Interpretation of the Change Points as General Geographic Areas Rather Than Specific Points in the Water Is Entitled to Deference.*

The Coast Guard interprets the regulatory scheme as providing change points that are general geographic areas rather than specific points in the water. As the final decision explained: “[T]he scheme envisioned for change points in the Code of Federal Regulations is that change points are general geographic in which a pilot’s assignment begins or ends, not specific points in the water.” AR000001. *See also* AR000002a. Given the Coast Guard’s permissible interpretation that the change points are general geographic areas, it is irrelevant whether the pilot exchanges are occurring elsewhere in the vicinity of Port Colborne versus on the precise one mile arc relied on by LPA. In either case, the regulatory scheme does not envision the charging of overcarriage fees.

The Coast Guard’s interpretation of its own regulation is entitled to deference. A court “must defer to the agency’s interpretation of its own regulations unless the text is unambiguous or the agency’s interpretation is ‘plainly erroneous or inconsistent with the regulation.’” *InterModal Techs., Inc. v. Peters*, 549 F.3d 1029, 1031 (6th Cir. 2008) (quoting *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 474-75 (6th Cir. 2008)).

The Coast Guard's interpretation in this case is well supported. The "designated change points" are provided by the regulation in general geographic terms—"Snell Lock," "Cape Vincent," "Port Weller," "Lock No. 7, Welland Canal," "Detroit/Windsor," "Port Huron/Sarnia," "Detour," "Gros Cap," "Chicago," and "Duluth/Superior and Fort William/Port Arthur." 46 C.F.R. § 401.450. Indeed most are either cities or large geographic features. The Coast Guard further pointed out in its decision that no change points have ever been expressed as specific geographic points, whether latitude and longitude, or a precise distance from shore as suggested by LPA, since the beginning of this regulatory scheme. AR000002a.

Likewise, the system of general geographic areas allows for a workable pilot change-out process with the necessary flexibility to accommodate the vagaries of ships and weather, whereas LPA's theory results in a "rigid and impractical pilot change-out process." AR000002a. The Coast Guard explained that if it "were to adopt LPA's position that the 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.'" *Id.*

LPA's rigid interpretation is also inconsistent with § 401.450's purpose of promoting safety by prohibiting marathon trips, and § 401.428's purpose of compensating pilots for lost work time and transportation expense when they cannot get off at the designated change point and must be carried to the next stop. LPA's interpretation actually *shortens* the leg from what was provided in the applicable regulation (Lock No. 7), and there is no lost work time or additional transportation expenses. (The pilots are being picked up or dropped off by the Port Colborne pilot boat

regardless of where precisely in the Port Colborne area they actually embark or disembark from the commercial vessels.) Nothing in the regulatory scheme suggests that pilots are entitled to charge a *daily rate* fee of several hundred dollars for crossing an arc in the water before the pilot boat picks them up.¹⁵ The Coast Guard further explained that “the regulations governing Great Lakes Pilotage have never allowed for such a rigid and impractical pilot change-out process.” *Id.*

The Coast Guard’s interpretation of the regulation as providing general geographic areas, rather than fixed points, is reasonable and certainly not “plainly erroneous or inconsistent with the regulation.” *InterModal Techs., Inc.*, 549 F.3d at 1031. Given this permissible interpretation of the regulatory scheme, LPA’s claim that the Memorandum of Arrangements supplies the change point is irrelevant. Even if it did *and* it had the power to preempt a regulation, it still would not entitle LPA to charge overcarriage for pilot change-outs in the general area.

3. *LPA Cannot Rely on the Memorandum of Arrangements to Avoid Repayment.*

As discussed above, there is no conflict between the Memorandum and the regulations because the Memorandum does not define change points or address when overcarriage fees may be charged. However, it is worth emphasizing that the United States–Canada Memorandum does not purport to provide any individually enforceable rights that LPA could use to avoid the repayment ordered by the Coast Guard. The Memorandum is an international agreement between the U.S. and Canada. It simply, in

¹⁵ Section 401.428’s per day charge can be contrasted with 46 C.F.R. § 401.420, which provides for hourly charges in the case of vessel cancellation, delay or interruption. Such use of a daily charge, as well as provision for transportation expenses, is not consistent with LPA’s rigid interpretation. By way of contrast, this is the same fee that a pilot providing services from Port Huron to Detroit who cannot transfer from the vessel at Detroit (for example, because the Detroit pilot boat is broken) is entitled to charge fee for the entire trip from Detroit to Port Colborne. AR002687-91.

relevant part, obligates the States Parties to coordinate revenue sharing and the provision of pilotage services on the Great Lakes. The rights and obligations with respect to the international agreement are thus held by the U.S. and Canada, not LPA. *Cf. United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (holding that even in the case of treaties, they do not, “[a]s a general rule . . . create rights that are privately enforceable in the federal courts. ‘A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.’”) (*quoting Head Money Cases*, 112 U.S. 580, 598 (1884)).

In briefing this issue, LPA mistakenly relies on a series of cases to support the argument that it may invoke the Memorandum as a basis for refusing repayment that would otherwise be required under § 401.450. However, these cases are easily distinguishable. For example, LPA cites *Department of Defense v. FLRA*, 685 F.2d 641 (D.C. Cir. 1982) for the proposition that an executive agreement may be regarded as equivalent to “federal law.” *Id.* at 648. But this case only held that a particular agreement was equivalent to federal law for purposes of statutory interpretation. Similarly, in *Weinberger v. Rossi*, 456 U.S. 25 (1982) as well as *B. Altman & Co. v. United States*, 224 U.S. 583 (1912), the precedent that the D.C. Circuit relied on, the Court held that an executive agreement was a “treaty” but made clear that the designation was solely one of statutory interpretation.

The plaintiff next cites *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416-17 (2003) for the proposition that “valid executive agreements are fit to preempt state law, just as treaties are.” While this is certainly true of some executive agreements, the

agreement in *Garamendi* differs significantly from the agreement in this case. The agreement in *Garamendi* falls into a narrow category of international claims settlement agreements. Such agreements, concluded without the specific ex post approval of Congress or advice and consent of the Senate, have the potential to preempt state law, because of “a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned.”¹⁶

B. The Coast Guard’s Final Decision Requiring Repayment of Overcarriage Charges Is Not Arbitrary and Capricious.

There is no dispute that LPA was not entitled to overcarriage under the applicable regulation designating the change point as Lock 7, so there is nothing arbitrary and capricious in order repayment on that basis. Likewise, the Coast Guard’s interpretation of the regulatory scheme as providing general geographic areas for change points is reasonable and permissible. Nonetheless, LPA makes several arguments that the Coast Guard acted arbitrarily and capriciously.

LPA’s first argument is its claim “the Coast Guard, like the rest of industry, had consistently recognized the change point at the arc south of the Port Colborne light.” Br. 26. LPA then cites to cases to the effect that an agency may not ignore prior decisions. *Id.* (citing three D.C. Circuit cases). Yet LPA points to no evidence that the Coast Guard issued any decision or opinion recognizing the arc as the change point, or, more relevantly, recognizing LPA’s right to charge overcarriage for transferring a couple miles beyond the precise arc in the water.¹⁷ More importantly, *LPA itself did not start charging on this basis until 2006*, which was the initiation of this dispute.

¹⁶ *Dames v. Moore*, 453 U.S. 654, 686 (1981). See *Garamendi*, 539 U.S. at 397.

¹⁷ Indeed, the regulation on the books at the time specifically listed the change point as Lock 7.

The only piece of evidence LPA cites to in an attempt to establish that the Coast Guard was ignoring its own prior decision is an August 2006 email from Mr. Wasserman gathering information for purposes of understanding *this dispute*. AR000045. In that message, Mr. Wasserman referred to Welland Canal as “not at the regular change point.” *Id.* Whether Mr. Wasserman wholly understood or had analyzed the dispute at the time he made this inquiry is unknown, but such statement a does not constitute the Coast Guard taking a position on the issue. This is casual language in an inquiry letter made while investigating the dispute at issue in this litigation. It is certainly not a “prior decision” similar to those considered in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004) and the other cases cited by LPA.

LPA’s second argument is that the Coast Guard promulgated a retroactive rule. Br. 27. Presumably, this argument refers to the new regulation promulgated in 2008 during this dispute changing the change point from “Lock 7” to “Port Colborne.” However, the Coast Guard final determination does not rely on the amended rule. AR000001-3. Rather, it states:

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 amend the regulation. An amendment to 46 C.F.R. § 401.450 is the only way to modify pilot change points. No one, including LPA, is free to ignore regulations they feel are “erroneous” and then substitute their own ideas.

AR0000021. The decision also rejects the argument that the Memorandum of Arrangements provides the change point, and explains that, in any event, change points are general geographic areas. AR000001-3.

LPA's third argument is its claim that the Coast Guard "depart[ed] from precedent by requiring that LPA demonstrate changing at the arc would be 'dangerous or impractical.'" Br. 27. Counsel has carefully reviewed the final decision and has not been able to identify where the Coast Guard applied any such criteria.¹⁸ The phrase "dangerous or impractical" does appear in the initial decision at AR000093. But even this initial decision was not suggesting that LPA be required to "demonstrate changing at the arc would be 'dangerous or impractical.'" Br. 27. Rather, that opinion was merely explaining that the purpose of the overcarriage provision is "to cover cases when a pilot must be carried beyond the normal change point *to another enumerated change point* because making the change at the regular point would be dangerous or impractical." AR000093 (emphasis added). The initial opinion gave the further example:

[I]f weather or conditions prevent pilots from being transferred at Detroit on a ship sailing west through Lake Erie, two pilots might board at Port Colborne, with one taking the ship to Detroit, and the second from Detroit

¹⁸ LPA's claim is followed by its assertion that embarking or disembarking inside the shelter of Port Colborne was for the convenience of the shippers versus for the convenience of the pilots. Br. 26-27. *See also* Br. 8-9, 14. The Coast Guard's final determination made no finding regarding whether transfer in the canal was for the convenience of the shippers, the pilots, or both. *See generally* AR000001-5. (The initial determination mentioned that transferring "near shore or in the anchorage in convenient for all concerned." AR000092.) Simply put, however, *why* transferring in the shelter of the Port is the best option is not relevant to the question of whether LPA is entitled *to charge* for transferring there.

In attempting to make this question relevant, LPA cites (at Br. 14) an inapplicable Coast Guard Advisory Opinion addressing a period of time during which *two pilots* were being assigned for the entire trip between Port Colborne and Port Huron because the pilot boat at Detroit had broken down, meaning pilots could not embark or disembark at that change point without delay. AR002687-88. One pilot provided services between Port Colborne and Detroit, and the other pilot provided services between Detroit and Port Huron. *Id.* LPA claimed that it was entitled to charge for double pilotage services for the entire trip, citing 46 C.F.R. § 401.425, even though only one pilot was providing services for each leg and the director of GLP had not authorized double service as "necessary for safe navigation of the ship," as required before double pilotage fees can be charged under § 401.425. AR002689. In rejecting LPA's argument, the Coast Guard contrasted situations where using two pilots concurrently is necessary for "navigational safety" with the situation of the broken pilot boat where two pilots are on board merely for "facilitation of traffic." *Id.* The Advisory Opinion concluded that double pilotage can only be charged where the Director authorizes it as "necessary for safe navigation of the ship" under § 401.425. AR002687-90. LPA, therefore, was entitled to charge only the § 401.428 overcarriage fee—not double pilotage fees—for the non-working pilot on each leg. AR002689-91.

LPA's claim here that this Advisory Opinion authorizes LPA to charge for § 401.428 overcarriage when it "facilitates traffic" is patently false.

to Port Huron. When not actually in charge, each pilot is entitled to charge an overcarriage fee for the leg of the journey in which they are being carried beyond the normal change point [Detroit, in this example] (as well as reasonable travel expenses they may incur).

Id. The initial opinion was explaining this in order to contrast the intended purpose of the overcarriage provisions with LPA's assertions that the same fee should apply to boarding or departing within a mile or two of specific point in the water. *Id.* Even if this were the Coast Guard's final reasoning, there is nothing arbitrary and capricious, nor any departure from precedent, in this analysis.

LPA's fourth argument involves a discussion regarding the Canadian pilots' view of the Memorandum of Arrangements and when Canadian pilots can charge overcarriage fees. Br. 28. The discussion is without citation and lacks support in the record. Regardless, the Canadian pilots' interpretation of Canadian pilotage regulation, even if faithfully relayed and correct, does not determine the issue for U.S. pilots.

LPA's fifth argument that the Coast Guard was arbitrary and capricious is to imply that it is being "coerced" into providing pilotage service "beyond the lawful boarding point." Br. 28. In fact, however, LPA is actually complaining that it is not being allowed to charge the *extra* overcarriage fee of several hundred dollars (as well as transportation costs it could not otherwise charge for) for those services it now claims are unlawful. This argument simply folds back into the question of whether the Coast Guard's interpretation of the regulatory scheme is unlawful, which it is not.

LPA's final argument is that the Coast Guard knew it was acting arbitrarily and capriciously, which is why it reduced the repayment amount by 50%. Br. 15, 29. LPA must show that the Coast Guard acted arbitrarily and capriciously, not ascribe motivations to the Agency. The repayment amount was reduced one of the initial

decisions. AR000093. The final agency determination found “regrettable” this reduction in “an effort to amicably resolve this matter,” but did not overturn that decision. *Id.* If the Court finds that halving the repayment amount was arbitrary, then the matter may need to be remanded for reinstatement of the whole reimbursement amount. This is certainly not an argument for finding the remainder of the repayment order arbitrary.

II. The Coast Guard Was Not Arbitrary and Capricious In Ordering That LPA Repay Industry for Unauthorized Transportation Charges.

A. Introduction.

LPA also challenges the Coast Guard’s determination that it must repay \$78,860 in inappropriately charged transportation fees. AR000003a-4a. Specifically, LPA included an additional line item “transportation” fee, ranging from \$40.00 to \$150.00, on its bills to ship operators. AR000003a.¹⁹ Because the regulatory scheme only allows itemized charging of transportation expenses in certain limited situations not applicable here, the Coast Guard ordered LPA to return the erroneously charged costs.

LPA is entitled to charge the basic rates for their services contained in 46 C.F.R. § 401.407, multiplied by a factor based on the size of the vessel receiving the pilotage services. 46 C.F.R. § 401.400. Transportation costs of the pilots are taken into consideration in setting basic rates included in § 401.407. 46 C.F.R. Part 404. *See, e.g.*, 68 Fed. Reg. 3202-14. LPA is prohibited from charging any fees or charges that are not set forth 46 C.F.R. Part 401, unless approved by the Director of Great Lakes Pilotage. 46 C.F.R § 401.430.

The regulations authorize LPA to charge “reasonable travel expenses” in two circumstances. First, LPA can charge “reasonable travel expenses” if the ship cancels the

¹⁹ The source forms illustrating these charges are contained at AR000677-795 and AR001189-2241.

order for a pilot after he has commenced travel. 46 C.F.R. § 401.420(c)(2). Second, LPA can charge “reasonable travel expenses to and from the pilot’s base” in the case of carrying a pilot beyond the normal change point. 46 C.F.R. § 401.428. The regulations do not authorize transportation charges in any other circumstances. *See generally* 46 C.F.R. Part 401.

The Coast Guard’s final decision found that LPA billed for \$78,860 in transportation fees that were neither authorized by § 401.420 or § 401.428, nor otherwise authorized by the director under § 401.430. AR000003a-4a. This decision is well supported in the record.

LPA makes two arguments to justify charging the transportation fees. First, it claims that the Director orally authorized the charging of the transportation fees during a telephone call, and, second, it argues some of the transportation are valid under 46 C.F.R. § 401.428, if they are associated with Port Colborne overcarriage. This latter argument rises and falls on the question of whether there was overcarriage, as discussed extensively in Part I of this brief.²⁰

B. The Coast Guard’s Finding that the Director Did Not Authorize the Transportation Charges is Not Arbitrary and Capricious.

LPA challenges the Coast Guard’s final determination that the Director did not authorize the transportation charges.²¹ AR000004. The Coast Guard found that the

²⁰ LPA oddly claims (at Br. 19) that the Coast Guard did not address at any level its argument that some of the transportation charges are authorized in connection with overcarriage at Port Colborne. Of course, the Coast Guard extensively explained its finding that there was no overcarriage at Port Colborne. *See, e.g.*, AR000001-13, AR000092-94.

²¹ At one point, LPA’s brief (Br. 30) suggests that the Coast Guard’s final decision turned on whether the Directors approval was in writing. The Coast Guard’s decision was not based on this ground. *See generally* AR000003a-4a. Rather, the final decision considered the lack of documentation, amongst other factors, in reaching the conclusion that approval (written or otherwise) had not been given. AR000004a.

Director had not orally authorized the charges, finding LPA's evidence to that effect unpersuasive. AR000004a. Specifically, it found unconvincing the declaration of LPA's president, Dan Gallagher, in which Captain Gallagher claimed that the Director had authorized him during a phone conversation to begin charging for transportation costs. AR000033. In support of this credibility determination, the Coast Guard explained that the regulatory scheme already includes transportation in the basic rates (such that the Director would not authorize their double-billing) and that the letters submitted by LPA in support of their argument pertained to unrelated situations. AR000004-4a.

LPA attacks these finding, and additionally argues that the final decision is faulty because there is no sworn testimony from the Director of GLP. None of these arguments demonstrate that the Coast Guard acted arbitrarily and capriciously in finding that the Director did not authorize the charges.

1. Declaration from the Director.

As noted, LPA argues that the final decision is unsound because it does not "rely on any sworn statements from the Director denying that he had given such authorization." Br. 33. LPA points to nothing that would require the Coast Guard to seek sworn statements from its own personnel, much less the Director of the program who himself first identified the overcharges as being unauthorized. Furthermore, the record does in fact contain a declaration from the Director.²² AR000366-92. This declaration states that LPA was overcharging for transportation costs in an intentional violation of the

²² Although the original audience of this Declaration was the Coast Guard Investigative Service, it was used for background information during the administrative review and is therefore a part of the Administrative Record.

regulations. AR000371. That the transportation charges were unauthorized is implicit in this Declaration.

2. *Inclusion of Transportation Costs in Basic Rates.*

The final decision relies on the fact that transportation costs are already included in the basic rates and thus would not be separately authorized as part of the reason for the credibility finding regarding whether GLP authorized transportation charges. LPA now disputes (Br. 31) the proposition that transportation costs are actually included in the basic rates as a means of attacking that credibility determination.

LPA's argument, in essence, is not that the basic rates do not include transportation costs, but that the rates did not sufficiently compensate them because of a "surge"²³ in vessel traffic (Br. 31-33). This misunderstands the regulatory scheme. The system does not provide for direct 1:1 reimbursement of transportation costs, as discussed above. Rather, it sets basic rates that are based, in part, on prior transportation costs. 46 C.F.R Part 404; AR000003a. The approximation in the regulatory system might result in rates that fall short of expenses during some season or years, and rates that overcompensate in other seasons or years. The fact remains, however, that the rates set by the Coast Guard are intended to compensate for expenses, even though it is not a

²³ The only evidence of an alleged "surge" in traffic cited by LPA is an undated and unsigned letter that LPA submitted in support of its administrative appeal. The letter is authored by the U.S. Great Lakes Shipping Association and addressed to the Shipping Federation of Canada (*contra* LPA's description at Br. 12). AR002506-7. In this letter, the Shipping Association is soliciting the Canadian Federation's support of a surcharge to finance a third pilot boat in District 2. *Id.* at AR002506. The letter notes the previously poor relationship between industry and District 2 pilots, and the insistence of District 2 pilots of "working the rule only." *Id.* at AR002507. The letter goes on to note improved relationships after implementation of programs to pass certain pilot costs to industry as surcharges. *Id.* The letter further describes "see[ing] very positive results" in terms of lack of delays "in spite of the traffic levels being unusually high in the early going of this year." *Id.* The letter provides no specific information about the volume of traffic levels or the length of time higher than normal levels persisted, and the letter is written in the context of lobbying the Canadian Shipping Federation's support of a new surcharge. Ultimately, however, the existence of a "surge" in traffic is not relevant to whether LPA can charge transportation fees under the regulations, so its existence, extent, or length are not relevant to the determination.

direct reimbursement system. To the extent that vessel traffic is higher or lower than expected, necessitating more or less transportation expenses, the rates remain the same regardless of whether they result in over or under compensation. Any extra transportation costs associated with the alleged surge in traffic would be included in the next rate adjustment, regardless of whether the surge had subsided. This system does not—and is not intended to—result in precise reimbursement for actual expenses, but rather approximates compensation levels.

3. *Authorization of Transportation Charges in Different Circumstances.*

LPA also argues that three letters, relating to two different situations, lend support to their claim that the Director authorized transportation charges in this case. These include a 2003 letter to LPA and two letters from 2005 and 2006 to the St. Lawrence Seaway Pilots Association (“SLSPA”). Br. 30, 33-34. The Coast Guard’s final decision found that “both letters address specific situations not applicable to the transportation charges currently in dispute.” AR000004. The Coast Guard was not arbitrary and capricious in concluding that these letters do not establish “that the Director actually authorized LPA to charge industry for routine transportation fees during the 2006 and 2007 shipping seasons.” *Id.*

The 2005 and 2006 letters relate to the Director’s authorizing SLSPA to charge transportation costs associated with the new Iroquois Lock night relief program. AR000004-4a. As explained in the final decision, the Director authorized SLSPA to directly charge the transportation costs of this program until the new rates (taking into account the transportation costs of the new program) were set in 2006. *Id.* The Coast

Guard understandably did not believe this was evidence that the Director had authorized wholly other transportation charges by a different association.

As explained in the final decision, the 2003 letter related to the 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.” AR000004. That is not the situation in this case, and the Coast Guard was not arbitrary and capricious in rejecting LPA’s attempt to stretch a letter about a specific situation raised years earlier into a blanket authorization of transportation charges.²⁴

CONCLUSION

For the foregoing reasons, the United States Coast Guard’s Motion for Summary Judgment should be granted and LPA’s Motion for Summary Judgment should be denied.

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Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

BARBARA L. McQUADE
United States Attorney
Eastern District of Michigan

By: //s//
LYNN M. DODGE (P38136)
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-0205
Email: Lynn.Dodge@usdoj.gov

²⁴ The Coast Guard’s final determination also found the 2003 letter to be incorrect, since it was addressing a situation already covered by 46 C.F.R. § 401.420. AR000004. But, as noted by the final determination, this is irrelevant since the letter is also inapplicable. *Id.*

SARAH S. KEAST (LEAD)
Trial Attorney
Aviation & Admiralty Litigation
Torts Branch, Civil Division
United States Department of Justice
P.O. Box 14271
Washington D.C. 20044-4271
Phone: (202) 616-4039
Fax: (202) 616-4159
Email: Sarah.Keast@usdoj.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Michigan via the CM/ECF system which will send an electronic notice of filing (NEF) to each of the following:

John Longstreth
Mark Ruge
K&L GATES LLP
1601 K Street NW
Washington, DC 20006
(202) 778-9000
(202) 778-9100 (fax)

A copy will be mailed by U.S. mail to:

Charles G. Kelly
David A. Keyes
KELLY, WHIPPLE, ZICK, AND KEYES PPC
627 Fort Street
Port Huron, MI 48060
(810) 987-4111
(810) 987-8763 (fax)