



HENRY McMASTER  
ATTORNEY GENERAL

September 29, 2009

Charles L. Green, Deputy Assistant General Counsel  
For Enforcement and Litigation  
United States Department of Commerce  
NOAA – GCEL – SS  
8484 Georgia Avenue  
4<sup>th</sup> Floor, Suite 400  
Silver Springs, Maryland 20910

Dear Mr. Green:

In a letter to this office you referenced a final regulation of the National Oceanic and Atmospheric Administration (NOAA) which seasonally restricts the speed of vessels greater than or equal to 65 feet in length to ten knots or less in certain areas to reduce the likelihood of ship strikes involving endangered North Atlantic Right Whales. See: 50 C.F.R. § 224.105. This ship speed restriction is applicable to waters off of Charleston for a designated part of the year. However, the regulation in subsection (a) specifically states that “...these restrictions do not apply to law enforcement vessels of a State, or political subdivision thereof, when engaged in law enforcement or search and rescue duties.”

This office in a prior opinion dated April 29, 2009 cited in your letter dealt with the question of whether Charleston Branch Pilots’ Association vessels are considered to be law enforcement vessels of the State of South Carolina. The opinion concluded as follows:

...it is clearly recognized that such vessels provide a valuable service in protecting public safety on the water, insuring the safety of vessels and the lives of crew and passengers on these vessels. As such, in the opinion of this office, these vessels exercise a quasi-law enforcement function to protect public safety and should be considered law enforcement vessels of the State of South Carolina.

While your letter raises several issues regarding the application of the prior determination in that opinion by this office to other possible areas, such as whether such vessels are state public vessels for purposes of liability arising from maritime tort claims and whether pilots are State employees for purposes of the State Tort Claims Act, it does not appear that a response to such issues is necessary for purposes of the exemption of the referenced federal regulation which specifically exempts “law enforcement vessels of a State, or political subdivision thereof, when engaged in law enforcement or search and rescue duties.” Absent from your letter is the recognition that NOAA’s exemption in the referenced federal regulation deals solely with the exemption for “law enforcement vessels of a State” and not with the status of individuals manning them.

Moreover, pursuant to State Regulation 136-080, effective May 22, 2009, it is specifically provided that

A. Every pilot, or operator of any pilot vessel regulated pursuant to 1976 Code 54-15-170, who detects any apparent violation of 1976 Code Sections 54-15-270 and 54-15-280, and 1976 Code Section 40-1-200, wherein an unlicensed person is acting as a pilot, said pilot shall immediately report such circumstances to the sheriff of the county having jurisdiction, and/or to such other law enforcement authority designation by the Commissioners. The reporting pilot or pilot vessel operator shall thereupon identify the vessel by name, type, ownership, flag, homeport, and, if known or suspected, the vessel’s apparent destination within the affected port, its present location and apparent speed, and any other particulars of interest. The pilot or pilot vessel operator shall provide any sheriff, or deputy sheriff, or other duly authorized law enforcement officer of the State with full details involving any attempts to inform such a vessel of the requirements of Title 54, Chapter 15, and/or 46 CFR 15. Further, the reporting pilot and/or any other licensed pilot or pilot vessel operator may assist the appropriate law enforcement agency in lawfully causing the vessel in violation to comply with State law. Such assistance might include the use of any pilot vessel that is under the command of a State-licensed pilot.

B. Notwithstanding the requirement of Part 136-070C to immediately report such violations of pilotage statutes as “hazardous conditions” to the U.S. Coast Guard, the pilot shall also initiate a voice SECURITE’ call on VHF Channels 13 and 16. When and if such a vessel is indicating it is a U.S. flagged vessel, such message shall advise all marine traffic that a vessel requiring a pilot is underway on the bar and/or harbor may be in violation of federal laws and regulations with respect to manning.

C. The Commissioners consider this enforcement role of pilots, and by the pilot vessels under their command, as being in the interest of the safety and security of the

port(s) at which the pilots are licensed. Pilots and pilot vessels constitute a major surveillance asset for achieving maritime domain awareness in order to protect the port, its population, its waterways and structures, and its marine environment from the consequences of a maritime disaster, accidental or deliberate, and other like illegal activities. Pilots and pilot vessel operators shall immediately report suspicious activities and events or other actions detected upon the bar and harbor that they may consider illegal to the sheriff and/or other law enforcement official designated by the Commissioners.

D. Pilots and pilot vessels are part of Division II of the S.C. Naval Militia pursuant to 1976 S.C. Code Section 54-17-50 and S.C. Regulation 80-010(5)(b). As such they shall immediately report to the Coast Guard any and all circumstances observed that are deemed to be of a suspicious nature and that might threaten the maritime security of the port and state. Pilot vessels are considered to be law enforcement vessels of the State of South Carolina. (emphasis added).

Therefore, in the opinion of this office, pursuant to such recognition afforded them by the State regulation, pilot vessels of the Charleston Branch Pilots' Association should be considered exempt from the referenced federal regulation restricting ship speed restriction applicable to waters off of Charleston for a designated part of the year.

Regardless of the need to determine the status of the harbor pilots manning the "law enforcement vessels of a State" as referenced in the federal regulation, in support of the conclusion that these vessels perform a law enforcement function is the recognition that harbor pilots do indeed perform a law enforcement function. This office was advised that a comment to the referenced federal regulation states that the "NMFS...(National Marine Fisheries Service)... has decided to exempt State enforcement vessels when they are in enforcement or human safety missions." See: Federal Register, vol. 73, no. 198 at comment 5; emphasis added). According to a letter this office received regarding your question, as to the harbor pilots, it is recognized that

...their traditional and primary role...is human, maritime and environmental safety; a role they engage in with each and every transit. More recently, (especially since 9-11) they have taken on an additional role as the State's front line "eyes and ears" in protecting human safety and port security.

Moreover, in addition to the law enforcement function assigned pilots by State Regulation 136-080, the earlier opinion of this office noted above referenced comments from the South Carolina Maritime Security Commission, the United States Coast Guard, the South Carolina Naval Militia, the South Carolina State Ports Authority, and the City of Charleston Police Department in reaching its

Mr. Green  
Page 4  
September 29, 2009

conclusion regarding the service and law enforcement function performed by the harbor pilots manning these recognized law enforcement vessels.

I trust that this resolves the matter as to the opinion of this office on the question raised by you.

With kind regards, I am,

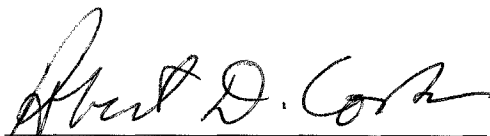
Very truly yours,

Henry McMaster  
Attorney General



By: Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General