THE STATE of ALASKA
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April 28, 2022

The Honorable Sara Hannan
House Community and Regional Affairs, Co-Chair
Alaska State Capitol, Room 204
Juneau, Alaska 99801

The Honorable Calvin Schrage
House Community and Regional Affairs, Co-Chair
Alaska State Capitol, Room 104
Juneau, Alaska 99801

Re: HB 303 compliance with the federal tonnage clause

Dear Co-Chairs Hannan and Schrage:

The Committee requested the Department of Law provide its view regarding whether using Commercial Passenger Vessel Environmental Compliance ("CPVEC") fees to fund the grant program proposed in Section 13.D. of House Bill 303 ("the Bill") is permissible under the Tonnage Clause of the U.S. Constitution. The Department of Law's view is that the answer is likely yes.

Relevant provisions of the Bill:

Section 13 of the Bill proposes to create a new statute, AS 46.03.482, which would establish the wastewater infrastructure grant fund. Under proposed subsection (c), "[a] municipality may submit an application for a wastewater infrastructure grant to be used to establish, upgrade, or improve a wastewater treatment collection system or facility in a port community that serves commercial passenger vessels." The amount of any award is limited by proposed subsection (d), which provides: "Awards granted by the department from the separate commercial passenger vessel environmental compliance account shall be limited to the percentage of operations that the wastewater treatment collection system or facility expends servicing commercial passenger vessels."

Limitations imposed by the Tonnage Clause:

The Tonnage Clause provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage[.]" Over the years, federal courts have interpreted that provision to mean state governments cannot impose a tax or fee on seafaring vessels for the mere

privilege of accessing the harbor or port. *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 7 (2009). Similarly, states cannot impose a vessel tax or fee for "general, revenue-raising purpose[s]." *Id*. at 10.

Instead, states can only impose a fee to fund a service that benefits the vessel itself. *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 85 (2d Cir. 2009). More specifically, "[v]essels that pay a purported services charge must actually receive a proportionate benefit in return." *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, 805 F.3d 98, 107 (3d Cir. 2015). Thus, "projects which do not and could not benefit the [fee-payer]," and yet charge "the fee-payers for services that are not available to them [are] impermissible under the Tonnage Clause." *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 88 (2d Cir. 2009). Notably, however, "[s]ervices that constitute a service to a vessel do not become unconstitutional or unlawful because of incidental/parallel use by the general public." *Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau, Alaska*, 356 F. Supp. 3d 831, 845 (D. Alaska 2018) [hereinafter *CLIAA*].

Decisions from several federal courts of appeal provide context for what kinds of service charges the Tonnage Clause allows. The U.S. Supreme Court struck down a law that was designed to "raise revenue for general municipal services" such as "police, airport, civic center, and medical services." *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 10 (2009); *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 623 (Alaska 2008), *rev'd and remanded sub nom. Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1 (2009). In contrast, the Fifth Circuit concluded that the Clause allows charging vessels a fee to ensure that emergency services will be available to them, even though not all vessels will actually need such services. *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1023 (5th Cir. 1989) ("Ships entering Plaquemines Port pay a fee to ensure that emergency services will be available; this is a transaction, not a revenue device, a regulation or a payment simply to use the Port. *Clyde Mallory* holds that fees for 'services rendered to and enjoyed by the vessel' pass muster under the tonnage clause. Here, as there, not every ship paying the fee needs the service; they have paid for the assurance of its availability."). The Ninth Circuit likewise upheld mooring and anchoring fees for the use of restroom, parking, and trash facilities, even though the general public used these facilities too. *Barber v. State of Hawai'i*, 42 F.3d 1185, 1196 (9th Cir. 1994).

More recently, in *CLIAA*, the federal district court of Alaska opined on how the Tonnage Clause restricts Juneau's spending of the fees it charged cruise ships that dock there. The Court concluded that "in order for a fee imposed upon a vessel to be permissible under the Tonnage Clause, it must be compensation for a service rendered to the vessel itself." *Id*. at 842. Though the Clause allows fees "that reflect the costs of services provided to a vessel or for services which, if called upon by a vessel, would

further the marine enterprise," "[n]o case law supports the proposition that fees imposed upon vessels but expended for services that benefit vessel passengers *only* would be constitutional under the Tonnage Clause." *Id*. at 843 (emphasis added).

Thus, the district court concluded that Juneau's cruise ship fees "may not be expended for services benefitting passengers which do not also constitute a service to a vessel—that is, a service which advances the interstate marine enterprise of the vessel." *Id.* at 854. Expenditures "which enhance the tourist experience of passengers brought to Juneau by [cruise ships] do not qualify as a service to a vessel, even though the enhancement of passengers' experience at Juneau may benefit [cruise ship companies] financially. What is critical is that there be a service to a vessel." *Id.* at 855. Giving specific examples, the court opined that "a gangplank used by passengers and the general public is a service to a vessel," but "sidewalk repairs and access to the public library's internet, which passengers share with the general public, are unlikely to be a service to a vessel." *Id.* at 853.

In sum, under *CLIAA* and preceding U.S. Supreme Court and other federal caselaw, the Tonnage Clause prohibits the State from imposing general revenue-raising taxes on cruise ships; it may only charge them fees "for services rendered to and enjoyed by the vessel" that "further the marine enterprise" of the vessel. *Clyde Mallory*, 296 U.S. at 266; *CLIAA*, 356 F. Supp. 3d at 843. In other words, the State can legally assess CPVEC fees on vessels, but it must use the funds for services to the vessels. Services that only "enhance[] passengers' experience" in Alaska and thereby indirectly benefit cruise ship companies by helping them sell more tickets are not sufficient; "[w]hat is critical is that there be a service to a vessel." *CLIAA*, 356 F. Supp. 3d at 855.

Application of the Tonnage Clause to the proposed wastewater infrastructure grant program:

The grant program proposed in Section 13 of the Bill is likely facially valid because the service that it funds—onshore treatment of wastewater—provides a benefit to cruise ships that pay the fee. Any vessel that is permitted to discharge wastewater in state waters must collect and treat any waste its passengers generate while onboard. That is a critical function of those vessels. If port communities did not have a wastewater treatment system capable of accommodating the passengers' waste, then the cruise ships would have to collect, treat, and dispose of the waste themselves. Thus, while port communities usually do not directly pump waste off the vessels for treatment, the port communities perform the functional equivalent of that service by taking on the waste instead of the vessel. The port communities are therefore providing the waste treatment services that the vessels would otherwise need to perform for the passengers. That is likely a valid, beneficial service under the Tonnage Clause.

Notably, some cruise ships are not permitted to discharge in state waters, and therefore travel to international waters to discharge without treating the wastewater. These vessels, therefore, do not receive the same benefit from port community wastewater treatment facilities as the permitted vessels. But that does not mean the unpermitted vessels receive no benefit. The port communities still reduce the amount of waste the unpermitted vessels must collect, which reduces stress on the vessels' waste collection system and reduces the need for storage capacity. The decreased amount of waste the unpermitted vessels take on may also reduce the number of trips the vessels need to make to international waters for the purpose of discharging, thereby potentially saving time and fuel costs. The unpermitted vessels, therefore, likely also receive a benefit from the onshore treatment facilities even if the benefit is not as direct or significant as the benefit the permitted vessels receive.

The benefit that vessels receive from onshore wastewater treatment facilities is distinguishable from the benefits of the purported services that have been struck down in other cases. For example, in *Polar Tankers*, the "police, airport, civic center, and medical services" did not relate to the vessel's marine enterprise because they are unassociated with any of the vessel's operations. 557 U.S. at 10. Only the passengers were benefitted, in their capacity as tourists in the city. Here, the collection and treatment of human waste by onshore facilities performs an operation that permitted vessels would otherwise need to perform themselves, and reduces the amount of waste unpermitted vessels need to take on and accommodate.

Notably, due to the small number of cases addressing the type of services that would be funded by the proposed grant program, it is possible a reviewing court could take a stricter view than the analysis here. The difference of opinion would likely be whether the service benefits the passengers *alone,* not also the vessels. As explained above, however, that conclusion is fairly unlikely.

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Conclusion:

Because the permitted vessels receive a substantial benefit from the onshore treatment facilities providing waste treatment services, the grant program is likely facially valid under the federal Tonnage Clause. The benefit enjoyed by unpermitted vessels may be less, but is likely still a valid use of the fees collected from those vessels. Thus, the wastewater infrastructure grant program is likely a permissible use of fees collected from cruise ships in Alaska.

Sincerely,

TREG R. TAYLOR
ATTORNEY GENERAL

By: */s/ Nathan Haynes*
Nathaniel J. Haynes
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RCP/NJH/smr

cc: Governor's Legislative Office