

Manager's Office
Municipal Building
93 Cottage Street
Bar Harbor, ME 04069



Kevin L. Sutherland
Town Manager
manager@barharbormaine.gov

MEMORANDUM

To: Bar Harbor Town Council
From: Cruise Ship Working Group
Date: August 16, 2022

Re: Questions and Responses to the Cruise Management Plan

This memo was put together in response to questions raised in the [Email on Cruise](#). Some of the questions have been modified to address tone or context, some were eliminated because they were rhetorical or redundant.

1. Can you address the specifics of what will be included in the Memorandum Of Agreement (MOA) and Standard Operating Procedure (SOP)?

The MOA has not yet been drafted, but the intent would be to address the daily and monthly caps as well as limits to size of ship and other industry specifics in a formal agreement with each of the lines that call on Bar Harbor. Major elements - See slide 14 [HERE](#). Ideally, the SOP would continue to exist at least until all elements of the SOP are a part of the Shoreside Vendor Ordinance or are a part of the MOA. Current SOP can be found [HERE](#).

2. Can you give specifics on utilization of anchorage A and B? When might anchorage A be used and why? Can anchorage B hold 3 ships and can larger ships be anchored at anchorage B?

Anchorage A and B are both federally approved anchorages that exist in [federal statute](#), along with our right to schedule what takes place in those anchorages. Any private vessel may anchor in either anchorage but we do have authority to schedule and manage large ships. Anchorage A will be used when weather conditions prevent the safe anchoring of a ship in B and when we have three ship days, as per pilots, two large ships are really the safe limit for the area contained in Anchorage B, therefore the smallest of the three will be set to anchor in A.

3. Can limits for the use of anchorage A be detailed in the SOP?

This is the language currently written in the 2022 SOP: “The preferred Anchorage is Anchorage B. On days when one or two ships are in port, ships will only be anchored in Anchorage B. On days when three ships are in port, the smallest of the three ships will be anchored in Anchorage A. Anchorage assignments will be given on a first come first serve basis according to reservation date. The final determination of anchorage assignment will be made by the Harbormaster and will be in the best interest of safety and expediency of operations. In times of inclement weather or other unplanned incidents, the Harbor Pilot may anchor the vessel in Anchorage A, and will communicate this change to the Harbormaster as soon as practicable.”

4. Can you give specifics on how many free days there are in a month? Is there a minimum of free ship days?

There are no written minimums for cruise ship free days. The monthly caps would theoretically create additional days off (September 2022 has 3). Our best guess for 2024 is between 4 and 11 days for September.

5. What are the rules regarding how long tenders are allowed to idle?

The current SOP states: “Bar Harbor inner harbor is a NO WAKE ZONE and is clearly marked as such with private aids to navigation. Tenders are responsible for the effects of their operation within the confines of the inner harbor including prop wash. Tenders should be made fast to the landing float and shut down to reduce negative effects on other vessels operating in the vicinity and minimize exhaust emissions.”

6. Is it possible to maintain the pause instituted in 2021 to continue for the year 2023, 2024, etc?

The cruise industry has, in good faith, been negotiating with the town for nearly six months to address 2023 and beyond. Should the Council decide to propose further restriction not agreed to by the industry, it would more than likely be addressed in court. This is based on our understanding of the law and from the opinion of [the town attorney's](#) (Page 92) and others hired by the Council, it would not be a favorable result for the Town of Bar Harbor.

7. What's the difference between a 3,800 daily cap with harbormaster's discretion up to 200 more and a 4,000 daily cap?

The discretion of 200 is to allow the Harbormaster to accept the 2 ships that are slightly larger than 3,800 lower berth capacity (lbc) but less than 4,000 lower berth capacity which currently visit Bar Harbor. This would not be an everyday occurrence, but the larger ships utilize a greater share of the monthly cap resulting in more days without ships.

8. Why exactly are we looking at increases in total numbers (at least from 2022) for the months of May through August?

We didn't do anything to the July and August months other than to significantly lower the monthly caps from 108,500 (July - 3,500/day x 31 days) to 40,000 because we assumed that the cruise industry would begin to try to shift fall visitation to summer if possible. As for May and June, we are reducing the daily caps of 5,500 to 3,800 and implementing the same efforts with a monthly cap of 170,500 down to 30,000. It doesn't reflect what the 2022 numbers are in comparison to the new cap, but will take years to even reach these caps as they need to build up the market and build smaller ships to fit under the caps.

9. Can you say more about the Shoreside Vendor Ordinance?

This has yet to be developed because we would first want Council support to move in this direction and secondly to include those who would be impacted by this. Here are some potential sections that would be covered by the ordinance:

- **License requirement for Tour Operators - Currently the big two are Destinations North America and Coastal Kayaking.**
- **Limit on number of tours allowed to run per day**
- **Limit on number of buses each tour operator is allowed to operate on a given day in town**
- **Limit on time buses can stage in loading areas**
- **Limit on number of buses that can be loaded at one time, or on number of tours that can depart the loading area within a certain time span**
- **Limit on where certain size ships must tender and disembark passengers, for example ships under 2500 could all be required to use Harborside Pier.**
- **Requirement for certain staff levels to be maintained by tour operators in the loading area**
- **All of the traffic flow requirements and current loading area restrictions in the current policy should be continued and added to the ordinance with some modification after this year.**
- **Provision for spring and fall meetings of industry reps to go over ordinance requirements and plan for season or perform after action review of season.**
- **Enforcement mechanism for PD for violation of the rules required to be followed under the ordinance. Consider mirroring Special Amusement permit violation process, Disorderly House violation process, avoid something that will lead to town involving the courts for enforcement.**

Groups to partner with / work with while writing ordinance

- **Tour Company executives and front-line managers**
- **CFR 105 secure tender facility owners and managers**
- **Customs and Border Protection**
- **Bus companies**
- **Residents and Fisherman**
- **Police and Harbormaster**
- **Council Reps**
- **Committees**
- **Chamber Reps**

10. Do we know what the impact is on our wastewater treatment plant for a cruise ship day vs. a non-cruise ship day?

We record the Total Effluent flow every 24 hours. On average we do anywhere from 800,000 GPD to 1,000,000 GPD this time of year. We can easily compare flow on Cruise ship days to non- cruise ship days. The additional flow from cruise ships at this point aren't an issue for the plant, considering we are designed for 2.2 MGD. The real impact is a Higher BOD (strength of wastewater) during a cruise ship day. With that being said, we keep enough MLSS (Solids) to treat Higher BOD's as we never know what the strength on any given day or week will be this time of year.

11. Where does the liability lie for disembarking passengers?

Passengers disembark from ship tenders and private tenders to privately owned and managed docks. The liability is on the private company that does the disembarkment.

12. Exactly how will the cruise ship citizen's initiative be worded on November ballot?

The Citizen petition must be presented as drafted by the petitioners as required by state law. The order for the citizen initiative can be found on page 72 of the July, 19, 2022 [Council packet](#).

13. Is the Harbormaster still taking reservations for 2023 and beyond?

The council voted to make all booking requests made after July 20, 2021 tentative. The Harbormaster has been accepting requests for bookings, but actual reservations won't be made until the Council acts to give the harbormaster authority to accept the requests. The new proposed guidelines would be applied to any request made after July 20, 2021 for the 2023 season and beyond.

14. Does the town count the passengers?

The Town does not count passengers because we go by lower berth capacity (lbc) rather than counting disembarkments. Reservations are requested by the industry for the individual ship which has a set lower berth capacity. (on [Portcall.com](#), it is labelled as 'guests') The lbc is what the Harbormaster uses to determine whether the limit has been met for a specific day. Additionally, the town collects passenger fees based on lbc, not the actual number of passengers that disembark.

In addition to lowering the lbc for May, June, September, and October, the proposal from the working group institutes a new parameter for the Harbormaster to consider when approving requests, monthly lbc limits.

15. How can it be legal to set limits at 3,800 and not at some other number?

The current daily passenger caps were created through agreements with the industry over the years. The question about whether Bar Harbor has the legal ability to lower or eliminate the caps without industry agreement is complicated and not clear. See question 20 for more. Cruise ships are managed under rules for international and interstate commerce as well as maritime law. The approach proposed by the Working Group for Council consideration is to limit daily caps to 3,500 or 3,800 per day is a direct agreement with the industry and would not be challenged as to its legality by the cruise industry.

16. Why didn't the proposal developed by Council in late August of 2021 go forward?

In August of 2021, the Council made a first attempt to redefine cruise visitation. We used a suggestion from a citizen proposal for reduction to think about the daily and monthly experience. We adjusted cruise visitation down when land-based tourism was higher.

We then sent our draft to the cruise ship committee to get feedback on the workability, feasibility, and effectiveness of our plan. Due to anti-trust trade laws, the cruise ships industry members were not able to productively participate in the conversation. We also learned from staff that our approach would be tough to schedule. We learned more about the regulatory tools and the complexity of our ability to set new caps without industry agreement. In December of 2021, the council voted to investigate a daily max cap of 3,000 passengers to simplify the August chart.

When our new town manager came onboard, he suggested that we create a working group of 2 councilors, the harbor master and a representative from the Maine State Tourism office to directly engage with the industry through CLIA to avoid the anti-trust law issues the cruise ship committee was encountering. The working group started with the 3,000 daily passenger caps and added a monthly cap into the mix. Over 6 months, the working group learned more about the current and future sizes of the cruising fleets and the nuances of visitation - ship size versus congestion. We believe that with tighter shore-side management and shifting buses to private property, the Town of Bar Harbor can manage 3,800 passenger days. We will build tools to evaluate and adjust should this not be the case.

In short, this proposal is the result of the August numbers moving forward through a learning process. We reduced visitation in the months of September and October by 30%. Direct agreement with each cruise line gives the Town tools to control, evaluate, and adjust cruise visitation professionally and in collaboration.

17. Did you have your proposal vetted by the cruise industry? and that is why the cap is so high?

The Cruise Management Plan as presented on August 2, 2022 has been reviewed and agreed to by the industry lines that currently visit Bar Harbor and are members of CLIA. There are 2 or 3 lines who are not part of the CLIA that we'll need to work with once the Council has provided their approval.

18. The Town has no say on what ships can come to our harbor based on environmental records, yet Key West gives preference to ships with strong environmental records. How do they do it?

The proposed limits to cruise visitation in Key West were introduced through the citizen's initiative process. One of their initiatives limited ships based on environmental ratings. While the citizens of Key West voted the initiatives into law, the state overruled the town's authority to use the initiative process to limit ships which has led to litigation. It's not clear about whether they will be able to limit ships completely through local rule.

In our case, while the community survey did tell us that the majority of residents were looking for cruise ship reductions, the biggest concerns were around congestion, scale/ size of ships and overall balance between community and tourism. The Council chose to focus on those issues.

19. There are claims that real estate taxes will rise if cruise ships are limited. Do you have data on this and by how much might they increase?

The town currently has budgeted \$665,000 for Cruise related expenditures utilizing the cruise ship fund, currently paid for by the industry based on the fulfilled reservation and the lower berth capacity of the ship (not the total passengers that disembark). Roughly \$180,000 of that are direct expenses and without cruise ships would not be shifted to another revenue stream. The other \$485,000 for Annual Operating needs such as portions of salaries and Capital Improvement projects such as police and fire equipment replacement would mostly shift to the general fund. At the beginning of January, this was estimated to be \$.25 on the mil rate. For the median, non-waterfront home valued at 400k, this would be an additional \$100 on their tax bill.

Further explanation of this can be found in the initial FY23 budget presentation. Either via [PDF](#) or [video](#).

20. Do we have any rights to refuse foreign flagged ships who are well known for their poor environmental records and labor practices?

In general terms, a municipality has limited, if any, authority to regulate cruise ships. That authority is preemptively exercised by the federal government. But the issue is not a simple one.

All "navigable" waters are within the federal government's jurisdiction. The United States Coast Guard (USCG) issues regulations and actively enforces them here, including regulations specific to cruise ships.

All cruise ships that call on Bar Harbor have a USCG issued license: a Certificate of Compliance and/or a coastwise license. In such cases, federal law preempts state law, even within a state's territorial waters.

See (*UFO Chuting of Hawaii, Inc. v. Smith* (9th Cir. 2007) 508 F.3d 1189, 1192-1193.)

In this case, a municipal government could not ban cruise ships. (*Id.* p. 1194.) At most, “states may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power,” provided that such measures do not conflict with federal measures. (*Ibid.*) But the town’s authority would be even more questionable, especially any attempt to regulate a vessel beyond the town’s territorial reach.

Similarly, the National Oceanic and Atmospheric Administration (NOAA), an agency with the U.S. Department of Commerce has the responsibility to create and enforce specific regulations about permitted cruise ship activities. NOAA’s regulations would preempt any conflicting or even parallel municipal regulations.

21. Can you verify an occasion where a 500 passenger ship called for 10 buses?

The specifics of upcoming excursions is proprietary from the shoreside industry’s perspective. But some of the lines provide tour packages as part of the overall cruise package. One of the ships in the 500 passenger range has booked the potential for up to 10 busses ($500 / 50 = 10$). If their cruise ends up with fewer passengers than the max lbc, they will likely cancel some of the busses.

22. How will you count disembarkation and be able to notify a ship, with a reservation accepted, that we have reached our capacity for this month?

The town does not currently and will not under the proposed plan count the number of passengers disembarking from the ship. The reservations are approved based on the lower berth capacity of the ship. The reservations will be approved by the Harbormaster on a first come first served based on capacity for the day and capacity for the month.

23. What relevance does the map highlighting Yarmouth have to do with cruise ships? Why are we shown a map of ports that don’t host cruise ships?

The map was used as a visual aid. Each of those arrows is a straight line depicting visual distance and showing, beyond its access to a National Park, how Bar Harbor is the closest and most convenient for travel from Canada.

24. Would you please post the SOP on the Town Official Website under everything with cruise ship in the title?

The [SOP](#) is posted on the Cruise Ship Working Group site.

25. Has the Town spoken to our counterparts in Key West or Portland to glean any insight into what our legal consequences maybe from limitations that we may place on cruise ships?

The Working Group here in Bar Harbor has done a significant amount of work connecting with representatives in Key West FL, Portland ME, Monterey CA, and Juneau AK to try and get a better handle on the differences and similarities each community is facing.

All four communities have run into contradictions with state law and/or federal law as they've tried to address their concerns – specifically maritime law and commerce clauses.

Key West, Portland, and Juneau have municipal owned docks which gives the community slightly more control over calls for cruise.

Juneau sees well over a million visitor each year. They recently lost a court case over use of cruise funds and have had to scale back the broad use of them.

In Key West it was not a clean process at all and it took years. In the end, the citizen referendum was not upheld by the state legislature as it was passed and the city spent a lot of money on outside council to ultimately negotiate an agreement with the industry and the private pier owner.

Monterey, like Bar Harbor have cruise ships anchored in the bay, but their docks where tenders disembark are owned by the City. Monterey is also less apt to benefit at all from cruise, as there are very few ships that visit per year and those that do bus the passengers to other parts of the state, such as out to the wine country.

The closest comparison for us might be Portland, because they follow Maine law and have state statute around the role of Harbormaster and ports of call. However, Portland does not have a cruise ship committee, and they do not have existing caps. Historically, the Council in Portland does not regularly discuss cruise ships at all, so this referendum is much more of a surprise than it is for Bar Harbor. The Portland Council has done exactly what Bar Harbor has done: voted to put it on the ballot this fall. At its Aug 8 meeting, the Portland Council did briefly consider passing it and directly sending it to committee to be amended, but that effort failed, so instead they voted to put it on the ballot as is. And there are many organizations mobilizing against it and suggesting legal action.

26. Do we have any legal consequences if we negotiate directly with the cruise ship companies and not Ocean Properties?

Any decision the Council makes (or doesn't make) has risk. By negotiating directly with the cruise industry, we believe this is the least risky option to work to achieve reductions and take a step towards addressing balance for the community.

27. What do the lawyers who represent our Town feel our possible liabilities may be if the vote passes to limit in town cruise ship visitors to 1,000 per day?

Regarding the citizen's initiative, we fully intend to address our concerns about workability (counting disembarking passengers instead of tracking lower berth capacity) and enforcement of violations in future dialogue with the community, but we believe this has the highest risk and greatest potential for legal damages to the Town of Bar Harbor.

28. What do the lawyers who represent our Town feel our possible liabilities may be, if the vote fails; and we proceed based on the contract negotiated directly with the cruise ship industry.

Any decision the Council makes (or doesn't make) has risk. By negotiating directly with the cruise industry, we believe this is the least risky option to work to achieve reductions and take a step towards addressing balance for the community.

29. How many businesses operate in Bar Harbor?

Bar Harbor does not have a business licensing ordinance, so it is unclear how many businesses operate in Bar Harbor. Other interesting stats, we can offer; the Chamber has 280 members in Bar Harbor, residential represents 74% of the taxable assessed value and commercial represents 26%, and there are 382 commercial accounts and 3,105 residential accounts in the assessor's database.

30. How many owners of businesses operating in Bar Harbor are also residents of Bar Harbor?

The Town does not have the data to determine this.

31. Why are we allowing the Industry to dictate numbers to us rather than informing them that our Town, not they, will determine the numbers that are acceptable and that we are willing to accommodate?

Please see response to question 15, 16, and 20.

32. You explained that our Town is geographically critical to the East Coast Cruise Industry. Critical to whom? Why is that our responsibility or concern?

The Town of Bar Harbor worked with the State of Maine, the New England Region and the Canada/American cruising networks to build out the cruise ship visitation that we have today. Itineraries, markets, and schedules are built upon this international network. Bar Harbor's role is important both as the gateway to Acadia National Park (a key market draw) and as a designated Class A port of entry which allows for the ship to clear customs as they re-enter (or enter) the US. While our regulation and limits need to be based on the needs of Bar Harbor, we also need to understand how the cruise industry, other cruise ship destinations, and the markets operate to reach agreements that work and to avoid potential litigation.

33. Please explain who is responsible for counting the disembarking passengers now and how accountable and accurate these numbers are?

The Town of Bar Harbor does not count cruise ship passengers disembarking from the ships. Their authorization to use the anchorage is approved by the Harbormaster based on established lower berth capacity guidelines and limits. See question 14 for more information.

34. Would you please delineate for us exactly what control the Town does and does not have over both domestic and foreign ships using our harbor and disembarking passengers?

Please see question 20.

35. Is the Town or private business ultimately responsible for scheduling, determining, and controlling numbers, vessels, schedules, docking etc?

Currently, the Council is responsible for approving the SOP, which has historically been developed by the Harbormaster with input from the Cruise Ship Committee. The Harbormaster is responsible for booking the ships that call and meet the parameters established in the SOP (including lower berth capacity of each of the ships that call). The ships have their own tenders to transport passengers to privately owned docs and/or hire local vessels to assist with the transfer. The Harbormaster and staff are on site to ensure safety and compliance.

36. Why are you proposing that the Town NOW draft agreements with vessels for the first time? And what happens to those agreements if the Initiative is successful?

Most every other community in the country that is visited by cruise ships have started developing agreements to better manage the relationship between the industry and the expectations of the citizens to which the cruise industry in choosing to visit. If the citizen initiative is successful, we are certain it will be taken to court and our hope is that these agreements are what continue forward instead of the current caps or no caps.

37. Please explain why you feel our municipal insurance will be inadequate to counter suits filed if the Initiative passes. And if so, can private individuals and businesses donate money to help the Town fight the lawsuit?

It would depend on the type of case and how our insurance would view our violation of 'contract'. For example, a claim for money damages, as opposed to a claim for injunctive relief, would generally trigger a duty of the insurance company to defend the Town on all counts of the complaint.

Regardless, if this issue went to court, based on any of these scenarios, the Town would likely have to continue operations as is until it was settled and that may take years.

Finally, the Town would likely agree to accept donations to cover legal fees, but we would also much rather be in a position where we don't spend any time dealing with our disagreements in court.