

HB

1941

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April 2, 1991

Robert A. Harrington  
Investigator  
State of Alaska Board of Marine Pilots  
Department of Commerce and Economic Development  
P.O. Box D - Lic  
Juneau, Alaska 99811 - 0800

HAND DELIVERED

Re: Captain Terry K. Bennett

Dear Mr. Harrington:

This office represents Captain Terry K. Bennett, who has asked us to respond to your letter of February 13, 1991 (received February 19, 1991).

As I understand the facts, you received a complaint from Captain Bennett's competitor, the Southeastern Alaska Pilots' Association, alleging that during the summer of 1990 Captain Bennett had failed to collect the "published tariff" for marine pilot services.

I note that the Board of Marine Pilots has authority to adopt "under the Administrative Procedure Act [...] standards by which pilotage fees may be established." AS 08.62.020(a)(1). However, the "published tariffs" to which your letter refers were not properly adopted under the Administrative Procedure Act ("APA"), but simply appear in your office's printed booklet of statutes and regulations pertaining to marine pilots as an addendum.

As you are aware, the legislature very broadly defined what constitutes a regulation under the APA. See generally, AS 44.62.640; Kelly v. Zamerello, 486 P.2d 906, 910 - 11 (Alaska, 1971). Unless properly adopted, regulations are unenforceable. Ibid.

Mr. Kevin Harrington  
April 2, 1991 p. 1

The Alaska Supreme Court recently had occasion to discuss the definition of a "regulation" in this context:

The legislature specifically defined "regulation" to "include[] ... 'policies' ... and the like, that have the effect of rules, orders, regulations or standards of general application." AS 44.62.640(a)(3). Indicia for identifying a "regulation include (1) whether the practice implements, interprets or makes specific the law enforced or administered by the state agency, and (2) whether the practice "affects the public or is used by the agency in dealing with the public."

Gilbert v. State, Dep't of Fish & Game, \_\_\_ P.2d \_\_\_, Op. No. 3649, at 13 - 14 (December 7, 1990) (emphasis and ellipses original), citing Kenai Peninsula Fishermen's Co-op Ass'n v. State, Board of Fisheries, 628 P.2d 897, 905 (Alaska 1981).

The "published tariff" appears indisputably to be a "standard of general application" which "makes specific the law enforced or administered by" the Alaska Board of Marine Pilots. In order to be valid, therefore, the "published tariff" must have been properly adopted as a regulation under the APA - which it was not. Kelly v. Zamerello, 486 P.2d at 910 - 11. As the Supreme Court recently noted, where a regulation has not been properly adopted,

'[t]here can be no future reliance on this particular policy or option either in the regulation-making process or as a basis for emergency orders until the procedures required by the APA are observed.'

Gilbert, Op. No. 3649 at 15, quoting Kenai Peninsula Fishermen's C-op, 628 P.2d at 906.

Thus, it is our conclusion that the complaint by Captain Bennett's competitor does not provide a basis for any action by your office. Further, the courts would look askance at any attempt to enforce these invalid regulations through the "bootstrap" of 12 AAC 56.140, referenced in your letter. As valid rates have not been adopted by the Board, the regulation to apply is 12 AAC 56.130.

It is also worth noting that the Board of Marine Pilots probably no longer has the authority to adopt and enforce specific tariffs. Even if the proper procedures were followed, the APA provides that regulations are:

not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030.

The Board previously had authority to "regulate pilot fees" under former AS 08.62.040(a)(4), § 2 ch 106 SLA 1970. However, the legislature removed this authority, and now the Board only has authority to:

Adopt regulations under the Administrative Procedure Act (AS 44.62) establishing standards by which pilotage fees may be established [...]

AS 08.62.040(a)(4), §§ 2, 3 ch 143 SLA 1980 (emphasis added).

It is likely that even had the "published tariffs" been properly adopted under the APA, the courts would not allow the Board to go beyond its authority to "establish[] standards" by which pilots and pilot associations may set the rates charged to their customers. The legislature greatly reduced the Board's authority in this area with the 1980 amendments to AS 08.62.040.

Thus, adoption of "pilotage fees" instead of "standards by which pilotage fees may be established" would be inconsistent with statute, not reasonably necessary to carry out the statutory purpose, and unenforceable. Kelly v. Zamerello, supra; State, DOT/PF v. Alyeska Pipeline Service Company, 723 P.2d 76, 78 (Alaska 1986).

Lastly, I must note that any attempt by the Board to enforce the "published tariff" would run afoul of both state and federal antitrust laws. This is an area which is some sensitivity to this Board, which is presently being sued in federal court for alleged violations of the antitrust laws.

The complaint by Captain Bennett's competitor amounts to a request that the Board enforce the fixing of prices for marine pilot services. The fixing of prices by competitors is an illegal horizontal restraint of trade under both the Sherman Act, 15 USC § 1, and the Alaska Monopolies Act, AS 45.50.560. The Board's sanctioning of, and participation in, the fixing of pilot charges would violate the antitrust laws unless this activity falls within one of the recognized exceptions. Goldfarb v. Virginia State Bar, 421 US 773 (1975).

There is only one exception which could apply here, the state action doctrine. Simply put, the antitrust laws are not intended to restrain state regulatory action, nor to impose liability on those who act in anticompetitive ways because they are required to do so by a state regulatory agency. - Parker v. Brown, 317 US 341 (1941) (Sherman Act); AS 45.50.572(g) (Alaska Monopolies Act). However, the state action doctrine is not a blanket immunity:

The national policy in favor of competition cannot be thwarted by casting a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful [...]"

California Liquor Dealers v. Midcal Aluminum, Inc., 445 US 97 (1980).

The state action doctrine is applied through a "rigorous two-pronged test." Parker. The challenged restraint of trade must be one which is "clearly articulated and affirmatively expressed as state policy" by the legislature. Lafayette v. Louisiana Power & Light Co., 435 US 389, 410 (1978) (opinion of Brennan, J.).

[T]his issue requires a two-step analysis: First, whether the activity complained of is authorized; second, whether the state intends to displace competition with regulation.

Lancaster Community Hospital v. Antelope Valley Medical Group, \_\_\_ F.2d \_\_\_, 60 BNA Trade Regulation Reports 174, 175 n.4 (9th Circuit 1991).

If this test is met, the anticompetitive conduct additionally "must be actively supervised by the State itself." Ibid; see also California Liquor Dealers, 445 US at 105 and Patrick v. Burgett, 486 US 94 (1988). Only if all the factors noted are present does the state action doctrine apply to exempt price-fixing from the antitrust laws.

On the first prong, as noted earlier, the legislative policy as stated in AS 08.62.040(a)(4) is not "forthrightly stated and clear in its purpose," California Liquor Dealers at 105, if that purpose is to allow the Board to set rates. Compare, New Motor Vehicle Board v. Orrin W. Fox Co., 439 US 96 (1978) (state law clearly required state approval of locations for new automobile dealerships) and Southern Motor Carriers Rate Conference v. United States, 471 US 48 (collective rate making "clearly sanctioned by the legislature").

The Alaska legislature substantially limited the Board's prior authority to "regulate pilot fees" when it amended the statute. Now, it only allows the Board to "establish standards by which pilotage fees may be established." AS 08.62.040(a)(4). Allowing the Board to establish standards by which pilots may set their own fees is not a "clearly articulated and affirmatively expressed" state policy in favor of price-fixing. Parker.

On the second prong, review of the Pilot Act does not indicate an "affirmatively expressed and clearly articulated" state policy to displace competition in the pilot industry with state regulation. Lafayette; California Liquor Dealers. The statute provides a de minimus framework for regulation by the Board. Compare, e.g., AS 08.62 with AS 42.05 (Alaska Public Utilities Commission). The statutory change discussed above cuts against a finding that the second prong of the Parker test is met.

Last, even if both of these prongs were met, it must be shown that the anticompetitive conduct at issue is "actively supervised by the State itself." Lancaster Community Hospital. This requires a concrete showing that the State actually, actively, and consistently regulates the activity in question. Patrick.

As far as I have been able to ascertain, during the last decade the Board has not taken any supervisory action involving pilot fees whatsoever. Indeed, the Southeastern Alaska Pilots' Association has consistently paid its contract pilots fees which are roughly 30% to 40% below the "published tariffs." There has been no supervision - or criticism - of this practice by the Board of Marine Pilots.

Thus, it appears that any attempt by the Board to enforce the "published tariffs" would violate both federal and state antitrust laws.

Under these circumstances, Captain Bennett respectfully requests that you seek the advice of legal counsel before proceeding any further with this particular investigation. I would of course be very glad to discuss this matter with your counsel.

Sincerely yours,

DILLON & FINDLEY

By: 

Richard D. Monkman

RDM/oth

cc: Gary Amendola, Assistant Attorney General

# ALASKA STATE LEGISLATURE

## ELECTIVE DISTRICT 1

HYDER  
KETCHIKAN  
KUPREANOF  
MEYERS CHUCK  
PETERSBURG  
SAXMAN  
WRANGELL



## HOME

P.O. BOX 5723  
KETCHIKAN, AK 99901  
PHONE 225-6304

## DURING SESSION

P.O. BOX V  
STATE CAPITOL BUILDING  
JUNEAU, AK 99811  
PHONE 465-3424

**Representative Cheri L. Davis**

## MEMORANDUM

TO: Representative Dave Donley,  
Chairman, Judiciary Committee

FROM: Representative Cheri Davis *Cheri Davis*

DATE: April 9, 1991

RE: Scheduling of House Bill 194

Please accept this memorandum as my request for House Bill 194 to be scheduled for a hearing in your committee.

The version of the bill that you will be hearing in your committee is a compromise between pilots and the industry, except for regionalization. The regionalization issue will be worked on later this week.

If you have any questions, please do not hesitate to contact me.

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# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## DEPT. OF ENVIRONMENTAL CONSERVATION

April 18, 1991

**BILL NUMBER:** CSHB 104 (L&C)


**TITLE:** Relating to the Board of Marine Pilots, marine pilots, and marine pilot organizations; and providing for an effective date.

**DEPARTMENT POSITION:** Support with amendment

**ANALYSIS:** This bill clarifies and strengthens the authority of the Marine Pilots Board. Its passage would insure that competent marine pilots would be on board certain vessels in Alaska State waters, thus increasing the level of safety of vessel operations and protecting our marine environment.

The Department of Environmental Conservation believes that the mandatory use of local marine pilots with knowledge of the area in which they operate is an integral part of oil spill prevention. State licensed pilots was a major recommendation of both the Alaska Oil Spill Commission (Recommendation #20) and the States/British Columbia Oil Spill Task Force (Recommendation #15).

**PROPOSED AMENDMENT:** The Department would propose that the bill be amended to require the Board consult with DEC in establishing training standards for those marine pilots and deputy marine pilots operating in regions where there is crude oil tanker traffic.

  
John A. Sandor  
Commissioner

LEGISLATURE OF THE STATE OF ALASKA  
HOUSE JUDICIARY COMMITTEE

TESTIMONY OF  
PAUL G. KIRCHNER  
GENERAL COUNSEL, AMERICAN PILOTS' ASSOCIATION  
ON  
HOUSE BILL 194

April 18, 1991

My name is Paul G. Kirchner. I am with the law firm of Kuzrus & Kirchner in Washington, D.C. and serve as General Counsel to the American Pilots' Association (APA). It is a pleasure to testify here today on behalf of the APA on House Bill 194, the proposed "Alaska Marine Pilotage Act."

INTEREST OF THE APA

The APA is a national trade association composed of state pilot associations located in each of the coastal states and the three groups of pilots operating in the Great Lakes under the authority of the United States Coast Guard. There are 57 state pilot associations in the APA. They contain a total of approximately 1,050 licensed, active pilots.

Among the objectives of the APA is the promotion of public safety and protection of life, property and the environment through measures to maintain and strengthen the state pilotage system. The foundation of that system, and the primary reason for the traditionally high standards of the state pilot profession,

is effective state regulation. For that reason, the APA wholeheartedly supports Alaska, or any other state, assessing its pilotage statute and regulations and making improvements where necessary or appropriate. We are happy to render any assistance that we can in such efforts. The perspective that the APA can offer is its familiarity with the experiences of the pilotage systems of other states and an understanding of the federal government's role in pilotage and how it affects state pilotage regulation.

We have followed closely the efforts of the State of Alaska to reassess and upgrade its pilotage regulatory system. As this process has entered the legislative phase, the APA member groups in Alaska, the Southeastern Alaska Pilots' Association and the Southwest Alaska Pilots' Association, have kept us apprised of the issues that have been raised and the legislation that has been proposed or introduced, particularly H.B. 194.

#### GENERAL COMMENTS ON H.B. 194

The APA congratulates Representative Davis and the other sponsors of H.B. 194. This bill, in our opinion, significantly improves the State's present pilotage regulatory system. It provides for: a strong pilot board with sufficient statutory authority and direction, regulated tariff rates, meaningful licensing and training requirements, oversight of pilot organizations, and effective penalties for violations of the State's compulsory pilotage requirement. These are the essentials of an effective state pilotage system.

We are also pleased that H.B. 194 clearly recognizes that pilots perform a vital public service that is essential to navigation safety, to the protection of the marine environment and the persons and property of the State's citizens, and to the economic well-being of the State. It is important that the shipping industry and the public, generally, understand the role of the state pilot and the State's compelling interest in regulating the pilotage of vessels moving in its waters.

With our support for H.B. 194, we offer the following specific comments on several items in the bill.

COMMENTS ON SPECIFIC PROVISIONS OF H.B. 194

1. Section 1 - Findings

The APA recommends that all state pilotage statutes contain a strong statement of legislative findings and intent. It is not clear, however, whether the statement of findings in Section 1 will be codified. If, in its present form, it is not to be placed in the pilotage statute, we would recommend that it be reconstituted as a separate section in AS 08.62. The findings should be readily available, both practically and as a matter of law, to guide the pilot board and to those who are affected by the pilotage statute.

Finding number (2) could perhaps be stated more clearly. The essential service that pilots provide to the state is the exercise of independent judgment in which the public interest will always take precedence over the interests of the vessel operator or of the pilot whenever a conflict among these interests may arise.

Although we would agree that pilots can best exercise such independence of judgment when they operate as independent contractors, the emphasis should be on the former.

Finding number (6) particularly highlights the value of codifying the statement of findings. In situations when the authority of the pilot board may be called into question, it would be important to be able to refer to the legislature's direction that the Board's authority is broad and extends, specifically, to establishing pilotage regions, tariffs, and training and licensing criteria.

Finding number (8) is a useful and important statement. Not only does it accurately describe the role that pilot organizations should play in a state system, it provides the predicate for state regulation and recognition of pilot organizations.

## 2. Section 4 - Powers and Duties of the Board

This is a good mix of specific statutory direction as to the things that the board must do and broad discretion as to the things that the board may do in carrying out the purposes and policy of the statute. Both are necessary features.

Ideally, a grant of authority could be permissive only so that a pilot board or any other administrative body would have the flexibility to apply the legislative will to changing circumstances. The actual does not always equal the ideal, however. There have been some unfortunate occasions in state pilotage regulation in which a state pilot board has, for various reasons, not done what a pilot board should do and, specifically, not what

it was intended to do by the legislature. Proposed, reenacted AS 08.62.040 takes the proper approach expanding the functions that the board must perform under paragraph (a) while continuing the board's authority in paragraph (b) to do those other things that the board may determine are appropriate or necessary, particularly in response to changing circumstances.

The language of paragraph (b) could possibly be revised, however, to make clear the expansive nature of the board's discretionary authority. We understand that the apparently broad authority granted in the present AS 08.62.040(b), which is continued in the bill, has not been interpreted as such by the State's Office of Attorney General. The following language is suggested to broaden the scope of paragraph (b):

(b) The board may make, adopt and enforce all rules and regulations that it deems reasonable, necessary and expedient for carrying out the provisions and purposes of this chapter, including but not limited to, rules and regulations for the purpose of regulating the training, licensing and conduct of pilots; establishing marine pilotage regions and pilotage tariffs; compelling the use of pilots required under this chapter; ensuring proper, safe, economically viable pilotage operations; and facilitating the efficient administration of this chapter.

### 3. Section 15 - Liability

We support this proposed new section, which delineates the extent of liability that a pilot or a pilot organization may have in the event of damage or loss occasioned by the pilotage of a vessel. Limitation of liability is economically justifiable and appropriate. It will not decrease safety in any way or contravene any other state interest. In my opinion, it is a legally valid

exercise of a State's right and duty to ensure reasonable pilotage rates and an adequate supply of competent, qualified pilots.

4. Section 17 - Regional Organizations of Marine Pilots

Paragraph (b) of proposed new section 08.62.175 stating that the board may recognize organizations of marine pilots is confusing. First, it seems inconsistent with proposed section 08.62.040 (Section 5), which states that the board shall recognize such organizations. Second, it is not clear what "recognize" means and what are the benefits or obligations of a recognized organization. For example, as far as we can see, there is no requirement that an organization of marine pilots must be recognized, even under proposed 08.62.040 requiring the board to recognize organizations. Presumably, an organization could elect not to seek recognition and would not suffer for making such an election. Even without being recognized, it is still eligible for the limited immunity from the state antitrust restrictions that is offered under Section 23 of the bill, which applies to "licensed marine pilot organizations" (we assume that the term "licensed" is used there to refer to marine pilots, not pilot organizations).

We would recommend the following: (1) require all licensed pilots to belong to a recognized organization of marine pilots; (2) require that the board shall recognize any organization of marine pilots that meets requirements similar to those set forth in proposed paragraph (c); and (3) extend the antitrust immunity only to recognized organizations.

With reference to proposed paragraph (c), the required approval of the board should not be limited to approval of articles, bylaws and rules meeting the tests of subparagraphs (1)-(3). The organizations themselves should be subject to approval (i.e., recognition) on the basis of the tests of subparagraphs (1)-(3) plus a requirement that each organization demonstrate that it has the necessary equipment, financial wherewithall and experience to provide the level and quality of service required by the State. The articles, by-laws and rules would simply be evidence of the organization's compliance with the requirements of the statute and board regulations.

5. Section 18 - Exemptions

Section 08.62.180(a) should be changed. The term "enrollment" is no longer used in vessel documentation law. As a result of revisions to the federal documentation system made in the 1980 Vessel Documentation Act, Pub. Law No. 96-594, 46 U.S.C. Chapter 121, a vessel under enrollment is now a vessel with a "Certificate of Documentation Endorsed With a Coastwise License."

Since the purpose of section 08.62.180 is to recognize the coastwise vessels that are made exempt from state pilotage jurisdiction under federal law, 46 U.S.C. §8501(d), we suggest that the term "vessels under enrollment" be replaced by "coastwise vessels exempt from state pilotage requirements under 46 U.S.C. §8501(d), as amended, excluding coastwise vessels subject to 46 U.S.C. §8502(g)(2) as amended". The latter reference is to the recent provision enacted in the federal Oil Pollution Act of 1990,

Pub. Law No. 101-380, §4116, which requires a pilot licensed by the State of Alaska for all tankers moving between Valdez and a point south of Bligh Reef in Prince William Sound.

CONCLUSION

These comments have been respectfully offered for the purpose of assisting this Committee in its review and consideration of H.B. 194. I would be pleased to respond to any questions that the Committee may have.

Thank you.

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600

April 18, 1991

Hon. Dave Donley  
Alaska House of Representatives  
Room 122, Capitol Building  
P.O. Box V  
Juneau, Alaska 99811

Re: CS for HB 194 (L&C)

Dear Representative Donley:

On your behalf, Laurie Otto asked this office to review and comment on CS for HB 194 (L&C), a bill currently in the House Judiciary Committee that would amend the laws pertaining to marine pilotage in Alaska. More specifically, we understand that you want to know whether there are any potential legal problems with the bill, including how state and federal antitrust laws may be implicated.

For at least the past couple of years, questions have been raised with increasing frequency about whether certain components of the existing marine pilotage system violate state or federal antitrust laws. The targets of those questions have for the most part been related to (1) the authority of the Board of Marine Pilots (the Board) to establish and enforce mandatory tariffs for pilotage services in particular areas or ports, and (2) the requirements for advancement within the profession being in the control of the currently licensed marine pilots and existing marine pilot associations, the most notable of these requirements being the one that allows a pilot to upgrade an entry level license only after completing a certain number of dockings and undockings under the supervision of a state licensed marine pilot. 1/

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1/ The Board of Marine Pilots, and the individual members of the Board are currently defendants in a lawsuit filed in federal court wherein the Plaintiff, Captain Joseph Homer, has generally accused the Board of allowing the Southeastern Alaska Pilots' Association (SEAPA) to monopolize the profession by, among other  
(continued...)

To the extent that these antitrust concerns arise in the existing statutes, it is our opinion that this legislation addresses those problems. 2/ The public interest of the state, which may at any time be significantly impacted by the quality of marine pilotage, is served only when marine pilotage is safe, efficient, and, except under very unusual circumstances, always available to those who are required to use it. For that reason alone, marine pilotage has been, and should continue to be, a heavily regulated profession. 3/

In CS for HB 194 (L&C), a part of that heavy regulation includes (1) giving the Board broad and express authority (A) to adopt and enforce pilotage tariffs and (B) to approve the by-laws and operating rules of pilot organizations, and (2) establishing statutory standards for licensure and training. In our opinion, those provisions pave the way for the state to avoid antitrust concerns with its marine pilotage system. Why we only say "pave the way" is explained below.

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1/ (...continued)

things, establishing a pilotage tariff and allowing SEAPA to control advancement in the profession through the dockings/undockings requirement.

The Plaintiff recently filed a Motion for Partial Summary Judgment against the Board on the basis that the dockings and undockings requirement was beyond the Board's authority to adopt and that the manner in which it is being implemented is a violation of antitrust laws. In the next month or so, this office will respond to that motion. By the middle of June, the Plaintiff's reply, if any, must be filed with the court. If requested, oral argument will be scheduled sometime after that. After oral argument, the court will rule on the motion.

2/ As you are probably well aware, SEAPA also is the defendant in lawsuits alleging that it has monopolized the marine pilotage business in Southeast Alaska. Although we believe that this legislation also addresses some antitrust concerns of SEAPA, in this memorandum we are only discussing the antitrust concerns of the state directly, except to the extent that those issues necessarily overlap.

3/ The amount of regulation and the significance of the public interest in the endeavor makes the regulation of pilotage in some ways analogous to that of a public utility.

In general, antitrust laws prohibit a variety of monopolistic, anti-competitive activities. However, in addition to certain statutory (state and federal) exemptions, under certain circumstances, the courts have recognized a state action exemption to a claim that activities violate antitrust laws. In California Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), the United States Supreme Court described the exemption as follows:

These decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.).

Midcal, 495 U.S. at 105. (Footnote omitted.)

In order for the state action exemption to be valid, there must first be a clearly articulated policy and law authorizing what otherwise might be anticompetitive behavior. In this bill, we believe such a clearly articulated policy and law exists. Secondly, for the exemption to be validly invoked, the state must actively supervise the otherwise anticompetitive conduct. This bill certainly contains provisions to effect that active supervision, e.g., employment of marine pilot coordinator and the generally clear and increased regulatory authority of the Board. If those provisions are implemented, we think that the active supervision standard will be met. 4/

Although other legal issues were discussed and considered during the process that began last fall on drafting a bill on this subject, we think that those issues have been dealt with in such a way in this bill so that we find none outstanding. 5/

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4/ It is not perfectly clear to what extent a state must supervise for that supervision to be "active." Recent caselaw indicates that the courts are not making the standard a rigorous or onerous one for a state to meet.

5/ For example, the bill does not contain a provision limiting the number of licenses that would be issued.

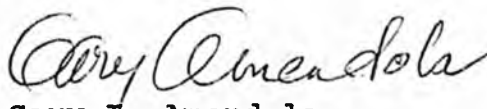
Hon. Dave Donley  
Alaska House of Representatives

April 18, 1991  
Page 4

Recognizing that this letter is somewhat conclusory, if you have any questions or wish further details, please let me know.

Sincerely yours,

CHARLES E. COLE  
ATTORNEY GENERAL

By:   
Gary I. Amendola  
Assistant Attorney General

GIA:jf

cc: Ann P. Boudreaux, Director  
Division of Occupational Licensing, DCED

HOUSE COMMITTEE REPORT

(7) Date Referred: April 10, 1991 FURTHER REFERRALS: Finance

Date of Committee Action: 5-13-91

The JUDICIARY Committee considered: HB 194

HOUSE BILL NO. 194 REGULATION OF MARINE PILOTS

"An Act relating to the Board of Marine Pilots, marine pilots, and marine pilot organizations; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title  
 be replaced with CS HB 194 (Jud) [X] a new title  
 [ ] have attached amendments(s)  
 [ ] do pass  
 [ ] do not pass  
 [ ] no recommendations  
 [ ] individual recommendations  
 [ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date)  
 [X] fiscal impact CED [ ] fiscal note(s) \_\_\_\_\_  
 [ ] zero fiscal note \_\_\_\_\_ [ ] zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Kevin P. Parnell</i>	✓				
<i>Larry Mathew</i>	✓				
<i>Dick Donley</i>	✓	<i>Mark Stanley</i>		✓	
<i>Phil Ellis</i>	✓				

*W. Donley*  
 CHAIRMAN'S SIGNATURE

**FISCAL NOTE**

**STATE OF ALASKA**  
**1991 LEGISLATIVE SESSION**

**BILL NO. CSHB 194(Jud)**

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Dev.  
 Title: Relating to the Board of Marine BRU: Occupational Licensing  
Pilots, marine pilots, .... Component: Administration  
 Sponsor: Rep. C. Davis, et al  
 Requestor: House Judiciary COMPONENT SERIAL NO. 

0	3	5	6
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	72.3	72.3	72.3	72.3	72.3	72.3
TRAVEL	10.0	10.0	10.0	10.0	10.0	10.0
CONTRACTUAL	10.0	10.0	10.0	10.0	10.0	10.0
SUPPLIES	1.0	1.0	1.0	1.0	1.0	1.0
EQUIPMENT	10.0					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>103.3</b>	<b>93.3</b>	<b>93.3</b>	<b>93.3</b>	<b>93.3</b>	<b>93.3</b>

<b>CAPITAL</b>						
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<b>REVENUE</b>	0	131.6	0	131.6	0	131.6
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FUNDING: (Thousands of Dollars)

GENERAL FUND	103.3					
FEDERAL FUNDS						
OTHER GF/PR		93.3	93.3	93.3	93.3	93.3
<b>TOTAL</b>	<b>103.3</b>	<b>93.3</b>	<b>93.3</b>	<b>93.3</b>	<b>93.3</b>	<b>93.3</b>

POSITIONS:

FULL-TIME	1	1	1	1	1	1
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)  
  
(SEE ATTACHED)

Prepared By: Jennifer Strickler, Admin. Officer Phone: 465-2144  
 Division: Occupational Licensing Date: May 14, 1991  
 Approved by Commissioner: Glenn A. Olds  
 Agency: Commerce and Economic Development Date: 5-14-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE ANALYSIS

CSHB 194 (JUD)

The bill makes a number of amendments to the Marine Pilotage Act. The expenses identified in this fiscal note result from paying for audits to collect information needed to apply standards as mentioned in Section 2, and the employment of a Marine Pilot Coordinator established by Section 4.

The bill places the Marine Pilot Coordinator in the partially exempt service of State government and is charged with the responsibility to administer and enforce the chapter. The costs identified are based on a similar Executive Director position, Range 22.

Personal Services:

Marine Pilot Coordinator, XE, 12 months, \$72.3  
Range 22A

Travel: 10.0

Funding of \$10.0 will cover travel and per diem expenses for the marine pilot coordinator to conduct audits, review training programs, and to enforce compliance with the marine pilotage act.

Contractual Services: 10.0

This funding will provide for communications, postage, printing, advertising, and auditing costs.

Supplies: 1.0

Funding will provide for daily operating supplies for the Marine Pilot Coordinator position.

Equipment: 10.0

Funding will provide one-time equipment costs for the Marine Pilot Coordinator position. This funding will also provide for on-going office space costs.

TOTAL COSTS: \$103.3

Revenues:

There are approximately 123 licensed marine pilots whose licensing fees must be increased to cover the new costs provided in the bill. In addition, current expenses of the Board of Marine Pilots exceed revenues generated from licensing fees to support its licensing program.

Licensing fees must be raised to cover an additional \$131.7 (an average of the new costs identified in this fiscal note for the first two years, \$98.3, and the current deficit of \$33.4), totalling \$131.7. Therefore, a biennial licensing fee of \$1,070 (\$535 per year) will be necessary to cover the additional program costs ( $\$1,070 \times 123 = \$131.6$ ). Marine Pilot licensees currently pay a biennial fee of \$180 (\$90 per year). If licensing fees are not increased to cover program costs, the program must then be supported by the general fund.

Since marine pilot licenses are due for renewal on December 31, 1992 (FY 93), revenues will not be collected in the first year of operation under provisions of CSHB 194(JUD). Funding in the first year must therefore be covered by general funds, unless a special one time assessment fee is made to licensees in FY 92.

The revenues identified in this fiscal note are based on the assumption that licensees will be willing to increase their fees to fully cover the costs of its licensing program beginning in FY 93 during the license renewal period.

ALASKA STEAMSHIP OPERATORS ASSOCIATION  
HOUSE JUDICIARY COMMITTEE  
APRIL 18, 1991

<u>AMEND.</u> <u>NO.</u>	<u>PG.</u>	<u>SEC.</u>	<u>LINES</u>	<u>PROPOSED CHANGES</u>	<u>COMMENTS</u>
One	2	1	2	DELETE: "and adjacent to water"	Conforming amendment to reflect language found at pg. 7, sec. 4, line 25.
				INSERT: " <u>inland and coastal waters</u> "	
Two	3	1	7	DELETE: (5)  INSERT NEW (5): " <u>(5) establish maximum rates to be charged by pilots for basic pilotage services within each pilotage region and charges to be paid for by persons licensed or applying for licenses under this chapter for training, licensing and other purposes.</u> "	By requiring vessels to use pilots, the State has a duty to insure that pilots do not use this power to exact excessive rates for services. Therefore, it is incumbent upon the State to make sure that rates for pilotage services do not exceed a maximum level authorized by the Board. Below that maximum, pilots and vessel owners should be able to negotiate rates based upon a multitude of factors such as, for example, guaranteeing a minimum number of engagements. To prohibit pilots and vessel owners from negotiating lower rates is really an attempt to protect pilots from competing with each other. That is not a proper matter for the State to involve itself in. This amendment also makes it clear that it is the pilots and applicants for pilot licenses who pay for training and licensing fees.
Three	3	4	30	INSERT NEW SUBSECTION (d): " <u>(d) For</u> "	The intent of this change is to

<u>AMEND.</u>	<u>PG.</u>	<u>SEC.</u>	<u>LINES</u>	<u>PROPOSED CHANGES</u>	<u>COMMENTS</u>
				<u>purposes of AS 08.62.040(a)(5), the term "basic pilotage services" is intended to refer to the conduct of a vessel over or within a specific waterway or into or out of a specific port."</u>	limit the rate setting authority of the Board to matters directly related to movement of the vessel. All other charges would be left to negotiation between the pilots and vessel owners.
four	3	4	26	INSERT: <u>"(13) establish standards by which a marine pilot may receive licensing and endorsements to pilot in more than one region as provided in AS 08.62.080 and this chapter."</u>	This is compromise language designed to deal with the regionalization concept. Instead of limiting a pilot to one region, it would allow licenses for multiple regions, specify the waterways and ports for which the license is valid.
five	4	6	10	DELETE: line 10  INSERT: <u>"(b) If a person is licensed to pilot vessels in more than one region, the license shall specify which region is the primary license region and which regions are the secondary license regions. A license issued to a person for a secondary pilotage region shall limit the specific waterways and ports in that region within which the person is authorized to pilot a vessel based upon the particular training and other qualifications of the person."</u>	Same as amendment four.
Six	7	13	14	INSERT: after "alcohol" <u>"or drugs"</u>	This language clarifies that intoxication of any sort is unacceptable when performing pilotage duties.
Seven	7	13	20 & 21	DELETE: Lines 20 and 21	Same as amendment two.

<u>AMEND.</u> <u>NO.</u>	<u>PG.</u>	<u>SEC.</u>	<u>LINES</u>	<u>PROPOSED CHANGES</u>	<u>COMMENTS</u>
Eight	8	15	9	DELETE: "the organization or" beginning at the end of line 10 and "or indirectly" at the beginning of line 12. If this is done, one can also delete the entire sentence beginning on line 12.	It is correct that a marine pilot organization should not be liable for errors or omissions of its individual members occurring in the performance of pilotage services. If the organization itself acts improperly, it should be held to the same standard as any other private business. For example: an organization should be held liable if it breaches a contract with another party whether or not that breach was wilful. Furthermore, if the organization itself acts negligently, the organization should be held accountable whether or not that negligence constitutes gross negligence. All this change does is make sure that pilot organizations, when acting as organizations, are held to the same level of accountability as any person in business is held to.
Nine	9	17	15	DELETE: "maintaining a sufficient number of qualified pilots available for dispatch"  INSERT: " <u>demonstrating the ability to maintain and dispatch pilots</u> "	The existing language requires that any new organization must, from day one, have enough pilots on their roster to meet the needs of any and all vessels entering their region. The Board would have the authority to ensure that all organizations would comply with the intent to provide year round pilotage.
Ten	10	19	7	DELETE: "...person's name..."	This is a point of clarification. It is individual companies not

<u>AMEND.</u> <u>NO.</u>	<u>PG.</u>	<u>SEC.</u>	<u>LINES</u>	<u>PROPOSED CHANGES</u>
				INSERT: " <u>employer of said person</u> "
Eleven	10	23	25	DELETE: Section 23 and renumber

COMMENTS

its employees conducting business within the State. As long as a person is in the employ of a company licensed to do business in Alaska then that is sufficient.

We are not aware of any other State that exempts pilot organizations from its antitrust laws. The fact of the matter is that, for example, a pilot organization was to enter into an exclusive dealing arrangement with a shipper that should be illegal given the potentially disastrous implications on competing shippers. If there are multiple pilot organizations that want to merge, the antitrust implications of that merger should be subject to scrutiny. If a pilot organization was to enter into an agreement with a shipper in which the organization agreed to charge all other shippers higher rates, that should be subject to antitrust scrutiny. Pilot organizations are private businesses that are subject to only limited governmental scrutiny. As to those areas in which the government does not regulate, the antitrust laws provide a necessary level of protection to prevent abuse of market power.

Testimony To The House Judiciary Committee  
From Captain Terry Bennett of  
Alaska Coastwise Pilots Association  
April 18, 1991

Mr. Chairman, Members of the Committee, Thank you for the opportunity to testify today. My name is Terry Bennett and I am President of Alaska Coastwise Pilots (ACP). I hold a masters license, any gross tons and have been piloting in Alaska since 1981.

Our association was formed in 1988 by myself and Captain Joseph W. Homer for the purpose of seeking employment as pilots independent of Southeastern Alaska Pilots Association (SEAPA). I have provided committee staff with documentation describing the struggle Captain Homer and I had trying to find work from June 1988 to June 1990.

In June 1990 Captain Homer and I negotiated a contract with Windstar Sail Cruises to provide Alaska pilotage service for one of their vessels. Our successful 1990 season led to negotiation with the parent company of Windstar, Holland America Line, a wholly owned American company whose stock is publicly traded.

This past fall we expanded our association to six full share members and three contract pilots. The combined experience of our group is nearly two hundred years of accident free pilotage. Some of our members have piloted in other parts of the world, including large cargo ships in Hawaii, passenger ships in the Panama Canal and VLCC's in the Persian Gulf. The growth of ACP allowed for the successful conclusion of a contract between HAL and ACP in which ACP will provide dispatch services for pilots on HAL cruise ships in Southeast Alaska for the next five seasons. It is the aim of ACP to increase our market share and to the extent we do, provide year-round service to our customers.

We see this bill as an attempt to put ACP out of business and to force our customers back to SEAPA for pilots. We believe Southwest Alaska Pilots Association (SWAPA) supports SEAPA's efforts so as to prevent our offering pilotage service to HAL ships in Prince William Sound.

The bill suggests that there is a need for improving safety of navigation and upgrading training and entry standards, but the bill attempts to provide an economic answer and thereby exposes its real purpose, the eventual, if not immediate elimination of competition.

Page Two

We suggest that the bill be discarded. Failing that we have specific recommendations for amendments which if made would allow ACP and/or other new pilot groups to compete successfully with SEAPA and SWAPA.

AMENDMENT NO. 1

p. 2 l. 18 Add: Pilot membership of the board shall rotate evenly among the existing pilot associations.

AMENDMENT NO. 2

p. 2 l. 31 Delete and keep current statutory language. Comment: This language is code for eliminating competition through arbitrary and capricious use of board authority as influenced by SEAPA and SWAPA. In addition it is not necessary since qualifications and limitations already occur through the license exam process.

AMENDMENT NO. 3

p. 3 (7) Delete all. Replace with: Provide advice and assistance to pilot organizations desiring to establish or upgrade their pilot training programs.

AMENDMENT NO. 4

p. 3 (9) Delete all. Replace with: Adopt no rule the result of which is the limiting of business or termination of any pilot organization existing in this state now.

AMENDMENT NO. 5

p. 4 Sec. 08.62.050 Marine Pilot Coordinator. Delete all. Replace with: The department may hire a marine pilot coordinator to act as an advisor to the department on the administration of this chapter. The coordinator may not be an active pilot in Alaska, nor have been a member of a pilot organization in Alaska for three years prior to his date of hire. Among his duties may be conducting check rides for pilots seeking docking licenses.

AMENDMENT NO. 6

p. 4 Sec. 6 Delete all and replace with language of current statute.

AMENDMENT NO. 7

p. 4 Sec. 9 (3) Delete all.

AMENDMENT NO. 8

p. 5 l. 8 Delete: member of a professional pilots organization, and replace with professional marine pilot. Comment: Many excellent pilots work on federal license and would not be eligible.

AMENDMENT NO. 9

p. 5 (d) after word of insert: any gross tons and dock vessels of 30,000 gross tons.

AMENDMENT NO. 10

p. 5 Sec 08.62.097 Training Programs for Deputy Marine Pilots. Delete and replace with: Upon an applicant's successful completion of the license exam for the deputy marine pilots license the board will recommend to the deputy marine pilot's organization an appropriate continuing education program. Comment: The deputy pilot would then be licensed and qualified to work immediately. The further training can be applied flexibly since pilots entering the profession have differing background experience.

AMENDMENT NO. 11

p. 7 Sec. 13 (7) Delete. Comment: anti-competition.

AMENDMENT NO. 12

p. 9 (b) Delete all. Comment: Not necessary for state to recognize regional organization. State does recognize pilots as individuals. Idea of a "social contract" between State and association is nonsense, reference study + FTC FLA. comment.

AMENDMENT NO. 13

P. 9 (c) Delete all. Replace with: All pilot organizations shall promote safe and efficient pilotage in Alaska. Each organization shall apply its articles, bylaws or rules in a fair, uniform and nondiscriminatory manner. Each pilot organization will comply with applicable state and federal laws.

AMENDMENT NO. 14

p. 10 Sec. 23 Delete all. Comment: This would give anti trust immunity.

AMENDMENT NO. 15

p. 1 (3) Delete all. Comment: The licensing and regulation of marine pilots has not protected the public from the consequences of marine casualties. e.g. Exxon Valdez and North Star casualties.

COMMITTEE SUBSTITUTE FOR SPONSOR SUB-BILL NO. 806 (relating to heads, detectors of divisions of principal executive branch and to members of and commissions) (page 1042 of the House Journal Supplement No. 54.

Committee has had HOUSE BILL NO. 933 (relating to the Alaska Statehood Act (to land) under consideration and committee recommends it do pass. (Co-Chairman), Halford, Chatterton, and Zharoff.

to the Judiciary Committee.

Committee has had HOUSE BILL NO. 961 (relating to Commercial Fishing and Agriculture for an effective date) under consideration and a majority of the committee recommends it do pass. COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 961 (relating to Commercial Fishing and Agriculture for an effective date) and reports it back with recommendations. Freeman (Vice Chairman), and Duncan recommend do pass. and have no recommendation.

to the Rules Committee for placement.

Committee has had HOUSE BILL NO. 970 (relating to regional aquaculture for an effective date) under consideration and committee recommends it be replaced by COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 970 (relating to regional aquaculture for an effective date), and reports it back with recommendations. Freeman (Vice Chairman), and Duncan recommend do pass. and have no recommendation.

to the Rules Committee for placement.

#### SECTION OF CITATIONS

Documents were received:

Arlie C. Bruce  
Executive McKinnon

Mary Edna Crawford  
Executive McKinnon

Miss M. Betty Malay  
Executive McKinnon

Documents were referred to the Rules Committee on the calendar.

#### INTRODUCTION, FIRST READING AND REFERENCE OF HOUSE BILLS

HOUSE BILL NO. 1025 by the Commerce Committee, entitled:

HB  
1025

"An Act continuing the existence of the Board of Marine Pilots and amending the law relating to its powers and responsibilities; and providing for an effective date."

was read the first time with the following committee report:

The Commerce Committee has had HB 1025 under consideration and a majority of the committee recommends it do pass and attaches a letter of intent. Concurring: Brown (Chairman), Malone, Osterback, Halford and Munson. Not concurring: Randolph recommends do not pass and Bettisworth has no recommendation.

HB 1025 was referred to the Rules Committee for placement on the calendar.

The letter of intent on HB 1025 follows:

Dear Mr. Speaker:

It is the belief of the House Commerce Committee that entry into the Marine Pilots profession has been unnecessarily restrictive. It is therefore the intention of this committee that the Board of Marine Pilots develop an apprentice training program. This program should provide an opportunity to all qualified Alaskans to impartially participate in training, which when successfully completed, would qualify them to compete for and obtain available pilotage positions. A report providing complete details for implementing this program shall be presented to the next session of the Legislature on or before the opening day of the session.

Respectfully submitted,

  
Representative Fred Brown  
Chairman  
House Commerce Committee

June 3, 1980 were read stating the Senate following:

AND REFERENCE OF SENATE RESOLUTIONS

SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION the Rules Committee:

the Second Amendment to the for the Sale and Purchase Royalty Oil between the Alaska and The Alpetco Com-

time and referred to the Rules Com-

AND REFERENCE OF SENATE BILLS

ended, by the Rules Committee by re-

proving the second amend- the agreement for the sale use of state royalty oil the State of Alaska and the company; and providing for the date."

as and referred to the Rules Commit-

OF STANDING COMMITTEES

has had SENATE BILL NO. 294 amended tna River hydroelectric project; consideration and a majority of ds it be replaced with HOUSE COM- SENATE BILL NO. 294 (Finance):

"An Act relating to power projects of the Alaska Power Authority and the Susitna River hydroelectric project; and providing for an effective date."

SB 294 am

that it do pass and attaches a new fiscal note. Con- curring: Mackins, Rogers, McKinnon, Guy, Moss and Duncan- Not concurring: Freeman (Vice Chairman), Haugen, Smith, Montgomery and Schaeffer have no recom- mendation.

SB 294am was referred to the Rules Committee for place- ment on the calendar.

Fiscal note appears in House Journal Supplement No. 85.

The Rules Committee has had SENATE BILL NO. 573 (con- tinuing the existence of the Board of Marine Pilots and amending the law relating to its powers and responsi- bilities; effective date) under consideration and a majority of the committee recommends it do pass and that the House Commerce Committee letter of intent on HB 1025 (page 1085 of the journal) be adopted. Con- curring: Cotten (Chairman), Brown, Miller, Parr and Phillips.

SB 573

SB 573 appears on today's calendar.

REPORTS OF SPECIAL COMMITTEES

The FREE CONFERENCE COMMITTEE, which has had COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 114 (Rules) amended (competitive bidding under the Fiscal Procedures Act) and HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTI- TUTE FOR SENATE BILL NO. 114 (Finance) amended House (same title) under consideration recommends that:

HCS CSSB 114 (Fin) amH

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 114 "An Act relating to stata contract- ing and procurement procedures, and competitive bidding under the Fiscal Procedures Act."

be adopted.

**THE FOLLOWING DOCUMENT(S)  
MAY NOT FILM LEGIBLY BECAUSE OF  
THE POOR QUALITY OF THE ORIGINAL**

# Columbia River pilots' feud threatening business

by Terry McDermott  
Times staff reporter

**K**ALAMA, Cowlitz County — There's trouble on the river. An angry, corrosive feud between two groups of riverboat pilots has broken the normal calm of Columbia River commerce, threatening businesses, safety and, according to some accounts, lives.

The dispute has made public many aspects of the often intensely private world of the river pilots, an exclusive fraternity whose members last year guided 2,000 ships and \$12 billion worth of oceangoing goods up and down the river.

There is a rugged, cowboy sort of autonomy among the pilots, who pride themselves on their skill, exclusivity and independence. The cowboys, however, aren't completely wedded to independence. They have for more than a century operated as a cartel — the Columbia River Pilots Association.

Sixteen months ago, two pilots, Gordon Howe and Mark Nichols, broke away from the association, whose 40 members had held a monopoly on river traffic for 140 years. Howe and Nichols breached a longshore picket line honored by the other pilots and formed a competing organization, Lewis and Clark Pilotage. They signed an exclusive agreement with one of the biggest exporters on the river, Peavey Grain Co., a Kalama-based subsidiary of ConAgra, the international agribusiness giant.

With the exclusive agreement, Howe and Nichols at least potentially enriched themselves. They also broke the monopoly, the longshore strike and friendships generations in the making.

Since Lewis and Clark was formed, Howe and Nichols have been immersed in a war with both the longshoremen whose picket line they crossed and, especially, with the other river pilots.

In a federal anti-trust and racketeering lawsuit against the CRPA filed in Portland this spring, Howe and Nichols allege their business and lives have been

threatened. Nichols says that after he and Howe formed their company, the immediate reaction of two old longshoring acquaintances was to ask him what sort of anchor he'd make. Other threats have followed, he says.

The threats, the suit alleges, take different forms. Sometimes, the trouble takes the innocent shape of a ship passing unannounced in the night, its pilot never acknowledging a ship piloted by Nichols or Howe. Some days trouble comes over the telephone in angry sibilant sounds, threatening economic reprisal to companies that do business with Nichols and Howe. Some days it is a more direct warning to life and limb.

On a recent morning, trouble wore benign, longshore boots, eight of which stood unmoving on the dock at Peavey Grain. The dockworkers inside the boots stood for 15 minutes alongside the Aegean Dolphin, shuffling their feet but little else.

Up on the Dolphin's bridge, Howe waited and seethed. Howe was eager to move the

big grain ship away from the dock and get down river. He couldn't begin until the contrary clump of longshoremen untied the ship.

The Dolphin's Greek captain was agitated and wanted to know why Howe didn't get under way. Howe was agitated and told the captain he was helpless. Helplessness is not a condition he relishes. Moving according to their own clocks, the dockworkers eventually untied the Dolphin and set it free. Finally under way, Howe said, "I suppose that was just my imagination."

Howe is regarded even by friends as a prickly sort of man. And his ormeriness is, to a large degree, responsible for his current situation.

Peavey is the biggest single shipper on the river. Last year, more than 60,000 rail cars dumped 250 million bushels of Midwest grain, primarily corn, into Peavey's elevators. Almost all of it was loaded onto ships bound for Asia.

In October 1989, a dispute



A our carrier from Japan heads downriver, guided by a Columbia Riv

Seattle  
Times

4/7/91

pp. E1-E2

had it?

"What did I need the money for? To hoard it? Probably the two biggest issues was: I didn't want federal pilots on the Columbia River and I didn't want people manhandling my fellow pilots."

**Piloting** is an old and honored maritime profession. Pilot groups exist virtually everywhere in the world where special knowledge of local idiosyncrasies is needed or desired for safe passage of ships. They exist on the theory that a ship's oceangoing captain is insufficiently acquainted with the peculiarities of local waters, normally harbors or inland seas, to safely pilot a ship through them.

Ships are usually required by custom or law to employ a local pilot.

In the United States, the control of piloting was one of the first duties bequeathed to the states by Congress, and local pilots, usually licensed by the states, have operated in coastal waters throughout the country ever since.

Five groups of pilots — each working its own pilot grounds — operate in the Northwest. One group guides ships through Puget Sound. Two others work in southern Oregon waters. A fourth group guides ships over the treacherous stretch of water known as the Columbia Bar, where the Columbia current collides with the Pacific Ocean.

The Columbia River Pilots Association takes over ships from the bar pilots at the mouth of the Columbia and brings them all the way up the navigable portion of the river. A typical trip from Astoria to Portland is 85 miles. It is one of the longest and its pilots say one of the most difficult stretches of water in the world for oceangoing ships.

A typical merchant vessel calling on a Columbia River port might have Panamanian registry, a Japanese owner, a Greek captain and a Filipino crew. They all have local pilots.

Even early explorers of the region employed local Chinook Indian pilots. And no ship within anyone's memory, including Navy ships of various nations, has come up river without a local pilot.

"This isn't Puget Sound. This isn't San Francisco or Chesapeake Bay," says Hum, the pilot association president. "This is 85 miles with a 600-foot ditch with lots of rocks and shoals in it."

The difficulty results, in large part, from the size of the ships — which is large — and the size of



Capt. Donald Hughes is the longest-serving pilot in the Columbia River

the channel — which is small.

In many waters, the passing of two 750-foot-long ships within a quarter mile of one another is regarded as a near-miss collision. The Columbia channel is only one-tenth of a mile wide. Every passing is a near-miss.

Because of the relatively close quarters in which they operate, coordination among pilots on the river is essential. One of the functions of the CRPA over the years has been to assure the pilots have the training and skills needed to negotiate the river. "I don't want to meet a lazy guy in a dense fog," Hum says. "If one doesn't execute, you buy the farm."

"At this speed," said pilot Hughes, "if we hit the dock we'd go right through it."

Hughes spoke as he tried to wedge the Ocean Lily, a Japanese log ship, into a tight berth at Longview. To the uninitiated, the Lily was moving imperceptibly, if at all, yet Hughes and the ship's captain, Jo O Yong, were both tense.

The captain, in fact, kept trying to persuade Hughes not to park his ship as close to the one ahead of it as Hughes was being asked to do by Port of Longview harbor masters. But Yong did not otherwise interfere. He let the pilot run his ship.

The Lily, like most ships on the Columbia, had no incoming cargo. It was tying up at Longview to take on logs. It is axiomatic to the

people on the river that the Columbia ports are involved mainly in export. By sheer amount of cargo, this is certainly true.

A great majority of the ships come in empty and go out loaded with grain and wood. Of those that do carry cargo in, the majority are loaded with Japanese cars.

In one of the telling mockeries of modern trade, the financial balance of trade on the river is actually tipped in favor of the imports. The value of those relatively few cars and other high-cost imports routinely outpaces the value of the far greater tonnage of raw-material exports.

The men — and they are all men and all white — entrusted with both export and import cargoes have all been members of CRPA. Oregon state retains nominal control over the pilots, setting rates and granting licenses. The state, however, has not licensed a pilot who did not belong to the association since it came into existence just before the Civil War, and pilots only join the association through the approval of its members.

(Oregon licenses the pilots rather than Washington largely because Oregon was there first; also, a majority of the ships that come up the Columbia dock on the Willamette River, which is entirely within Oregon borders.)

The membership vote, which is secret, has huge consequences for

# ess, safety, maybe even lives

over work rules arose between Peavey and Local 21 of the International Longshoremen's and Warehousemen's Union.

The union says its members were locked out. Peavey says it was struck. Neither the company nor the union will answer questions about the dispute, but it is clear from other sources that, for whatever reasons, the union began picketing the Peavey dock. The pilots for several days passed through the picket lines as they always had in the past and moved ships. That changed, however, on Oct. 25, when, according to other pilots, Paul Stevenson, the youngest of the CRPA pilots, was jostled and threatened by longshoremen after docking an incoming ship at the elevator.

The threat — never specified in public — was strong enough to convince other pilots to begin honoring the picket lines. Ships began stacking up at the mouth of the Columbia. Others were stranded at docks along the river. Howe, who had been out of town, returned to learn what had happened and was incensed.



river Pilot Association member.

"The longshoremen pushed a couple of our people around, tried to intimidate them," Howe says. "I guess I took that more seriously than some others. I couldn't take that. I couldn't. I wouldn't. And I won't. I hate terrorism and intimidation. Too many people have died to give me the right to freedom. I take that pretty god-dam strong."

Howe tried to convince the rest of the pilots that their responsibility was to move ships.

"We all felt the ship should be moved," says Don Hughes, the longest-serving pilot in CRPA. "We just didn't want to become scapegoats."

Capt. Glen Hum, president of the CRPA, says the plain fact is the pilots were scared.

"If you're going to go down there and some guy's going to smash your head in, you think twice about doing it," he says.

Howe declared he was going to move the ship regardless. Nichols was the only one to join him.

"We had a definite opinion the ship should move," Nichols says. "Because we've always moved ships. It's our job. If we didn't move them, somebody else was going to. This was a monster step. We didn't make that decision lightly."

Two things were at stake in the making of that decision: money and principle. Howe and Nichols are, they swear, men of principle. They are, in Nichols' phrase, "the last of the dinosaurs."

In less friendly descriptions, they are the greediest men on the river.

As two out of 40 pilots, they represented 5 percent of the CRPA membership. They now control 12 percent of the CRPA's former revenue, something in excess of \$600,000 last year. That means nothing, says Howe, who is 58 and nearing retirement. His financial motivation for crossing the picket line was, "Zero. Zero. Nobody'll believe that, but that's it. That's what everybody says: I'm greedy. Taking everything I can get. Why should I take everything I can get when I already

Please see **PILOTS** on E 2



Alan Berner / Seattle Times  
Pilot Association

those being voted upon. Once a member of the association, the pilot is entitled to a pro-rata share of the association's pooled income. In normal years, the pilots each earn more than \$140,000. If a pilot is denied membership in the CRPA, he has been effectively barred from piloting ships on the Columbia.

Howe and Nichols threw the whole system into confusion. They already held licenses when they left CRPA, but they are

The two have never been accepted as members of the CRPA and the state has had a hard time determining what its standards of qualification, which had been primarily membership in the CRPA, ought to be.

Cliff Alterman, an attorney for CRPA, says the monopoly of the association is natural. He classifies it as a public utility, like the gas or electric company.

Virtually everyone involved in any discussion of Howe, Nichols and the CRPA gropes for language to describe the split. Almost all end up with the same metaphor - divorce.

The pilots were a family. Howe and Nichols have fractured it.

Says Hughes: "When you have a family, a tight-knit group, you can call any one of them at any time and they'll come. Like that."

There are oddities in all of this. No one is acting much like family these days. The CRPA pilots uniformly describe themselves as men of principle, yet they refuse to acknowledge that Howe and Nichols might have acted for principled reasons. The pilots profess not to be concerned with wealth, yet they see in Howe and Nichols nothing but the pursuit of it.

Howe and Nichols profess not to have cared about money, yet they took the precaution of negotiating a five-year contract with Peavey before they moved a single ship. They profess to have wanted to move the ship to keep pilots from coming in from outside and moving it for them. They acted, in other words, to preserve the monopoly they are now in court trying to dissolve.

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1 competition with us." When I asked Baldry where they had heard  
2 that, he said, "I can't say."

3 14. I went to the SEAPA office to get information  
4 about ship movements. The board indicated that a log ship was  
5 going to be moved from Metlakatla to Ward's Cove, with Captain  
6 Ed Creasy as the pilot, on December 28, 1990. I called Captain  
7 Creasy and left a message on his answering machine.

8 15. Later that day, I stopped back at the SEAPA office  
9 and spoke again with Captain John Baldry. He said, "Things  
10 seem to have changed since the Anchorage [Board of Marine  
11 Pilots'] meeting." Captain Baldry indicated that SEAPA  
12 expected "reconciliation" with me after the Board meeting, but  
13 that it had not happened. I took this to mean that they  
14 expected me to give up competing. I told Baldry that I was  
15 still looking for work for the 1991 season, and that I was just  
16 there for the dockings they'd offered.

17 16. I left two calls for Captain Ed Creasy on his  
18 answering machine. About 8:45 p.m., the hotel desk clerk gave  
19 me a message from Captain Creasy stating, "I'm not taking any  
20 new riders." At 4:15 a.m., December 28, 1990, Captain Creasy  
21 called me and asked if I had received his message. Captain  
22 Creasy said, "I'm sorry but at this time I feel that I cannot  
23 train a competitor."

24 17. At 8:30 a.m. on December 28, 1990, I met with  
25 Captain Dale Collins to discuss the dockings. Collins said  
26 "now that you are a competitor there won't be a lot of guys in

1 SEAPA who will cooperate on dockings." Collins said that he  
2 would keep his personal promise to supervise me in dockings and  
3 undockings. Collins then spoke at some length about the "fate  
4 of the industry" if there are competing pilot groups. Collins  
5 said that ship operators would use competition to "drive a  
6 wedge between us", and that "we'll all make less money."

7 18. As for the Board of Marine Pilots' request,  
8 Captain Collins said that the Board could not order SEAPA to  
9 cooperate with me. Collins said that whether or not to  
10 supervise my dockings and undockings was up to each individual  
11 pilot. Collins said that he would "supervise" me, since it was  
12 his policy to "give everyone dockings," but that he would not  
13 "train" me.

14 19. On December 31, 1990, I went with Captain Dale  
15 Collins on a trip from Guard Island to Wrangell. The ship was  
16 the Hyundai #16, 22,000 GRT, Korean registry. I was allowed to  
17 do the docking with some assistance and instruction from  
18 Captain Collins.

19 20. On January 2, 1991, I called the SEAPA office to  
20 check on the next job dispatch. The next job was assigned to  
21 Captain George Porter. I left a message with Barbara Jones,  
22 the office administrator, asking if I could go on the trip and  
23 do the docking or undocking. Captain Porter left word with Ms.  
24 Jones that: "No, I will not take Bennett."

25 21. Later on January 2, 1991, I went to the SEAPA  
26 office in a last attempt to arrange any more dockings or

1 undockings. Captain Barney Elsensohn left a meeting in the  
2 conference room and came out to talk to me. Captain Elsensohn  
3 said that there was no conflict of interest when he sat on the  
4 Board of Marine Pilots and reviewed my application for a  
5 license upgrade. Captain Elsensohn said he represented the  
6 state when he sits on the Board, not SEAPA. He then told me  
7 that "competition in the pilot industry is bad." Captain  
8 Elsensohn said that competition will lead to "company pilots"  
9 and an erosion of industry standards.

10 22. It is my firm conviction that the members of SEAPA  
11 have no intention whatsoever of cooperating with the Board or  
12 myself in this matter. In every conversation I had with a  
13 SEAPA pilot in Ketchikan, the SEAPA pilot raised the subject of  
14 "competition." I was told directly and indirectly that I would  
15 not get any cooperation in getting my dockings until I stopped  
16 competing with SEAPA. Again and again, SEAPA pilots implied  
17 that if I "went along" with SEAPA, or "joined up", or "came  
18 back to the fold", there would be a very different attitude on  
19 the part of SEAPA pilots.

20 23. I do not believe that it is fair for a person to  
21 be required to join a particular private association in order  
22 to earn his livelihood in the State of Alaska. As I said  
23 above, it is my opinion that the members of SEAPA include some  
24 very fine and capable pilots. This does not mean that they


25 ///

26 ///

1 should be allowed to monopolize the industry and keep other  
2 capable pilots out of Southeast Alaska.

3 FURTHER YOUR AFFIANT SAYETH NAUGHT.

4 Dated this 24 day of January, 1991, at Woodinville,  
5 Washington.

6  Terry K. Bennett  
7 Captain Terry K. Bennett

8 Subscribed and sworn before me on the date and at the  
9 place above written.

10 Tama L. W. Alexander  
11 Notary Public Alaska  
12 Commission expires: 7/18/94

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DILLON & FINDLEY  
ATTORNEYS AT LAW  
ONE SEALASKA PLAZA, SUITE 202  
JUNEAU, ALASKA 99801  
(907) 586-4000

November 28, 1990

Captain Dale O. Collins  
Southeastern Alaska Pilots'  
Association  
Box 6100  
Ketchikan, AK 99901

Dear Captain Collins:

At its annual meeting on November 8-9, 1990, the Board of Marine Pilots reviewed the license upgrade application of Captain Terry Bennett. The board denied the application but resolved to request your association's cooperation in providing Captain Bennett the opportunity to meet the license upgrade requirements.

Captain Bennett presently holds a Channel Pilot License and has applied to upgrade to a Limited, Step 1, license as a pilot on vessels of not more than 20,000 gross tons. To qualify for this upgrade, he must submit ten dockings and undockings that conform to 12 AAC 56.027.

Because no more than five dockings and five undockings may be made under the supervision of the same pilot, Captain Bennett must perform five additional dockings and undockings before receiving a Limited, Step 1, license.

The Board of Marine Pilots requests that Southeastern Alaska Pilots' Association provide Captain Bennett the opportunity to perform these additional dockings and undockings by June 1, 1991. If completion is not possible by this date, please notify the board in writing of the date by which this may be accomplished.

If you have any questions or comments, please direct them to the board at the address above.

Sincerely,

JoAnne Cummings  
Licensing Examiner

JC/dg18434D  
112890a

cc: Terry K. Bennett

DEC 21 1990

December 21, 1990

Captain Dale O. Collins  
Southeastern Alaska Pilots'  
Association  
P.O. Box 6100  
Ketchikan, Ak. 99901

Dear Dale,

This is to confirm our phone conversation of Friday December 21, 1990. Thank you for your offer of assistance in acquiring the additional dockings and undockings required by the Board at their November meeting. I expect to be in Ketchikan December 26th and will call or stop by your office at that time. In the meantime best wishes for the holidays.

Sincerely,

*Terry K. Bennett*  
Terry K. Bennett

**THE FOLLOWING DOCUMENT  
HAS NOT BEEN FILMED  
BUT IS AVAILABLE IN THE  
ORIGINAL FILE**

*Statutes and Regulations*

# **Board of Marine Pilots**

**September 1990**

**ALASKA**

**DEPARTMENT OF COMMERCE  
AND ECONOMIC DEVELOPMENT  
DIVISION OF OCCUPATIONAL LICENSING**