

**ALASKA**  
**7059**

**LEGISLATURE**  
**HOUSE LABOR**

**COMMITTEE FILES**  
**& COMMERCE**

**1991-1992**

**8672**

**RECOMMENDATION:**

1. The Marine Pilotage Act should be amended to include an opening statement of intent, which establishes the fact that marine pilots are employed as independent contractors under state control for the purpose of protecting lives, property, vessels, and the marine environment.

**B. PILOT QUALIFICATIONS**

That state pilots hold extensive knowledge of local waters should be the foundation of, and rationale for, a compulsory pilotage system. However, the study finds that existing state entry level standards cannot assure that all licensed pilots have this special knowledge. Alaska's extensive coast line, difficult weather conditions and numerous ports of varying size and accessibility preclude one individual from gaining extensive local knowledge of the entire state. Thus, the Alaska situation appears to dictate regional licensing. Given both diverse physical characteristics and region-specific types of shipping traffic, qualifications and entry-level requirements may differ by region. However, documented, extensive sea-going experience should be a basic entry-level requirement of prospective pilots in all regions.

While some of the knowledge required for piloting can be acquired by traditional educational methods, local knowledge is best gained through hands-on experience under the direction of senior or master pilots. In this respect, the report questions whether or not the current sea-going experience and docking/undocking requirements are sufficient for licensure. All other maritime states require more extensive training and sea-going experience than does Alaska, although Alaska's size and diversity makes its compulsory pilotage waters among the most extensive and difficult in the country.

Based on information received, the report also questions whether or not pilots currently holding limited licenses have adequate opportunity to gain the experience necessary to upgrade their licenses.

The report finds that existing statutory and regulatory language is insufficient to allow the State Board to set up and enforce entry level qualification which can adequately ensure the required local knowledge on the part of state pilots.

**RECOMMENDATIONS:**

1. The State Board of Marine Pilots should be given clear and unambiguous authority in statute to promulgate and enforce more extensive entry-level requirements for state pilots.
2. The Board should establish a third region in Western Alaska in addition to the two current regions (Southeast and Southwest).
3. The Board should strongly consider setting additional requirements by region to accommodate differing physical conditions and shipping patterns. The Board

should move towards exclusive licensing by region. A transition period should be established to allow existing pilots who are licensed for more than one region of the state to choose their licensing region. Pilots new to the system should be required to train in and be certified for only one region of the state. The Board should be given the authority to allow inter-regional endorsement for specific ports to allow for a smooth transition between current regulation and exclusive licensing by region. Strict recency requirements should be adopted for pilots who wish to maintain inter-regional endorsements and no new inter-regional endorsements should be issued.

4. The Board should be authorized to establish a formalized deputy pilot program, with substantial experience requirements (in addition to existing tonnage requirements) that must be completed before a pilot is allowed to take the exam for a higher license. Each pilot seeking a higher license should also be required to pass a check ride evaluation. The Board should require the pilot organization of each region to develop training procedures that enable all deputy pilots to have equal opportunity to perform ship movements, take observer trips, and perform the dockings/undockings necessary to upgrade their license.

### *C. PILOT EVALUATION AND RELICENSING*

Currently, the state has no system for evaluating pilots after they have been licensed. Once a person has obtained a license of any type (with the exception of a temporary license), s/he is free to operate under that license indefinitely upon payment of a biennial license renewal fee and submission of a physical exam results. In theory—and allegedly, in practice—pilots can hold endorsements for state waters and for ports which they have not visited for years. Pilots can continue to renew licenses with only minimal actual pilotage within a two-year period. Finally, although new technologies are being introduced in the industry, the state currently requires no continuing education for licensed pilots.

Because the state has an interest in assuring the continued competency of the pilots to which it has granted licenses, the report concludes that the current system of virtually life-long licensure without periodic evaluation is insufficient.

Despite national concern about substance abuse, particularly in occupations of high importance to public safety, Alaska currently conducts no oversight of the marine pilots in this respect. This lack is particularly troubling in view both of Alaska's known high incidence of substance abuse and of several recent legal actions alleging abuse among pilots.

Finally, some persons contacted in the course of the study expressed concern that Alaska had no age limit for license renewal. A mandatory retirement age has been suggested. The study concludes that physical condition rather than age should be the main judgement criteria. In this respect, the existing general, biennial physical

examination requirements are insufficient to ensure that pilots maintain the level of health and stamina required by the profession.

#### RECOMMENDATIONS:

1. The Board should establish a check-ride system for fully-licensed pilots, that would allow the skills of each pilot to be observed prior to license renewal. Check rides should be evaluated by current senior pilots (i.e., peer-review), designated from each region by the Board. The check-ride evaluator should be considered an employee of the state at the time s/he performs the evaluations and should be insulated from liability exposure and peer pressure in the performance of the evaluation duty.
2. Recency criteria should be adopted for pilots to maintain endorsements for specific waters and ports. Some form of "use it or lose it" provision, such as a minimum number of ship movements between license renewals, should apply to all pilots.
3. The Board should be authorized to conduct random substance abuse testing.
4. Every pilot should be required in statute to submit to a complete annual physical exam administered by a fully-licensed, practicing physician.
5. The Board should develop an approved list of continuing education options, such as simulator or Automatic Radar Plotting Aids (ARPA) training, and require that pilots complete a course between license renewals.

#### *D. PILOT DISCIPLINE*

In the past, the state relied upon the pilot associations to handle pilot discipline within their own ranks. However, recent court cases allege that associations are no longer willing or able to fulfill this function. Therefore, the state must increase its ability to monitor the profession.

The study finds that Alaska's statute concerning pilot discipline is among the most comprehensive and modern of the maritime states. However, the study also finds that the statutory sanctions are seldom invoked. Major hindrances to the efficient policing of pilotage by the state appear to be the difficulty in obtaining timely information about accidents and incidents and the lack of trained marine investigation personnel to follow up on those which are reported.

#### RECOMMENDATIONS:

1. The Division of Occupational Licensing should be authorized to hire a full-time marine pilot coordinator, to be funded with program receipts from increased pilot license fees and a portion of tariff receipts. Ideally, the coordinator would have no connection with any pilot organization in the state and would be approved by the Board of Marine Pilots. S/he should be qualified to review pilot organization training programs, participate in license examinations, and investigate accidents and incidents of pilot misconduct. The coordinator would report findings to the state Board for action. Allegations of pilot misconduct should be expeditiously handled

- by the board under the powers granted in AS 08.62.150-155.
2. All complaints concerning pilotage service should be directed to the State Board through the Marine Coordinator—not to pilot organizations.
  3. The state should pursue the possibility of establishing an accord with the U.S. Coast Guard to share information about accidents/incidents, conduct joint investigations, and coordinate mutual requirements (e.g., for physical examinations, substance-abuse testing, etc.). Study staff have made preliminary contact with the Coast Guard on this issue and believe that additional discussions would be fruitful.

#### *E. LIMITING THE NUMBER OF PILOTS*

Every other state places a limit on the number of pilots either by explicitly setting a limit in statute, delegating responsibility to set a number to a Board(s), or through an apprenticeship program where piloting associations must recommend an apprentice for licensing. Sentiment among pilots and pilot groups in Alaska is strongly in support of granting the Board of Marine Pilots similar authority to limit the number of licenses issued. However, as mentioned in the body of the report, Alaska's compulsory pilotage system differs in significant respects from that of other maritime states. Compulsory pilotage waters in the state cover substantially larger areas than those of other states, where pilotage is generally limited to specific ports. The size of Alaska's regions impose travel costs and potential time delays on industry associated with bringing qualified pilots from their home location to the ship to be serviced. As the shipping industry evolves in the state, the pilotage system must maintain the flexibility to form new associations and groups closer to the point of shipping activity. The desires of some pilots and pilot groups to limit the number of licenses must be weighed against the larger issue of efficient service to the industry and, ultimately, to the consumer of shipped goods. The study concludes that at the present time there is no objective information that too many pilots have been licensed by the State of Alaska. Study findings suggest that ease of entry rather than absolute number of licenses is the problem to be addressed.

If the recommendations in this report are accepted, the number of pilots in each region will be controlled indirectly through increased entry-level qualification requirements, extended deputy pilot training, increased license fees, an enforceable tariff schedule, and increased requirements for license renewal. In addition, the capacity of regional training programs to accept new entrants will be limited by virtue of the fact that the suggested training will require much greater participation and oversight by senior pilots. The effect of the new licensing requirements on reducing the number of active pilots in the state is as yet unknown.

#### **RECOMMENDATIONS**

1. In order to trace these effects, this report recommends that the Board compile the information on ship movements, currently filed with the Division of Occupational Licensing, into a form which is usable for management purposes. Over a period of

time, if the Board determines from these management reports that there is a shortage or an overage of pilots relative to the demands of shipping, it should take the steps necessary to relieve the situation. Such steps may include requesting legislative authority to limit the number of licenses issued.

#### *F. BOARD OF MAINE PILOTS*

The study concludes that during the past few years, the Board of Marine Pilots has been thwarted in attempts to adopt and enforce higher standards for pilots, largely because of inconsistent policy direction from various DCED commissioner's designees on the Board and conflicting legal advice from the Attorney General's Office. The report finds that current statutory language defines a state pilot license as an individual right and not as a franchise granted by the state to perform a public service. This language has led to a situation whereby state efforts appear to be directed at meeting individual pilot interests rather than asserting the state's interests in protecting life, property, and the environment.

The current make-up of the Board does not recognize changes that have taken place in the industry. Currently, the Board has heavy representation from two regions and none from the Aleutian region. The two public members on the Board are both from the same region. State representation on the Board (i.e., the DCED commissioner or designee position) appears to be of limited value in asserting state interests, primarily because of the high turn-over rate of designated members.

During the course of the study, it was found that the Board currently requires individual pilots to file frequent reports on ships' movements which they have handled. Study staff had intended to utilize this information to provide a more quantitative description of Alaska's shipping industry. However, the information received by the Board is not maintained in a useful format. The report concludes that existing reports are not being utilized by the State Board or the DCED. Yet, the state should have access to the management information necessary to efficiently regulate marine pilotage in the state.

#### **RECOMMENDATIONS:**

1. The Board must be given specific authority in statute to set pilot license fees and tariffs, impose experience and training requirements as it sees fit, set physical/health standards, and require drug and alcohol testing of pilots.
2. Since Board actions benefit the entire shipping industry, particularly with respect to pilot qualifications, accident investigation, and rate setting, the Board should have authority to consider state administrative costs in setting pilotage rates. A portion of the tariff would be returned to the state and could be used, on appropriation by the Legislature, to assist in funding program administrative costs.
3. Because of increased duties and responsibilities being recommended for the Board, meetings should be scheduled at least three times per year, with provision for emergency meetings at the request of the chair.

4. Board membership must be increased to encompass all three of the state's pilotage regions. In order to preserve balance of representation, it is recommended that an additional pilot, ships' agent and public member be appointed to the Board to represent the Aleutian region.
5. Given the emphasis in the proposed legislation on regional licensing and entry-level requirements, no action on setting regional requirements should be taken until Board membership has been altered to include all affected regions.
6. The DCED Commissioner or designee position should be reassigned to accommodate the membership changes set out in Recommendation Number 4. The fact that the Board operates under the aegis of the Department of Commerce and Economic Development appears to be sufficient to assure that state administration concerns are taken into consideration by the Board.
7. In its review of association by-laws, the Board should require that procedures by which the associations recommend representatives to the State Board allow equal participation from all association members.
8. The Board should organize the detailed information on ships' movements currently submitted by individual pilots into a form which can be used in making management decisions. Where additional information is determined to be necessary for the regulation of pilotage, the Board should have the ability to require this information from individual pilots and pilot associations.

#### *G. PILOT ORGANIZATIONS*

Despite current internal problems within some pilot associations, the report concludes that associations and other voluntary organizations of pilots will continue to provide the core of mandatory pilotage services in Alaska, as is standard practice in all other maritime states. If the above recommendations concerning increased entry level requirements are adopted, the associations will be called upon to play the major role in training, since their members constitute the largest pool of senior pilots with unlimited licenses. Under the recommendations for pilot evaluation, association members will also take the responsibility for peer review. In performing these functions for the state, associations must have liability protection.

The report also concludes that pilot associations and groups are the most efficient mechanisms for providing comprehensive, 24-hour per day, year-round pilot services. Although individual pilots can and should be allowed to continue to operate independently to provide specific services, without some form of pilot association, portions of the state and the industry are very likely to be under-served. If associations are to continue to perform the services of pilot dispatch, they must be cleared of antitrust charges.

However, the report also finds that in return for recognition and protection from antitrust allegations, the state should more closely monitor association activities.

Based on U.S. maritime history and the experience of other states, as well as the testimony of most Alaskan pilots, the report concludes that unregulated competition among pilots can have a corrosive effect both on the quality of services provided and on the independence of state pilots from shipowner control. While nothing in state regulations should grant monopoly rights to associations or preclude individual pilots or groups of pilots from providing more efficient service to the industry by cutting down travel time and costs or by moving dispatch services closer to the point of ship traffic, competition based only on pilotage rates should be discouraged. Where such competition has been allowed in other states,<sup>38</sup> the result has been a cut-throat battle for lucrative shipping jobs while more difficult routes, remote ports and unusual vessels have been unable to obtain timely services. Additionally, to corner the most desirable assignments, pilots and pilot groups have apparently given up a large measure of independence and operate essentially as employees of the shipowners.

#### RECOMMENDATIONS:

1. Pilot organizations should be recognized in state law and chartered to provide state-approved training for deputy pilots.
2. In return for limiting liability and providing protection from antitrust litigation, the state should require that pilot organizations file their bylaws and operating rules with the Department of Commerce and Economic Development. The Board should have the authority in statute to veto bylaws and/or suspend the charter of organizations for practices that it feels do not serve the public interest.
3. In order to assure that all pilots and pilot organizations honor the Board-established pilotage rates, pilot organizations and individual businesses should be required by law either to submit copies of their annual audits to the State Board or, in the case of individual contract pilots, to keep their books open for state audit.

*Note:* The charter of pilot organizations does not preclude individual pilots from offering their services independently, so long as they adhere to the tariff schedule.

#### H. INDIVIDUAL PILOT LIABILITY

The study concludes that the traditional liability protection afforded pilots has been eroded by an increasing number of "nuisance suits" brought against pilots. This exposure is expected to increase as a result of recent federal anti-oil-spill legislation. Although pilots should continue to be held liable for wanton and reckless behavior, some dollar limitation on liability would relieve pilots from being automatically included in any claim for damages arising from performance of their duties.

#### RECOMMENDATION:

1. Individual pilot liability should be limited in statute to a specific dollar amount. Most states which have enacted such protection set the amount at \$5,000.

### *I. PILOT LICENSE FEES AND TARIFFS FOR SHIP MOVEMENTS*

The existing fee schedule for pilot licenses appears to be extremely low and has not been amended for several years. The report finds that a biennial fee of \$180 has little relation to either the administrative costs associated with renewal or the value of the license to the holder. Most other maritime states charge significantly higher fees.

The tariff schedule has been in effect since the early 1980's and does not reflect changes in cost of living or in the industry. In addition, as mentioned above, the Board's authority to set and enforce rates has been called into question.

#### **RECOMMENDATIONS:**

1. Pilot license fees should be reviewed by the Board and increased substantially to reflect the increased costs of program administration. It is recommended that the Legislature consider treating license fees as program receipts and authorize that they be used to partially fund a marine pilot coordinator and evaluation requirements. Based on other states' rates, an annual license fee for pilots of \$1,500 appears to be reasonable.
2. The Board should be authorized in statute to establish an enforceable tariff schedule, to avoid unhealthy rate competition among pilots.
3. The tariff schedule for ship movements should be reviewed by the Board and adjusted where necessary. The Board should consider special rates for unique circumstances, such as ferrying fisheries observers to vessels in Dutch Harbor.
4. The Board should be given the authority to include a training fee in the tariff schedule. The fee would be used by associations and individual pilots to provide partial support for training and continuing education. A portion of the fee should accrue to the state as program receipts which, if appropriated by the Legislature, would cover expenses for evaluation check rides.

## FOOTNOTES

<sup>1</sup> See Appendix B for a copy of Captain Murphy's letter and Governor Cowper's response.

<sup>2</sup> See Appendix C for a copy of Mr. Kirchner's letter.

<sup>3</sup> See Appendix A for a summary of public comment.

<sup>4</sup> Florida Statutes §310.001

<sup>5</sup> Captain Earnest A. Clothier and Captain Hilton Lowe, *State Pilotage in America: Historical Outline with European Background*, American Pilot's Association, 1979, p. 11.

<sup>6</sup> Gibbons v. Ogden, 9 Wheat 207

<sup>7</sup> 46 United States Code §8501

<sup>8</sup> 46 United States Code §364. The inspectors of steam vessels were employed by the Steamboat Inspection Service, created in 1852 as part of the Treasury Department. The service was transferred to the Coast Guard during WW II.

<sup>9</sup> Vessels sailing under register are American vessels engaged in foreign trade or in any trade other than that requiring a coastwise, Great Lakes or fisheries license.

<sup>10</sup> According to Paul Kirchner, counsel for APA, "The oil industry and certain people with an interest in pilotage have pointed out to the APA that there is nothing in Alaska law to prevent a vessel owner from employing a compulsory Alaska pilot to serve exclusively on its vessel." Telefax communication from Paul Kirchner, "Comments of the American Pilots' Association on Review Draft of The Alaska Marine Pilotage Study", November 5, 1990.

<sup>11</sup> Alex L. Parks, The Law of Tug, Tow and Pilotage, Second Edition Cornell Maritime Press, 1982.

<sup>12</sup> 43 SLA 1970; "west coast" includes Alaska, Hawaii, and British Columbia, Canada

<sup>13</sup> 22 SLA 1973

<sup>14</sup> 78 SLA 1977

<sup>15</sup> AS 08.62.010

<sup>16</sup> Quick, George A., "The Role and Function of a Pilot", paper presented to the National Academy of Sciences, 1979, pp. 8-10.

<sup>17</sup> Code of Virginia §54-1-905

<sup>18</sup> AS 08.62.100

<sup>19</sup> See Massachusetts Statute Chapter 103 §3 and Maryland Statute §11-305 for examples of discretionary language.

<sup>20</sup> Washington Statutes §88.16.035)

<sup>21</sup> Florida House of Representatives Committee on Regulatory Reform, *The 1989 Report on the Issues Associated with Mandatory Pilotage*, November, 1989.

<sup>22</sup> *Report of the Pilotage Study Group* to the U. S. Coast Guard, September, 1989, p. 6.

<sup>23</sup> Washington Statute §88.16.100

<sup>24</sup> AS 08.62.155 (a)

<sup>25</sup> AS 08.62.040 (4)

<sup>26</sup> California Statute §134

<sup>27</sup> Oregon Statute 776.520

<sup>28</sup> Hawaii Statutes §462A-15

<sup>29</sup> A copy of Mr. Cloudy's letter is included in Appendix D.

<sup>30</sup> "Marine Pilot Group, Member Tangle Over Accusations," Iuneau Empire, May 24, 1989.

<sup>31</sup> AS 08.62.100 (emphasis added)

<sup>32</sup> A license for "any gross tons" is an unlimited license, enabling the holder to work on ships of any size.

<sup>33</sup> 12 AAC 56.050 (3)

<sup>34</sup> AS 08.62.120

<sup>35</sup> 12 AAC 56.080 (b)

<sup>36</sup> Judith L. Linfield, "A Survey of North American Pilot Training Programs," California Maritime Academy, 1990.

<sup>37</sup> Paul Kirchner, Letter to C. L. Cloudy, July 27, 1990. See Appendix E.

<sup>38</sup> Only Florida (Tampa Bay Port) and Connecticut have experienced such competition. Both states are currently attempting to remedy the situation by law or regulation.

Appendix A

Summary of Public Comments  
on Review Draft of Study

**APPENDIX A:  
Summary of Public Comment  
on Review Draft of Study**

Copies of the review draft of the Alaska Marine Pilot Study, together with proposed legislation, were widely distributed to concerned parties for review and comment. Written comments were received from pilots, ship agents and state agency staff, analyzed by study staff, and presented to the State Board of Marine Pilots at its November meeting. Where possible, comments have been incorporated into the final draft. Comments addressed to particular study recommendations are summarized below:

**STUDY RECOMMENDATIONS**

• *The Marine Pilotage Act should be amended to include an opening statement of intent, which establishes the fact that marine pilots are employed under state supervision for the purpose of protecting lives, property, vessels, and the marine environment.*

**Comments:**

**SEAPA**

- tie board duties and responsibilities back to legislative intent
- state that it is intent of legislature to limit number of pilot licenses

• *The State Board of Marine Pilots should be given clear and unambiguous authority in statute to promulgate and enforce more extensive entry-level requirements for state pilots.*

**Comments:**

**Coast Guard:**

- entry level qualifications too stringent
- would exclude marine ferry employees
- State should have same qualifications as Coast Guard
- use Coast Guard nomenclature, where appropriate, to avoid confusion

#### Alaska Maritime Agencies

- should keep provision for two years as Master in local region

#### SEAPA

- 1600 tons or more
- calculate time same as Coast Guard
- minimum service time
- refine wording re: experience appropriate to specific region to preclude charter fishing boat, pleasure boat, etc.
- set requirement at "six years licensed seagoing experience"
- set specific hour requirements under different types of Coast Guard licenses

#### AMP

- 1600 gross ton or more
- add two years service as active pilot in an association
- allow pilots who do not meet entry level requirements to enter training program, but to undergo additional training (similar to an apprenticeship program)

#### SWAPA

- allow for experience on any vessel of 1600 gross tons
- delete section concerning appropriate to region or require that person gain experience while holding master's license

#### Other pilot (unidentified region)

- 1600 gross tons

• *The Board should establish an additional pilotage region in the Aleutian Chain.*

• *The Board should move towards exclusive licensing by region.*

#### Comments:

#### SWAPA

- define regions but keep Dutch Harbor and Captain's Bay in Southwest Region
- allow port endorsement outside region only for those pilots so licensed at effective date of legislation

#### AMP

- don't allow port endorsements outside region
- allow transition period, based on recency experience

#### SEAPA

- don't allow port endorsements outside region
- grandfather, but make new requirements mandatory at next renewal

#### Alaska Maritime Agencies

- regions a good idea, but agents must maintain right to employ any qualified pilot in region regardless of group with which they are affiliated

#### Other

- don't allow port endorsements in other regions
- grandfather existing licenses

*• The Board should establish increased standards for progressive licensing, including a formalized deputy pilot program. The Board should develop training criteria that provide all deputy pilots equal opportunity to perform the ship movements necessary to upgrade their licenses.*

#### Comments:

#### Other

- current docking/undocking requirements inadequate

#### SWAPA

- detail steps of deputy pilot program
- require simulator training
- set limits for training period
- state that deputy must complete training to be eligible to take exam for limited license, not over 20,000 gross tons

#### SEAPA

- current docking requirements inadequate
- give associations sufficient leeway to allow them to train new pilots and to take in new members according to internal criteria so long as criteria reasonably adhere to guidelines set forth and are equitably administered by association
- give Board explicit authority to oversee training programs

#### Coast Guard

- require simulator training
- recurrent training for working pilots to deal with new technology (similar to airplane pilots)
- consider establishing a separate "docking pilot" license

• *The Board should establish a check-ride system for fully-licensed pilots, conducted by current senior pilots designated from each region by the Board.*

#### Comments:

##### Other

- check ride evaluation not appropriate for marine pilots

##### SEAPA

- check ride evaluation not appropriate for marine pilots

• *Recency criteria should be adopted for pilots to maintain endorsements for specific waters and ports.*

• *The Board should develop an approved list of continuing education options and require that pilots complete a course between license renewals.*

**Comments:** (includes comments on renewal as well as recency)

**SEAPA**

- require 60 days service in last biennium as federal or state pilot as condition for renewal
- grandfather existing pilots from meeting entry level requirements

**AMP**

- define familiarization trips

**Coast Guard**

- for each year that license has lapsed, require two round trips on vessels over 1600 GT to each major port and waterway in pilotage region, with at least one trip made at night

• *The Board should be authorized to conduct random substance abuse testing.*

• *Every pilot should be required to submit to a complete annual physical exam.*

**Comments:**

**Coast Guard**

- require that pre-employment physical exam include chemical test for dangerous drugs
- follow Coast Guard requirements for physical exams prior to license renewal
- consider having state appointed physicians establish minimum physical standards relating to vision,

- hearing and general physical condition and possibly review and/or administer general physicals
- use Coast Guard terminology for "chemically impaired"

#### SEAPA

- define chemically impaired to cover both habitual substance abuse and intoxication/drug use while on duty

*• The Division of Occupational Licensing should be authorized to hire a full-time marine pilot coordinator to investigate marine accidents, review training programs and participate in license examinations.*

*• All complaints concerning pilotage service should be directed to the State Board through the Marine Coordinator—not to pilot organizations.*

*• The state should pursue the possibility of establishing an accord with the U.S. Coast Guard to share information about accidents/incidents and to conduct joint investigations.*

#### Comments:

##### Alaska Maritime Agencies

- good concept as long as individual performs investigative and clerical support functions for board
- must not assume operational or administrative control of policy

#### SEAPA

- assure that coordinator operates subject to guidance and oversight of Board
- Board must maintain primary authority
- will be difficult to find qualified person to take job
- coordinator should also be specifically empowered to direct and assist in accident investigations

Other

- coordinator could become dominant individual, usurping Board authority

Coast Guard

- agree that accord between Coast Guard and state should be established

• *The state should not place a specific limit on the number of pilot licenses issued.*

Comments:

SEAPA

- limit number of licenses

Other

- new pilotage act should have provisions for closely monitoring pilot requirements and for only issuing licenses that satisfy those requirements

SWAPA

- Board should be authorized to limit number of licenses

American Pilots Association

- Board should be authorized to limit number of licenses

• *The Board should have authority to consider accident investigation and other state administrative costs in setting pilotage rates.*

Comments:

Alaska Maritime Agencies

- expenses of state Board in conducting the state's business should be part of the tariff

• *Board meetings should be scheduled at least three times per year, with provision for emergency meetings at the request of the chair.*

• *The Department of Commerce and Economic Development Commissioner or designee position on the State Board should be reassigned to an active pilot from the Aleutians region. Non-pilot members should represent all regions of the state.*

• *The Board should either cease to require detailed information on ships' movements from individual pilots or should use the information to publish periodic management reports.*

**Comments:**

**SEAPA**

- replace "may" with "shall" in proposed legislation when referring to powers and duties of Board

**SWAPA**

- Board should not only have authority in statute but should be mandated to perform listed duties and responsibilities

• *Pilot organizations should be recognized in state law and chartered to provide state-approved training for deputy pilots.*

**Comments:**

**SEAPA**

- give board authority to review both associations and independent pilots
- section recognizing associations is meaningless as written. Should state that state will sanction pilot associations as long as their bylaws and operating procedures are approved by the state
- The state should consider some of the more abstract aspects of the regulated monopoly issue before it embraces that concept completely.

- Marine pilots as a class should not be denied the protection offered to all other citizens under existing antitrust laws?
- a lack of competition does not assure competence

#### SWAPA

- amend antitrust laws to exclude marine pilot organizations

#### American Pilots' Association

- clearly state legislative intent to remove pilot organizations from antitrust law

#### AMP

- include "independent contractor" in proposed legislation after pilot associations to make clear that pilots are independent within their association for liability purposes

*• In return for limiting liability and providing protection from antitrust litigation, pilot organizations should have their bylaws and operating rules approved by the Board.*

#### Comments:

##### Federal Trade Commission

- make board authority over pilot associations more explicit
- make non-competition agreements illegal
- allow board to hear antitrust or monopoly complaints brought against pilot organizations

##### Alaska Maritime Agencies

- Board should have statutory authority to approve all dispatching and working rules employed by association

#### SEAPA

- Association policies do not promote enhanced professionalism or competent pilotage

- The State must investigate disciplinary policies of the Pilot Associations and safeguard them from being merely a vehicle for advancing the views of an empowered minority.
- The State must accomplish a vigorous and comprehensive review of the bylaws, operating rules, articles and other documents of the associations with regard to establishing and maintaining the rights of pilots to due process, free speech and freedom to pursue a livelihood in their chosen profession.
- Associations cannot be watchdogs over themselves

• *The Board should be authorized in statute to establish an enforceable tariff schedule.*

**Comments:**

**SWAPA**

- don't create special tariffs by region

**SEAPA**

- don't create special tariffs by region
- state that tariff schedule is to insure safe, efficient and year-round pilotage service

**AMP**

- current inequities in state tariffs need to be addressed

• *In order to assure that all pilots and pilot organizations honor the Board-established pilotage rates, pilot organizations and individual businesses should be required by law either to submit copies of their annual audits to the State Board or, in the case of individual contract pilots, to keep their books open for state audit.*

**Comments:**

**Alaska Maritime Agencies**

- Board should be able to conduct audits of financial records for purposes of tariff adjustment and approval/rejection of items claimed by pilot associations that impact tariff

SEAPA

- the State must look into the practice of spreading liability for litigation costs and legal settlements against association among contract pilots who have no voice in Association business
- the State must assure that income and expensing procedures are equitable and equal to the work performed.

*• Individual pilot liability should be limited in statute to a specific dollar amount.*

*• Pilot license fees should be reviewed by the Board and increased substantially to reflect the increased costs of program administration.*

*• The tariff schedule should be reviewed by the Board and adjusted where necessary. The Board should consider special rates for unique circumstances.*

*• The Board should have the authority to include a training fee in the tariff schedule to provide partial support for training and continuing education programs.*

**Comments:**

**Alaska Maritime Agencies**

- any expense not directly related to shipboard operations should not be recovered through the tariff; for example, legal and travel costs associated with restraint of trade cases pending against pilot groups

Appendix B

Letter from Captain W.E. Murphy to Governor Cowper,  
January 1, 1990

Letter from Governor to Captain W.E. Murphy  
March 21, 1990

Capt. W.E. Murphy, Inc.

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January 1, 1990

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Wes  
Coyner*

Governor Steve Cowper  
Capitol Building  
Juneau, Alaska

Dear Governor:

I am writing to alert you to serious problems in state marine piloting which I believe should be of grave concern to you, to legislators and to the public. The following observations and conclusions have been reached after more than 15 years of piloting in Southwest Alaska and 4 years of service on the Alaska Board of Marine Pilots, 3 of them as chairman.

State pilotage in Alaska is in trouble in several ways. High standards of training and performance are legally nonexistent and those imposed by pilot associations are being eroded by legal action. Outside steamship agents are manipulating pilots and sponsoring competition to the detriment of safety and thereby striking to the heart of state pilotage. The Alaska Board of Marine Pilots faces an increasingly uphill battle to maintain and strengthen pilot training and performance standards. Alaska is the easiest state in this country in which to obtain a state pilots license.

#### ERODING AND NONEXISTENT STANDARDS OF TRAINING AND PERFORMANCE

Traditionally, pilot associations throughout the U.S. have set and maintained standards of training and performance for pilots. The pilot association of which I am a member, Southwest Alaska Pilots, typifies most pilot groups which maintain strict qualification and training standards. Our pilots have extensive seagoing backgrounds, have attended the best shiphandling simulators available in the world today and have passed a long training and check-ride system with veteran pilots. We have long recognized that the state license is entry level only and not an assurance of competency. Local association requirements such as ours should be the minimum a responsible pilot association should expect and be able to maintain. Sadly, however, pilot associations nationwide find it increasingly difficult to maintain high professional standards.

The traditional role of pilot associations as trainers and watchdogs over professional standards is being eroded by an alarming trend in today's legal climate. Locally imposed standards are failing to protect and maintain a high standard of piloting for at least two reasons:

1. Pilots have successfully sued their own associations claiming the group had no right to selectively dispatch or impose training on an individual because the pilot already had a Coast Guard and state license and, hence, a "certificate of competency."
2. Association lawyers are telling us these days that associations are probably liable if a pilot who has been trained and otherwise qualified by an association, absent some kind of statutory requirement, has an accident.

Today's dismal legal situation for pilot association training programs is combining, to the detriment of safety, with a weak state pilotage act which does not require high enough licensing standards to reinforce the association imposed requirements being eroded away by court decisions. Alaska's state pilotage act requires relatively minimal seagoing background and Coast Guard license and no apprenticeship training at all for beginning pilots. Not only are there virtually no state required training standards or training program for candidate pilots, neither are there recurrent training and continuing education requirements for practicing pilots. These low standards should be cause for grave concern.

The standards required for a Coast Guard pilotage endorsement, prerequisite for a state license, are even more paltry and inadequate than those imposed by the state.

It is an open question how long pilot associations, on their own, can hold the line on high professional standards. I submit the ultimate victim of today's worsening legal situation coupled with virtually nonexistent state and federal standards will be the professionalism and competency of piloting in Alaska and, ultimately, the safety of intra-state marine transportation. Could the state of Alaska be found liable if a serious maritime accident occurred at the hands of a state pilot whom a court determined was insufficiently qualified and trained?

Governor Steve Cowper  
January 1, 1990  
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CONTROL AND MANIPULATION OF STATE PILOTS BY OUTSIDE STEAMSHIP AGENTS AND ITS EFFECT ON SAFETY

The problem of low entry standards coupled with Alaska's practice, unlike any of the other 22 maritime states, of issuing an unlimited number of licenses is creating a surplus of licensees, many of whom have had scant seagoing background and little or no training. I believe this system is being taken advantage of by outside steamship agents who feel that competition among pilots is in their interest. The situation is beginning to cause accidents:

- When the SWALLOW grounded and polluted Dutch Harbor last year she was waiting for a pilot. There was a pilot ready and available but he was from an association not in favor with the steamship agency that represented the ship. Hence, the ship had to wait for a pilot from the preferred group. While waiting the mate on watch apparently fell asleep and the ship then went aground.

- In another more recent incident a pilot who was on duty in Dutch Harbor was contacted by an agent and asked to bring a ship, REEFER FRESH, into inner Iliuliuk Harbor. The pilot refused the job on grounds of safety: the ship was judged too large to enter Iliuliuk under the conditions then prevailing. The agent thereupon contacted a competing pilot group whose members had no such compunctions. That group dispatched a pilot to the job. Witnesses state the ship went aground maneuvering to enter the channel and had to be pushed off by tugs.

- Currently there is a movement afoot by some licensees to offer "through service" pilotage on cruise ships which transit both Southeastern and Southwestern Alaska during summer months. Their claim is, presumably, that such service will cost the operators less money. Veteran pilots from both geographic areas agree that there is no way an individual pilot can maintain the high degree of currency and local knowledge of both these huge areas necessary to do a credible and safe job of piloting. But rather than lose their livelihoods these veterans will offer the same service, despite their serious reservations, if they must in order to survive.

Unlike groceries or airline fares, for example, state pilotage should not be a commodity in the market place where competition is seen as good because it keeps prices down and service up. In piloting, there are public interest implications of safety which have a higher value than competition. That is why the maritime states control piloting and set rates much as they do with a publically regulated monopoly such as a utility company.

Competition between pilots for jobs totally violates the "guts" of state pilotage, the essence of which, as you know, is the independence of the state pilot from the interest and control of the shipowner or his agent. A pilot should make shiphandling decisions based on safety considerations only rather than on the shipowner's or agents' commercial interest. He is not free to do this if he is forced to hustle jobs and fend off other pilots who may be in favor with particular agents or who may offer a shipowner or agent a better "deal". Ideally, the state pilot sees his allegiance to the citizens of the state and to local political authority. He must be insulated from commercial demands, unrelated to safety, imposed by having to vie with other pilots for jobs. Only in this way can safety be served. It is important to note that of the 23 coastal states only Alaska permits competition between pilots.

If these concerns sound self serving they are not intended to be. The issue here is not individual pilots or pilot groups. Rather it is the integrity of Alaska's state pilotage scheme. A system which permits an unlimited number of licenses and requires little or no training is ripe for tampering by commercial interests. I submit that this is happening and safety will continue to suffer if a better system is not put in place.

#### PILOT BOARD DIFFICULTIES IN MAINTAINING AND UPGRADING STANDARDS

During my tenure on the pilot board the twin problems of getting regulations in place and maintaining a meaningful system of pilot discipline were almost intractable. This was largely because of what can only be termed an uncooperative, if not obstructionist, attitude by the department of law toward the pilot board and, indeed, perhaps toward all boards. For example, the department of law recently opined that the pilot board had to issue a pilot a license for Southeastern Alaska based on dockings and undockings he performed in Southwest Alaska!

Governor Steve Cowper  
January 1, 1990  
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Law department attorneys claim that the way the pilot statute is written is responsible for those kinds of interpretations. If that is indeed the case, then the state pilotage act should be overhauled and rewritten so that sensible and meaningful regulations can be put in place in a timely way and not delayed and thwarted by state attorneys whose job it is, presumably, to help the board. This is manifestly not the case now.

#### PILOT DISCIPLINE

When pilots err, as they occasionally do, it is the pilot board's job to discipline them, when appropriate, after due process. The problem here is that due process is routinely taking between 2 and 3 years before a pilot discipline case ever comes before the board. During this hiatus, the pilot in question continues to hold his license and works on it with no restrictions. This makes pilots and the maritime public view the pilot board as a paper tiger that never takes prompt disciplinary action. Even worse, it is unfair to the public which rightfully expects errant pilots to be dealt with.

#### EASE OF ENTRY

Alaskans probably expect that their state government requires high standards for entry into the demanding profession of ship piloting where the consequences of failure can have a profound impact on them and the environment. Unfortunately, that is not the case. It is a fact that Alaska is the easiest state in which to obtain a pilot's license. In this state liquor licenses, taxi cab permits and commercial fishing entry permits are limited among individuals for the larger public good. Ironically, an unlimited number of pilot licenses can be issued. Biologists tell us that the fish resource cannot withstand unlimited pressure from too many fishermen. I submit that the "resource" of maritime safety cannot withstand the pressure of too many pilots, particularly when many of them are poorly qualified and trained.

#### RECOMMENDATIONS

Alaska's state pilotage act should be thoroughly overhauled and rewritten. Only in this way can the problems I have cited be properly and permanently dealt with. Specifically:

Governor Steve Cowper  
January 1, 1990  
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1. The new pilotage act should require the highest standards of entry and training:

- Applicants for license should possess a minimum Coast Guard license as master of ocean, unlimited.

- A comprehensive training program should be established which would be funded by the state using monies from pilot fees. The program should include simulator, observer trips and lots of hands-on shiphandling under the guidance and instruction of experienced pilots. At the completion of his or her training the trainee must be capable of independent piloting on lower tonnage vessels, advancing to larger ships as experience and performance permits. California has a program very much like this and I believe it could become a model for the profession. Alaska's goal should be to have the most qualified, best trained pilots in the country.

2. The new pilotage act should tightly control the number of licenses issued and in force consistent with the needs of shipping. Those needs should be established by a representative pilot board. This is done in all other maritime states I am aware of. It is the only way to prevent the unsafe situation where too many pilots compete for jobs by bowing to the commercial pressures of shipowners and agents. To prevent individual pilots or pilot groups from discriminating about who may become a pilot, the pilotage act should provide for state selection of trainees for licensure based on need and an objective set of professional criteria.

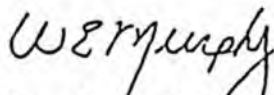
3. Working pilots should be required to complete recurrent training and ongoing education in the same manner as other professionals. Every 2 or 3 biennial license renewal cycles pilots should have to document completion of training at a shiphandling simulator previously approved by the pilot board.

4. The new pilotage act should be written so clearly and concisely and the pilot board's authority stated so specifically that there is no longer the possibility of conflicting and contradictory interpretation by staff attorneys. A way should be found in the Administrative Procedures Act to permit timely resolution of pilot disciplinary cases.

5. Finally, state pilots should be legal residents of Alaska. In many, many cases they are not. If one believes as I do that the state pilot license confers on the individual special obligations and responsibilities to the state then it follows that a licensee should live here.

The problems I have outlined are real, Governor. Alaska's system of mandatory state pilotage is in trouble. I urge you and your staff to examine the problems and find solutions. If I can help in any way I will gladly do so. Thank you for looking at this critical issue.

Sincerely yours,

A handwritten signature in cursive script that reads "W.E. Murphy".

Capt. W.E. Murphy

Governor Steve Cowper  
January 1, 1990  
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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

March 21, 1990

Captain W. E. Murphy  
P.O. Box 597  
Homer, AK 99603

Dear Captain Murphy:

Thank you for your thoughtful letter concerning marine pilotage in Alaska. The issues you raise are of definite concern to me. They are also issues that should be fully addressed by both the Executive and Legislative Branches. As you know, the Board of Marine Pilots is up for sunset review next year. It appears to me that the upcoming sunset review process will provide the State with the forum it needs to explore the matters you have raised.

In preparation for that process, I have instructed Mary Halloran, Director of Policy in my Office of Management and Budget, to coordinate work on this issue during the interim. Your letter clearly suggests that the administration needs to get up to speed on piloting issues nationwide, and Division of Policy research staff will be most helpful in exploring the potential implications of the direction you see piloting regulation taking in Alaska.

As part of that work, the Department of Commerce and Economic Development, Division of Occupational Licensing, will look closely at other pilot licensing boards, report on the relationship between those state boards and related private pilot associations and be prepared to offer suggestions that address the antitrust concerns that result from these considerations.

Finally, the Department of Law will review the legal ramifications of issues such as pilot experience and training in light of my concerns for the protection of both our environment and Alaska's important renewable resources.

We will keep the Board of Marine Pilots apprised of our progress. I have also asked that these agencies seek the advice and comment of the state's piloting and shipping interests during this process.

Captain W. E. Murphy

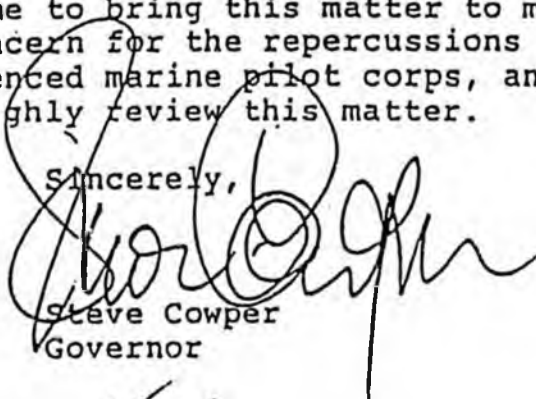
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March 21, 1990

By involving all interested parties, I feel confident that the administration will be in a good position to focus legislative attention on those areas of piloting regulation in Alaska that we believe need public debate and perhaps significant change.

Thank you for taking the time to bring this matter to my attention. I share your concern for the repercussions of a poorly trained and inexperienced marine pilot corps, and you have my commitment to thoroughly review this matter.

Sincerely,



Steve Cowper  
Governor

cc: Attorney General Doug Baily ✓  
Commissioner Larry Mercurieff ✓  
Board of Marine Pilots Members  
Mary Halloran  
Randall Burns

Appendix C

Letter from Paul Kirchner, Counsel to the American Pilots Association  
to Marilou Madden, Senior Policy Analyst, Alaska Governor's Office,  
Division of Policy, May 25, 1990

*Kurrus & Kirchner*  
*A Professional Corporation*  
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OFFICE OF  
MANAGEMENT & BUDGET

MAY 28 1990

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RICHARD W. KURRUS \*  
PAUL G. KIRCHNER †  
PETER N. KYROS ‡  
JOHN R. MCKAY § †

\* ALSO ADMITTED IN MASSACHUSETTS  
† ALSO ADMITTED IN VIRGINIA  
‡ ALSO ADMITTED IN MAINE  
§ ALSO ADMITTED IN NEW YORK

May 25, 1990

Ms. Mary Lou Madden  
Office of the Governor  
State of Alaska  
P.O. Box AD  
Juneau, Alaska 99811

Dear Ms. Madden:

I am General Counsel to the American Pilots' Association (APA). Captain Pat Neely, President of the APA, has been participating in the Xth Congress of the International Maritime Pilots Association in Israel for most of this month. He has asked me to respond to your letter to him of May 2, 1990.

The following information and commentary is addressed to the questions raised in your letter and is organized and presented in the same order as the questions.

1. Entry Level Requirements.

Alaska's requirements are noteworthy in that the entry level requirements and the requirements for obtaining a full state pilot's license are the same. In other words, there is no significant training required. To my knowledge, no other state grants pilot licenses without some pre-license training program tailored to the needs and conditions of the particular areas for which licenses

*Hurris & Kirchner*

Ms. Mary Lou Madden  
May 25, 1990  
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are given. In that respect, I believe that Alaska's requirements for obtaining a state pilot license are the lowest and least stringent of any state's requirements at the present time.

The existing entry level requirements of Alaska law do not approximate a pre-license training program. A federal pilot license is not a substitute for a training program. In all other states, it is either a precondition for admission to a training program or is one of the initial steps in the program. Unlike the typical state pilot license, a federal pilot license may be obtained without any prior training or service as a pilot.

Alaska's requirement of 10 docking and undocking jobs under the supervision of a state pilot is a similarly inadequate alternative to a training program. Trainee pilots in other states make hundreds and, under some programs, thousands of trips with instructing state pilots before they can receive a full state license. Not only is the 10 required jobs a relatively minimal number of such jobs, but a simple requirement for a specified number of jobs or trips lacks any assurance of the educational content and instructional value of the assignments. Although I am confident that a supervising state pilot would take his instructional duties seriously, such jobs should be part of an established training program.

*Hurmus & Kirchner*

Ms. Mary Lou Madden  
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2. Pre-License Training.

A) Need.

A distinguishing feature of the state pilotage system in this country is that in almost all cases, pilots learn their craft under the tutelage of master pilots. This is integral to the status and function of a state-licensed pilot, which is significantly different than the status and function of someone with only a federal pilot license.

State pilots are, and should always be, independent of the owners, operators and agents of the ships on which they provide pilotage services. They serve and protect the interests of the state, not the shipowner. State pilots must be experts in navigation and in handling the different types and sizes of ships likely to be encountered. State pilots must know how to handle themselves on the bridge of a ship, often among crew members whom they have never met before. Finally, state pilots must have a detailed familiarity with the local waters and the various conditions and factors that affect navigation in the area covered by their license.

These skills and responsibilities can only be learned through locality-specific pilot training programs. No matter how much sea service an individual may have, no matter how many times an individual may have transited a particular body of water while

*Hurris & Kirchner*

Ms. Mary Lou Madden  
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a member of a ship's crew, and no matter how long an individual may have had a federal pilot license for that body of water, the individual should not be allowed to walk into a licensing office and be given a state pilot license.

B) Legal Authority and Policy Considerations.

Your letter suggests that there may be some concern that a requirement for pre-license training may pose illegal or inappropriate restraints on entry into the pilotage profession. Such a concern is unwarranted.

It is well established that, as a legal matter, a state may limit the right to pilot vessels subject to state jurisdiction to individuals who have been licensed by the state. To do so does not violate either the United States Constitution or the federal antitrust laws. Olsen v. Smith, 195 U.S. 332, 49 L. Ed. 224 (1904). Further, a state has considerable discretion under its licensing authority in restricting the number of licenses issued, in establishing training requirements and in selecting individuals for training -- notwithstanding the fact that such features of pilotage regulation necessarily restrain entry into the profession. Kotch, et al. v. Board of River Port Pilot Commissioners for the Port of New Orleans, et al., 330 U.S. 552, 91 L.Ed. 1093 (1947); Brechtel, et al. v. Board of Examiners of

*Harris & Hirschner*

Ms. Mary Lou Madden  
May 25, 1990  
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Bar Pilots for the Port of New Orleans, 230 F.Supp. 18 (E.D. La. 1964).

Of course, what a state may legally do and what it should do are two different matters. Even without considering the latitude of state legal authority, however, it is generally accepted that it is entirely appropriate for a state to set up training or apprenticeship programs designed to assure, as much as possible, that only competent, knowledgeable persons are issued pilot licenses. I am aware of no recent instance in which a state's pre-license training requirement has been attacked on the ground that it unfairly restricts entry into the profession.

To be sure, there have been complaints on some occasions that the method of selecting individuals for certain training programs is unfair or illegal. I do not know of any successful legal challenges of that sort, however. Indeed, both the Kotch and Brechtel cases upheld a training and licensing system that, according to the plaintiffs' allegations, limited pilot licenses to relatives and other persons acceptable to existing state pilots.

The states regulate entry into their training programs in a variety of ways. Some states have a competitive exam procedure; some rely on a screening process that is competitive but does not involve an examination. In many states, the pilots

*Hurmus & Hirschner*

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May 25, 1990  
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have a role, of varying degrees, in the selection of trainees; in other states, pilots are excluded from the selection process. All states have certain stated eligibility requirements for applicants.

There is no one training program or selection process that the APA endorses as the best or most effective and fair. Each state's requirements should be based on the particular needs of that state. In general, we would recommend that a training and licensing program satisfy two criteria. First, the program should not discriminate either for or against any individual or class on the basis of race or gender. Second, the requirements of the program should be concerned solely with achieving the primary objective of state pilotage regulation, which the Court in Kotch stated, "is to secure for the State and others interested the safest and most efficiently operated pilotage system obtainable." In my opinion, it would be a serious mistake for a state to allow other factors unrelated to that objective to dictate a training and selection process. For example, I do not believe that creating employment opportunities or encouraging competition are appropriate or prudent goals of this aspect of pilotage regulation.

*Hurmus & Kirchner*

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May 25, 1990  
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C) Legal Status.

Some training programs are set out in detail in the state pilotage statute. An example would be the Florida training and license eligibility requirements, which are provided in Fla. Stat. Ann. §§310.071 - 310.081 (West 1989). In other states, the statute directs the Pilot Commission or Board or some other licensing body to prescribe by regulation training and licensing criteria. See, e.g., Cal. Harb. & Nav. Code, §1171.5 (West 1990) (San Francisco Bay pilots). Finally, in some states, the pilot associations develop the training programs, which are then submitted to the licensing body for approval and adoption as the official training programs required by the state. New York and Pennsylvania are examples of such states.

In all states, pilots have a role in the training process, most commonly as instructors on training trips. In that capacity, the pilot not only instructs the trainee during the trip but also records the trip, often with comments on the instructional content of the trip and on the trainee's performance.

In administering training programs, pilots and pilot associations act as instrumentalities of the state. It must always be understood that the state issues the license and, by doing so, certifies that the trainee/applicant has met the training requirements and possesses the other necessary qualifications for the

*Kurvus & Kirchner*

Ms. Mary Lou Madden  
May 25, 1990  
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license. That understanding is relevant to your question regarding possible liability concerns of pilot associations.

D) Types of Programs.

Apprenticeship or training programs vary considerably from state to state. There are two general models, however.

Most of the East Coast states have lengthy apprenticeship/deputy pilot programs. Prior sea service or equivalent service on a tug under a federal license is generally not required for entry into the apprenticeship program. Service on ships or tugs with or without a license is typically accepted in lieu of an otherwise required degree from college or a maritime school, however, and, in fact, many apprentices have both prior service and a degree. These apprenticeship programs receive approval from the Coast Guard so that time spent in the program may be accepted in lieu of licensed service for purposes of qualifying for a federal pilot license. The programs feature classroom and shipboard instruction in general shiphandling and navigation and in local conditions and requirements.

Following completion of the apprenticeship program, which may last between two and six years, a trainee becomes a deputy pilot and is issued a limited state license. The deputy then is permitted to pilot ships within the size limits and other

*Hurmus & Hirschner*

Ms. Mary Lou Madden  
May 25, 1990  
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conditions of the license. During this period, the deputy also makes many trips on larger ships, receiving "hands-on" experience under the supervision of a full licensed pilot. Limits on the deputy's license are removed on a gradual, step-by-step progression based on the period of time or the number of such trips. The deputy pilot period may last from two to four years at the end of which the trainee is eligible for a full pilot license.

Most states outside of the East Coast require licensed service on ships or tugs, and usually a federal pilot license, for entry into their training programs. As a result, their training programs are of shorter duration. Because the trainees entering such programs have experience in shiphandling and general navigation requirements, much of the curriculum of the typical East Coast apprenticeship program is not necessary. Rather, these other programs concentrate on the development of local knowledge and the pilotage skills required in the particular area. Generally, there is a purely instructional period of between six months and a year followed by a deputy pilot period of hands-on training and limited but progressively broader pilotage authority. Trainees in these programs are usually referred to as deputies throughout the process and until they receive a full pilot license.

*Hurris & Kirchner*

Ms. Mary Lou Madden  
May 25, 1990  
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3. Continuing Education.

You are correct that the emphasis on continuing education is a national trend. Although I have heard, as you have, that California and Washington may be considering mandatory continuing education for state-licensed pilots, I am not sufficiently familiar with those plans to comment on them.

The Coast Guard has required periodic recertification of Radar Observer status for federal pilot licenses for several years and has recently proposed adding training in Automatic Radar Plotting Aids (ARPA) to the qualifying courses leading to certificates of Radar Observer. State pilots, all of whom have federal pilot licenses, must, of course, take those courses and comply with that continuing education requirement. In addition, many state pilot associations have had their own continuing education programs for some time. Those programs have included periodic ship simulator courses and participation in shiphandling schools, most notably the one in Grenoble, France. Pilot participation in association programs is voluntary. The association's role is to disseminate information about the available courses and school programs and to pay all or some of the costs and expenses for some agreed number of pilots per year.

Even with the current trend emphasizing continuing education for pilots and other licensed mariners, there remains a

*Hurxus & Kirchner*

Ms. Mary Lou Madden  
May 25, 1990  
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considerable amount of disagreement within the maritime community over the value of simulator courses and shiphandling schools for continuing education. Without taking sides in that dispute, I believe that it is safe to say that the value is not the same for all pilots. Some pilotage areas are not covered by any simulator program. Some may never be because of the difficulty of replicating the conditions of the areas. Some pilotage tasks are not approximated in any simulator exercise or ship-handling model.

The expansion of continuing education for the pilotage profession is therefore limited by the availability and utility of instructional programs and exercises. A state that would want to establish continuing education requirements should first carefully examine what continuing education is available and what benefits it might provide. It has been my experience that state pilots have been in the forefront of the maritime industry in educating themselves in the latest changes in technology and in pursuing ways to maintain and improve their skills. For that reason, I would consider the primary benefit of a state-mandated continuing education program to be to formalize and give official sanction to what pilots themselves would consider appropriate. I would also support such a program if it would facilitate including the substantial costs of continuing education in the

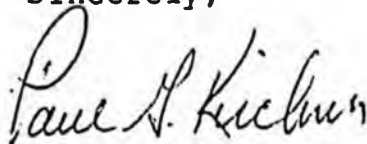
*Hurmus & Kirchner*

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May 25, 1990  
Page Thirteen

occurs or an allegation of incompetence or misconduct is made. My own personal view is that pilot boards or other bodies responsible for disciplining pilots should be part of a state agency or department. The benefit of that connection is that the disciplinary body would have access to the resources and capabilities of the state government, such as investigatory personnel and technology and legal assistance. Some pilot disciplinary bodies simply do not have on hand or readily available the expertise or resources to investigate accidents or to conduct disciplinary proceedings in a meaningful fashion. Where that is the case, action is often too slow, and neither the state nor the pilot is well served.

I hope that this information and my comments are helpful. The APA intends to follow with great interest Alaska's review of its pilotage system. If there is any additional information or assistance that Captain Neely or I can provide, please do not hesitate to ask.

Sincerely,

  
Paul G. Kirchner

PGK/wmm  
cc: Captain Pat J. Neely, Jr.

*Hanus & Hirschner*

Ms. Mary Lou Madden  
May 25, 1990  
Page Twelve

the pilotage rate base.

4. Pilot Discipline.

I do not know of any state disciplinary system that would allow for a more speedy removal of an incompetent pilot than the power that you describe Alaska has to summarily suspend a license if it finds a clear and present danger to health or safety. In fact, I do not think any state could have a system that would be more speedy and still meet minimal due process requirements. A danger in a summary suspension procedure such as the one Alaska and some other states have is that, as a practical matter, the decision to suspend the license may often be based more on the extent of damage and loss from the accident than on an objective review of the license-holder's conduct. A quick, summary procedure is more likely to be influenced by public opinion and political considerations. Speed should not be the overriding objective in disciplinary actions.

There are, however, certain features of a disciplinary system that facilitate purposive, fair action that serves the interests of the state and protects the rights of the accused. For example, investigative and hearing procedures should be clearly established and published. The capability to conduct a disciplinary procedure should be in place before an accident

Appendix D

Letter from C.L. Cloudy, Counsel to Southeast Alaska Pilots  
Association to Brad Pierce, Senior Policy Analyst, Alaska Governor's Office,  
Division of Policy, June 25, 1990

LAW OFFICES OF  
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ROBERT H. ZIEGLER, SR.

June 25, 1990

Mr. Brad Pierce, Senior Policy Analyst  
Division of Policy  
Office of Management and Budget  
Office of the Governor  
Post Office Box AD  
Juneau, Alaska 99811

OFFICE OF  
MANAGEMENT & BUDGET

JUN 26 1990

STRATEGIC PLANNING

Re: Sunset Pilotage Act  
Our File 29.039.48

Dear Brad:

Thank you for taking the time to stop off in Ketchikan and visit with the SEAP Board members and myself on Sunset and overhaul of the Pilotage Act. Although somewhat disjointed in our enthusiasm to speak up, I feel the presentation covered all of the basic problems confronting pilotage in Southeast Alaska from SEAP's standpoint. The critical points of discussion are hereinafter summarized as I recall them.

Limitation on Licenses

My personal opinion is that if entry level qualifications are increased, this of itself would serve as a limitation upon the number of licenses issued, because not everyone will be willing to make the investment required to meet the higher standards of entry. (This is borne out by the number of channel pilots who are dispatched in the summer who evidence no interest at all in training up because they would have to invest in winter-time activities in Southeast.)

As I understand SEAP's position, however, SEAP would also want the Pilot Board to have the authority to open and close entry into the pilotage profession. Thus far, either or both concepts have been poorly received by both the Pilot Board and its advisors, principally upon grounds related to monopoly and anti-trust. However, as pointed out

Mr. Brad Pierce, Senior Policy Analyst  
Division of Policy  
Office of Management and Budget  
Office of the Governor  
June 25, 1990  
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by Paul Kirchner in his letter on behalf of APA, the power and authority of the State to so regulate has never, ever been successfully questioned in the courts of the United States.

Opening and closing license entry into pilotage, of course, is directed related to economic concerns, and appropriate mechanisms must be set in place to fairly address those matters.

#### Training Up

You have raised the question of whether or not the associations would commit to provide training access in order that increased entry level requirements could be met. As I pointed out, this question of itself suggests that SEAP has carried on the practice of withholding training access, which SEAP denies.

Since its organization in December of 1970, and through the 1990 season, SEAP will have dispatched 213 non-member pilots during the summer tour season. Excluding seasonal repeat dispatch, SEAP will have dispatched 67 individual non-member pilots during this time frame.

Almost all of these non-member pilots came to SEAP with little more than entry level qualifications, and without exception, anyone who wanted to train up was given the opportunity to do so. For the most part, however, these non-members have been content to skim off the cream in the summer and very reluctant to come back in the winter and avail themselves of training up opportunities. SEAP has stated to you that they would continue this practice companion to an increase in entry level license requirements and limitations on the number of licenses. SEAP's performance to date should constitute assurance that the commitment would be honored.

Notwithstanding the above, without some sort of statutory or regulatory involvement, training up creates and will continue to create unacceptable risks. Training up suggests warranty if the pilot is then dispatched to a position which requires the experience he has gained in

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the training program, and even more so if he is admitted to membership in the association on that basis. Under an obligatory program, I would assume that the members of the association would be acting in a quasi-public capacity on behalf of the State of Alaska and thus not open to individual warranty claim. In any event, this question needs to be explored and resolved.

Training up also raises tariff problems. As currently practiced, the non-member pilot is charged for using SEAP's dispatch and pooling services which charge ranges between 25% and 10% of the tariff receipts generated by the non-member pilot depending upon his license level. These funds are passed through the income-expense pool and are shared equally by the member pilots. My contacts with other pilotage states reveals that such an arrangement is not unusual, save that in other states statutory or regulatory provision is made for the practice. Consideration should therefore be given to such approval.

The tariff question above noted also creates a liability problem. The income shifting raises a question of whether or not the non-member pilot is "working for" the members. If so, respondeat superior comes into play. This question should also be put to bed by statutory or regulatory coverage.

Tariffs

Over the years, the Pilot Board has vacillated over the matter of tariffs. There is current thought within the State administration that the Board lacks authority to establish tariffs. I disagree and have engaged in unfruitful communication with one or more attorneys in the Department of Law on the subject. In addition, although AS 08.62.170 creates a lien in favor of the pilot for the tariff charge, no effective measure of enforcement is provided. Presumably, the statutory lien is to supplement the maritime lien which automatically arises. However, the maritime lien cannot be enforced without seizure of the vessel at

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extreme cost. In times past, we have sought to involve the Attorney General's Office with regard to enforcement of the statutory lien without success.

The Pilot Board should therefore be clearly vested with authority to set maximum and minimum tariffs, if it does not already have such authority. In addition, some means of simple enforcement of the statutory lien should be developed.

Penalties

The penalties available for imposition upon a vessel under AS 08.62.190 are less than adequate.

Entry Level Licensing

SEAP is in accord with Paul Kirchner's advice on this subject given on behalf of APA.

Admission to membership in SEAP requires more than Alaska's entry level qualifications at all license levels because SEAP believes Alaska entry level requirements are woefully inadequate, and they do not choose to associate on a membership level with those who barely possess licensing qualifications. Historically, pilotage has been based upon local knowledge and experience. With 40,000 or more miles of coastline, Alaska is simply too large to safely license a pilot for one area based upon his experience in another area. It would make just as much sense to give an Alaska license to a British Columbia pilot based upon British Columbia experience.

The administration must accept the premise that without site specific experience, even the best all-around pilot is not competent to pilot into an area he has not been before in a pilotage capacity. From time to time, representatives of the Department of Law have advised the Pilot Board that a regulation calling for site specific licensing would be illegal without "proof" of the need, such proof to consist of lengthy hearings over the differences between one port and another. I do not

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know of any pilotage state which has approached the question in this manner, and given the historical background of pilotage and the practices of other states which have withstood attack, there is no valid reason for Alaska to do so. As voiced by Captain Collins and Captain Elsensohn, they themselves and others like them continually reacquaint themselves from time to time with ports or areas they have not regularly transitted by making observer trips even though they are fully licensed for all of Southeast Alaska.

Pilot Liability

As discussed, some pilotage states have adopted a dual tariff so as to provide funds adequate to cover liability insurance premium costs. If the vessel opts for the lesser tariff, the event is exculpatory of the pilot as between the vessel, its owners and the pilot, and the pilot is considered to be the servant of the vessel. I have yet to receive a satisfactory answer from anyone involved with such legislation as to why the master-servant relationship is critical, and lacking such, I have always viewed the creation of such a relationship as a fiction. If the stated relationship enables the vessel to include the pilot as an assured on the vessel's insurance policy, there is a better way to make provision for that. I have asked APA to consider giving some guidance in this area. At present, the only protection the members of SEAP have is the exculpatory clause on the pilotage ticket. However, the extent to which it is effective as to content is lost with regard to non-English speaking foreign masters.

Pilot Performance

You have expressed interest in developing some sort of plan which would provide for a check on pilot performance. As discussed, SEAP does not believe any such effort would work if it depended upon participation by the vessel masters. Experience over the years has shown that the masters will not involve themselves in evaluating a pilot's

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performance. SEAP sometimes will selectively dispatch around a master's concern, much to my dismay, because the master will not produce anything in writing to conform his concern. To my knowledge, the Pilot Board has experienced similar problems. If there is to be a watchdog program of any sort, it must revolve around random observer check rides by a fully licensed pilot. Even then, I personally question either or both the effectiveness and the need for such a program. The best watchdog of all is the membership of any particular association whose own survival and success depends upon weeding out the incompetents or training them up to the required level. Here, again, stiffer entry level license requirements will go a long way toward elimination of any need for such a program.

#### Associations

The question of whether or not membership in a pilot association should be voluntary or mandatory was touched upon. As you are aware from the materials you have under review, some associations are a creature of the legislature, some are a creature of a particular pilot board, some are voluntary but "recognized", and others, as in Alaska, are voluntary and "unrecognized".

There is little question but that many of the legal problems which have confronted SEAP over the years would not have arisen but for the fact that it is a voluntary "unrecognized" association. At this point in time, however, I am ambivalent over resolution of the question raised. I personally have a natural reluctance to have SEAP move away from what has existed for twenty years if the desired -goals can be achieved by other means. As matters progress, I may be able to come up with something I can advance to my clients.

#### Legal Environment

You have asked for a summary of the type of legal claims which have confronted SEAP over the years. The following listing

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encompasses most of these claims:

1. Assertions that because SEAP permits use of its dispatch and income-expense pooling service by non-members, the non-member pilot is entitled to membership and if he is denied membership, then anti-trust or monopoly violations have occurred.

2. Assertions that SEAP as an association has a responsibility to arrange for and direct its membership to permit observer trips for license upgrade purposes by non-members.

3. Anti-trust claims that SEAP has no right to drop a non-member from dispatch contract for navigational error, failure to report for assignment, or other causes.

4. Claims that SEAP cannot lawfully limit its membership and to do so constitutes some sort of anti-trust and monopolistic act.

5. Claims that income shifting as is practiced in most pilot associations is unlawful. Currently, income shifting within SEAP occurs only as to non-member pilots as above noted, and year-round expenses are paid out of a summer income pool as an alternative to income shifting.

6. Claims that because SEAP accepted a non-member for dispatch, the Association and the entire membership warranted his qualifications and can be held liable for his negligence.

7. Claims that it is illegal for SEAP to "selectively" dispatch by matching experience with the call for pilotage even though licensing may be equal.

Admiralty Attorney

You have asked whether or not it would be helpful to the cause of better regulation and understanding of marine pilotage for the Department of Law to assign an admiralty attorney to advise the Pilot Board. My answer was and is "No." The law of marine pilotage, although of admiralty derivation, is not the common weal of admiralty. In 1952,

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when I was admitted to the practice of law, I was admitted as a "proctor in admiralty". From the very start, I actually practiced admiralty law and was paid a proctor's fee by the Admiralty Court for every admiralty appearance. However, in 1970, when I organized SEAP, and later on SWAPA, my admiralty experience was not particularly helpful to me as counsel for a pilots association. Any competent attorney in the Department of Law who will take the time to fully familiarize himself with and accept the law of pilotage will fill the bill. My problems with those assigned to the Pilot Board over the years have arisen from their complete lack of knowledge in the pilotage area--not from their general lack of competency.

What the State Can Do

As stated at the meeting, I believe it to be essential that the Administration accept marine pilotage for what it is and has been recognized as being since the formation of the United States. Congress has seen fit to leave the regulation of pilotage to the individual states, principally because the marine pilotage needs of the several states are different one to the other and because marine pilotage is a site-specific profession. The State must also realize that competition is not the goal of marine pilot regulation and that, to the extent monopoly promotes the goals of marine pilotage (e.g., safety and a reasonable return for professional effort expended), such should be recognized and accepted as legal and appropriate. Without acceptance of these predicates, there isn't much the State can do to achieve any measure of betterment in the pilotage world. Once these predicates have been accepted, sound statutory and regulatory controls will easily follow to the benefit of all concerned.

Miscellaneous

During the course of our discussions, I referenced you to the LaMoureaux case which creates difficulty with regard to dispatch and

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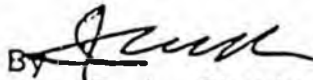
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training up of lesser qualified pilots. The citation for that is LaMoureaux v. Totem Ocean Trailer Express, 651 P.2d 839 (Alaska 1982).

You have asked how SEAP views the advice of Paul Kirchner on behalf of the American Pilot Association to the OMB. Both myself and my clients are in full accord with the points he makes and are extremely pleased to have these shortcomings pointed out by someone remote from the Alaska pilotage scene.

Sincerely,

ZIEGLER, CLOUDY, KING & PETERSON

By   
C. L. Cloudy

CLC:ce

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Appendix E

Letter from Paul Kirchner to C.L. Cloudy, July 27, 1990

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July 27, 1990

Mr. C.L. Cloudy  
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Dear Mr. Cloudy:

Thank you for your recent letter and materials concerning the State of Alaska's review of its pilotage laws.

You have suggested that the APA might be able to offer some input on the matter of liability limitation in general and the dual tariff system and master-servant relationship issues in particular. I am not sure that the APA has a formal position on those subjects, but I am happy to provide my own views and research, as follows.

PILOT LIABILITY LIMITATION GENERALLY

According to our information and research, five states (Washington, Oregon, Louisiana, Texas and South Carolina) have adopted some form of limited liability/exculpatory provisions in their pilotage statutes. Copies of these statutory provisions are enclosed. Pilots in other states claim similar protection through

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pilot commission regulations, tariff provisions or contract language in pilotage tickets or source forms. The enforceability of such non-statutory liability limiting mechanisms is questionable. See, e.g. Gulf Towing Co. Inc. v. Steam Tanker Amoco New York, 648 F. 2d 242 (5th Cir. 1981); Getty Refining and Manufacturing Co. v. Puerto Rico Ports Authority, 531 F. Supp. 396 (D.P.R. 1982). It is generally agreed that an enforceable limitation of pilot liability and corresponding vessel owner responsibility for third party claims requires either specific statutory direction or circumstances or practices that would indicate a knowing and voluntary acceptance by the vessel owner in a non-compulsory pilotage setting, United States v. SS President Van Buren, 490 F. 2d 504 (9th Cir. 1973).

The trend is definitely in favor of liability limitation for pilots. In addition to the five states that already have it, several others are considering it. I would expect that three or four more states will adopt limited liability provisions within the next three years.

Although a detailed discussion of the arguments in support of limiting pilot liability is beyond the scope of this letter, I should mention some of the reasons why the trend has developed over the last few years. In the past, pilots were rarely sued. As self-employed, independent contractors, they were thought to

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be judgment proof. Although a potential damage award against an individual pilot is still of dubious value today, pilots are nevertheless being named in suits with increasing frequency, often where recovery from the pilot is clearly not the objective of the plaintiff. It is virtually automatic now that in any marine accident, if a pilot was aboard, he will be a named defendant in one or more lawsuits. Usually, the legal fees alone are beyond the limited resources of the pilot. As a result, pilots today confront the reality that every time they board a vessel, they face the prospect of financial ruin, regardless of how well they perform their services. That situation does not promote better, safer pilotage or provide any other benefit to a state or its citizens.

In every place where a pilot liability limitation statute has been adopted, the shipping industry has supported it. Vessel owners and operators have made the judgment that it is in their economic interest to have liability shifted from the pilot to the vessel and its owner and operator. Standard marine hull and P&I insurance policies have always covered loss or damage due to pilot negligence. Assuming that pilotage rates would have to reflect either the cost of meaningful liability insurance for the pilot (such insurance, in fact, is not available) or the financial risks to the pilot of the uninsured liability, it is economically inefficient for a vessel to pay such rates when its own insurance already provides coverage at little or no additional cost.

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DIFFERENT FORMS OF LIABILITY LIMITATION

Limited liability statutes take several forms. The first state to adopt limited liability was Oregon. In 1959, that state enacted the dual rate system that you describe. At the current time, it is the only state with that type system, which offers the vessel the option of two rates. The higher rate would include the cost to the pilot of obtaining reasonable trip insurance covering the pilot's potential liability for that pilotage assignment. Alternatively, a vessel may elect a lower rate. In return for the lower rate, the vessel agrees not to assert any personal liability against the pilot or pilot association and to defend, indemnify and hold harmless the pilot and his association from third party claims. Additionally, each pilot must obtain a surety bond in the amount of \$250, which amount is the exclusive, total limit of a pilot's liability to third parties unless the act or omission was in connection with the pilotage of a vessel electing to pay the higher rate. Or. Rev. Stat. §§776.510.540 (1989).

In 1981, the State of Washington adopted a dual rate system virtually identical to that of Oregon. That statute was replaced in 1986, however, by a simple statement that a pilot's liability for damages or loss occasioned by the pilot's errors, omissions, fault, etc. in the performance of pilotage services, will not

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exceed \$5,000 except in the case of willful misconduct or gross negligence. The Washington statute also declares, as does the Oregon statute, that the vessel and its owner and operator are liable to third parties for the pilot's negligence. Wash. Rev. Code §88.16.118 (1989 Pocket Part).

In 1988, South Carolina adopted a statute virtually identical to Washington's. S.C. Code Ann. §§54-15-350, -360 (Law. Co-op. 1989 Pocket Part). A similar, simple limit on liability was enacted for pilots in Houston (Harris County), Texas in 1987, although the limit there is \$1,000. Tex. Stat. Ann. art. 8280a (Vernon Pamphlet, 1990). In 1989, identical limitations were provided for pilots in Galveston, Freeport (Brazoria County), and the Sabine River (Jefferson and Orange Counties), id, arts. 8280b-8280d. The Texas statutes differ from those of South Carolina, Washington and Oregon in that they do not contain the declaration of a master-servant relationship, which you have mentioned and which is discussed below. They do, however, state that the vessel and its owner and operator are liable to third parties for a pilot's negligence.

Louisiana has taken a somewhat different approach. Pilots operating between Pilottown and New Orleans on the Mississippi River (the Crescent River Pilots) are covered by a provision added to their pilotage statute in 1986 stating that any person seeking

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to hold a pilot liable for damages or loss occasioned by the pilot's error, omission, fault or neglect must prove by clear and convincing evidence that the damages arose from the pilot's gross negligence or willful misconduct. Rev. Stat Ann. §34:1011 (1990 Pocket Part). This standard of care/liability exclusion was extended to the other two groups of pilots operating on the Mississippi River in 1988. Id §§ 34:966 (Associated Branch [Bar] Pilots), 34:1005 (New Orleans - Baton Rouge Pilots).

#### ANALYSIS OF THE DIFFERENT FORMS OF LIABILITY LIMITATION

Although I understand that you have been discussing the dual-rate system with the Alaska OMB, it is my opinion that the Washington, South Carolina, and Texas model may be the preferable limitation of liability mechanism. To me, the Oregon statute has troubling features that are the product of the legal uncertainties attendant to that "first generation" experiment in liability limitation and of the unique circumstances surrounding its adoption and subsequent revisions.

The dual rate system created in the statute is somewhat illusory. It was designed to impart at least the appearance of consideration and bargaining to the "agreement" required in the statute by which a vessel and its owner and operator assumes the risks of the pilot's negligence. The unstated belief was that, in fact, no

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vessel would elect the higher rate. It is my understanding that the pilots have contracted with an insurer who will offer trip insurance but that such trip insurance has only been purchased in a handful of instances over the years involving vessels (primarily drydocks) that do not regularly engage in shipping activities and that do not have their own P&I insurance. Those vessels purchased the trip insurance as an alternative to their own P&I policy. They paid a very high premium that was acceptable only because it was the only insurance carried. That was not the circumstance envisioned by the statute.

The Oregon statute also has a number of declarations, characterizations and certain repeated phrases designed to bolster the sense that the vessel's waiver of claims against the pilot and its indemnification of the pilot are either freely assumed or are derived from the employment of the pilot rather than from the statutory mandate. I question the need for these items and am concerned that they may have unwanted consequences in other, non-liability areas. The master-servant predicate that you have mentioned is one example. Another would be the statement that "the services of any individual pilot...have been voluntarily accepted and are voluntarily rendered pursuant to the election authorized by ORS 776.510." Although a similar statement in a municipal tariff was found by the court in United States v. President Van

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Buren, supra, to be a significant factor supporting the enforceability of immunity provisions in the tariff, I am not sure, as discussed below, that such language is necessary for the validity of a statutory provision.

Additionally, the statute reflects the view that noncompulsory pilotage is also essential to the enforceability of the dual rate system. When the Oregon statute was first enacted in 1959, the state did not have a compulsory pilotage law. In 1973, however, the state adopted a compulsory pilotage requirement. A number of observers, including the late Alex Parks, the author of the 1959 statute as well as the treatise, The Law of Tug, Tow, and Pilotage, felt that the switch to compulsory pilotage eviscerated the theory of voluntary election on which the dual rate system depended. Parks discussed this subject in the 1982 edition of his treatise, pages 1035-1039 (copy enclosed). I should caution that Parks' views expressed there were naturally affected by his authorship of the 1959 legislation, a fact not disclosed in the treatise.

Ironically, by 1982 Parks had taken the position that a monetary limit on pilot liability, without the dual rate mechanism, could survive legal challenges, even in a compulsory pilotage setting, so long as it was presented as deriving from a state's authority to maintain reasonable pilotage fees. He suggested a \$250

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limit with the requirement that each pilot post a bond in that amount.

The uncertainties resulting from the 1973 compulsory pilotage requirement were addressed in 1983 amendments to the Oregon statute. At the urging of the Columbia River Pilots, the compulsory pilotage provision was replaced by one that allows a ship to decline to take a state pilot upon payment of 3/4 of the otherwise applicable pilotage fee. At the urging of the Columbia River Bar Pilots, however, the \$250 liability limit/bond requirement suggested by Parks was also adopted. Whatever the relative merits of a dual rate system versus a simple liability limit may be, the presence of both in the same statute would seem to present additional questions and concerns.

It is not clear to me that non-compulsory pilotage is essential to the validity of a dual rate system. If it is, that would be an important factor favoring a liability limit instead. The prevailing view today is that a "take or pay" pilotage requirement, such as that presently used in Oregon and a few other states, is no longer an acceptable substitute for a clear, affirmative pilotage requirement. This is a subject to which the APA and this firm have devoted substantial attention in the past year. It cannot be adequately covered in this letter. I should mention, however, that the Coast Guard has expressed the belief that "take

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or pay" provisions and certain other perceived shortcomings in the language of some state pilotage requirements are a serious problem. This assessment may not be justified by the facts. Nevertheless, the Coast Guard's view and the potential for a federal "remedy" must be acknowledged. For that and other reasons, a number of states are currently reviewing the language of their pilotage requirements to see if they can be expanded and strengthened. I would hate to see a state move in the opposite direction.

A liability limitation of the type adopted by Washington, South Carolina, and Texas has obvious advantages over a dual rate system. It is more simple and direct. Also, because such a limitation is not based on a theory of voluntary election by the vessel owner, compulsory pilotage should not be a problem.

Of course, the concern with a liability limitation is with its enforceability and constitutionality. The courts tend to look with disfavor on efforts to shield professionals and others from the consequences of their own negligence. Nevertheless, there are many forms and types of liability limitation that not only pass constitutional and judicial scrutiny but are in the public interest as well.

The important consideration in this area is that innocent people who have suffered damage through the actions of others must be able to secure compensation for that damage. So long as an

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injured party's right to recover for damages from some source is not jeopardized, the placement of liability can be treated as essentially an economic matter. Shifting liability from one party to another occurs frequently whether by law or by private contract. For example, a standard ship repair contract will require the vessel owner to waive consequential and incidental damages arising out of faulty workmanship and to indemnify the shipyard against third party claims arising out of the yard's performance of the repair work, even claims involving negligence by the yard. This is acceptable to a vessel owner, in most cases, because it is much cheaper to have the vessel's insurance cover those claims. As with a pilotage assignment, the potential damages and the resulting cost of insuring against the damages would far outweigh the value of the repair job if the yard were to assume liability for its negligence.

I believe that it is a legitimate exercise of state power to limit a pilot's liability. It is a rational feature of a comprehensive system designed to assure that an adequate number of well-trained pilots are available to handle all vessels moving in the state's waters and that pilotage rates are maintained at reasonable levels.

A statutory limitation should have the following features, each of which can be found in one or more of the existing statutes:

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1. a statement of legislative findings and intent justifying the limitation;
2. a clear, simple, monetary limitation;
3. an exclusion from the limitation for wanton and reckless acts (the use of the term "gross negligence should be avoided if possible); and
4. a statement that the vessel, its owner and operator remain liable for damage or loss occasioned by the vessel as a result of any act by the pilot in the performance of his pilotage duties.

An additional consideration in this area is that the limitation should not only fix the pilot's potential liability for damages, it should provide a disincentive for suing the pilot or otherwise protect the pilot from the staggering legal fees that accompany these types of suits. I have no specific recommendations on that point, although I am familiar with many of the ideas and suggestions from various pilot attorneys and other interested observers. The state statutes enclosed handle this in different ways. For example, the Oregon and Texas statutes provide that in the event that a pilot is named in a suit for which the limitation would be applicable, the pilot can pay the limitation amount into the court and have the proceeding dismissed as to him.

Finally, I must acknowledge that the law in this area is neither extensive nor certain. No case of which I am aware has directly addressed the enforceability or validity of any of the five limitation statutes. The liability exclusion in the Oregon

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statute was applied in the well-known HALCOUSSI case, Olympia Sauna Compania S.A. v United States, 604 F Supp. 1297 (D. Or. 1984). To my knowledge, the validity of the liability exclusion in that statute was not challenged, however, I have also been told that the Louisiana (Crescent River) standard of care statute was determined by a court to be procedural rather than substantive and was applied to an accident that occurred prior to the enactment of the statute.

While there is no case that can be cited as directly upholding the enforceability of a liability limiting statute, I do think that the trend in adopting such statutes can be seen as reflecting a growing level of comfort in the legal and policy justifications for limiting pilot liability. Until such time as the courts give specific, contrary direction, this trend should continue.

#### Master/Servant Relationship and Liability Limitation

A declaration of a pilot's status as the servant of a vessel and of its owner and operator is not common to all statutory liability limitation schemes. The Texas statutes, for example, do not contain any such declaration, although they do state that a vessel its owner and operator are liable for the acts of a pilot. Ironically, one state, California, has such a declaration but does not have liability limitation. Cal. Harb. & Nav. Code §1134 (West

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1990 Cum. Pocket part).

I have never seen an explanation of why the master/servant declaration is in those statutes that have it. It is my belief, however, that they all, including the one in the California statute, can be traced back to the original 1959 Oregon dual rate statute. My impression is that it was considered as another feature contributing to the enforceability of the liability limitation. I would guess that Alex Parks took it from the standard "pilotage clause" in towing contracts. These clauses are used to apply the borrowed servant doctrine to the provision by a towing company of a docking pilot for a vessel. They typically state that when a docking pilot boards the vessel, he is the servant of the vessel and its owner and that the towing company will not be responsible for his actions. In contrast to liability exclusion/limitation clauses in pilotage tickets, "pilotage clauses" in towing contracts have been repeatedly upheld in court. Sun Oil Co. v. Dalzell, 287 U.S. 291 (1932); see also, Parks, Law of Tug, Tow and Pilotage, 1057-1065.

Whatever the reason for including the master-servant provision in the Oregon statute, I believe that the other states simply copied it without a great deal of thought.

In the case of the 1959 Oregon statute, the master-servant provision did not make a change in law. As you know, the

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traditional maritime principle is that in a non-compulsory pilotage setting, the ship is liable in rem and the shipowner is liable in personem for the negligence of a pilot. The theory is that the pilot in those cases is a voluntarily hired employee of the vessel and its owner or operator, and, under the rule of respondeat superior, the owner or operator is responsible for damages caused by the pilot's negligence just as much as they would be for any member of the crew. See, e.g. Homer Ramsdell Trans Co. v. Compagnie Generale Transatlantique, 128 U.S. 406, (1901); California v. Norfolk, 435 F. Supp 1039 (N.D. Cal. 1978). Since Oregon had a non-compulsory pilotage system in 1958, the statutory recitation that the pilot is the servant of the vessel and its owner and operator would have merely codified existing maritime law.

In the case of compulsory pilotage, the pilot is deemed an independent contractor. There is no master-servant relationship between the vessel owner and operator, on the one hand, and the pilot, on the other. As a consequence, the vessel owner or operator is not personally liable for damage caused by the pilot's negligence. People of California v. Italian Motorship Ilice, 534 F. 2d 836 (9th Cir. 1976); Matteria v. Commercial Cable Co., 137 F. Supp. 472 (S.D.N.Y. 1956); New York Dock Co. v. New York and Cuba Mail S.S. Co., 1931 A.M.C. 1349, aff'd. 1932 A.M.C. 1984 (N.Y. Sup. Ct.) In compulsory pilotage, the vessel, however, is

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liable in rem for damages caused by the negligence of the pilot.  
The China v. Walsh, 74 U.S. (7 Wall.) 53, 19 L. Ed. 67  
(1868). The Barnstable. 181 U.S. 464 (1900).

Washington, California (San Francisco Bay only), South Carolina, and Louisiana all have compulsory pilotage. As a consequence, it would appear that the master-servant declarations in their statutes make a substantive change of law. I have expressed previously, however, my own opinion that a statement extending liability for a pilot's negligence to a vessel and its owner and operator is a desirable and perhaps necessary feature of a system for limiting a pilot's liability. A substantive change of law to accomplish that would therefore be required by statute in compulsory pilotage states.

It seems to me that such a statutory change need not be in the form of a declaration of a master-servant relationship. A direct statement of vessel owner and operator liability without the master-servant language, such as that found in the Texas statutes, should be sufficient. There are some unfortunate, non-legal consequences to declaring a pilot to be a servant of the vessel and its owner and operator. Wherever possible, both the state and the pilots should be careful to promote the importance of the state pilot's independence of the vessel and its owner. When a state pilot boards a vessel, his primary obligation is to

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protect the state, its citizens and its environment. Any unnecessary diminution of the state pilot's status should be avoided.

Federal Legislation Affecting Vessel Owner/Operator  
Liability for Pilot Negligence

An issue that has not yet been considered in any depth, to my knowledge, is the effect that the federal oil spill liability and prevention legislation may have on liability for pilot negligence. That legislation will soon be completed. It will provide that a vessel owner and operator, and perhaps the owner of the cargo, will be liable, up to the limits set in the bill, for damages from oil spills caused by the vessel owner or operator, its employees, agents, and others in a "contractual relationship, existing directly or indirectly, with the [vessel owner or operator]." Although the question has not been addressed during consideration of the bills in Congress, I would assume that a pilot, compulsory or non-compulsory, would be treated as a party in a contractual relationship with the vessel owner or operator.

If that will indeed be the case, the effect of the federal legislation would be to assure a deep pocket for oil spill damages caused by the acts of a pilot. As a consequence, there should be even less hesitancy over excluding or limiting a pilot's liability. Retaining pilot liability would provide no benefit to

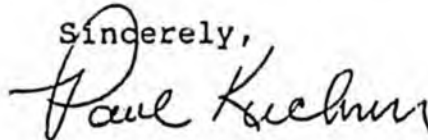
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the public in terms of preserving useful sources for compensation. Once vessel owners are made responsible for a pilot's acts by this legislation, I am sure that they would much rather have restrained pilotage fees than pay higher fees required to cover a pilot's potential liability.

I hope that this information and these views are helpful.

Sincerely,

A handwritten signature in cursive script that reads "Paul Kirchner". The signature is written in dark ink and is positioned above the typed name.

Paul G. Kirchner

Enclosures  
PGK/aes