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dispute, is perfectly clear so long as the commissions act within the parameters of the statutes creating them and defining their powers. *Williams v. Potter*, 210 Fed. 318, *aff'd* 223 Fed. 423 (CA-2); *Sturgis v. Spofford*, 45 N.Y. Rep. 446; *Farney v. Stockton Port District*, 12 Cal 2d 832, 86 P2d 832; *In re Hand*, 266 Pa. 277, 109 Atl. 692; *Caples v. McNaught*, 147 Or. 72, 31 P2d 780; *Ring v. Patterson*, 137 Or. 234; *Riley v. Thompson*, 227 Pac. 712.

In *Williams, supra*, the decision of the pilot commission that the plaintiff applicant did not possess the qualifications for issuance of a license was sustained. In *Sturgis, supra*, a statutory penalty was upheld against a pilot who employed an unlicensed person to act as a pilot, although the penalty was limited to one occasion and not for each day that he employed the unlicensed person. In *Farney, supra*, the court held that a pilot whose license had expired or had been revoked could not compel the commission to issue a renewal. *In re Hand, supra*, held that the pilot commission had authority to decide whether or not a pilot had overcharged on his fees and, if so, to require him to repay the overcharge to the vessel piloted or face suspension of his license. In *Riley, supra*, the statute provided for a 5% fee to be withheld from pilotage fees and retained by the pilot commission for salaries and expenses. The court held that the 5% fund need not be paid into the state treasury but could be withheld without further accounting.

See, however, *Moore v. Clyde Pilotage Authority* [1943] S.C. 457, 77 Ll.L.Rep. 138 (Scot.), where the pilotage authority revoked a pilot's license. He appealed to the Sheriff on the grounds that the procedure was irregular and that the authority had reached the wrong conclusion on the merits. The Sheriff reversed on both grounds of appeal. In *McGillivray v. Kimber* (1915) 52 S.C.R. 146, 26 D.L.R. 164 (Can.), the pilotage authority, by resolution alone, without complaint, notice or investigation, declared a pilot dismissed for "neglect and incapacity." It was held that the failure of the authority to observe statutory requirements resulted in the authority not having exercised "judicial functions" and did not insulate it from liability in an action by the pilot for damages. In *Halifax Pilot Comm. v. Farquhar* (1894) 26 N.S.R. 333 (C.A.) (Can.), efforts by the pilotage authority to collect pilotage dues from the purchaser of a barque wrecked, beached, condemned and sold and later towed into Halifax by another vessel were stricken down on the ground that the barque was not a "ship" within the meaning of the

Pilotage Act, 1886. In *In re Lee* (1899) 25 V.L.R. 205, 21 A.L.T. 101, 5 A.L.R. 253 (Vic.Sup.Ct., Aus.), the practice of Marine Board to treat certificates of exemption to a master as valid without the consent of the Board, as required by statute, held to violate the statute.

Rules and Regulations

Rules and regulations of pilot commissions, validly and properly adopted, are of the same force as if such rules and regulations were incorporated in the enabling statute. *Nash v. Thebes*, Fed. Cas. #10022 (DC, Mass.).

If pilot commission rules and regulations are to be sustained, certain conditions must occur; i.e., the enabling statute, by its terms, must authorize the adoption of such rules and regulations; the rules and regulations must be reasonable and not arbitrary and capricious; they generally must be in the interest of safe navigation and promote an orderly administration of the pilotage laws; they must bear a reasonable relationship to the ends to be effected; and they must not infringe upon Constitutional rights and privileges.[23]

Rules and regulations by pilot boards and commissions were sustained in the following instances:

Morse v. Heide (N.C.), 68 S.E. 173 (rule prohibiting pilots from leaving their assigned stations); *Davis v. Heide* (N.C.), 77 S.E. 691 (rule limiting the cruising grounds beyond which a vessel could not be "spoken," prescribing penalties for failure to answer a signal requesting a pilot, and removing pilots for misbehavior or misconduct in office); *People v. Gunner* (N.Y.), 108 N.Y.S. 726, 124 App. Div. 153 (rule providing that business of pilotage should be carried on by one vessel and that inward bound vessels should be spoken and boarded from a pilot boat stationed within a radius of three miles from a designated point); *In re Appeal of Henry Verden*, 13 Phila. 151 (rule authorizing board of wardens to revoke a pilot license when a pilot deserts his vessel and ordering the pilot to refund the compensation received); *Verden v. Board of Pilot Commissioners*, 8 Del. Ch. 1, 67 Atl. 975 (rules regulating the boarding of pilots at specific ports of vessel bound for the Delaware River and Bay); *People v. Board of Pilot Commissioners*, 23 Hun. (N.Y.) 603 (rule

23 Note the remarkable similarity to Halsbury's four essential elements of a valid by-law, *supra*.

prescribing the type of vessel which could be used by pilots for boarding vessels); *Baldwin v. Pouliot* [1969] S.C.R. 577, 7 D.L.R. (3d) 367 (Can.) (by-law prohibiting the consumption of alcoholic beverages while on duty or about to go on duty held validly enacted under Sec. 329(f) of Canada Shipping Act, 1952); *Forth (Trinity House of Leith) Pilotage Authority v. Lord Advocate and Others* (1949) 82 Ll.L.Rep. 1000 (not necessary for unanimous agreement between all members of pilotage authority before a by-law concerning the handling of money in a pilot's benefit fund would be confirmed).

By contrast, however, see *Jones v. Gamache; Gamache v. Ministre Des Tpts.*, [1969] S.C.R. 119, 7 D.L.R. (3d) 316, varying [1968] 1 Ex. C.R. 345, where by-laws adopted by the Quebec Pilotage District setting up classes of pilots having unequal rights were held invalid as the adoption of such by-laws was not authorized under the 1952 Act. In *McAlister v. Forth Pilotage Authority* (1943) 76 Ll.L.Rep. 32, a by-law requiring that any question involving the distribution of a pilots' pooling fund be referred to the Authority and that the decision of the Authority would be final was held invalid as not being justified by the provisions of the Pilotage Act. In *Bruce v. Moore; Ex Parte Moore* (1911) S.Q.R. 57, 5 Q.J.P.R. 45 (Q. Sup. Ct., F.C., Aus.), a regulation, forbidding any unlicensed person from acting as a pilot in the Torres Strait and Inner Route when the services of licensed pilots were available and imposing a penalty for so acting, was held partially valid and partially invalid. And see cases cited, *supra*, under "Authority to Fix Rates."

Revocation and Suspension of Licenses

It is rather surprising but nonetheless true that many believe that licensing boards given broad powers can simply revoke or suspend licenses on a mere whim. Nothing could be further from the truth. No license can be revoked or suspended arbitrarily and capriciously. Uniformly, pilotage authorities are required to grant a hearing to an accused pilot at which time he is entitled as of right to be heard, to be present, to confront witnesses, to be fully apprised of the charges against him, to prevent evidence, and to be judged on a fair and impartial basis. And if the pilot feels he has been unjustifiably punished, he has a right of appeal to a higher tribunal.

An excellent example is *Conway v. Clyde Pilotage Authority* (1951) S.L.T. Sh.Ct. 74 (Scot.). There, a pilot whose license had been revoked after a casualty appealed under Sec. 28 of the Pilotage Act, 1913, to the sheriff having jurisdiction at the port where the decision was given. The pilot contended the decision was wrong on the merits, that the proceedings were irregular because there was no proper procedure for ascertaining the facts, nor was he fully informed of the charges against him nor of the possible penalty, and because his fault was assumed and he was not given a fair hearing. The Sheriff-Substitute sustained the appeal in that it was wrong on its merits, and that the proceedings were irregular. In doing so, he stated in part:

> In my view no accident should be recorded against a pilot in the sense that it may be used against him prejudicially at a later inquiry, unless the evidence necessary for a judicial decision has been heard by or on behalf of the executive committee.
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> The pilot was not informed that the suspension or revocation would be considered which would have afforded the opportunity of preparing an adequate defence in advance. He did not bring to the meeting witnesses whose evidence was essential for a proper decision.
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> The executive committee allowed to be raised and to be considered matters which were irrelevant on the question of fault, such as unspecified complaints by certain shipowners.

In *Moore v. Clyde Pilotage Authority* (1944), *supra*, the Sheriff-Substitute held that the proceedings by which the pilot's license had been revoked were irregular, oppressive and unjudicial, and the punishment meted out too severe. The pilotage authority appealed to the Court of Session whereupon the decison of the Sheriff-Substitute was sustained. The court noted that the right to be heard embraced the right to put on evidence on the part of the pilot, and the pilot was not given an opportunity to do so. See, also, *Gariepy v. R.* [1939] Ex. C.R. 321, [1940] 2 D.L.R. 12 (Can.); *McGillivray v. Kimber* (1915), *supra; Belisle v. Minister of Transport* [1967] 2 Ex. C.R. 141 (Can.); *Koenig v. Minister of Transport* [1971] F.C. 190 (C.A.) (Can.); *Bulger v. Benson*, 262 Fed. 929 (CA-9); *State v. Merny*, 29 N.J.Law. 189; *In re Delaware Pilotage*, 22 Pa.Dist. 329; *Morris v. Board of Commissioners*, 30 Atl. 667; *Verden v. Board of Pilot Commissioners*, 8 Del. Ch. 1, 67 Atl. 975; *Farney v. Stockton Port District*, 12 Cal. 2d 832, 86 P2d 832.

Members of Pilot Associations—Rights, Duties, and Obligations, *Inter Sese*

The relative rights, duties and obligations of pilots vis-a-vis themselves and their respective pilot associations are of the utmost importance. As a practical matter, it is almost impossible for a pilot to operate individually, especially so where he must make provision for means of boarding and unboarding vessels; and expulsion or suspension of membership in the association literally means economic destruction for an individual pilot.

Considerable litigation has arisen between individual pilot members and their associations, relating to such matters as pension rights, accountings, suspension or revocation of membership, and rights to a division of association assets upon retirement or death.

In *Magee v. San Francisco Pilots B & P Association* (Cal), 198 Pac. 933, the pilot-member was permanently injured while boarding a vessel, thereafter retired as a regular member and applied for an associate membership. He surrendered his regular certificate of membership and received $7,500, the then present value of the certificate. A by-law of the association provided that one could be accepted for associate membership only upon a two-thirds vote of the membership, and the plaintiff fell far short of receiving sufficient votes. The court held that there was no evidence that a pension fund had been created under the by-laws of the association and that since the plaintiff was denied associate membership, he was entitled only to the $7,500 received.

In *Browne v. Makin,* 1950 A.M.C. 114, 177 F2d 753 (CA-5), the pilot was permanently injured and brought suit to establish his pension rights. The court held that he was entitled to share in the fund because he had contributed to it for a considerable period of time. After pooling of the fees and payment of expenses, the net amount was divided in such fashion that a retired or incapacitated pilot received two-thirds of the amount received by active pilots. Having contributed his share in prior years, so that other pensioners received their proper amounts, he was entitled to "reap part of the harvest which he had helped to sow."

Right to Expel from Membership

The authority of an association to expel a member depends upon the existence of a valid and proper by-law permitting the same but only in accordance with procedural due process.

In *Walters v. Maryland Pilot Association,* 1937 A.M.C. 1141 (Cir. Ct., Md.), the association expelled the member for alleged acts detrimental to the association. The court held that since a proper notice of charges and a hearing was not given to the expelled pilot, his expulsion was unlawful and he was ordered reinstated. In *Heuer v. Crescent River Pilots' Association,* 1964 A.M.C. 821, 158 So. 2d 221 (Ct. App., La.), the court upheld the right of the association to expel its president for his refusal to account for the expenditure of approximately $200,000 in association funds. In *Marshall v. Verden,* 19 Pa. Super. Ct. 245, the pilot absented himself so that he was unable to take his regular piloting turn. Pursuant to an association by-law, and after due notice, he was suspended from membership. On his appeal, the court refused to set aside his suspension, stating:

> . . . The president and board of directors, at a regular meeting of which the plaintiff had notice, held the plaintiff bound by the by-law above quoted. The action was taken pursuant to the seventh article of the constitution referring to that body the determination of matters of dispute arising among the members.
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> The result to the plaintiff is a considerable loss for what might seem to be trivial transgression. But we are not willing to stamp the by-law as unreasonable and for that reason unenforceable. The plaintiff was a member of the defendant association. He participated in its organization. He assented to its by-laws. He found nothing unreasonable in the provision now complained of until he chose to violate it. Furthermore, the by-law covered a subject of no mean importance. The members of the defendant association have much to do with the commerce of the city of Philadelphia. If without severe penalty members might absent themselves at will, serious consequences might result to outgoing vessels and thus to the interests of a large community. As the learned judge of the court below says, the organization is quasi-public. Its members perform high duties with which go great responsibilities. In view of the considerations suggested, we cannot regard the penalty here imposed by virtue of the by-law so unreasonable as to set aside the by-law or to relieve from its operation.

Imposition of Fines

The authority of an association to fine its members again depends upon the existence of a valid by-law and observance of procedural due process.

In re Vachon, 1963 A.M.C. 2097 (Arb.), the arbitrator ruled that a $500 fine imposed against the pilot should be refunded to him since he was not given a hearing upon that phase of the arbitration.

In *Nelson v. Associated Branch Pilots of Lake Charles (La.)*, 44 So2d 357, *reh. den.* 45 So2d 218, the pilot was fined for refusing to obey the secretary-treasurer's lawful orders on four separate occasions during one month. On appeal, the court sustained the fine and, in addition, ruled that the fine should not be considered as a capital asset of the association in which the pilot under discipline should share, but instead should be distributed among the other non-offending pilots as compensation for the extra work they were compelled to perform because of the dereliction of the pilot who was fined.

In *Levine v. Michel*, 35 La. Ann. 1121, the association filed a suit for specific performance and an injunction, alleging that the defendant pilot had violated the articles of agreement requiring that he bring to the association his skill, time, labor, etc., and should not carry on any business in the nature of pilotage for his own account. The association alleged that the pilot was, for his own account, piloting from a small open boat and refusing to use the pilot boats of the association. Upon rehearing, the court held that while the delinquent pilot could not be compelled specifically to perform his contract, he could and would be enjoined from piloting for his own account so long as the association remained undissolved.

In *Application of W. J. Warner*, 1962 A.M.C. 1036 (NYPC), the court held, in accordance with the general rule, that before a pilot association can validly fine or discipline a member, it must comply with the fundamental requirements of due process, to wit, notice, hearing and an opportunity to defend. The court found that the pilot had been unjustly removed from the assignment board for 7 days and that the fine imposed on him should be remitted because it was imposed without notification or a fair hearing, but upheld the intrinsic validity of the association by-law stating that a pilot could be fined for refusing an assignment and failing to request being taken off the assignment board in the event of illness.

It would appear that the development of the law in England with respect to the control exercised over domestic tribunals (voluntary associations) was somewhat tardy as compared to the development of that field of law in the United States. *Lee v. The Showmen's Guild*, [1952] 2 Q.B. 329, was a landmark decision in that direction.

In that case, the plaintiff had a recognized "pitch" at the Bradford Summer Fair. Another showman, William Shaw, claimed the pitch. The Trade Union committee decided in favour of Shaw. They

found the plaintiff had been guilty of unfair competition and fined him £100. He then brought an action against the Trade Union, claiming that the committee's decision was invalid. Lord Denning, in his crisp and precise style, said, in part:

> Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard . . . Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts from their jurisdiction . . . They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void. . . .
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> . . . This is a new question which is not to be solved by turning to the club cases. In the case of social clubs, the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club; and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties.
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> * * *
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> It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows . . . If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important than, his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.

> But the question still remains: to what extent will the courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal has observed the law. This includes the correct interpretation of the rules.
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> . . . The rules are the contract between the members. The committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, no matter how honest they may be. They have only such jurisdiction as the contract on its true interpretation confers on them, not what they think it confers. The scope of their jurisdiction is a matter for the courts, and not for the parties, let alone for one of them.

That decision was followed by *Bonsor v. Musicians' Union*, [1956] A.C. 104, in which the plaintiff was awarded damages for having been wrongfully expelled for being in arrears on his union dues. Subsequently, there followed *Nagle v. Feilden* [1966] 2 Q.B. 633 (wrongful exclusion by the Jockey Club of a woman applicant for a license); *Dickson v. Pharmaceutical Society* [1967] Ch. 708 (rule prohibiting chemists from selling certain materials in their shops held invalid); *Edwards v. SOGAT* [1971] Ch. 354 (exclusion from membership held unfair where the union by its own mistake failed to notify employers about the payment of union dues); and *Green v. AEU* [1971] 2 Q.B. 175 (refusal by committee to approve election of a shop steward on a misapprehension). And see *Enderby Town Football Club v. Football Association* [1971] 1 Ch. 591, involving the right of a member to be represented by legal counsel at a hearing before a domestic tribunal.[24]

Decisions of Collateral Nature

In *McNulty v. Higginbotham* (Ala.), 40 So2d 414, a pilot member brought suit against the association secretary-treasurer for an accounting of association funds. The court held that, in the absence of an allegation of fraud, suit would not lie.

Houston Pilots v. Goodwin (Tex.), 178 SW2d 308, involved a suit between two pilot associations, each of which claimed the right to pilot on certain pilotage grounds. The court held that the Galveston pilots did have exclusive rights to pilot on the specified grounds and that the Houston pilots had intentionally and wilfully trespassed on such rights. Not content with this judicial ruling, the Houston pilots brought a libel in Federal court seeking to establish their right to pilot on the disputed grounds. *Galveston—Houston Pilots' Case*, 1945 A.M.C. 5, 146 F2d 341 (CA-5). The Federal court, principally on the grounds of the state court decision being *res judicata*, denied relief.

Citizens' Bank of Houston v. O'Leary (Tex.), 167 SW2d 719, involved a contest between two parties claiming a lien against a pilot's certificate, having a fixed value of $3,000 payable by the association to the executor of a deceased member. A bank held the certificate as collateral security for a loan made to the pilot, and the pilot's sister held a chattel mortgage on it also but had failed to perfect her recordation of the mortgage. The court held that the bank's lien was superior to that of the deceased pilot's sister.

Taxes

A pilot association doing no business except as agent for its individual members, owning no property and having no income as an entity, is not required to pay income taxes as an association, and if, by mistake, it previously filed an income tax return, an estoppel does not result thereby. *Mobile v. Commissioner*, 1938 A.M.C. 1052, 97 F2d 695 (CA-5).

In *Seeth v. Joseph*, 1950 A.M.C. 1723 (NYAD), the court held that the City of New York could not assess and collect a gross receipts tax on business upon the earnings of a Sandy Hook pilot whose work related to interstate commerce within the meaning of the Commerce Clause.

Penalties and Offenses

For the violation of a statute or lawful rule and regulation, there is usually exacted either a penalty, or the act or omission is deemed a criminal offense. Where recovery for the doing or failure to do a certain act runs in favor of someone other than the state, or where the same is made subject to forfeiture only, it is usually denominated a penalty. On the other hand, where the doing or the failure to do

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24 I am greatly indebted to Lord Denning for calling attention to the foregoing cases in his delightful and illuminating book, *The Discipline of Law*, London, Butterworth's, 1979. I am emboldened to make this laudatory comment as it is most unlikely that I shall ever have to appear before his Court and therefore cannot be accused of attempting to curry favor with the Court.

some act is punishable by fine or imprisonment or both, and is made the subject of an information, indictment or formal disciplinary charges (in the case of Coast Guard violations), it is deemed an offense.

Penalties

In the following cases, penalties were imposed on pilots or would-be pilots for violations of statutes or regulations:

United States v. Sience, Fed Cas. #16239 (DC, Pa.) (captain began his voyage and continued it without having on board a licensed pilot, thereby arrogating to himself the responsibilities of a pilot; he was fined $100 and his vessel subjected to a penalty of $500 by suit in admiralty); *Carrie L. Taylor*, 106 Fed. 246 (CA-4) (one acting as a pilot but not licensed as such subjected to a $40 fine and forfeiture of pay received, for the use of the pilot commissioners); *Commissioners of Pilots v. Pacific Mail S.S. Co.*, 52 N.Y. 609 (pilot commissioners recovered a judgment against the steamship company defendant pursuant to statute for employing a person not holding a license as a pilot and for piloting a vessel to sea without a pilot); *Cash v. Auditors of Clark County*, 7 Ind. 227 (one piloting a boat over the falls without having a license as a pilot was forced to pay the penalty prescribed by statute, notwithstanding there was a licensed navigator aboard who merely acted as a steersman); *U.S. v. Greenman*, 37 Fed. 64 (DC,Conn.) (pilot violated the overtaking rule by endeavoring to pass a vessel at an improper time and in improper circumstances).

In 1969, in *Dewey Soriano—Pilot License*, 1969 A.M.C. 2141 (USCG), a Coast Guard examiner handed down a decision involving a state pilot's license which could have had far-reaching implications. That proceeding involved charges of negligence against a pilot arising out of a collision involving a vessel of foreign registry he was piloting under the authority of his state license. The hearings examiner found the respondent pilot guilty of fault in a number of respects. The critical issue in the proceeding was whether or not the U.S. Coast Guard could take disciplinary action against the Federal license of the pilot for negligence or fault of the pilot while piloting a foreign registered vessel under his state license. Notwithstanding a prior decision to the contrary by another hearings examiner involving an earlier proceeding in which the same pilot was charged (see

1965 A.M.C. 391), the hearings examiner held that the Coast Guard did have jurisdiction to discipline the pilot in such circumstances and suspended his Federal license for a period of twelve months. Among other conclusions, the hearings examiner stated:

(1) To hold otherwise would disregard the mandate of Congress to safeguard life and property at sea, including protection of foreign flag vessels transiting United States waters;

(2) The controlling statute was 46 U.S.C.A. 214 (quoted *supra*, "Licensing of Pilots");

(3) The Washington State Pilotage Act requires a Federal license as a condition precedent to issuing a state license;

(4) Consequently, the pilot was acting under authority of his Federal license and endorsement thereon at the time he was piloting the vessel.

The examiner stated in part:

> . . . Without this Federal license the respondent could not serve on any vessel in waters of the Puget Sound in capacity of pilot. The Coast Guard is not bound, nor required, to recognize the primacy of State authority and jurisdiction over a State Pilot on a foreign vessel, even if it may have done so in the past.

The examiner summarily dismissed the contention that he was bound by a prior decision by another hearings examiner, stating: "An examiner may be guided by another examiner's decision but that is the extent of its authority."[25]

In the First Edition of this text it was stated:

"The soundness of the examiner's decision is seriously doubted in the light of the historical development of state pilotage laws and the present state of the Federal pilotage statutes. For example, 46 U.S.C.A. 211 makes it perfectly clear that until further provision is made by Congress, all pilots in bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilot may be or with such laws as the states may respectively enact for that purpose. And 46 U.S.C.A. 215 concludes with this proviso:

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25 Counsel for the pilot, Jacob Mikkelborg of Seattle, Washington, advised at the time that the decision was being appealed to the Commandant of the Coast Guard and that it was probable that it would be appealed to the courts. And that is what happened.

> . . . Nothing in Title 52 of the Revised Statutes shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situated upon the waters of such State.

"(46 U.S.C.A 214, relied upon by the examiner as authority for the suspension of the pilot's license, was, of course, enacted as a part of Title 52 of the Revised Statutes.)

"The thrust of the examiner's decision seems to be based upon 'bootstrap' reasoning; i.e., alleged acts of negligence while piloting under the authority of his state license were utilized as a basis for a finding under 46 U.S.C.A. 214 that it constituted satisfactory evidence 'of negligence, unskillfulness, inattention to the duties of his station' as respects his Federal license although he was not in the least performing his services under such Federal license. As such, it partakes of 'guilt by association—once removed'."

The Commandant did in fact sustain the examiner's conclusions, and on appeal to the District Court, Western District of Washington (1972 A.M.C. 1767) the decision was again affirmed. However, the Ninth Circuit (1974 A.M.C. 283, 494 F2d 681) reversed, holding squarely that the pilot holding both licenses, while piloting a foreign flag vessel in the state waters of Puget Sound, was acting under his state license only and was not subject to disciplinary action or suspension of his Federal license by the Coast Guard.

In *York v. Board of Port Wardens,* 1976 A.M.C. 166 (St,Fla.), the state board was held to have the authority to revoke an apprentice pilot's license for gross misconduct, noting that the statute authorizing the Board to suspend and/or revoke a pilot's license necessarily embraced the power to revoke an apprentice pilot's license and that it would be incongruous not to do so.

In *Kennedy v. Board of Commissioners,* 1973 A.M.C. 1166 (NYAD), where a New York statute required the state board to grant a license to all Federal pilots who had been "actively engaged, as a regular occupation" in piloting vessels through specified state waters, the state board had no discretion to deny licenses to qualified persons because they had made only a certain number of trips or derived less than a certain percentage of their income from pilotage in such waters.

In *Ohrn v. R.I. Pilotage Commission,* 1975 A.M.C. 327 (St.,R.I.), a Rhode Island requirement existed to the effect that applicants for a Rhode Island pilot's license must have resided in Rhode Island for at least five years immediately preceding the application. The plaintiff applicant, a resident of neighboring Massachusetts, was fully qualified, had passed all required tests and had in fact been navigating and piloting vessels in Rhode Island for eight years under his Federal Coast Guard license. The court held the requirement unconstitutional as a violation of the equal protection clause of the 14th Amendment, noting that there was absolutely no relationship between residency in Rhode Island and a person's knowledge of Rhode Island waters or his competency to pilot on those waters.

In the following cases, although recognizing the propriety of the imposition of a penalty, the courts held that penalties were not enforceable.

People v. Deming (N.Y.), 13 How. Pr. 441 (statute provided for imposition of penalty for piloting without a license by a suit by the "master warden"; the suit was not prosecuted in the name of the "master warden"); *Hunt v. Cash* (Mass.), 14 Pick. 135 (statute imposed a penalty for piloting a vessel into Boston harbor without a license; court held the statute did not apply to a British vessel by reason of a treaty between the United States and Great Britain); *Ayers v. Knox,* 7 Mass. 306 (statute assessing a penalty for piloting without a license held not applicable to a vessel of war of the United States). See also, *Commonwealth v. Kemp* (Mass.), 150 N.E. 172.

In *Lister v. Warne, Lister v. Abson* (1935) 53 Ll.L.Rep. 96 D.C., a company purchased a steamship for scrap and had it towed from Norway to the River Tees. Abson, a master mariner and a director of the company, was in charge of the vessel as it entered the Tees. While within the Tees Pilotage district, a licensed pilot offered his services which were refused. Warne then gave orders to the tugs although he was not a licensed pilot or the master or member of the crew. The defense was that neither of them received any pay for carrying out the functions complained of. Both were convicted, Warne on the basis of a prima facie case having been proved and Abson because the Act did not imply that remuneration had to be paid when one is "employed."

In *Smith v. Cocking* [1959] 1 Ll.L.Rep. 88, D.C., Cocking (who was not a licensed pilot) was convicted of having piloted a vessel

after a licensed pilot had offered to do so and was refused by the master.

See, also, *Phillips v. Born* (1905) 93 L.T. 634, 10 Asp. M.L.C. 131, D.C. (master convicted for refusal to take a pilot in a compulsory district); *Turner v. Peat* (1888) 53 J.P. 230, D.C. (Third mate of a vessel convicted for acting as a pilot after a duly licensed pilot had offered to take charge); *Stafford v. Dyer* [1895] Q.B. 566, 7 Asp. M.L.C. 568; *Beilby v. Shepherd* (1848) 18 L.J. Ex. 73; *Buck v. Tyrrel* (1922) 10 Ll.L.Rep. 74, D.C.; *Acton v. Walden* (1862) 20 J.P. 166; *Babbs v. Press* [1971], *supra;* and *McMillan v. Crouch* [1972], *supra.*

Offenses

In the following cases, convictions were sustained by the courts:

Leech v. Louisiana, 214 U.S. 175, 53 L.ed. 956, 290 Sup. Crt. 552 (defendant indicted for piloting a foreign vessel from the Gulf of Mexico to New Orleans without a license issued by the State of Louisiana. Defendant's defense was the Federal statute authorizing the employment of a pilot licensed by either of two states to pilot vessels upon waters which constitute the boundaries between two such states. 46 U.S.C.A. 212. The court sustained the conviction on the grounds that New Orleans, although situated upon the Mississippi River, was not situated on waters which constituted the boundary between two states); *The Glenearne,* 7 Fed. 604 (DC, Ore., 1881) (same ruling as respects pilotage on the Columbia and Willamatte Rivers); *Commonwealth v. Sheriff* (Pa.), 13 Phila. 446 (jury's verdict finding defendant guilty of piloting a vessel on Delaware Bay sustained); *People v. Sperry* (N.Y.), 50 Barb 170 (defendant convicted of misdemeanor in permitting the towing of a vessel without a licensed pilot); *State v. Ames,* 47 Wash. 328, 92 Pac. 137 (defendant convicted of piloting without a license although the legislature repealed the statute after the appeal was taken); *Dorgan v. State,* 29 Ala. App. 362, 196 So. 160 (conviction sustained for piloting without a license); *U.S. v. Vogt,* 230 F.Supp. 607 (D,La.) (indictment alleged that defendant, as pilot, by his misconduct, negligence and inattention to duty navigated a vessel so as to cause loss of life; indictment upheld and motion to dismiss denied); *Commonwealth v. Ricketson* (Mass.), 6 Metc. 412 (defendant indicted for piloting a barge into harbor without a license; cause remanded on other

grounds); *Commonwealth v. Fitzpatrick* (Pa.), 15 Penn. Co. 154 (defendant found guilty of signing a receipt for pilotage fees which he did not in fact receive); *State v. Ring,* 122 Or. 646, 259 Pac. 760 (defendant had a Federal license but no state license; convicted of piloting a foreign vessel sailing under register).

Section 46 of the Pilotage Act, 1913, classifies certain acts committed by pilots as being "misdemeanors." There appears to have been no cases under this section, but cases under the Merchant Shipping Act, Section 220 may be persuasive as the two sections are phrased in identical terms although the latter relates only to masters, seamen and apprentices. See, *R. Gardner* (1859) F. & F. 699 and *Deacon v. Evans* [1911] 1 K.B. 571, 80 L.J.K.B. 385, 11 Asp. M.L.C. 550, D.C.

In the following cases, prosecutions for alleged violations failed.

State v. Turner, 34 Or. 173, 55 Pac. 92 (person navigating a vessel by towing it alongside held not a "pilot" in the definition of the term [as he was not aboard the vessel being "piloted"] and conviction reversed); *Bloom v. State,* 57 Miss. 782 (statute required all pilots bringing vessels into port to display flag at half-mast and keep it there until visited by a quarantine physician; person indicted was not a "pilot" and, therefore, the statute did not apply); *State v. Penny,* 19 S.C. Rep. 218 (indictment brought in wrong court).

In connection with offenses, attention is directed to *Gulf Oil v. Kate Malloy,* 1968 A.M.C. 1056, 291 F.Supp. 816 (ED, La.), holding that the master/pilot of a tug who pled the Fifth Amendment is entitled to refuse to answer questions at a deposition regarding a collision, both as to the facts of the collision and as to his background, for the reason that his answers might incriminate him under Sections (l) and (m) of the Motorboat Act (46 U.S.C.A. 526).

Pilot Vessels

Attention is directed to Section 17(d) of the Pilotage Act, 1913, which authorizes a pilotage authority to make by-laws for, *inter alia,* "the approval, licensing, and working of pilot boats in the district, and for the establishment and regulation of pilot boat companies."

In the United States it is common for the pilots' associations to own their own pilot vessels. Indeed, it is difficult to conceive how

pilotage could be carried on without means of boarding and unboarding the vessels served. Because the capital requirements for construction and maintenance of such vessels are so great, an individual pilot would find it difficult if not impossible to provide such facilities and, therefore, pilotage is effectively (and as a practical matter) restricted to members of pilot associations.

Cases have arisen involving pilot vessels. In *United N.Y. Sandy Hook Pilots Ass'n. v. Stans,* 1972 A.M.C. 2265 (EDNY), it was held that pilot vessels do not qualify for capital construction tax benefits under the 1970 Merchant Marine Act since they are not operating in "foreign trade" even though they service ships engaged in that trade. In *Bailey v. Pilots' Association,* 1976 A.M.C. 1047, 406 F.Supp. 1302 (ED,Pa.), an apprentice pilot, who was paid $5 per month for service abourd a pilot boat, was held to be an employee entitled to receive minimum wages prescribed by the Fair Labor Standards Act, but as he was employed as a "seaman" he was not entitled to the Act's overtime pay requirements. See, also, *Spears v. St. John Pilot Commissioners* (1910) 39 N.B.R. 495 (C.A.,Can.), involving the term "suitable pilot boat."

See, also, *Portland Steamship Operators Association v. Coos Bay Pilots' Association* (1979), *supra,* holding that the outside income derived by the pilots' association from the operation of tugboats (also used as pilots' boats) was irrelevant in the setting of pilotage fees by the Board of Pilot Commissioners.

CHAPTER XII
SALVAGE

As Brady observes, salvage of vessels may be generally classified in three categories: strandings, sinkings, and rescue (towing).[1] Norris, in his excellent text *The Law of Salvage,* refers to the last category as "salvage towage." Either term seems appropriate.

Whatever the category may be, it is almost certain that the salvage operation will be performed by a tug. Although occasionally other types of vessels may participate in, or even wholly perform, a salvage operation, it is safe to estimate that 95% of all salvage operations are performed by tugs, or by tugs in conjunction with other special service type accessorial vessels.

There have been several treatises on the subject of salvage generally, and many works on admiralty containing chapters on the subject. The leading American text on the subject in general is *The Law of Salvage,* Martin J. Norris. The standard English texts are Jones, *The Law of Salvage* and Kennedy, *The Law of Civil Salvage.* Chapters on the subject will also be found in Gilmore & Black: *The Law of Admiralty; Robinson on Admiralty* (Hornbook Series); and *Benedict on Admiralty* (6th ed.).

The scope of this chapter is limited to a brief discussion of the fundamentals of the law of salvage with particular emphasis where the cases have involved tugs, and a discussion in depth of the cases, both English and American, where salvage services have been rendered to tows by the towing tugs, and where salvage services have been rendered to vessels by pilots.

Fundamentals of Salvage—Elements and Definitions

The Supreme Court in the case of the *Blackwall,* 77 U.S. 1, 19 L.ed. 870 (1869) defined salvage as follows:

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1 Edward M. Brady, *Marine Salvage Operations,* Cornell Maritime Press, 1960, p. 1. Mr. Brady's text is an indispensable guide to the practical aspects of salvage operations.

In *Standard Navigation v. K.Z. Michalos*, 1981 A.M.C. 748 (SD,Tex), it was held that a time charterer, who was contractually obligated to pay hire even though the vessel was out of service during collision repairs, was subrogated to the shipowner's claim against the colliding vessel for lost earnings; the *Robins Drydock* doctrine does not preclude application of equitable subrogation principles.

Page 986. Under "Breach by Either Owner or Charterer" add:

See cases discussed, *infra*, under "Arbitration."

Page 998-1000. Under "Arbitration" add:

A party may be bound to arbitrate even though it has not signed the agreement.[9] Thus, it was an error for the district court not to order a trial as to whether a contract signatory's corporate affiliates and subsidiaries were bound by an arbitration clause, *McAllister Bros. v. A. & S.*, 621 F2d 519, 1980 A.M.C. 2050 (2d Cir.). Thus, where a tug services contract provided for arbitration of any disagreement as to the "adequacy" of the tug company's services, arbitration was correctly required even though one party claimed that the contract had been "abandoned" before its expiration date, *McAllister, supra*.

Where a charter party guarantee is silent as to how disputes concerning the guarantor's liability are to be resolved, the guarantor is not bound by the charter arbitration clause, *Cordoba Shipping v. Maro Shipping*, 494 F.Supp. 183, 1980 A.M.C. 1945 (D,Conn).

An arbitration panel exceeds its powers when it awards damages for breach of a time charter of a tug on an issue not submitted by the claiming party. The panel also acts improperly in telephoning the shipowner's counsel to verify a fact without advising the charterer's attorney, *Totem Marine Tug & Barge v. North American Towing*, 1980 A.M.C. 1961 (5th Cir.).

A claim for negligent repair and reinstallation of a vessel's engine, based on a written work order, sounds in contract as well as in tort and is subject to arbitration under the "any disputes" clause in the work order, *Andrew Martin v. Stork-Werkspoor*, 480 F.Supp. 1270, 1980 A.M.C. 2459 (ED,La).

The risk of having to arbitrate in two different forums is something which should be foreseen. Thus, where a vessel was hired under time charter containing a London arbitration clause, and the charterer subsequently entered into voyage charters providing for

9. Subject to the qualification that the face of the relevant instrument must give notice of any arbitration provision. See *Maru Shipping v. Burmeister*, 1980 A.M.C. 2186 (SDNY) (arbitration clause contained on reverse side of manufacturer's form, acknowledging receipt of an order for parts).

arbitration in New York, the charterer was required to arbitrate in both forums, *Seri Agriculture v. Pacific Importer*, 1981 A.M.C. 253 (SDNY).

Conflicting charter party clauses must be construed to give effect to both wherever possible, *Red. Kungsoil - Perusahaan*, 1983 A.M.C. 1441 (Arb., N.Y.).

Where a party raises a genuine issue of fact as to whether it is bound by a charter party arbitration clause, it is error to compel arbitration without first conducting a summary trial of the arbitrability issue as required by Section 4 of the Federal Arbitration Act, *Interbras Cayman v. Orient Victory*, 663 F2d 4, 1982 A.M.C. 737 (2d Cir.).

Attention is specifically directed to the following cases: *Texaco v. American Trading*, 644 F2d 1152, 1982 A.M.C. 191 (5th Cir.) (time charterer's tort action against owner of chartered vessel for collision damage to charterer's dock is not a dispute "arising out of the charter" subject to the charter party arbitration clause); *Prudential Lines v. Exxon*, 704 F2d 59, 1983 A.M.C. 1686 (2d Cir.) (party resisting arbitration has the burden of proving that the disputed issue arises out of a "collateral" agreement which is not subject to arbitration, as opposed to a subissue arising out of and arbitrable under the main agreement); *Bangladesh Agricultural v. Transcontinental Imex*, 1983 A.M.C. 1970 (SDNY) (a cargo plaintiff, suing a P & I insurer under the Florida direct action statute, is not bound by an arbitration provision in the insuring agreement to which it neither expressly nor impliedly consented); *Lubrizol v. Stolt Argobay*, 562 F.Supp. 565, 1983 A.M.C. 2488 (SDNY) (even though earlier appointed arbitrators had previously decided one dispute arising out of a particular voyage, a second dispute can be ordered arbitrated by a newly appointed panel where the dispute concerns the same events but involves significantly different issues); *Anthony Shipping v. Hugo Neu*, 482 F.Supp. 965, 1980 A.M.C. 1477 (SDNY) (an award may not be set aside as in "manifest disregard of law" merely because the three arbitrators denied a shipowner's claim against a charterer on differing grounds); *Albers v. Antone F.*, 487 F.Supp. 37, 1980 A.M.C. 2446 (WD,Wash) (London arbitration provision in a salvage contract executed on behalf of the salved barge's then owner does not bind the barge's subsequent purchaser); *Amoco Transportation Co. Lim. Procs.*, 659 F2d 2407, 1981 A.M.C. 2407 (7th Cir.) (shipowner's tort action against salving tug, asserting claims for misrepresentation and breach of duty before Lloyd's Open Form Salvage agreement was entered into, is subject to arbitration in London under the agreement's arbitration clause). For other pertinent decisions, see

American Maritime Cases, Twelfth 5-Year Digest under digest headnote, "Arbitration."

It should again be emphasized that there is no impediment to attachment of funds of an arbitrating party pending arbitration. The practice of attaching funds in order to secure payment of an anticipated arbitration award is a recognized one in admiralty: *Apex Oil v. Hector Maritime*, 659 F2d 1057, 1981 A.M.C. 2972 (2d Cir.); *Filia Compania Naviera v. Petroship, S.A.*, 1982 A.M.C. 1217 (SDNY).

The circuits appear to be divided as to whether or not a stay of an action pending arbitration is appealable. Compare *Rhone Mediterraniee Compagna v. Lauro*, 712 F2d 50 (3d Cir., 1983), with *Texaco v. American Trading*, 644 F2d 1152, 1982 A.M.C. 191 (5th Cir.). As to judgments dismissing writs of attachment, vessel arrests and garnishments conditioned upon submission to arbitration in another jurisdiction, and the posting of adequate security see *Constructora Subacuatica Diavez v. M/V Hiryu*, 718 F2d 690 (5th Cir., 1983).

CHAPTER XI

Pilotage

In general, it should be observed that in England the Pilotage Act 1983 consolidates the Pilotage Act 1913 and 1936 and certain provisions of the Merchant Shipping Act 1979. The Act went into force as of August 8, 1983.

Page 1011. Add to footnote 5 the following:

Quebec North Shore Paper and *McNamara Construction*, *supra*, imposed a restriction or limitation on Federal court jurisdiction that there must be "applicable and existing Federal law, whether under statute or regulation or common law." While this general limitation has not been challenged, succeeding decisions have interpreted existing Federal "maritime" law so as to extend and clarify the types of maritime claims which can be entertained in the Federal courts, including the following: *B.C. Marine Shipbuilders Ltd. v. F.M. Yorke & Son Ltd and Wire Rope Industries of Canada*, (1981) N.R. 288 (S.C.) (claim against repairer of a towing cable); *Zavarovalna Skupnost Triglav v. Terrasses Jewellers, Inc.*, [1983] I.L.R. 1-1627 (S.C.) (marine insurance); *Tropwood A.G. v. Sivaco Wire & Nail Co.*, (1980) 99 D.L.R. (3d) 235 (S.C.) (claim under a bill of lading for damage to cargo discharged in Canada—Canadian Carriage of Goods by Water Act only applies to bills of lading for shipments from Canada); *United Nations v. Atlantic Seaways Corp.*, (1980) 99 D.L.R. (3d) 609 (F.C.A.)

(claim arising out of a foreign contract for the carriage of goods between the U.S. and the Persian Gulf where all parties were located outside Canada); *Skaarup Shipping Corp. v. Hawker Industries Ltd.*, (1980) 111 D.L.R. (3d) 343 (F.C.A.) (claim for damages for breach contract to clean up oil escaping from a ship); *Antares Shipping Co. v. The Capricorn*, (1980) 1 S.C.R. 553, 111 D.L.R. (3d) 289 (S.C. (action brought to set aside a sale of the defendant ship); *The Queen v. St. John Shipbuilding & Dry Dock Ltd. et al*, (1982) 126 D.L.R. (3d) 353 (F.C.A.) (claim for damage to a floating crane).

Litigants in Canada have been plagued with uncertainty as to the concurrent jurisdiction of the Provincial courts in admiralty, not to mention the additional costs and expenses incurred when proceedings are necessary in two courts because an action *in rem* brought in the Federal courts cannot deal with all the claims between the parties. To date, legislation (including necessary amendments to the rules of the Provincial courts) has not been enacted to enable any of the Provincial courts to exercise concurrent jurisdiction by *in rem* proceedings.

See, also, with respect to admiralty jurisdiction, *McAllister Towing & Salvage Ltd. v. Gen. Security Ins. Co.*, [1982] 2 F.C. 34 (F.C.A.); *Kuhr v. Friedrich Busse*, (1982) 134 D.L.R. (3d) 261, 1983 A.M.C. 563 (F.C., Can.); *Cull v. Rose*, (1982) 139 D.L.R. (3d) 559 (Nfld.Sup.Ct.); *Seafarers' Union of Canada and Crosbie Offshore Services Ltd.* (1982) 135 D.L.R. (3d) 485 (F.C.A.); *Miida Electronics Inc. v. Mitsui O.S.K. Lines*, (1981) 124 D.L.R. (3d) 33 (F.C.A.); *Nisshin Kisen Kaisha Ltd. v. C.N.*, [1981] 2 F.C. 705 (F.C.A.); *Elesguro Inc. v. Ssangyong Shipping Co. Ltd.*, [1981] 2 F.C. 326 (F.C.) (jurisdiction refused because there was no jurisdiction *ratione personae* although there was jurisdiction over the *ratione materiae* . . . a breach of a charter party).

Page 1011. Under "Licensing of Pilots" add:

Recent cases have thrown additional light on regulation of pilots and the connection between state and Federal control over pilots. For example, in *Davis v. TMT Jacksonville*, 484 F.Supp. 52, 1980 A.M.C. 2943 (MD,Fla), it was held that state pilotage regulations are preempted by federal statutes and do not apply to a barge properly enrolled with the Coast Guard even though it was not "steam propelled." The court also held that the definition of "steam vessel" in 46 U.S.C. 361 does not apply to 46 U.S.C. secs. 215 and 364.

In *Jackson v. Moran Maritime*, 1980 A.M.C. 2134 (SD,Fla), the court held that a flotilla consisting of a tug and tow is considered as a unit; therefore, an unmanned enrolled tank barge in tow of a tug under the command of a federal pilot is a "coastwise seagoing vessel" under 46 U.S.C. 215 and exempt from state pilotage requirements.

In *Moran Maritime v. U.S.C.G.*, 1981 A.M.C. 2778 (D,DC), it was held that despite the Coast Guard's failure to enforce the federal pilotage statute (46 U.S.C. 364) requiring a federally licensed pilot on tugs towing barges of more than 1,000 gross tons which transport oil or hazardous substances in inland waters, the Coast Guard had never varied in its interpretation of its regulations to that effect. Hence, the Administrative Procedures Act (28 U.S.C. 553) did not require the Coast Guard to give notice and solicit comments before deciding to enforce the statutory requirement.

The Department of Transportation of the United States has ruled that the Coast Guard has no jurisdiction to proceed against the Coast Guard license of a pilot acting pursuant to state authority even though the state's authority to regulate pilotage had been delegated to a port district which would only issue a pilot commission to holders of a Coast Guard license. *U.S.C.G. v. Pierce*, 1980 A.M.C. 2014 (DOT). By a parody of reasoning, in *Hayes v. Cluff*, 1982 A.M.C. 2215 (NTSB), it was held that the Chesapeake and Delaware regulations do not preempt state pilotage jurisdiction over pilots aboard foreign vessels transiting the Canal and, therefore, the Coast Guard lacks jurisdiction to suspend a pilot's *federal* license because of the vessel's allision with a bridge.

In *Hayes v. Jahn*, 1982 A.M.C. 1603 (NTSB), it was held that in a proceeding against a pilot's license for collision with a stationary aid to navigation, the Coast Guard could not rely on any presumption of negligence once the pilot adduced evidence that there could have been some cause other than negligence.

A regulation of a state pilotage board requiring mandatory retirement of pilots at age 65, even though licenses issued by the federal government and other states contain no such age restrictions, does not violate a pilot's rights under either the equal protection or substantive due process requirements of the U.S. Constitution to continue the practice of his profession, *MacDonald v. Board of Commissioners*, 523 F.Supp. 949, 1982 A.M.C. 1147 (SDNY).

In *Baggett v. Department of Professional Regulation*, 717 F2d 521 (11th Cir.), a harbor pilot instituted suit in federal court requesting injunctive relief against an administrative prosecution by the state. It was held that *Younger* abstention was inappropriate where it was clear that under federal statutes the state was without authority to regulate the pilot's conduct.

In *Barker v. Pacific Pilotage Authority*, [1982] 42 N.R. 598 (F.C.A., Can.), a pilot was suspended because the ship he was piloting struck a rock or some other object while the ship was proceeding at an excessive speed and without regard to the ship's heavy trim. The

suspension was confirmed by the Minister of Transport who referred in his report to a similar accident of the same pilot in the same waters. On appeal, the Federal Court of Appeal set the decision aside and referred it back to the Minister for reconsideration, principally because the previous similar accident was deemed irrelevant as to the pilot's negligence on the particular occasion in question.

Page 1016. Note that Public Law 98-89, approved on August 26, 1983, substantially recodified the majority of the maritime safety and seamen protection laws administered by the Coast Guard, including the statutes referred to on pages 1016 through 1020 of the principal text. Refer to the discussion, *supra*, under Chapter VII, *Governmental Regulation*, this Supplement.

Page 1022. Under "Duties and Responsibilities of Pilots" add:

See *Transorient Navigation v. Southwind*, 525 F.Supp. 373, 1982 A.M.C. 1085 (ED,La) (inbound pilot should have been aware of potential danger of sheering caused by rapid narrowing of the channel beyond a government-excavated "borrow pit"; his negligence was sole cause of collision and not the government's excavation or maintenance of the channel).

Page 1027. Under "Master's Duty to Intervene" add:

See discussion in *Societa v. Los Angeles*, 1982 A.M.C. 2281 (Cal. Sup.Ct., 1982).

Page 1031. Under "Voluntary Versus Compulsory Pilotage" add:

See discussion in *Societa v. Los Angeles*, 1982 A.M.C. 2281 (Cal. Sup.Ct., 1982); *Olympia Sauna Compania Naviera, S.A. v. U.S. et al*, Civil No. 80-699LE, D.,Ore., June 8, 1983 and November 4, 1983 (not yet reported); *Texaco Trinidad v. Afran Transport*, 538 F.Supp. 1083, 1983 A.M.C. 1582 (ED,Pa); *Kane v. Hawaiian Independent Refinery*, 690 F2d 722 (9th Cir.); *Kitanihon-Oi v. General Construction*, 678 F2d 109, 1982 A.M.C. 2275 (9th Cir.).

Page 1034-1039. Under "Recovery for Negligence of the Pilot" add:

During the 1983 Legislative Session in Oregon, the Oregon pilots, with the aid and support of the local steamship operators' association, succeeded in persuading the Legislature to amend the Oregon Pilotage Act. Essentially, the amendments embraced: (1) reinstituting noncompulsory pilotage in Oregon; (2) strengthening and clarifying the obligation of vessel owners to indemnify and hold harmless pilots for their negligence; and (3) placing a limit on a pilot's liability of $250 per incident. Upon a claim being made against him for damages for his negligence, a pilot may, by posting a bond or cash for $250 with the clerk of the court in which the claim is

brought, limit his liability to that amount. In this respect, the $250 bond or cash provision does not differ from its counterpart in the Pilotage Act of 1913 in Great Britain.

Meanwhile, in *Olympia Sauna Compania Naviera, S.A. v. U.S. et al, supra*, the existing Oregon dual-rate pilotage tariff was upheld and construed as part of the contract between the shipowner and the pilot. Although pilotage in Oregon was (at that time) compulsory, the terms by which the pilot became the servant of the vessel and its owners were held not to be compulsory. Consequently, the court held, the shipowner consented voluntarily to a contract which made it responsible for damages, if any, that resulted from the pilot's negligence.

The facts in *Olympia Sauna* were unusual in that the only damage sustained was by the vessel itself whose bottom was ripped out when the vessel went on a rocky reef. The pilot blamed the stranding on a buoy which had been misplaced by the Coast Guard. The misplacement of the buoy had been brought to the attention of some of the members of the pilots' association but not to the individual pilot on board the vessel as he had been on vacation just prior to undertaking that particular pilotage movement. The vessel owners brought suit against the U.S. government which, in turn, impleaded the pilot and each individual member of the pilot association. The court exonerated the individual members of the pilot association. As to the pilot on duty at the time of the casualty, the court held that if the pilot and the United States were found negligent at the trial on the merits, their damages consequently would be apportioned with the United States being liable only for its own negligence. However, as the pilotage clause insulated the pilot from personal liability, that portion of his liability, if any, would have to be borne by the vessel owner as his "employer," and he was entitled to indemnity from the vessel owner.

Kane v. Hawaiian Independent Refinery, supra, involved a mooring master employed on a salary by the refinery. The refinery insisted, as a condition of doing business with it, that its mooring master be used to dock and undock vessels using its pier. Notwithstanding that the refinery compelled the use of its mooring master; that the vessel did not request the services of the mooring master; that the pilotage clause and general instructions were not given to the vessel until the mooring master boarded the vessel; and that there were no prior dealings between the parties since the vessel's captain spoke little English, the validity of the pilotage clause was upheld.

By contrast, however, in *Texaco Trinidad v. Afran Transport*, 538 F.Supp. 1083, 1983 A.M.C. 1582 (ED,Pa), involving substantially

similar facts, the court held that a pilot may be characterized as "compulsory" if required by a berth owner as a condition of discharging at the nominal employer's berth, even though his employment was not mandated by government statute or regulation. Consequently, the berth owner, as the nominal employer of the pilot, was held liable for the negligence of the pilot and the vessel compelled to use his services was exonerated.

Page 1039. Under "(B) Against the Vessel Owner, *In Personam*" add:

See *Societa v. Los Angeles*, 1982 A.M.C. 2281 (Cal.Sup.Ct., 1982), where it was held that harbor pilotage at Los Angeles is not "compulsory" even though local regulations required vessels to pay 75 percent of the applicable charges whether or not they elected to use the municipal pilots' services. It was also held that the pilot would be treated as the servant of both the municipality and the vessel owner for purposes of the *respondeat superior* doctrine; that although the California Tort Claims Act allows a public body to alter its liability by contract, the City had failed to prove that the shipowner had actual or constructive notice that the tariff provisions were intended to be incorporated in the implied oral contract arising out of the request for pilotage services; and that the City nonetheless had no obligation to indemnify the shipowner for navigational negligence of the non-compulsory municipal pilot.

And in *Kitanihon-Oi v. General Construction*, 678 F2d 109, 1982 A.M.C. 2275 (9th Cir.), the court held that the fact that the Port of Sacramento commissions harbor pilots and requires their use by its tariff does not mean that the Port owes shipowners any implied warranty of nonnegligent performance by pilots who are not employed or paid by it. As the court noted, shipowners are better able to protect themselves by insurance, citing this text.

Page 1040. Under "(C) Against the Vessel, *In Rem*" add:

The defense of compulsory pilotage, valid in the United States, has been abolished in England and Canada. See Sec. 15(1) of the Pilotage Act, 1913, in England as well as *Tower Field (Owners) v. Workington Harbour and Dock Board*, (1948) 81 L.L.L. Rep. 419, C.A., and *The Chyebassa*, (1919) P. 201. In Canada, see Sec. 31 of the Pilotage Act S.C. 1970-71-72 and *Maritime Telegraph and Telephone Co. Ltd v. The Dennurra*, 75 D.L.R. (3d) 766 (Can.).

Page 1043. Under "Liability of Port and Harbor Authorities, Canal Companies, and Municipalities Employing Pilots" add:

See *Societa v. Los Angeles, supra*, and *Kitanihon-Oi v. General Construction, supra*.

CHAPTER XII

Salvage

Page 1115. Under "Marine Peril" add:

Platora v. Unidentified Remains, 614 F2d 1051, 1981 A.M.C. 1097 (5th Cir.) (wreck of Spanish galleon, buried under sea bottom in Texas waters for over 400 years, was exposed to a "marine peril" from the action of the elements sufficient to justify an award for salvage expenses); *Heuer v. U.S.*, 525 F.Supp. 350, 1982 A.M.C. 847 (SDNY) (fact that sunken silver ingots might be stolen by treasure hunters constitutes a sufficient "peril" to make the ingots a fit subject for salvage); *Markakis v. Volendam*, 486 F.Supp. 1103, 1980 A.M.C. 915 (SDNY) (passenger ship, adrift without power for 20 hours off the rocky north coast of Cuba, was "imperiled" so as to justify an award of salvage to master and crew of sister vessel which took aboard passengers and crew and towed the disabled ship away from the Cuban coast pending arrival of rescue tug (reviewing cases); *B.V. Bureau Wijsmuller v. U.S.*, 702 F2d 1471, 1983 A.M.C. 1471 (2d Cir.) (in professional salvor's action for an award for removing $6.5 million government-owned cargo from a stranded merchant vessel, court held that the vessel was in peril as it was stranded on a rocky ledge at the mercy of wind and water; the trial court correctly applied the proper six factors in arriving at a $500,000 award . . . reviewing cases); *Cobb Coin v. Unidentified Remains*, 525 F.Supp. 186, 1983 A.M.C. 966, 549 F.Supp. 540, 1983 A.M.C. 1018 (SD,Fla) (ancient shipwreck is subject to a "marine peril" through the action of the elements or of pirates which is sufficient to support an admiralty salvage claim).

By contrast, in *W.P.L. Services, Inc. v. Bisso*, 598 F2d 417, 1980 A.M.C. 2959 (5th Cir.), because the stranded vessel could have broken free without assistance, no marine peril was found. And, in *Containerschiffs v. Lloyd's*, 1981 A.M.C. 60 (SDNY), after a fire aboard a containership at sea had been extinguished, the vessel was taken in tow for six days by a sister ship under a "no cure, no pay" salvage agreement. It was held that the sister ship service constituted towage, not salvage, and only $120,000 of the $350,000 paid in settlement of the sister ship's claim was allowed in general average.

Page 1117. Under "Voluntary Service Not Owed As a Matter of Duty" add:

Isaacs v. Sun State, 1982 A.M.C. 111 (SD,Ga) (tug volunteering assistance to prevent sinking of a capsized trawler cannot be held liable for failing to perform services which she never undertook; i.e., no liability for failing to locate and remove persons trapped between the trawler's hull or to administer resuscitation treatment after their bodies were recovered); *Consolidated Towing v. Hannah*, 509 F.Supp. 1031, 1982 A.M.C. 354 (WD,Mo) (vessel owner need not compensate volunteer salvor who, despite the fact that his offer had been unequivocally rejected, proceeded with unsuccessful salvage efforts knowing that the owner had engaged another salvor).

Page 1119. Under "Municipal Firemen" add:

S.C. Loveland v. Arlington, 1982 A.M.C. 704 (WD,La) (municipal fire department held entitled to $50,000 award for sucessful salvage of foundering barge since it had no legal duty to render assistance. Also, court held that because a tug has an obligation to see to the safety of her tow, she is not entitled to a salvage award without proof that the peril from which the tow was saved was not caused by the tug's negligence and that the tug used extraordinary efforts in the rescue).

Page 1120. Under "Master and Crew" add:

In *Texaco Southampton v. Burley*, 1983 A.M.C. 524, [1983] 1 Lloyd's Rep. 94 (N.S.W. Ct. App., Aus.), which may well prove to be a landmark decision, a tanker found itself without power as a result of a switchboard fire and was drifting toward the shoreline about 3½ miles away. Following a request by the master, its agents requested a local tug company, sole supplier of tugs for the tanker owner, to render assistance. The tug company, in turn, requested another tug company to perform the service for it.

When the tug left port, all the plaintiffs (master, pilot, and crew) were aware that it was likely they would be required to tow the vessel into Sydney, Australia, harbor. Few had any real experience in towing a disabled vessel at sea and the services performed involved little more than the kind of work they customarily performed as members of a tug crew. They were paid generous wages and the tug company was amply compensated for the use of its tug.

The plaintiff crewmen contended that any services rendered to a vessel in danger, by whomsoever rendered, are by their nature salvage services and the fact that the services of the master and crew were rendered pursuant to their contract of emloyment did not deprive them of a salvage award since (a) they owed no duty to the salved vessel, and (b) a contract binding the tug which excluded a claim by it to a salvage award would not bar such a claim on the part of its crew, who did not assent to the contract. The owners contended that neither the tug nor its crew were volunteers because (a) the tug owner was bound by its contract to provide towing services and the plaintiffs were bound to it by their contracts of employment,

Alaska
Coastwise
Pilots
Assoc.

Alaska Coastwise Pilots' Association
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JUNEAU, ALASKA 99802
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Marine Pilotage Dispatch Service
Ketchikan Office
PHONE: (907) 225-7245
FAX: (907) 247-4568

April 13, 1992

Governor Walter J. Hickel
P.O. Box K
Juneau, Alaska 99811

HAND DELIVERED
COPY BY CERTIFIED MAIL

Re: Alaska Coastwise Pilots' Association
Our file no. 2102.3

Dear Governor Hickel:

Attached are copies of letters which have been circulated to all deck officers employed by the State of Alaska Marine Highway System. We believe these letters were written and circulated at the request of, and in combination with, your appointee to the State Marine Pilot Board, Dale O. Collins; the International Masters, Mates & Pilots' Union; and the Southeastern Alaska Pilots' Association ("SEAPA"), of which Collins is a member and past officer.

These letters seek to discourage Marine Highway System deck officers from working with ACPA and to prevent ACPA trainees from obtaining training trips on the state ferries necessary to qualify for their United States Coast Guard and State of Alaska licenses. Recent events confirm this intent with a vengeance.

This spring, Captain Kathleen Rathgeber began participating in the ACPA's training program for prospective deputy marine pilots. Captain Rathgeber has excellent credentials. She is a graduate of the U.S. Merchant Marine Academy at Kings Point, New York; is licensed as Master of Ocean Steam or Motor Vessels of Any Tons; and has served in all capacities up to staff captain of cruise ships.

Until this week, Captain Rathgeber was riding the State of Alaska, Marine Highway System's M/V TAKU as a pilot observer, in order to obtain the area exposure and recency trips necessary for her license. It was our understanding, based on assurances from Captain Kelly Mitchell of the Marine Highway System, that she was welcome to ride the M/V TAKU as part of her effort to obtain a pilot's license.

This changed when the attached letter from the IOMM&P was circulated last week to all deck officers employed by the State of Alaska's Marine Highway System. When the M/V TAKU docked in Ketchikan this week, this letter was delivered to the vessel's deck officers. Your appointee to the State Pilot Board, Dale O. Collins, then apparently met with the Captain of the M/V TAKU.

After meeting with your appointee, the Captain of the M/V TAKU advised Captain Rathgeber that he would no longer sign her trip logs or otherwise assist her in her efforts to obtain the training required for a state pilot's license. He advised Captain Rathgeber that all other deck officers employed by the State of Alaska's Marine Highway System would join in the boycott of her efforts to obtain this necessary training. At his suggestion, Captain Rathgeber left the M/V TAKU at Auke Bay.

It is our belief that the IOMM&P circulated the attached letter at the request of, in combination with, and in furtherance of certain illegal, monopolistic or tortious goals of Collins and SEAPA. The letter interferes in contractual relations between ACPA, its associated pilots, and its customers, and is the latest in a pattern of practice by the Union, Collins and SEAPA aimed at injuring our business efforts.

Now, as you can see from the second attached letter from the Captain of the M/V TAKU to the deck officers of the ferry system, the State of Alaska has become engaged in these efforts to injure, defame, and destroy our business. It is highly inappropriate for public employees, operating public facilities, and employed by a public agency to participate in these collusive actions.

The members of ACPA have built our business to what it is today by our own hard work and our steadfast dedication to the highest standards of our profession. To meet our high standards, and to obtain their licenses, ACPA pilot trainees need a full and fair opportunity to ride the ferries of the Alaska Marine Highway System.

If given the chance, Captain Kathleen Rathgeber will be a valuable addition to the marine pilot profession in Alaska. But Captain Rathgeber needs that chance, which you can provide by directing the Alaska Marine Highway System to open its bridges to all pilot trainees, without any form of discrimination.

We trust that you believe in private enterprise and, pursuant to our rights under Article I, Section 6 of the Alaska Constitution, we petition you to take all appropriate steps to immediately resolve this issue.

Respectfully,

Terry K. Bennett

Captain Terry K. Bennett
President
Alaska Coastwise Pilots' Association

cy: Burton Epstein, Esq.
General Counsel
International Masters, Mates & Pilots Union

Mr Bob Watt,
Chairman,
State Board of Marine Pilots

James R. Ayers
System Director
Captain Kelly Mitchell
Port Captain
Alaska Marine Highway System

Tuckerman Babcock
Director, Boards and Commissions
Office of the Governor

Charles E. Cole, Attorney General
Bruce M. Botelho, Deputy Attorney General
Gary I. Amendola and Jack B. McGee, Assistant
Attorneys General
Department of Law

Captain Carl Luck
Marine Pilot Coordinator
Department of Commerce and Economic Development

Honorable Virginia Collins
Honorable Rick Halford
Honorable Jim Duncan
Alaska State Senate

Honorable Dave Donley
Honorable Bill Hudson
Honorable Fran Ulmer
Alaska House of Representatives

MV TAKU
8 APRIL, 1992

MM & P MASTERS/MATES
ALASKA MARINE HIGHWAY

SHIPMATES:

THE TEMPERATURE RISES IN THE DIRTY LITTLE PILOT WAR OVER SOUTHEAST TURF. IT IS A DAMN SERIOUS BATTLE THAT ALREADY INVOLVES EVERY ONE OF US.

AFTER MEETING WITH T. BENNETT, M. SPENCE, AND D. COLLINS THIS PAST WEEK, I AM CONVINCED THAT OUR MARINE HIGHWAY JOBS ARE AT RISK. MOST (NOT JUST ONE) OF THE S.E.A. PILOTS ARE INCENSED ENOUGH TO RAID OUR POSITIONS SHOULD THEIR GROUP GO DOWN (TURPIN LOVES IT!). THEY HAVE GOOD REASON TO BE PASSIONATELY PISSED: THEIR UNION "BROTHERS" (OUR CO-WORKERS) HAVE HELPED STEAL THE SWEETEST CRUISE SHIP CONTRACT, WHILE ON "VACATION" FROM THESE JOBS AND SECURE UNDER OUR HEALTH AND WELFARE UMBRELLA. LIKE MOST MARRIAGES, THIS BREAK WITH THE S.E.A. PILOTS IS LARGELY THE RESULT OF MISUNDERSTANDING AND POOR COMMUNICATION.

DOUG, CHUCK, JOHN! SIT DOWN AND TALK TO DALE AND COMPANY. YOU WILL, EVENTUALLY--BETTER NOW BEFORE ANY MORE BLOOD FLOWS. SURRENDER YOUR EGOS AND DO WHAT YOU KNOW IS RIGHT BEFORE YOU FURTHER TEAR THESE MEMBERSHIPS APART. DO NOT MAKE THE MISTAKE OF UNDERESTIMATING THE THREAT TO THESE JOBS.

FOR MY PART, I REFUSE TO SIGN ANOTHER PILOTAGE TRIP UNTIL THE PILOT GROUPS ARE ONE. I ASK MY COLLEAGUES TO FOLLOW LYNESS' LEAD AND DO THE SAME. THE TAKU PILOT OBSERVER LEAVES THE SHIP IN AUK BAY THIS MORNING. GLAD, I BELIEVE, TO BE SPARED MORE GRIEF.

HERE'S TO SANITY NOW, NOT LATER!

VERY SERIOUSLY,

SHEP

K. SCHOEPPE

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS

PACIFIC MARITIME REGION

2819 First Avenue, #100 ★ Seattle, Washington 98121-1128 ★ Telephone: (206) 441-1070 ★ FAX: (206) 443-6758

March 31, 1992

TO: Deck Officers of the Alaska Marine Highway System

Dear Fellow Deck Officers,

I am writing to you regarding the piloting situation in Southeast Alaska. I am sure most of you are aware of the non-recognized pilotage group that has split away from the Southeast Alaska Pilotage Association, which has been recognized by the International Organization of Masters, Mates and Pilots since its inception. Three members of the Pacific Maritime Region employed by the Alaska Marine Highway System, as well as members of other membership groups, have agreed to perform pilotage services for this new split-off pilot group. I have also recently heard that a number of other Deck Officers of the Alaska Marine Highway System are considering working as pilots for this splinter group in the near future.

The International Organization of Masters, Mates and Pilots is very concerned that if this situation with the Pilots continues or worsens, it will have a tremendous repercussion on the jobs and working conditions of all Deck Officers employed by the Alaska Marine Highway System.

Your Union is asking for solidarity and the support of all Deck Officers regardless of membership group in order to help resolve this situation.

I am deeply concerned that any member continuing to work, or any other members accepting employment with this new splinter group, will cause a reaction against our jobs that we may not be able to stop. *

This Organization supports one Pilotage Group in Southeast Alaska under the umbrella and affiliation with the International Organization of Masters, Mates and Pilots and will continue efforts to bring the parties involved together in negotiations to resolve their problems.

Fraternally,

Dave A. Boyle

CAPTAIN DAVE A. BOYLE
Vice President
Pacific Maritime Region

DAB:s

cc: General Executive Board
Mr. Burton Epstein General Counsel

* CHARGES WILL BE FILED AGAINST MITS MMP MEMBERS WHO CONTINUE TO WORK FOR THE AK. COASTWISE PILOTS

Brd. of Marine Pilots Mtg. Minutes

4/20

Drue –

Interesting statement (and attachments) from George Pletnikoff of St. Paul Island re: recent request from Marine Pilots.

Bobby 4/20

Testimony Before the Alaska Board of Marine Pilots
April 1992

Good Afternoon, Mr. Chairman and members of the Board. Thank you for giving me the opportunity to address you. My name is George Pletnikoff. I am here representing the City of St. Paul, on the Pribilof Islands, where I was born and raised, and am currently working as the Assistant to the City Manager.

For those of you who may not be to familiar with the Pribilof Islands, I would like to give you a brief history of our people. We are descendants of the Aleut people who have lived and survived for almost 10,000 years on the Aleutian Chain. Just a little over two hundred years ago, we were brought to the Pribilofs by the Russians to harvest the rich fur seal resource, and had been doing that for the two super powers, Russia and the United States, until 1985 when the commercial harvest of these animals was stopped. During that period, we were not allowed a share in the profits which the super powers enjoyed, and in our case, which paid for the purchase of the entire State of Alaska. Since then, we have been allowed to harvest up to 1500 animals annually for subsistence purposes, which by the way, we have to weigh and justify annually to the United States Government, why we need that amount of fresh seal meat, and to prove that none of the seal meat is wasted. With the current population of 840 Aleuts on both St. George and St. Paul Islands, that works out to a little over 17 pounds per person per year of fresh meat. To add salt to the wound, we must destroy the pelts unless we are able to process them for use in culturally relevant crafts.

When our only source of livelihood was stopped virtually overnight, Congress adopted amendments to the Fur Seal Act of 1966 which said, quote:

> "...the United States shall assist the Islanders in creating a stable, self sufficient, enduring and diversified economy not dependent on sealing...".

With that, a new and bright hope emerged for our people. For the first time in our history on the Pribilofs we were heading towards "self-determination," or so we thought. The people gathered, debated, challenged one another, and finally settled on putting all available financial resources, (a process which essentially took a decade to accomplish,) into building a boat harbor. This, we thought, will offer us means to remain at home, be productive while providing for our families, and enter into the lucrative fishing industry. Little did we know that to make such a large transition would involve a generation or two of our young people changing their entire perspective and cultural relationships with the environment which we treasure. Having to compete so intensely with an industry which is already established, in an economy which is, at best, dependent upon the abundance of natural resources, or the lack thereof, and which is fast becoming so regulated even before we have a chance to enter the industry, has surely taken its toll on a once proud culture. The cost of making this transition will continue, I'm afraid, for several years to come.

It is no secret that we choose to live, as the memorandum of the Alaska Marine Pilots to the Board of April 1, 1992 states on page four and others;

> " where fogs are especially thick and prevalent...accompanying strong winds....where winds do not continue to blow from the same quarter...where after September 1, gales are frequent and **violent**, and blow from all directions...and are near the southern limits of the ice of the Bering Sea."

Page five of the memorandum continues to graphically describe our homeland:

> " Frequent windy periods are characteristic of the (St. Paul Island) area throughout the year. Frequent storms occur from October to April, and they are often accompanied by gale force winds to produce blizzard conditions."

And, to further defend their need to provide environmentally safe vessel exchanges of valuable cargo, the descriptions of how harsh the weather conditions are, continue. It makes one wonder, why we choose to live in such a terrible environment? The simple answer is, because it's our home.

Further, it is also no secret that the Pribilovians take a great deal of pride in our unique ecosystem. Day in and day out, on this foggy windy island, we were taught, and our children are taught even to this day, to cherish this environmental miracle, while others are reaping the rewards of the resources at the expense of the environment. We are the first to make the necessary sacrifices in our economy where it threatens our environment, and to regulate ourselves in order to cause the least possible damage to what we proudly call the Galapagos of the North. When, since the 1970's, we stood in the cold wind on the shores of St. Paul Island, subsistence hunting to care for our families, and there were 150 or more crabbers anchored off the island reaping the rewards of a rich king crab, and now tanner crab fishery, and we had and have no means to get a skiff even to jig for halibut, we calmly pointed out that the resource is being destroyed by overfishing, and no one paid attention. Currently we are organizing the indigenous peoples of the Bering Sea coast of both Alaska and Russia to begin to take a more active role in the use and management of the resources. We are putting up scarce amounts of monies funding scientific research because of our concerns about the environment and what is happening to it; declines in fish stocks, crab stocks, marine mammals and birds sadly, very little attention is given our concern. We know all too well the dangers which development sometimes brings at the expense of the environment. When all valuable resources are gone, we the Pribilovians will remain trying to survive in our homeland. Others, well, they will move on. So when the State, and through its legislative powers looks into ways of trying to protect the environment, and now through the mandate that there must be compulsory pilotage three miles off the shores of the five islands which make up the Pribilof Islands, to further this worthy cause, we are the first to reply, "wonderful." However, in this particular case, something more than just wanting to protect the environment is being promoted under the guise of this noble cause. Jobs and economics.

Alaska statue 08.62.040(a) (1) provides that the Board shall:

> "provide for the maintenance of efficient and competent pilotage services on the inland and coastal water of and adjacent to the state to assure the protection of shipping, the safety of human life and property, and the protection of the marine environment."

Looking at the above mentioned Memorandum of the Alaska Marine Pilots on page two and three, AMP correctly state:

> "These are the only criteria the Board may consider in evaluating whether to designate compulsory pilotage waters in the Pribilofs..."

and further on top of page three:

> "...the Board may not properly consider the economic impact of compulsory pilotage either on local governments or on the shipping or fishing industries."

The argument is made that the economics of the designation of compulsory pilotage waters must not enter into the decision. If this were true, and the marine pilots were truly concerned about the need to protect life, property, and especially the environment, why don't we just design[illegible] all [illegible]torial waters of Alaska as pilotage zones? We all know differently, h[illegible]t has everything to do with economics. Look at the argument made by the AMP in the same memorandum on page seven and following:

> "The second relevant consequence of the shallow water surrounding these islands is that vessels can anchor almost anywhere within the three-mile territorial sea. As AMP documents below, vessels are already anchoring

> and operating just outside the current compulsory pilotage boundary **to avoid the expense of engaging a pilot.** The charts attached as Exhibits E-I will help the Board to understand why it is essential for the Board to create a compulsory pilotage zone to the full extent of its three mile territorial jurisdiction."

Is that not concern over the economics, that if you will not play within the boundaries of my yard, and pay me for doing so, I will just extend the size of my yard? And to further their argument, that should you the Board fail to impose compulsory pilotage in that area, page four of the memorandum states, then:

> "the federal government has the authority to do so."

thus stating outright, and seemingly as a threat to the Board, that if you will not make our yard bigger for us, someone else will.

Mr. Chairman and members of the Board, the Bering Sea has been the source of revenue for thousands of people around the world from many different nations, for such a long time. No people are more aware of this than we are. When one stands on the shores of these windblown foggy islands and watch all this offshore activity taking place wishing to be a part of that economy, and settling to menial jobs as gas station attendants for our crab fleet, the feelings of hopelessness begin to take hold. As you know, our harbor and the promises which we felt that would bring for us to diversify our economy, and enable our children to have a reason to want to continue to live at home, has just become fully operational two years ago. It is taking us some time to adjust to this change, a change which we as yet do not fully realize. As resources become more scarce in other oceans and seas of the world, more and more people are looking further and further for jobs and these valuable resources.

Again, I wish to emphasize that after all is said and done, we the Aleuts of the Pribilofs will be left holding on to a dream as everyone else moves on, perhaps wondering (after its to late,) what happened.

It appears that the only rationale the Marine Pilots, who do not live on the Pribilof Islands, have for wanting to extend the compulsory pilotage zone out three miles is based solely on economics. Asking the Board to insert that amendment into the Act is a reaction to an oversight. Where will it end? Using the Pribilofs as a precedent setting example, to extend the zone out three miles, should we also require, at the whim of the pilots, that all waters within the jurisdiction of the State be designated as such? I mean, we did it out at the Pribilofs, why not do it elsewhere, all under the guise of protecting the environment, property and human life?

Finally, Mr. Chairman, this is a very difficult decision for us. How do we balance the need to protect life, property, and the environment, with the need for economic development? Representatives of the industry, sitting here today, have told us that these additional costs could force them to look elsewhere to do business in order to remain competitive. With the fiscal problems which both the federal and state governments are facing, the probability of securing additional revenues into our community do not look bright. Will the industry move? We do not know, nor are we sure that anyone would be able to guarantee that this will not happen. The revenues generated by the industry doing business in and around the Pribilofs are sorely needed. Not only do we realize revenues generated by them into the City coffers, but other businesses are also dependent upon this activity which employs people and takes care of families. It is no over-exaggeration to state that without this industry, the largest Aleut Community in the world will not survive. The consequences of your decision could have a devastating effect on our survivability in the Pribilofs. With such potential dire consequences, the state has *no* obligation to assess this possibility before acting. To do otherwise will be morally and ethically irresponsible and criminal.

Our position was clearly stated in a letter to Mr. Larry Galloway, Assistant Commissioner of the Department of Commerce and Economic Development, to take one of three courses of action:

1. No designated zone/zones around the Pribilof Islands, or

2. With the zone already in place, no additional designations, or

3. A cost\benefit and economic impact analysis be done before considering any further designations.

We want the environment to be protected. We can state without reservation, that no federal or state agency is doing more to protect the Pribilof ecosystem than the Aleuts. At the same time, we want the opportunity to be productive in our homeland, and participate in a meaningful way, a way never before available to us, in sharing the rewards which the resources of the Bering Sea can provide. We urge you to seriously consider the potential implications this can have on our communities. Referring to the biblical example of Solomon who was asked to decide who was the mother of the child who was claimed by two women, and he proposed to divide the child in two, the real mother of the child chose to give him up in order for the child to live. If we were asked to choose between the protection of the environment and the economy, we would probably choose the environment. However, the realities are, we need the economy.

Mr. Chairman. I don't know if this is the proper forum to express this, but on a personal point, I take issue with the Marine Pilot Coordinator making mention of the fact that the industry is only using the Aleuts of the Pribilofs to fight this issue. This statement is an insult to our intelligence. Anyone knowing Pribilof Aleut history understands that we decide our own course of action. We have a history of slavery which is the driving force behind our determination to dictate our own direction. Concluding that we are puppets for some interest group because our interests may coincide is ridiculous and unwarranted.

Thank you for this opportunity to submit this testimony. I will be glad to answer any questions.

DRAFT

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF OCCUPATIONAL LICENSING
BOARD OF MARINE PILOTS

MINUTES OF MEETING
MARCH 27, 1992

By authority of AS 08.01.070(2) and AS 08.62.030, and in compliance with the provisions of AS 44.61, Article 6, and AS 44.62.310, a scheduled telephone conference meeting of the Board of Marine Pilots was held on March 27, 1992.

Call to Order/Roll call

The meeting was called to order at 1:10 p.m. by Mr. Bob Watt, Chairman. Those present and constituting a quorum of the board were:

Mr. Bob Watt
Mr. Russel Sell
Mr. Bill Lorch
Captain Dale Collins
Captain Michael O'Hara
Mr. Keith Greba
Mr. Larry Galloway

Also present in Juneau and representing the Division of Occupational Licensing was JoAnne Cummings, Licensing Examiner, Mr. Gary Amendola Assistant Attorney General, and Karl Luck, Marine Pilot Coordinator.

Public meeting places were established at public request in the following locations: Anchorage, Valdez, Sitka, Juneau, Ketchikan, Soldotna, Fairbanks, and Seattle.

In attendance at the various locations were:

Captain Bill Swain
Captain Terry Bennet
Captain Mike Spence
Captain Doug McPherson
Captain George Porter
Captain Archie Diment
Mr. Richard Gurry
Mr. Dick Monkman

Captain Simon La Chefisky
Ms. Karla Hilmendorf
Captain Arnt Antonsen
Mr. Tom Rueter
Mr Bernie Smith
Captain Pierce
Mr. Dave Millen
Mr. Stuart Mork
Mr. Harry Scally.

Agenda

On a motion by Mr. Sell, seconded by Mr. Galloway and carried unanimously, it was

RESOLVED to set the agenda as:

1. Public comment.
2. Final adoption of regulations involving tariff.
3. Final adoption of regulations involving pilot organizations.
4. Final adoption of regulations involving regions.

Agenda Item 1 Public Comment

A. Captain Swain, SEAPA, addressed the board regarding regionalization. If we are going to allow pilots to go from one region to another, we don't have regions. If 12 AAC 56.021(c) is deleted, you have a free-for-all. A pilot can pilot wherever he chose. There are 40 some pilot associations in the U.S. that cover all the waterways and each is confined to a particular region. There is no free-lancing. It works well throughout the rest of the world and I don't see why it won't work in Alaska. You don't have San Francisco pilots piloting in Coos Bay. I don't see why you will have Juneau pilots piloting in Whittier. Alaska has more coastline than the rest of the U.S. and I don't see why our customers want to impose a different scheme.

DRAFT

B. Captain Terry Bennet, ACP, would like these subjects discussed in a full forum. The law mandates the board to describe the way that cross-region piloting be accomplished.

C. Mr. Millen, representing AMP, submitted written comments concerning several editorial changes and the omission of several specific statements which were changed from the previous version of the regulations.

D. Captain Pierce, SWAPA. We were not informed of the changes and this format is irregular if we are going to make changes. Is the region language purposing cross over within the regions? I protest that we did not have a legal mind look at this. If the board changes what has already been passed, we will have "cherry picking." The tariff we negotiated with industry was based on package that covered the region as previously agreed upon. If the region scheme changes, we will have to go back to ground zero.

E. Mr. Monkman - Mr Grouse has joined the group, I concur that the scope of this is too much for this forum. If changes are going to be made, we want more time to study the changes.

Mr. Sell made the motion to defer the agenda to the Juneau meeting or a later date. Mr. Lorch seconded the motion. Captain O'Hara desired more explanation on the deletion of 12 AAC 56.021(c).

Mr. Watt commented that the accompanying documentation did not include mention of the Senate comments in regard to the legislative intent of the law. The motion carried four to three with Captain Collins, Mr. Greba and Mr. Watt opposed.

Captain Collins made a motion to discuss the tariff and transition issues. Mr. Greba seconded the motion. The motion passed, with Mr. Watt opposed.

Agenda Item 2 — Adoption of Regulations Involving Tariff.

Captain Collins made a motion to accept 12 AAC 56.022 transition as written. Mr. Galloway seconded the motion. The motion passed unanimously.

Captain O'Hara made a motion to adopt 12 AAC 56.210, Tariff for the Southeast Alaska Region, as written. Mr. Galloway seconded the motion. The motion passed, with Mr. Lorch opposed.

Mr. Sell had to leave the teleconference.

It was the consensus of the board to defer 12 AAC 56.220, Tariff for Southcentral Alaska Region, until the next regular meeting.

Mr. Watt directed the following language be added to 12 AAC 56.230, Tariff for Western Alaska Region:

> "it is within the pilot's discretion on not to use a tug boat." If not added to this section, this statement should appear elsewhere in the regulations.

It was the consensus of the board to defer 12 AAC 56.230, Tariff for the Western Region, until the next regular board meeting.

Agenda Item 3 — Adoption of Regulations Concerning Pilot Organizations

Mr. Lorch made a motion to accept 12 AAC 56.300, Standard for Recognition, as written. Mr. Greba seconded the motion. The motion passed, with Captain Collins opposed.

Mr. Lorch made a motion to accept 12 AAC 56.310, Qualifications for Recognition, as written. Mr. Galloway seconded the motion. The motion passed unanimously.

Captain O'Hara made a motion to accept 12 AAC 56.320, Suspension or Revocation of Recognition, as written. Mr. Galloway seconded the motion. The motion passed unanimously

Captain O'Hara made a motion to accept 12 AAC 56.990(10)(11)(12) and (13). Motion amended by Mr. Lorch to only accept 12 AAC 56.990(10) and (11). Mr. Greba seconded the motion. The motion passed unanimously.

Mr. Watt requested the AG's office have the drafted training programs ready for the board's review at the April meeting.

Agenda Item 4 — Adoption of Regulations Concerning Pilot Regions

Item deferred to next regular board meeting.

Adjourn

The meeting was adjourn at 4:00 p.m.

Respectfully submitted:

Karl A. Luck
Marine Pilot Coordinator

Approved:

Bob Watt, Chairman

Date: _____

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March 9, 1992

Honorable Walter Hickel
PO Box A
Juneau, Alaska 99811-0101

Dear Governor Hickel,

Recently there was a hearing of the Marine Pilot's Board in Anchorage. One of the agenda items was a proposal to institute compulsory pilotage in the Pribilof Islands.

At the hearing no substantive testimony was presented that would indicate a safety problem. By contrast, considerable testimony and information was presented by processors' representatives and the local communities regarding the economic hardships and logistical difficulties that compulsory pilotage would create.

The ability to efficiently transfer finished product to freighters has created a unique local fishery and substantially increased the raw fish tax paid to the communities in the area. If compulsory pilotage was imposed, many processors would be forced to relocate.

Some of the board members, pilots themselves, argued that the consequences to the local communities and the impact on business should not be a consideration in their decision.

Fortunately, several of the members of the board were able to objectively evaluate the situation and voted to institute compulsory pilotage only in the limited area required by law. Compulsory pilotage in this smaller area will not create any serious difficulties in operations. Board members: Russell Sell, William Lorch and Robert Watt were instrumental in reaching this balanced decision.

I sincerely hope that you consider retaining these individuals when their terms expire. I believe these people strongly reflect your commitment to balanced development of Alaskan resources and realize that there is a "people" environment that should receive due consideration when new requirements are contemplated.

Sincerely,

Charles H. Bundrant
President

cc: Tuckerman Babcock, Governor's Office and Douglas Donegan, Trident

Sea-Land

1/4

TRANSMITTAL

Sending: 4 pages

Date: January 29, 1992

To: The Honorable Jack Coghill
Lt. Governor of Alaska
Fax (907) 463-5364

From: H. L. Schuyler
Sea-Land Service, Inc.
Tel (206) 233-3348 / Fax (907) 233-3605

Subject: ALASKA PILOTAGE BOARD

The 1991 Legislature passed a new Pilotage Bill which the operators had little input into the makeup. It seems that the various pilot organizations in Alaska, the three Coast Port Pilot organizations; Puget Sound Pilots, Oregon Pilot and San Francisco Bay Pilots, as well as the National Pilots Association out of Baltimore, Maryland, were all in the act to influence the Legislature. Truly, a well organized lobbying effort, as well as a success for pilots of Alaska.

This Bill regionalizes the Pilots into four groups, which will become four regional monopolies.

There were two positions filled by the Governor to replace vacancies on the Board. One from Sitka, who, I have been told, has not experience in management or much knowledge of large vessels, representing the public interest for S.C. Alaska. An industry representative (who evidently has little or no experience in the seagoing vessel area, for S.E. Alaska. Rumor has it that, Clem Tillian of Homer, who sold his boats to the S.W. Pilots for use as boarding boats, was very instrumental in getting the two appointments pushed through the Governor's Office for the appointees in S.E. Alaska.

The representative of the State is from the Department of Licensing in Juneau. Also a new appointment.

Pilots are setting up Maximum Tariffs to protect the Industry from being gouged. This is for their benefit, because if a new organization came into being, it would cut rates to get the business, no operator would spend the time of day with the party that would charge higher than present Pilots or try to gouge the operator. Pilots have stated that they want a 300% increase in the Tariff by 1993.

THE HONORABLE JACK COGHILL
(RE: ALASKA PILOTAGE BOARD)
JANUARY 29, 1992
PAGE TWO

Latest Board meeting in Anchorage last week has allowed the Dutch Harbor Chain Pilots a 35% increase in the Tariff, Cook Inlet Pilots 50%, S.E. Pilots 50%. No increase for the operators in Valdez. These rates are effective immediately.

Pilots have not had an increase since 1979, however, there has been a 300% increase in traffic since with very few additional Pilots added to the roster. What we are trying to bring out is the Board is arbitrarily giving them the increase without looking at their records or evidence to support their increase. The Board should request an audited financial statement of each organization as well as data on the Pilot's own gross income for a year, for <u>each</u> Pilot of the region.

No one knows how much they are making a year, but rumor says it is between $200,000-$250,000 per year. Pretty healthy for 5-7 months of work.

Attached are two pages of information regarding the Pilots coming from other industry people in the Maritime Community. State of Alaska is spending a lot of time trying to develop Export/Import Trade as well as trying to hold down domestic rates. Doesn't seem reasonable in these recessionary times that a State Board would allow increases such as happened last week without support of expenses and Pilot remuneration evidence. Could price Alaska Maritime movements for export out of the economic range for Charter.

Jack, sorry to be so long winded, but had to pant the picture. The maritime industry cannot pass these cost back to the consumers and shippers in their tariffs, because we are in a recessionary competitive market.

What legal avenues does industry have to object to these increases?

Thanks for your attention.

HLS:tcc
coghill.hls

good of most or for the good of a select few

ICICLE SEAFOODS, INC.

P.O. BOX 79003
SEATTLE, WASHINGTON 98119

January 17, 1992

Mr. Bob Watt
Chairman
Board of Marine Pilots
State of Alaska
Dept. of Commerce & Economic Development
P.O. Box 110806
Juneau, Alaska 99811-0806

RE: Marine Pilotage Pribilof Islands

Dear Mr. Watt:

Icicle Seafoods, Inc., operates a floating processor around the Pribilof Island area annually during the Bering Sea Opilio crab season. We strongly urge the Board not to require marine pilots in this area.

During this fishery we are processing 24 hours a day for long periods of time. We are dealing with a live, perishable product that if not processed on schedule and in a timely manner will die and provide no value to the industry and waste a valuable state resource.

It is not realistic to think that pilots will be able to move from ship to ship in a safe and timely manner that will allow us to effectively prosecute this fishery. Each and every delay in processing due to pilot delays results in a delay to the whole fleet and fishery and will result in loss of product and revenue.

The weather during the time of year we operate changes hour to hour and results in constantly moving around the island in order to process effectively and at the capacity needed. The safety factor in moving personnel from ship to ship and or the great expense it will cost the industry is both unwarranted and not necessary.

To my knowledge there has not been a problem in the past and we urge the Board of Marine Pilots to not require marine pilotage in the Pribilof Island. Marine pilotage has not been needed in the past, cannot be safely and effectively implemented and a cost the industry cannot incur (both money and lost efficiency and capacity).

Thank you for you consideration.

Sincerely,
ICICLE SEAFOODS, INC.

Don Giles
Vice President, Production

DG.kb.75

Lawson Peterson
FAX 441-5836

ALASKA MARITIME AGENCIES, INC.

SUITE 315
300 ELLIOTT AVENUE WEST
SEATTLE, WASHINGTON 98119-4151

(206) 286-1700
FAX: 2062861709
TELEX: 372-4362 (GRAPHNET)
CABLE: ALAMAR

Mow to come.

November 21, 1991

TO: PRINCIPALS OF ALASKA MARITIME AGENCIES

RE: State of Alaska Pilot Board Meetings of Nov. 13 & 14.

(Please also note attached correspondence which was presented verbally at the above meetings)

It is possible that the 4 pilot associations in Alaska combined have, over the past year or so, spent over $1,000,000 to convince the Alaska State Legislature and the State Pilot Board that increases in pilot fees and the separation of Alaskan waters into regions was necessary due to safety concerns and in the "best interest of the state." It is also possible that as a whole, they have been able to have at least a dozen members work full time on this piece of legislation.

We think that this process is being used to create 3 separate monopolies in the 3 regions of the state and to demand (and probably receive) an outrageous increase in pilotage fees for personal gain.

Over the past year, Alaska Maritime Agencies has spent hundreds of personnel hours and thousands of dollars studying and understanding the new State Pilotage Act and attending all of the various pilot board meetings throughout the state. Obviously, the pilots were able to come up with the massive amounts of time and money to accomplish their goal. Unfortunately, Alaska Maritime Agencies was not able to match the funds nor personnel time to battle the pilots intense and aggressive push.

The pilot groups had devoted so much money and time to the issue that the State Pilot Board accepted nearly every proposal that was put before them. Most industry members on the board voted NO to nearly every proposition that concerned the separation of the State into regions and to any increase in pilotage fees. Unfortunately, only one or two negative votes per proposal was not enough to counteract their thrusts.

There also seemed to be little or no concern as there was very little response from the audience. As a matter of fact, in the last meeting approximately 85% of the members of the audience in the room were pilots and their lawyers.

DRAFT

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF OCCUPATIONAL LICENSING
BOARD OF MARINE PILOTS

MINUTES OF MEETING
January 22-24, 1992

By authority of AS 08.01.070(2) and AS 08.62.030, and in compliance with the provisions of AS 44.61, Article 6, and AS 44.62.310, a scheduled meeting of the Board of Marine Pilots was held on January 22-24, 1992 at the Egan Center, 555 W. 5th, Space 3, Anchorage, Alaska.

WEDNESDAY, JANUARY 22, 1992

Agenda Item 1 Call to Order/Roll Call

The meeting was called to order at 8:00 a.m. by Bob Watt, Chairman. Those present and constituting a quorum of the board were:

Mr. Russell Sell
Mr. Bob Watt
Captain Dale Collins
Captain Michael O'Hara
Mr. Bill Lorch
Mr. Keith Greba
Ms. Ann Boudreaux

Also present and representing the Division of Occupational Licensing was JoAnne Cummings, Licensing Examiner. Gary Amendola, Assistant Attorney General, was expected to be present later in the meeting.

Agenda Item 2 Review Agenda

Two items were added to the agenda: additional public comment regarding pilotage in the Pribilofs was added as agenda item 22a, and a discussion of license fees in conjunction with the funding of the Marine Pilot Coordinator position was added as agenda item 27a.

Agenda Item 3 Review Minutes

On a motion made by Mr. Sell, seconded by Ms. Boudreaux, and carried unanimously, it was

RESOLVED to approve the minutes of the meeting held November 12-14, 1991 as presented.

Agenda Item 4 Ethics

Captain Collins disclosed that an ethics complaint had been filed against him by Alaska Coastwise Pilots because he conducts the exams of members of an association that competes with the pilot organization of which he is a member. The complaint was also based on his participation in the formulation of a maximum tariff for Southeast Alaska.

Agenda Item 5 Review Correspondence

A. A letter from Captain Hendsch regarding renewal requirements for pilots working as masters was reviewed. The board determined that this problem would be solved through upcoming regulations changes.
B. A letter from Southeast Alaska Pilots Association (SEAPA) was reviewed regarding a possible merger with Alaska Coastwise Pilots (ACP). No action was taken.
C. Correspondence from Southwest Alaska Pilots Association (SWAPA) regarding the transition between regions 2 and 3 was reviewed. Alaska Marine Pilots (AMP) will provide a written response to this communication. No board action was taken.
D. AMP submitted notification of the working tariff that has been adopted by that organization. Discussion of this notice was tabled pending the arrival of Gary Amendola, Assistant Attorney General.

Agenda Item 6 Public Comment

A. Michael Spence, ACP, addressed the board regarding the earlier discussion of ethics. His perception of the disposition of the ethics complaint against Captain Collins differs from that reported by Captain Collins. He stated the claim had not been dismissed by the Attorney General, but rather specific recommendations had been made to the chairman of the board.

B. David Millen, counsel for AMP, commented on the proposed drug and alcohol testing regulations. He suggested the testing should be done under the authority of the Marine Pilot Coordinator rather than the pilot organizations. This would protect the associations from carrying the dual responsibility of reporting offenses and also defending against licensing actions.

C. Terry Bennett, ACP, requested a copy of the correspondence received from SEAPA discussed by the board earlier. He denied that there were any ongoing negotiations between ACP and SEAPA regarding a merger. He also requested a copy of Captain Elsensohn's letter to the governor.

D. Arie van Noort, Northwest Cruise Ship Association, distributed additional letters from the membership of the Northwest Cruiseship Association opposing the proposed tariff in the Southeast region.

E. Steve Yoshida, attorney for SWAPA, spoke on the transition in regions 2 and 3. He stated that SWAPA will operate in conjunction with AMP in Dutch Harbor.

He suggested that, in regard to recognition standards, the board should allow for internal disciplinary actions to be appealed within the pilot organization and then appealed to the board. He also asked that a shipper's request that a particular pilot not be dispatched should be given due process and include a right of appeal to the board.

F. Will Anderson, AMP, commented on the pilotage regions. He clarified that, though the geographic area of region 3 is larger than the other 2 regions, the actual pilotage areas are quite small and spread out. He urged the board to identify the prevention of accidents as its major criteria for making regional coverage decisions.

G. Gene Burden, Tesoro Alaska, complained that the board has not done adequate research to establish maximum tariffs. He recommended comparing compensation in equivalent occupations and disclosing the annual income or pilots.

H. Jeff Pierce, SWAPA, read a statement to the board. Limited geographical regions are necessary to provide the local knowledge required to insure safety. Transitions are necessary to protect the state, and increased tariffs are necessary to bring Alaska pilots' compensation in line with other west coast pilots so that talented pilots will continue to be attracted to Alaska.

I. Cees Delstra, Holland America Line, spoke about Holland America's attempts to increase efficiency and eliminate double staffing of pilots. The prohibition against a pilot working in both regions 1 and 2 results in additional expense for Holland America. He asked that the board provide for cross-regional service.

J. Jim Drahos responded to Mr. Delstra's statements by explaining that Holland America is asking for concessions in Alaska that would not be granted in Holland where pilot regions are enforced. In response to questions, Mr. Delstra said Holland America would support a pilot station at Yakutat.

K. Bill Sharp, Southeast Stevedoring Corp., reminded the board that a pilot station already exists at Yakutat, but the question is whether a suitable pilot boat may be found. On the question of tariffs, Mr. Sharp pointed out that a good deal of public comment was received by the board showing concern over the proposed increase. And regarding regionalization, Mr. Sharp finds it reasonable to let a pilot crossover between regions 1 and 2. The board will allow pilots who are licensed on the east coast to pilot in Alaska during the summer but will not allow a pilot licensed in Southeast Alaska to pilot in Southcentral Alaska.

L. Dan Grausz, general counsel for Holland America Line, previously submitted written comment on the proposed regulations with alternative proposals. He corrected statements made by SEAPA alleging that Alaska pilots make less than a third mate. According to Mr. Grausz, Holland America captains earn $70,000 for an 8-month work year. In a time of recession it is incongruous to double the tariff. Cruise ships are not guaranteed to return to Alaska, and the pilot board should be careful not to kill the industry that pilotage depends upon for revenue.

Mr. Grausz also briefly mentioned drug and alcohol testing and said that it is not unusual for an industry to have the conflict mentioned earlier by Mr. Millen.

And finally, Mr. Grausz said that a shipper should have the right to object to a particular pilot being dispatched since the shipper is liable for what happens on the vessel.

M. Doug MacPherson, ACP, pointed out that SEAPA's earlier tariff comparisons with other states may have included pilot boat fees which are not included in the Alaska tariff.

N. Hans Antonsen, SEAPA, informed the board that SEAPA wanted to negotiate with cruise ships prior to maximum tariff discussions with the board, but industry declined. He also justified the proposed tariff increase by explaining there has not been a tariff increase in ten years, and the increase is based on officers' pay on American flag ships. SEAPA supports the proposed tariffs, the proposed regions and the prohibition on regional crossover.

O. Archie Diment, SEAPA, presented a letter suggesting cruise ship companies negotiate contracts separately rather than as a cruise ship association; pilot boats, other forms of transportation to the bridge and tugs should be considered along with pilotage fees in the negotiation for pilot services; and the business practices of Southeast Stevedoring should be closely monitored by the board.

P. Tom Rueter, North Star Maritime Agencies, spoke in favor of a shipper's right to refuse dispatch.

Q. Arnt Antonsen, SEAPA, pointed out that the proposed increase in the tariff is only comparable to rates on the west coast; anything less means the board considers Alaska pilots inferior and Alaskan waters unworthy of the same level of protection as other west coast areas. The maximum tariff proposed will allow SEAPA to negotiate a working tariff based on the free market.

R. David Millen, AMP, suggested a shipper's refusal of dispatch should be channeled through the Marine Pilot Coordinator to relieve the pilot organizations of the responsibility for making decisions which cause a conflict between the pilot organization's responsibility to provide equal dispatch and the shipper's right to refuse the dispatch of a particular pilot.

T. Terry Bennett, ACP, objects to the proposed regulation which gives the specific circumstances when a pilot may be licensed in more than one region. He referred the board to ACP's handout for comments regarding drug testing regulations, and he asked that the license qualifications be changed to delete the word "entire" when describing the region. He feels licensing by port was the intent of the law.

U. Bill Sharp, Southeast Stevedoring, explained two situations where a shipper may object to a particular pilot. In one case there may be disharmony between a particular master and pilot and there is usually no problem in avoiding that combination in dispatch. In the other case, a shipper may request a particular pilot not be dispatched to any of its ships. In the latter case a shipper would not object to putting the request in writing.

V. Arie van Noort, Northwest Cruiseship Association, related the method used by British Columbia for handling refusal of dispatch by shippers. The parties are brought together at the close of the season and a letter is issued. Captain van Noort agreed to provide a copy of the basic letter.

Gary Amendola, assistant attorney general, arrived at 9:50 a.m. A short recess was taken from 10:10 to 10:20 a.m.

Agenda Item 7 <u>Proposed 12 AAC 56.021- Pilotage Regions</u>

Holland America submitted a proposal that regions 1 and 2 overlap in a limited manner to apply to cruise ships traveling between Yakutat and Seward.

A motion was made by Mr. Lorch to accept Holland America's proposal regarding regions. The motion failed by a vote of 2-5 with Mr. Lorch and Mr. Sell voting in favor of the motion.

A discussion of the problem of cruise ships and switching pilots when crossing from region 1 to region 2 followed.

A motion was made by Captain Collins and seconded by Captain O'Hara to adopt proposed regulation 12 AAC 56.021 as noticed. (The proposed regulations which were public noticed are contained in Attachment 1.)

Mr. Amendola advised the board that paragraph (c) of the proposed regulation probably conflicts with statutes because it effectively eliminates overlapping regions. The board discussed whether paragraph (c) is actually an exception or a prohibition to the statutory requirement that a license for more than one region be issued only under narrow circumstances.

Mr. Amendola explained the review process for regulations adopted by the board prior to becoming effective.

A motion made by Mr. Lorch to amend the above motion to delete paragraph (c) from proposed regulation 12 AAC 56.021 failed by a vote of 3-4 with Ms. Boudreaux, Mr. Lorch and Mr. Sell voting in favor of the motion. The main motion passed by a vote of 4-3 with Mr. Lorch, Ms. Boudreaux and Mr. Watt opposed. Therefore, it was

> RESOLVED to adopt proposed regulation 12 AAC 56.021 as noticed.

Agenda Item 8 <u>Proposed 12 AAC 56.022 - Transition</u>

The Board reviewed proposals for transitional licensing submitted by AMP and SWAPA and then requested that representatives from the two organizations meet and submit wording that was agreeable to both parties.

The meeting was recessed for lunch from 12:00 to 1:02 p.m.

Representatives from AMP and SWAPA submitted the following language to address transitional licensing in regions 2 and 3:

> All region 2 marine pilots shall maintain their licenses to pilot large container vessels in region 3 until such time, but no later than June 30, 1994 with extension of time allowed upon application and approval of the Board, as the Board is satisfied that members of a region 3 pilot organization have a sufficient number of qualified members to assure the protection of shipping, the safety of human life and property, and the protection of the marine and coastal environment in region 3. This shall be an exception to AS 08.62.080(b) under 12 AAC 56.021(c).

On a motion made by Captain O'Hara, seconded by Mr. Greba and carried unanimously, it was

RESOLVED to adopt the transitional language submitted by AMP and SWAPA.

Agenda Item 9 Repeal of Existing Tariffs and Charges

On a motion made by Captain Collins, seconded by Captain O'Hara and carried by a vote of 4-3 with Ms. Boudreaux, Mr. Lorch and Mr. Sell opposed, it was

RESOLVED to repeal 12 AAC 56.130 - 12 AAC 56.158

Agenda Item 10a Proposed 12 AAC 56.200 - Expenses in the Tariff

A motion was made by Captain O'Hara and seconded by Mr. Sell to adopted proposed regulation 12 AAC 56.200.

After discussion the board reworded the opening paragraph to read, "The maximum tariff shall be based on the following costs and expenses:"

A motion was made by Captain Collins and seconded by Ms. Boudreaux to amend the above motion to include a rewritten version of paragraph 5 to read, "compensation for overtime (over 8 consecutive hours);" deleting the reference to compensation for holidays. The amendment passed by a vote of 6-1 with Captain O'Hara opposed, and the main motion passed by a vote of 5-2 with Mr. Lorch and Mr. Sell opposed. Therefore, it was

RESOLVED to adopt proposed regulation 12 AAC 56.200 as amended.

Tariff Comparison Panel

A motion was made by Mr. Lorch and seconded by Mr. Sell to delay adoption of maximum tariffs and appoint a fact finding panel made up of two pilots and two industry representatives to research pilot rates in other states.

The board took a short break from 2:20 to 2:35 p.m.

The board chairman invited public comment on Mr. Lorch's tariff panel proposal.

A. Dave Millen said the proposal is a delaying tactic by industry. Pilot organizations have already presented in-depth information. Industry has had plenty of time to present contradictory documentation. The statutory deadline for adoption of maximum tariffs has already passed, and there is no purpose in proceeding with the proposal.

B. Jeff Pierce argued that SWAPA has already submitted figures galore and there is no point in doing it over again. SWAPA has already agreed to negotiate with industry again regarding the 1993 tariff.

C. Bill Sharp has no objection to interim tariffs because industry has had the understanding that renegotiations would take place. Industry had expected to meet with SEAPA and discuss interim tariffs as they had with other pilot organizations, but SEAPA declined.

D. Dan Grausz agreed that a study is a good idea, but an interim maximum tariff must be implemented. He suggested a 35% interim increase not to be applied to tonnage and passenger berths.

E. Arie van Noort agreed that a 35% increase (not an across the board increase) should be adopted.

F. Terry Bennett and Michael Spence submitted a compromise proposal with a 35% across the board increase, a mileage charge for cargo vessels and a winter surcharge of 10%.

G. Hans Antonsen expressed his agreement with representatives of AMP and SWAPA that it is too late to start the study proposed by Mr. Lorch. The proposed tariffs should be adopted and then the study can be undertaken if the board chooses.

Mr. Lorch recommended the board adopt a 35% interim increase to be valid until December 31, 1992. The results of the panel's tariff comparison should be ready for presentation at the April 1992 meeting of the board.

The motion regarding the tariff comparison panel was tabled.

A break was taken from 3:45 p.m. to 3:55 p.m.

Agenda Item 10b <u>Proposed 12 AAC 56.210 - Southeast Tariffs</u>

Mr. Amendola pointed out the Southeast tariff contains a limit on charges for pilot boat services which is not found in the central or western tariffs.

12 AAC 56.210(1)(A) was amended to change "Yakutat" to "Yakutat Bay"

On page 10 of the proposed regulations, the first sentence of 12 AAC 56.210(3)(E)(i) was rewritten to read,

> Charges for a pilot's travel expenses such as airplane and ferry fares, cab fares, telegrams, telephone calls, and other expenses pertaining to ship's business may not exceed actual costs, plus the per diem rate published by the Internal Revenue Service of the U.S. Federal Government for meals and lodging.

On a motion made by Captain Collins, seconded by Captain O'Hara and carried by a vote of 4-3 with Ms. Boudreaux, Mr. Lorch and Mr. Watt opposed, it was

> RESOLVED to adopt the tariff in 12 AAC 56.210 as amended.

Agenda Item 10c <u>Proposed 12 AAC 56.220 - Southcentral Tariffs</u>

The following changes were made to the proposed Southcentral tariffs:

On page 14, paragraph (2)(A), the last port charge should be listed as "Icy Bay" deleting the reference to Yakutat.

On page 15, the first sentence of (4)(D)(i) was changed to read exactly as the amended sentence in the Southeast tariff on page 10 dealing with travel expenses and per diem rates as listed above.

On a motion made by Captain Collins, seconded by Mr. Greba and passed by a vote of 6-1 with Mr. Lorch opposed, it was

> RESOLVED to adopt proposed 12 AAC 56.220 as amended.

Agenda Item 10d <u>Proposed 12 AAC 56.230 - Western Tariffs</u>

The following changes were made to the proposed Western tariff:

On page 19, the Kivalina charge was listed as $1270.

On page 20, the first sentence of (3)(D)(i) was changed to read exactly as the amended sentence in the Southeast tariff on page 10 dealing with travel expenses and per diem rates.

On page 21, paragraph (3)(G), the last sentence was rewritten to read, "Anchorage or laying to for loading cargo or discharging cargo or anchoring for any other purpose may be considered as a regular port charge and all fees and tariffs may be assessed as if the vessel was moored."

On page 23, paragraph (3)(R) the surcharges were changed so that the first entry shows a surcharge of zero for length overall of up to 449 feet, the second entry will show a surcharge of 5.0% for length overall of 450 to 500 feet. All other surcharges remain the same.

On a motion made by Captain O'Hara, seconded by Mr. Greba and carried unanimously, it was

RESOLVED to adopt proposed regulation 12 AAC 56.230 as amended by consensus.

Agenda Item 10e <u>Proposed 12 AAC 56.240 - Expiration of Tariffs</u>

On a motion made by Mr. Sell, seconded by Mr. Greba and carried unanimously, it was

RESOLVED to adopt 12 AAC 56.240 as amended so that tariffs for all regions expire December 31, 1992.

<u>Tariff Comparison Panel</u>

On a motion made by Mr. Sell, seconded by Captain Collins and carried unanimously, it was

RESOLVED to solicit and impanel a special tariff comparison study as drafted by Mr. Lorch's submittal. Panel will be comprised of one board member pilot, one board member agent, one non board member pilot, and one non board member agent. The study will not be limited to Mr. Lorch's suggested draft and will publish results to re-evaluate and/or correct the maximum tariff based upon a more accurate assessment of pilot business costs and earnings to be completed by the April meeting with an interim progress report no later than the third week of February, 1992.

Mr. Lorch and Captain O'Hara will represent the industry and pilot facets of the board. Mr. Bill Sharp of Southeast Stevedoring and Captain Thomas Dundas of Alaska Marine Pilots will complete the panel, representing industry and pilots respectively.

Reconsideration of Southeast Tariff

On a motion made by Mr. Sell, seconded by Ms. Boudreaux and carried by a vote of 4-3 with Mr. Greba, Captain Collins and Captain O'Hara opposed, it was

RESOLVED to reconsider the motion to adopt the Southeast tariffs as proposed in 12 AAC 56.210.

A new motion to adopt the Southeast tariffs as proposed in 12 AAC 56.210 failed by a vote of 3-4 with Captain Collins, Mr. Greba and Captain O'Hara voting in favor of the motion.

A motion was made by Mr. Lorch and seconded by Mr. Sell to set the maximum tariff in the Southeast region by increasing the Southeast tariff, as listed in Appendix A of the 1991 Marine Pilot statute booklet, by 35%.

Captain Collins made a motion to amend the above motion to increase the Appendix A charges by 75% across the board. The amendment was seconded by Captain O'Hara but failed by a vote of 3-4 with Captain Collins, Mr. Greba and Captain O'Hara voting in favor of the amendment.

Captain O'Hara proposed an amendment to the above motion to increase the Appendix A charges by 50% across the board. The amendment was seconded by Captain Collins and was carried by a vote of 5-2 with Mr. Lorch and Ms. Boudreaux opposed. Therefore, it was

RESOLVED to set the maximum tariff in the Southeast region by increasing the Southeast tariff, as listed in Appendix A of the 1991 Marine Pilot statute booklet, by 50%.

Agenda Item 12a Proposed 12 AAC 56.300 - Purpose of Recognition of Pilot Organizations

On a motion made by Captain Collins, seconded by Mr. Greba and carried by a vote of 6-1 with Mr. Lorch opposed, it was

RESOLVED to adopt proposed 12 AAC 56.300 as written.

Agenda Item 12b Proposed 12 AAC 56.310 - Standards for Recognition

The board amended page 25 of the proposed regulations so that paragraph (c)(4)(D) will now read, "acknowledging the authority of the board for cause and after notice and a hearing to suspend or revoke the recognition of the organization;" and

paragraph (c)(4)(E) will now read, "bringing to the attention of the Division of Occupational Licensing any credible information regarding a member of the organization that may require the board to act under AS 08.62.150 - 08.62.155;"

On page 26, the phrase "given the size of the membership of the pilot organization" was added to paragraph (c)(9), and paragraph (d)(1) was rewritten to read, "the organization and its members will participate in a continuing education program required by the board;"

On a motion made by Captain Collins, seconded by Captain O'Hara and carried unanimously, it was

RESOLVED to adopt 12 AAC 56.310, Standards for Recognition as amended.

Agenda Item 12c Proposed 12 AAC 56.320 - Suspension or Revocation of Recognition

This proposed regulation was amended to read,

In addition to imposing a civil fine under AS 08.62.155(b), the board may suspend or revoke the recognition of a pilot organization that fails to comply with its articles , bylaws or rules in such a manner that it fails to comply with the statutory or regulatory standards for recognition."

On a motion made by Captain Collins, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to adopt 12 AAC 56.320. Suspension of Recognition, as amended.

The meeting was recessed for the day at 7:02 p.m.

THURSDAY, JANUARY 23, 1992

Agenda Item 17 Reconvene

The meeting was called back to order at 8:02 a.m. by Mr. Watt. Present and constituting a quorum of the board were:

Captain Dale Collins
Captain Michael O'Hara
Mr. Russell Sell
Mr. Bill Lorch
Mr. Bob Watt
Ms. Ann Boudreaux

Mr. Greba was not present. Gary Amendola, Assistant Attorney General was present along with Don Faulkenburry, investigator for the Division of Occupational Licensing, and JoAnne Cummings, licensing examiner.

Agenda Item 15 Drug and Alcohol Testing

Matthew T. Fagnani from Allvest Laboratories, Inc. addressed the board regarding drug and alcohol testing. He recommended mirroring the Coast Guard requirements in CFR 49.40 and 46.16. He also recommended forming a consortium for all pilot organizations and randomly testing a percentage of the entire pool of pilots. Testing for drugs beyond the five for which DOT currently tests would require double testing.

Agenda Item 18 Investigative Report

On a motion made by Captain Collins, seconded by Captain O'Hara, and in accordance with AS 44.62.310(c), it was

RESOLVED to enter executive session to hear the investigative report.

The meeting was conducted in executive session from 8:25 to 8:55 a.m.

On a motion made by Mr. Sell, seconded by Captain Collins and carried by a vote of 4-0 with Ms. Boudreaux abstaining and Captain O'Hara absent for the vote, it was

RESOLVED to close case 1900-91-13.

Mr. Faulkenburry gave a litigation report on case 1900-91-08. An accusation has been served.

Agenda Item 19 Proposed Decision - Captain Skovoth

Frank Flavin, Hearing Officer for the Department of Commerce and Economic Development, presented the proposed decision in case number MP 91-004, in the matter of Michael Skovoth. This case was remanded to the hearing officer at the last meeting. Mr. Flavin did not take any further testimony. His opinion is that the previous agreement is within the regulations; therefore the former decision was resubmitted to the board.

Ms. Boudreaux was excused from the vote and discussion on this issue because of her position as director of the Division of Occupational Licensing.

On a motion made by Captain Collins, seconded by Mr. Sell and passed by a vote of 4-1 with Captain O'Hara opposed, it was

RESOLVED to accept option 1 of the proposed decision, to adopt the decision in its entirety.

Agenda Item 20 License Application Review

A. Robert E. Lee - On a motion made by Mr. Sell, seconded by Captain O'Hara and carried unanimously, it was

RESOLVED to accept the application of Robert E. Lee for Deputy Marine Pilot under AS 08.26.093(b)(5).

B. Vic Engstrom - The application must be resubmitted with documentation of combined tonnage, sufficient towing experience and the barges listed.

On a motion made by Captain O'Hara, seconded by Captain Collins, and carried unanimously, it was

RESOLVED to deny the application of Vic Engstrom under AS 08.62.093(b)(2).

C. James Drahos - On a motion made by Captain O'Hara, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to grant Captain Drahos a Limited, Step 2, license.

D. License Rewording - Tom Dundas and Dave Sanders had their licenses reworded to show Western Region authorization.

A brief recess was taken from 10:05 to 10:20 a.m.

On a motion made by Captain O'Hara, seconded by Captain Collins and carried unanimously, it was

RESOLVED to reconsider the approval of Captain Lee's application.

On a motion made by Mr. Lorch, seconded by Captain Collins and carried unanimously, it was

RESOLVED to defer action on license applications until the pilot organizations submit their recommendations for federal pilotage requirements in each region.

Agenda Item 21 Marine Pilot Coordinator Position

Mr. Sell recused himself from this discussion.

Ms. Boudreaux presented the resume of Karl Luck as the Division's selection to fill the Marine Pilot Coordinator position.

On a motion made by Ms. Boudreaux, seconded by Captain O'Hara and in accordance with AS 44.62.310(c), it was

RESOLVED to enter executive session to discuss the Marine Pilot Coordinator application.

The meeting was conducted in executive session from 10:35 to 10:50 a.m.

On a motion made by Ms. Boudreaux, seconded by Captain O'Hara and carried by a vote of 5-0 with Mr. Sell abstaining, it was

RESOLVED to approve the selection of Karl Luck as the Marine Pilot Coordinator.

Agenda Item 22 Disciplinary Grounds

Ms. Boudreaux presented information from the State of Florida on investigative procedures. The board asked staff to study this issue and make recommendations to the board.

Agenda Item 23 Pilotage in the Pribilof Islands

The board heard the following public comment on compulsory pilotage in the Pribilof Islands:

A. Don Blackmore, Alaska Maritime Agencies, reported the difficulties with using pilots near St. Paul Island. He suggested there are many questions to be asked before the board takes any action, and all parties should pool information and make a recommendation to the board.

B. Icicle Seafoods strongly urged the board not to require marine pilots around the Pribilof Islands. There has not been a problem in the past; pilotage cannot be safely and effectively implemented; and it will be a cost the industry cannot bear.

C. Ken Bowhay, All Alaskan Seafoods, opposes any requirement to use marine pilots in the waters around the Pribilof Islands. Besides the additional cost of pilots, the delays caused by a requirement to use pilots would be an unbearable burden. Many people are dependent upon the industry that might be forced to give up operations if a pilot requirement is imposed.

D. Tom Dundas, Alaska Marine Pilots, presented a chart showing the area under discussion.

E. Mike McEwan, Dragnet Fisheries, pointed out the economic and logistical problems with using pilots in the Pribilof Islands. He asked the board to justify the need and expense of this requirement and keep in mind that the season is already underway and rates have already been negotiated by the industry.

F. Tom Rueter, North Star Maritime, said that though pilotage waters in the Pribilofs have been included in the general definition, in the past pilots were not provided to cover the area.

G. Doug Donnigan, Trident Seafoods, questioned the need for pilotage. He asked if it would increase safety and stated it would create economic and logistical havoc. The market cannot absorb the extra costs. The shippers need unimpeded off-loading. Also, a requirement to use pilots will mean substantial tax revenues will be lost to the small communities in the area. He recommends a delayed decision after a committee of pilots and industry studies the need for pilotage and the method of implementation if found to be necessary.

H. Jack Johnson, SWAPA, stated the Pribilof Islands are compulsory pilotage waters.

I. Steve Moreno, Dave Millen, Will Anderson and Tom Dundas addressed the board on behalf of AMP. Their position is that no law change is needed to enforce pilotage in the Pribilofs. Economics and logistics should not be the basis of a decision that should be based on safety. Use of pilots would improve safety. If a study is made, pilots should be used in the Pribilofs while the study is being conducted.

J. Elwood Peterson said that the concerns expressed by those who have already commented on behalf of industry in the Pribilofs are urgent and valid. Closing an industry is not the way to make it safe. He urges further study.

K. Jeff Pierce, SWAPA, commented that the board needs to guarantee that qualified personnel that have been tested by the board are on vessels in the Pribilofs rather than relying on the qualifications of foreign masters.

L. Hans Antonsen, SEAPA, expressed his agreement with Captain Pierce's comments.

The meeting was recessed for lunch from 12:45 until 1:35 p.m.

The discussion on pilotage in the Pribilof Islands was tabled pending more information on 12 AAC 56.090 from the Attorney General's office.

Agenda Item 28a <u>Applications for Recognition of Pilot Organizations</u>

Alaska Coastwise Pilots presented its application for recognition. The board reviewed the Articles, Bylaws and Rules, made suggestions, and asked ACP to resubmit the application in time for consideration at the April 1992 meeting of the board.

A brief recess was taken from 3:35 to 3:55 p.m.

Agenda Item 23 <u>Pilotage in the Pribilof Islands (continued)</u>

Gary Amendola reported that, based on 12 AAC 56.090 and the Law of the Sea, the waters inside a line drawn from Zapadini Point to Reef Point are compulsory pilotage waters.

On a motion made by Mr. Lorch, seconded by Captain O'Hara and carried by a vote of 5-1 with Captain Collins opposed, it was

> RESOLVED to adopt the Attorney General's definition of compulsory pilotage in St. Paul Island, the inland waters from Zapadini Point to Reef Point.

A motion made by Captain O'Hara and seconded by Captain Collins to institute a regulations project to make the waters within 3 miles of St. Paul, St. Matthew and St. George Islands compulsory pilotage waters failed by a vote of 2-4 with Captains O'Hara and Collins voting in favor of the motion.

Agenda Item 28b Applications for Recognition of Pilot Organizations

Southeast Alaska Pilots Association presented its application for recognition. The board reviewed the Articles, Bylaws and Rules, made suggestions, and asked SEAPA to resubmit the application in time for consideration at the April 1992 meeting of the board.

Agenda Item 28c Southwest Alaska Pilots Association presented its application for recognition. The board reviewed the Articles, Bylaws and Rules, made suggestions, and asked SWAPA to resubmit the application in time for consideration at the April 1992 meeting of the board.

Agenda Item 28d Alaska Marine Pilots presented its application for recognition. The board reviewed the Articles, Bylaws and Rules, made suggestions, and asked AMP to resubmit the application in time for consideration at the April 1992 meeting of the board.

All pilot organizations were asked to submit their final Articles and Bylaws to Gary Amendola in time for his review and recommendation to the board at the April 1992 meeting.

The meeting was recessed for the day at 7:00 p.m.

FRIDAY, JANUARY 24, 1992

Agenda Item 31 Reconvene

The meeting was called back to order at 8:04 a.m. Present and constituting a quorum of the board were:

Captain Dale Collins
Mr. Bill Lorch
Ms. Ann Boudreaux
Mr. Bob Watt
Captain Michael O'Hara

Mr. Greba was not present. Mr. Sell arrived at 8:12 a.m.

Agenda Item 13a Deputy Pilot Training Standards - Region 2

Steve Yoshida and Harry Scally presented SWAPA's proposals for Deputy Pilot training requirements and Unlimited training requirements. The deputy program must be completed before a deputy pilot license is issued according to AS 08.62.093(a)(3) and AS 08.62.097. The Unlimited program is entered after the deputy pilot license is issued and must be completed before a full Marine Pilot license is issued under AS 08.62.100.

On a motion made by Captain O'Hara, seconded by Mr. Sell and carried unanimously, it was

> RESOLVED to accept the SWAPA proposal for Deputy and Unlimited training programs to proceed to the regulations stage.

Mr. Yoshida requested that the same standards of training be accepted as part of SWAPA's application for recognition as a pilot organization.

On a motion made by Captain O'Hara, seconded by Mr. Sell and carried unanimously, it was

> RESOLVED to accept the SWAPA training standards as part of the organization's recognition proposal.

On a motion made by Mr. Lorch, seconded by Mr. Sell and carried by a vote of 4-2 with Captains Collins and O'Hara opposed, it was

> RESOLVED to rescind the above motion accepting SWAPA's proposal to proceed to the regulations stage.

Representatives from ACP were invited to make comments regarding the training standards in the Southcentral Region.

Captain O'Hara was excused by Mr. Watt, chairman, from the discussion and vote on this issue because of a possible conflict of interests tied to his membership in SWAPA. On a motion made by Captain Collins, seconded by Ms. Boudreaux and passed by a vote of 4-0 with Mr. Watt and Captain O'Hara abstaining, it was

> RESOLVED to overrule the chair's decision to excuse Captain O'Hara.

With input from representatives from SWAPA and ACP, the board reviewed again the training standards for deputy pilots in region 2, Southcentral Alaska.

The SWAPA Proposed Deputy Pilot Training Program was used as the reference document. (See Attachment 2). Changes were made based on agreement between SWAPA, ACP and the board.

All parties discussed the federal pilotage prerequisites for admission into the training program.

On a motion made by Captain O'Hara, seconded by Captain Collins and carried by a vote of 4-2 with Mr. Lorch and Ms. Boudreaux opposed, it was

> RESOLVED that on page 1, Training Qualifications, item 3 be amended to read, "Have an Unlimited Federal Pilot endorsement for Seward/Resurrection Bay, Cook Inlet, Prince William Sound, and the Kodiak Island Ports of St. Paul Harbor and Woman's Bay."

On page 2, Training Program, the opening paragraph was rewritten to read,

> For the purposes of fulfilling the State requirement for dockings and undockings, all vessel movements are to be supervised by a state pilot holding an Unlimited state license with authorization from the Alaska Board of Marine Pilots to supervise the training of marine pilots. Maneuvers may be conducted on vessels under registry or enrollment of not less than 1600 gross tons.

On page 2, Kodiak Island Group, the paragraph titled, "Kodiak/Out Ports:..." was deleted. The paragraph titled, "Afognak Island/Danger Bay" was also deleted.

On page 3, Cook Inlet, the number of supervising pilots required for Homer/Kachemak Bay and for Anchorage was changed from two to three.

On page 3, Prince William Sound, the first sentence under "Whittier" was amended to read,

> Three dockings and three undockings under supervision, including one docking and one undocking at the DeLong Pier on vessels of not less than 10,000 gross tons.

On page 4, Cruise Ship Routes, the requirement under Western Entrances was changed to require two round trips through Ellington Passage rather than one. And a new paragraph was added to read,

> Approach via Cape Hinchinbrook: Eight round trips under the supervision of three different pilots on ships over 10,000 gross tons.

On page 4, Administration of Deputy Pilot Training Program, paragraph 2 was amended by deleting the phrase, "provided by SWAPA."

Page 5, Dismissal from Deputy Pilot Training Program, was rewritten to read,

1. The State Board of Marine Pilots must be advised within 30 days of the dismissal of a pilot trainee from the training program.
2. Due process must be observed in the dismissal procedure.

The section titled Appeal of Dismissal on page 5 was deleted.

On a motion made by Captain Collins, seconded by Captain O'Hara and carried unanimously, it was

RESOLVED to proceed with SWAPA's training program, as amended, as a proposed regulation for the minimum training requirements for region 2.

A short recess was taken from 11:25 to 11:32 a.m.

Agenda Item 13b <u>Deputy Pilot Training Standards - Region 3</u>

The board reviewed the proposed training standards submitted by Alaska Marine Pilots (see Attachment 3), and the following changes were made.

On page 1, under section 08.62.097(1), the proposal was amended to read, "In the Western Region, vessels under enrollment of not less than 1600 gross tons may be used to satisfy training requirements."

On page 2, paragraph (7), titled "Port Moller," was amended to read, "(7) Port Moller/Herendeen Bay: two transits to and from the pilot station to Port Moller, one of which is to Herendeen Bay."

Also on page 2, the number of years allowed to complete the deputy pilot training program was increased from two to three. And in that same paragraph, the statutory reference was corrected to read AS 08.62.097(a)(3).

On a motion made by Captain Collins, seconded by Captain O'Hara and carried unanimously, it was

RESOLVED to accept AMP's proposed Deputy training program, as amended by the board, as the board's proposed regulation for training standards in region 3.

A motion was made by Mr. Lorch and seconded by Captain O'Hara to accept AMP's proposed Unlimited Pilot training standards for public notice in regulation form with the deletion of item number 4, "attend a manned ship model course."

An amendment to the above motion was made by Mr. Sell and seconded by Captain O'Hara to include item 4. The amendment passed by a vote of 5-1 with Mr. Lorch opposed. Therefore, it was

RESOLVED to accept the Unlimited Pilot training standards submitted by AMP for processing as a proposed regulation.

Agenda Item 13c <u>Deputy Pilot Training Standards - Region 1</u>

Hans Antonsen, SEAPA, and Michael Spence, ACP, represented their organizations before the board to discuss proposed training standards in region 1.

Mr. Watt, chairman, ruled that Captain Collins should be excused from this discussion because his membership in SEAPA may present a conflict of interests. On a motion made by Mr. Sell, seconded by Captain O'Hara and carried by a vote of 4-0 with Captain Collins and Mr. Watt abstaining, it was

RESOLVED to overrule the chair's decision to excuse Captain Collins from participation in the consideration of training standards in region 1.

The SEAPA proposal (see attachment 4) was used as a guide for establishing the region 1 training standards and was amended as follows:

On page 1, 12 AAC 56.025(3) was amended by adding the phrase "except for Yakutat" to the end of the paragraph.

Also on page 1, 12 AAC 56.030 and .035 were deleted.

On page 2, 12 AAC 56.040(A) was rewritten to read:

(1) Port transit and experience requirements for Southeastern Alaska are as follows:

Ketchikan - 3 dockings, 3 undockings including the oil dock on a vessel of not less than 10,000 gross tons. One of the dockings and undockings must be at night.

Wrangell City - 2 dockings, 2 undockings

Shoemaker Bay - 2 dockings, 2 undockings

Klawock - 3 dockings, 3 undockings

Ward Cove Pulp Mill - 3 dockings, 3 undockings, one of which must be at night

Ward Cove Mooring - 1 mooring, 1 unmooring

Metlakatla - 3 dockings, 3 undockings

Skagway - 5 dockings, 5 undockings, 3 of the 5 must be to the Ore Dock,and one of these must be at night

Haines - 2 dockings, 2 undockings, one of which must be at night

Sitka Saw Mill Cove - 3 dockings, 3 undockings, one of which must be at night.

Sitka Inner Harbor - 1 docking, 1 undocking

Hawk Inlet - 5 dockings, 5 undockings

Hydaburg - 2 moorings, 2 unmoorings

Juneau - 5 dockings, 5 undockings, one of which must be at night

Petersburg - 2 dockings, 2 undockings

Dora Bay - 2 moorings, 2 unmoorings

Hobart Bay - 2 dockings, 2 undockings

Kake - 2 moorings, 2 unmoorings

Hoonah - 3 moorings, 3 unmoorings

Broken Oar Cove/Yakutat - 2 moorings, 2 unmoorings

Long Island - 2 moorings, 2 unmoorings

(2) The dockings/moorings and undockings/unmoorings must be completed with a minimum of three supervising pilots. A supervising pilot may not supervise more than 40% of the total dockings/moorings and undockings/unmoorings.

(3) The Pilot Board will add or delete facilities as required by the change in ship traffic.

(4) 40 percent of the dockings/moorings and undockings/unmoorings must be performed between October 1 and April 1.

(5) Incorporate SWAPA definitions for "docking," "undocking" and "night."

(6) 75 percent of the above movements must be made with tug assist.

(7) The supervising pilot will give the trainee pilot a briefing prior to, and a debriefing after each movement.

(8) The supervising pilot must be approved by the state board and have an Unlimited license.

(9) The minimum number of trips for the scenic cruising areas are:
Tracy Arm - 6 round trips
Endicott Arm - 6 round trips
Misty Fjords - 12 round trips

(10) Incorporate the wording under "Dismissal from Deputy Pilot Training Program" in the region 2 training standards.

On a motion made by Captain O'Hara, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to proceed with proposed regulations for the region 1 training program as amended above.

On a motion made by Captain Collins, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to accept the region 1 training proposal for SEAPA and ACP organization recognition purposes.

Agenda Item 20 <u>License Application Review</u>

On a motion made by Captain Collins, seconded by Captain O'Hara and carried unanimously, it was

RESOLVED to accept the Deputy Pilot application of Robert Lee.

On a motion made by Captain Collins, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to deny the Deputy Pilot application of Ted Kellogg because of incomplete federal pilotage.

On a motion made by Captain Collins, seconded by Captain O'Hara and carried unanimously, it was

RESOLVED to reconsider the license upgrade application of Anthony Chadwick at the April 1992 meeting.

Agenda Item 32 Unfinished Business

The unfinished business will be placed on the agenda of the April 1992 meeting.

On a motion made by Captain O'Hara, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to include discussion of a regulations project to require $250,000 liability insurance prior to licensure on the April agenda.

On a motion made by Mr. Lorch, seconded by Mr. Sell and carried unanimously, it was

RESOLVED to include a regulations project for medical and physical fitness requirements on the April agenda.

Agenda Item 33 Adjourn

The meeting was adjourned at 1:25 p.m.

Respectfully submitted,

_____
Bob Watt, Chairman

_____
JoAnne Cummings,
Licensing Examiner

Approved on: _____

Board of Marine Pilots Regulations

M E M O R A N D U M

TO: Alaska Board of Marine Pilots
VIA FAX 465-2974

FROM: Alaska Marine Pilots

RE: Proposed Regulations 12 AAC 56.021(b) and (c)

DATE: April 10, 1992

This memorandum presents the view of Alaska Marine Pilots ("AMP") respecting proposed regulations 12 AAC 56.021(b) and (c).

SUMMARY

Proposed regulation .021(b) is a redraft of the existing language. After it was put out for public comment and thereafter adopted by the Board at its January 1992 meeting, this subsection was redrafted by the Office of the Attorney General ("AG"). According to Mr. Amendola, the redrafting was not supposed to change the regulation in any substantive way. However, without questioning the AG's intent, AMP contends that the change is substantive and substantial. AMP asks the Board either to adopt the subsection in its original form or put it out for public comment again.

Proposed regulation .021(c) was first adopted by the Board at its Fall 1991 meeting, put out for public comment, and adopted unchanged at the Board's January 1992 meeting. The AG has indicated it will recommend to the lieutenant governor that the regulation as written is contrary to law and therefore unenforceable, and consequently should not be approved by the lieutenant governor. AMP strongly urges the Board not to change this subsection, and by this memorandum urges the AG to reconsider its position and approve the subsection as written.

SUBSECTION .021(b)

As originally adopted, .012(b) read: "Each exemption, addition, or endorsement to a marine pilot license must be identified on the license." As rewritten by the AG's office, it reads:

> (b) An exemption to a license for a pilotage region will be identified on the license for the parts of the region that the licensee is determined by the board as not qualified to pilot or the pilot does not seek licensure. An endorsement for an extended route will be identified on the license if the board issues an endorsement under this chapter.

The words "or the pilot does not seek licensure" is a significant substantive change in the regulation as adopted by the Board. AMP can see no justification in the statute or any regulation adopted by the Board for adding these words to the regulation.

The reason this is significant is that implies that pilots may make an election not to seek licensure in all of a region. AMP strongly urges the Board to adopt a policy that a pilot must have full federal and state pilotage in order to obtain an unlimited pilot's license under AS 08.62.100. There is no doubt that the Board has the authority to impose this requirement.

(AMP is aware that the statute no longer refers to anything called an "unlimited license." However, for the sake of discussion, AMP refers to the license contemplated by AS 08.62.100 as an "unlimited" license, distinguished from the deputy marine pilot license contemplated by AS 08.62.097.)

Furthermore, AMP urges the Board to impose a requirement that deputy marine pilots holding less than full state and federal licensure for a region make reasonable progress toward full licensure. In other words, the requirement should be that a deputy marine pilot will obtain the unlimited license within a reasonable time, or lose his deputy license.

The policy objective here is to ensure that each pilot eventually becomes fully licensed in his or her region, and therefore is able to provide pilotage services to all vessels in all ports of the region, at all times of the year, day or

night. The state's interests are not served by permitting a pilot to become licensed in one or two high-volume, high-profit ports in a region, to the exclusion of the other lower-volume, lower-profit ports. If the state permits that kind of "cherry picking," pilots and pilot groups will have a strong economic incentive to work and compete only in the profitable ports. In fact, it will become an economic imperative to do so. It will become economically impossible to provide service to remote, unprofitable ports and still stay in business.

For this reason, the words "or the pilot does not seek licensure" should not be included in the regulation. Clearly, this phrase represents a significate substantive change from the regulation that was put out for public comment and then adopted by the Board in January. The Board must either insist that the regulation be written as originally adopted, or must put this new version out for full public comment. In AMP's view, the Board cannot legally adopt this substantive change without going through the entire process.

SUBSECTION .021(c)

This is what has become known as the "cross-regionalization" issue. Some pilots and industry representatives are strenuously urging the Board to adopt a regulation that will permit pilots to cross regional lines freely. AMP strongly urges the Board to resist this pressure, and to maintain the tough regional restrictions contemplated by the legislature in HB 194.

The current language of 12 AAC 56.012(c) was suggested by AMP and thereafter adopted by the Board at its Fall 1991 meeting. It was put out for public comment, then adopted unchanged at the Board's January 1992 meeting:

> (c) A pilot may not be licensed in more than one region at a time unless the board determines that the members of the organization or organizations of that region do not have a sufficient number of qualified members to provide the kind of pilotage in the region that will assure the protection of shipping, the safety of human life and property, and the protection of the marine environment.

The need for this regulation arises from AS 08.62.080(b), which provides:

> A pilot may not be licensed in more than one pilotage region at one time, unless the board determines that it is in the best interests of the state to license pilots for parts of more than one pilotage region.

The regulation proposed by AMP and adopted by the Board was intended to define what constitutes "the best interests of the state."

The AG has indicated it will disapprove this section if the Board does not withdraw it. The AG's reasons are set out in a memo of March 20 from Mr. Amendola to Assistant AG Deborah E. Behr, and a subsequent memo dated March 20 from Ms. Behr to the Board. The bottom line is that the AG views this language as "anti-competitive" and therefore prohibited by AS 08.62.040(d). Subsection .040(d) provides that the Board may not adopt a regulation "resulting in anti-competitive practices that, if the board were subject to AS 45.50.562--45.50.596, would violate AS 45.50.562--45.50.596."

AMP respectfully contends that the AG is wrong in its determination that the current language of 12 AAC 56.021(c) is anti-competitive. AMP's threshold problem with the AG's position is that there is no discussion whatsoever in their legal memoranda to the Board explaining why the language would violate AS 45.50.562 -- .596. We can find no indication that the current language <u>does</u> violate any anti-trust provision of Alaska law. Without any discussion by the AG in its memoranda, it is impossible to determine where the violation might lie.

In AMP's opinion, the AG's memos gloss over the express language of AS 08.62.080(b). As written, the statutory presumption is that pilots shall not pilot in more than one region at a time UNLESS an exception must be made to serve the state's best interests. In other words, the presumption is in favor of the restriction, not in favor of the exception. The AG seems to be reading it the other way around: Mr. Amendola and Ms. Behr seem to be arguing that pilots should be able to pilot in more than one region at a time UNLESS they cannot demonstrate an ability to do so safely. This improperly reverses the language of the statute.

There is nothing in the regulation or the underlying statute that prevents a pilot from competing in any region in which he chooses to compete. However, it is undeniable that AS

08.62.080(b) creates a heavy presumption against allowing them to compete in two or more regions at the same time. The legislature obviously balanced the state's interest in unfettered competition against its interest in promoting local expertise. It enacted Section .080(b), together with mechanism for creating smaller pilotage regions, for the purpose of making sure that pilots do not spread themselves too thin. This is a safety-promotion measure well within the legislature's police powers.

The existing language of 12 AAC 56.021(c) is not "anti-competitive" except in the most literal sense -- that is, in the sense that the entire statute is "anti-competitive" because it does not permit unfettered and unregulated marine piloting. In that sense, the entire statutory scheme is "anti-competitive": no one can pilot without a license, and that very fact means that piloting is not purely competitive. Under the current scheme, a pilot is also restricted in where he can work, with whom he can work, and how much he can charge. It follows that the mere regulation of pilots cannot be construed as inherently "anti-competitive." If it were, the entire statute would have to be thrown out. In the context of AS 08.62.040(d), the term "anti-competitive" has to mean something more than "regulated" or "restricted."

AMP remains convinced that the regulation must define what constitutes the <u>state's</u> interest in deciding whether a pilot can pilot in more than one region at a time. It is not the interests of pilots or of industry that are to be considered, but the interests of the <u>state</u> alone. What are the state's interests? The statute spells it out at AS 08.62.040(a): safe and efficient pilotage service to assure the protection of shipping, the safety of human life and property, and the protection of the marine environment. These are the state's <u>only</u> interests in piloting, and the entire statutory and regulatory scheme is aimed at furthering these specific enumerated interests.

As long as these specific state interests are being adequately served by the pilots who are already working exclusively in a region, then Subsection .080(b) makes it clear that there is no justification for permitting a pilot from another region to work in both regions at the same time.

Put another way, as long as the state's interests are being adequately served in a region by the pilots working exclusively in that region, then Subsection .080(b) expresses the state's overriding interest in preventing pilots from other

regions from diluting their expertise by trying to work in two regions simultaneously.

Put yet another way, as long as the state's interests are being adequately served in a region by the pilots working exclusively in that region, then permitting pilots from other regions to work in that region serves only their own economic interests and the economic interests of industry, to the detriment of the state's interest in promoting safety by restricting pilots to one region at a time.

With all that in mind, we must disagree with the AG's office in its suggestion that the state's interest in this matter is only to make sure that pilots pass some tests and maintain their currency. Quoting from Ms. Behr's March 20 memo:

> The board may consider adopting more frequent examinations, enhanced continuing education requirements, or local experience requirements for pilots licensed in two or more regions.

If that were the legislature's intent, they never would have enacted Subsection .080(b). What the AG's office proposes is no change from the prior statutory and regulatory scheme, which placed no limitation on where a pilot could work, so long as he passed the proper tests. A basic rule of statutory construction is that the legislature is never presumed to have enacted a law without a reason. If the effect of a new law is to change existing law, it must be presumed that the change was intended.

In this case, the prior law consisted of a statute that did not even mention pilotage regions, and a regulation (existing 12 AAC 56.021(a)) that divided the state into two "licensing areas." There was no restriction on any pilot who wanted to work in both "licensing areas" as long as he passed the tests required by the board.

Contrast the old statute with the new legislation. The new legislation included a statement of policy setting forth a legislative finding that

> in order to assure the protection of lives and property and the marine environment of the state, licensed marine pilots <u>having extensive local knowledge</u> are required to pilot certain vessels on the inland and coastal waters of and adjacent to the state.

HB 194, Sec. 1(b)(1) (emphasis added). Without doubt, the legislature was interested in encouraging "extensive local knowledge." The statement of policy goes on to say that the legislature found that

> it is necessary to give the Board of Marine Pilots broad statutory authority, including the authority to establish pilotage regions . . . .

HB 194, Sec. 1(b)(5). The statute itself directs the Board to adopt regulations establishing pilotage regions, and provides that the Board <u>may</u> adopt regulations establishing standards for permitting a pilot to work in more than one region at a time. AS 08.62.040(a)(4)(A) and .040(b)(4). Finally, the new legislation establishes a strong presumption against allowing pilots to work in more than one region at a time. AS 8.62.080(b).

These are substantial changes from the law as it existed prior to the passage of HB 194. The Board and the AG <u>must</u> look at the presumption against "cross-regionalization" as a significant change in the law that was intended by the legislature.

In adopting the current language, AMP believes that the Board has properly exercised the broad authority conferred upon it by the legislature. AMP questions the authority of the AG's office to interfere in this exercise of authority, where the legislature clearly intended that the collective expertise of the Board was to be given great weight. On what is essentially a safety issue, the AG appears to have substituted its determination of what constitutes the state's best interests for that of the Board.

From AMP's perspective, the real issue here is defining what is meant in Subsection .080(b) by "the best interests of the state." We remain convinced that the board <u>must</u> look to the rest of the statute to define those interests, and as mentioned above, the statute defines those interests in terms of protection of shipping, of human life and property, and of the marine environment. If one reads Subsection .080(b) as raising a strong presumption against "cross-regionalization" (and AMP insists it must be read that way), then it necessarily follows that cross-regionalization will not be allowed so long as the pilots already working exclusively in a region are meeting those interests.

In discussing how best to serve the state's interests in marine piloting, the Board cannot lose sight of economic realities. Alaska will only have a corps of experienced professional marine pilots if pilots have reasonable assurance of job security and of compensation comparable to others in their profession. This is every bit as much of a safety issue as drawing charts and passing tests. Alaska cannot afford regulatory policies that drive the best marine pilots to other areas of the country or out of the profession altogether.

If the board permits multi-regional licensing in the name of competition (rather than in the name of safety), the overall quality of piloting will suffer in several ways. Pilots who are stretching themselves to work in two regions at a time will experience dilution of their local knowledge and expertise. Unrestricted competition will result in cherry-picking, with the accompanying loss of coverage in unprofitable outports. Eventually, the best and most experienced pilots will go elsewhere rather than bear the risks of inadequate compensation and uncertain employment security.

The AG's proposal would permit granting licenses for more than one region without any finding by the Board that the state's interest is being served by doing so. In effect, the AG's proposal would eviscerate AS 8.62.080(b) by substituting a scheme allowing pilots to get licensed in more than one region at a time without an independent determination by the Board that the state's best interests compelled it. As noted above, that is no change from prior law.

In order to satisfy the mandate of AS 08.62.080(b), every applicant for a license to pilot in all or part of a second region should be required to demonstrate to the Board that the state's best interests will be served thereby. That determination cannot be made by a blanket licensing scheme, but must be made on a case-by-case basis considering all the circumstances, and must be made solely on the basis of the state's interest in safe piloting, not the economic interests of the individual pilot or industry. The current language of .021(c) provides a yardstick for this determination that is itself grounded in the statute.

The AG's suggestion ignores another issue -- perhaps the central issue -- that has been brought to the Board's attention, but which the Board has so far been unwilling or unable to face head-on. It is the issue of "cherry picking," and it arises in these two related areas: whether pilots can pilot in more than one region at a time, and whether the board

should recognized pilot organizations that cannot serve all or substantially all of a region.

The problem of "cherry picking" is this: In a region, the revenue from piloting in the high-volume ports essentially subsidizes the low-volume remote ports. For instance, in the Western Region, AMP can only service outports such as Chignik, Lost Harbor, Cold Bay, and the Aleutians at reasonable rates because of the revenues generated by the high volume of traffic in ports like Dutch Harbor. If an individual pilot or a small pilot group is permitted to skim off the cream by working exclusively in Dutch Harbor and offering to do the piloting work there for less, then AMP will inevitably be forced either to abandon the outports and compete head-to-head in Dutch Harbor, or compete head-to-head in Dutch Harbor and raise the rates for the outports to a prohibitive level.

The state's interests are very much at stake in this matter, because if individual pilots or small pilot groups are allowed to "cherry pick" in the name of promoting competition, then larger pilot groups that are trying in good faith to serve an entire region will not be able to continue doing so. Why would any pilot or pilot group continue to serve the unprofitable outports if the only way to survive is to restrict themselves to competing in the high-money ports or trades? Clearly, the state's interests are not served if service to the outports either disappears or becomes prohibitively expensive.

In trying to promote competition, the central flaw in the AG's reasoning is that marine piloting is a free-market enterprise. That is incorrect. Marine piloting, and the state's interest in marine piloting, is more like a public utility or the post office: the public interest demands that piloting, like postal service, be maintained even in remote, low-volume areas where it is not profitable or even self-sustaining. In the interests of safety, the state should be doing everything it can to ensure that regional pilot groups will continue to serve the outports, even though they are not profitable. The state should NOT be doing anything to force pilots to abandon the outports.

The fact is that marine piloting <u>is</u> carefully regulated in the public interest. Unlike lawyers, doctors, hairdressers, and real estate agents, all of whom are also licensed by the state, marine pilots cannot decide unilaterally where they will work, and with whom, and for how much. Instead, the state has decided to restrict them to certain regions of the state, to regulate how much they can charge, and to require that they

become members of regional pilot organizations that must accept for membership anyone with a pilot's license. The AG's apparent assumption that marine piloting should be treated like a truly "competitive" profession is simply indefensible.

In order for the state's interests to be properly served, the state must ensure that professional pilots organizations that are making a good faith effort to provide full coverage to the entire region are NOT driven out of business. The members of these organizations MUST be permitted to make a reasonable living at least equal to professional pilots in the rest of the country, and they must have reasonable job security. The state's interests in having a solid corp of competent professional marine pilots with sound local knowledge is not furthered by encouraging a system under which remote locations cannot get pilots, good pilots are driven elsewhere for decent pay and job security, and piloting services in the busiest ports go to the lowest bidder in a cutthroat market. It is neither good nor responsible public policy. We aren't talking about cabbages here; we're talking about marine safety. Marine pilots are the equivalents of air traffic controllers, not grocers.

RECOGNITION OF MARINE PILOT ORGANIZATIONS

AMP supports the following policies for recognition of marine pilot organizations and the training and licensing of pilots:

1. In order to receive an unlimited license, a pilot must have full federal and state coverage for the entire region. AMP believes there should be a reasonable time in which to move from partial coverage as a deputy pilot to full coverage as an unlimited pilot, but also believe that a time limit must be established for doing that. In other words, "up or out." This would affect regulation .021(b), which implies that a pilot can elect indefinitely not to get fully licensed in the region. As noted above, AMP urges the Board to go back to the original formulation of .021(b).

2. In order to be recognized as a regional organization, a one-pilot organization must agree to provide pilotage services in the region for at least six months of the year. An organization with two or more members must provide pilotage services for the entire year.

3. No pilot organization, regardless of its size, may refuse a request for pilot services anywhere in the region, unless there is no competent pilot then available from the organization. In other words, if a competent pilot is available, that pilot must render requested services. "Competent" means physically and mentally competent and licensed for the particular area. An organization's refusal to perform pilotage services when competent to render them should be grounds for terminating the organization's recognition.

These measures are intended to preclude seasonal and geographic cherry-picking, and AMP believes they are reasonable requirements in furthering the statutory objectives of the act.

Respectfully submitted,

ALASKA MARINE PILOTS

cc: Gary Amendola
Office of the Attorney General
State of Alaska
(via fax)

MEMORANDUM

State of Alaska
Department of Law

TO Bob Watt, Chair
Board of Marine Pilots
Div. of Occ. Licensing
Dept. of Commerce
and Economic Development

DATE March 20, 1992

FILE NO 993-92-0041

TEL NO 465-3600

SUBJECT Board of Marine Pilot regulations (12 AAC 56)

FROM Deborah E. Behr
Assistant Attorney General
and Regulations Attorney

I have reviewed the regulations of the Board of Marine Pilots on pilotage regions, maximum tariffs, and the recognition of marine pilot organizations. I made several amendments for clarity and to conform to the drafting manual. The regulations, with the amendments, are retyped and are available for your board's consideration and readoption.

I wish to alert the board to one subsection that has significant legal concerns. The issue concerns proposed 12 AAC 56.021(c). That proposed regulation, as adopted by the board, states as follows:

> (c) A pilot may not be licensed in more than one region at a time unless the board determines that the members of the organization or organizations of that region do not have a sufficient number of qualified members to provide the kind of pilotage in the region that will assure the protection of shipping, the safety of human life and property, and the protection of the marine and coastal environment.

The proposed regulation cites AS 08.62.040 and AS 08.62.080 as authority.

AS 08.62.040(b)(4) allows the Board of Marine Pilots to:

> . . . by regulation, make any other provision for proper and safe pilotage upon the inland and coastal water of and adjacent to the state and for the efficient administration of this chapter, including establishing . . .
>
> (4) standards under which a pilot may receive a license or an endorsement to a license to pilot vessels in more than one pilotage region.

AS 08.62.080(b), though, restricts the authority of the board to issue licenses for more than one region, as follows:

> (b) A pilot may not be licensed in more than one pilotage region at one time, unless the board determines that it is in the best interests of the state to license pilots for parts of more than one pilotage region.

(Emphasis added.)

Also, AS 08.62.040(d) further defines the board's ability to adopt regulations on piloting in more than one region as follows:

> (d) Notwithstanding the exemption from AS 45.50.562 -- 45.50.596 granted to pilot organizations under AS 45.50.572(a), the board may not adopt a regulation . . . resulting in anti-competitive activities that, if the board were subject to AS 45.50.562 -- 45.50.596, would violate AS 45.50.562 -- 45.50.596.

(Emphasis added.)

Although on the surface these statutes may seem diametrically opposed, we believe that a court would likely read them in para materia, or together as one statutory scheme. This is especially likely because all of these sections were passed in the same bill in 1991 (SCS CSHB 194(L&C).) See ch. 89, SLA 1991.

Therefore, we believe that the court would interpret these statutes to allow the board to establish exclusive pilotage regions to encourage safe piloting, if the exclusive regions did not result in anticompetitive activities. This could be accomplished by the board allowing a pilot to demonstrate to the board that he or she can safely pilot in a second region and has current knowledge of local conditions essential for safe piloting for licensure in that second region. By adopting such a system, the board would be furthering the purposes of the Marine Pilotage Act to provide for safe and efficient pilotage while at the same time not running contrary to the anticompetitive prohibitions of AS 08.62.040(d).

This interpretation is consistent with testimony at legislative committee meetings, when HB 194 was debated last year. A major goal of the legislation appears to have been to ensure safe piloting in Alaska waters. Testimony frequently focused on the need for a marine pilot to have current and accurate information on local conditions. Persons testifying generally stressed that it was difficult for a pilot to maintain competency if the pilot was

expected to cover two or more large geographic regions. Testimony also was presented to urge the legislature not to take away from the board the power to license a pilot in more than one region, if the pilot was qualified to pilot safely in a second region. See House Labor and Commerce Standing Committee Minutes, April 2, 1991; House Judiciary Standing Committee Minutes, April 18, 1991.

The proposed regulation has difficulties because it appears to automatically preclude an otherwise qualified pilot from being licensed in a second region unless there are insufficient numbers of qualified pilots already licensed in the second region. The regulation on its face appears anticompetitive. If safety is the primary goal of the board, it could be accomplished without a blanket restriction, by having the pilot demonstrate to the board his or her competency to pilot in that second region.

The board has the expertise to develop the appropriate standards to license a pilot in a second region. The board may consider adopting more frequent examinations, enhanced continuing education requirements, or local experience requirements for pilots licensed in two or more regions.

In conclusion, we would recommend that the board withdraw proposed 12 AAC 56.021(c) at this time, to allow the board to refine the language of that provision in accordance with the advice in this memorandum. If the board does not do so, it will be disapproved by the Department of Law.

If you or any board member have any questions, please do not hesitate to contact me or Gary Amendola.

DEB:cl

cc: Hon Glenn Olds, Commissioner
Ann Boudreaux, Director
Division of Occupational Licensing
Department of Commerce & Economic Development

Gary Amendola
Assistant Attorney General, Juneau

MEMORANDUM

State of Alaska
Department of Law

TO: Deborah E. Behr
Assistant Attorney General
Legislation/Regulations Attorney

DATE: March 4, 1992
FILE NO: 993-92-0041
TEL NO: 465-2398
SUBJECT: Marine Pilot Regulations

FROM: Gary I. Amendola
Assistant Attorney General
Commercial Section-Juneau

I have reviewed the attached regulations of the Board of Marine Pilots (the board) and find them to be ready for your final review prior to filing with Lieutenant Governor Coghill. The regulations deal with three important areas of marine pilotage, i.e., regions, tariffs, and recognition of pilot organizations. These regulations are required by the amendments to the Alaska Marine Pilotage Act (AS 08.56) effective July 1, 1991. 1/

As these regulations developed, I expressed some concern about proposed 12 AAC 56.021(c) and 12 AAC 56.310(c)(9). Those concerns are as follows:

Proposed 12 AAC 56.021(c)

Proposed 12 AAC 56.021(c) states that "[a] pilot may not be licensed in more than one region at a time unless the board determines that the members of the organization or organizations of that region do not have a sufficient number of qualified members to provide the kind of pilotage in the region that will assure the protection of shipping, the safety of human life and property, and the protection of the marine and coastal environment".

The authority for the adoption of this regulation is AS 08.62.040(b)(4) (the board may, by regulation, establish standards under which a marine pilot may receive a license to pilot in more than one region) and AS 08.62.080(b) (a marine pilot may not be licensed in more than one region at any given time unless the board determines it is in the best interests of the state to do so). Thus, it is within the discretion of the board (i.e., the board is

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1/ The tariff and recognition regulations were supposed to be adopted by January 1, 1992. Secs. 32 and 33, 1991 SLA Ch. 89. In addition, based on the recognition regulations, pilot organizations must be recognized before July 1, 1992 in order to continue to provide pilotage services. Therefore, I urge review of this project as soon as possible.

not required) to adopt regulations that would allow for licensure in more than one region. AS 08.62.040(b)(4). When the board exercises its discretion, it must do so on the basis of what is in the best interests of the State of Alaska, AS 08.62.080(b), and must be mindful to avoid the adoption of regulations that will result in allowing for anti-competitive activities. AS 80.62.040(d). 2/

It is clear that neither the legislature nor the board may any longer rely on unsubstantiated findings to justify the enactment of a statute or the adoption of a regulation. The courts will look for the substance upon which such decisions are made; courts no longer accept at face value a litany of legislative findings to support an otherwise invalid enactment.

My concern with proposed 12 AAC 56.021(c) is that its practical effect will be to prohibit licensure in more than one region without there being a basis for the prohibition. I was present during much of the legislative process leading up to the enactment of the 1991 amendments. It is clear that the legislature intended the standards by which such licensure would be allowed to be stringent. I think it equally clear that the legislature did not intend dual licensure to be prohibited, but only carefully limited by the board in order to protect the state's interest in safe and efficient pilotage.

Why do I think proposed 12 AAC 56.021(c) will, in effect, prohibit licensure in more than one region? In order to allow dual licensure, the board must first determine there is a need based on the lack of qualified pilots in a particular region. 3/ Besides the fact that the bases for making such a determination appear very

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2/ Enclosed in this file are letters from attorneys representing two different pilot organizations. Not surprisingly, one claims that proposed 12 AAC 56.021(c) is valid and the other claims it is not.

The attorney claiming that it is valid suggests that AS 08.62.040(d) is invalid, especially if it were to be the basis for finding proposed 12 AAC 56.021(c) to be invalid. I disagree. There are a number of rules of statutory construction by which I think AS 08.62.040(d) would be, and should be found to be a valid exercise of the legislature's authority over state pilotage. Thus, it is properly a factor that we should consider in determining whether proposed 12 AAC 56.021(c) is a valid exercise of the board's discretionary authority.

3/ Indeed, during a transition in the Southcentral and Western Regions, licensure in both on a very limited basis will be allowed for Southcentral licensees only. See proposed 12 AAC 56.022.