ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7724 SENATE TRANSPORTATION

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(1) is incompetent in the performance of pilotage duties;
(2) is chemically impaired [HABITUALLY INTOXICATED];
(3) illegally uses or sells narcotic or hallucinogenic drugs;
(4) makes a false statement to obtain a license;
(5) violates a provision of this chapter or a regulation adopted under it;
(6) is guilty of misconduct during the course of employment; [OR]
(7) has had the person's United States Coast Guard pilot license conditioned, suspended, or revoked; or
(8) charges, collects, or receives an amount for pilotage services that is different from the pilotage tariff established by the board [SUFFERED REVOCATION OF FEDERAL LICENSURE AS A PILOT].

Simply stated, this legislation must ensure that Alaska has first class pilots by clearly delineating and requiring sanctions for certain unacceptable actions.

Finally, one section that is not covered in the proposed Bill is the composition of the Board. Currently the Alaskan Pilotage is made up prominently of pilots and shipping agents. If a profession is self-monitored in this way, it is most difficult for the disciplining of pilots to be objective. The Board must have representation of both ship owners and the general public to ensure that the best monitoring of the profession is carried out.

Thank you for considering these recommendations. I would be happy to respond to questions, if any.

Captain James Drahos, FNI

# Pilotage—State or Federal

IN A PREVIOUS COLUMN, the terms 'State' and 'Federal (CG)' pilot were used. Mariners of many other countries embark State pilots in the USA without really knowing the legal basis of the pilot's authority nor without any awareness that an approaching US ship may not have a separate pilot aboard. This column will attempt to explain the differences, provide some background to the present situation and highlight some current problems.

Basically, a Federal pilot is one who is licensed by the US Coast Guard (CG) to pilot US ships in a specific area and who is acting under the authority of that licence. A State pilot, who will, in almost all cases, concurrently hold Federal pilotage, is licensed by a State to pilot foreign ships upon that State's waters.

In many instances, the required Federal pilot is the master or one of the ship's mates who also hold the appropriate pilotage endorsement. The State pilot, however, is not a member of the crew, but a 'servant of the vessel,' engaged to advise the master about the waters to be transited. In actual practice, as most mariners around the world know, the pilot assumes the conn (while legally cloaked as 'adviser'!). Occasionally, the term 'docking pilot' will be heard. This does not necessarily mean that person holds any pilotage endorsement, but refers to the master of the assisting tug(s) who comes aboard the ship to control his tug(s) and perform the berthing/unberthing.

The First Congress (1789) recognised that the individual States would be better qualified to know the conditions of their ports and channels. Thus, the authority and basis for State regulation of pilots was established, in the words of the present statute: 'Except as otherwise provided . . . pilots in the bays, rivers, harbors and ports of the United States shall be regulated only in conformity with the laws of the States' [46 USC 8501(a)]. This not only meant that States would license pilots, but that they could determine where and when their pilots were required to be employed. States where a pilot is required are referred to as compulsory pilotage. Some States do not require a pilot to be employed (non-compulsory), but a pilotage fee must still be paid. Most masters, having to pay the pilotage fee anyway, will usually opt for the pilot.

## Federal pilotage

In the mid-1800s, Congress inadvertently threatened the State pilotage system, enacting two separate laws intended to provide greater safety in the operation of steamships by requiring Federal licensing of masters, mates, engineers and pilots. The situation was corrected by further legislation which effectively established the concept of Federal pilotage. The present statute requires that ' . . . a coastwise sea-going vessel shall be under the direction and control of a pilot licensed (by the CG) if the vessel is: not sailing on register (i.e., foreign trade); underway; not on the high seas; and, propelled by machinery and subject to inspection' [46 USC 8502 (a)].

The effect of this law was to allow US-flag ships in domestic trade to utilise CG-licensed pilots; US-flag ships in foreign trade and all foreign ships continued to be piloted by State-licensed pilots. Even many US mariners do not understand that the law thus *requires* pilots on subject vessels on *all* navigable waters of the US, including territorial seas. Practically speaking, it would be nearly impossible to comply with the law literally—i.e., pilotage endorsements for all waters—and the CG has long recognised that ' . . . there are many large portions of our coastline where there are no navigational risks to vessels proceeding along the coast within territorial seas. In view of this, the CG has a long history of only licensing individuals as pilots for a portion of the navigable waters of the US, primarily harbor areas, high traffic areas, rivers and the Great Lakes.' (FR, V. 53, N.108, p.20655)

It is interesting to note, in view of the brouhaha over pilotage in the *Exxon Valdez* casualty, that Congress *intended* to exempt parts of Prince William Sound from Federal pilotage requirements. As per 46 USC 8502(g), 'the Secretary shall designate by regulation the areas of the approaches to and waters of Prince William Sound, Alaska, on which a vessel subject to this section is not required to be under the direction and control of a pilot licensed' by the CG.

## Licensing of State pilots

As one might expect, the various procedures employed by the different States for licensing their pilots are as varied as their waters and conditions are unique. Some States restrict the number of State licences issued. Applicant entry varies from a four year apprenticeship (with no prior seagoing experience) to a competitive examination while holding a second mate's licence (with one year's sea time as second mate) to two years' experience as master on large ships and 50 round trips on the waters applied for.

Some States require a Federal licence as a prerequisite—others only require this licence after completion of training. Virtually all States require State-licensed pilots to progress through 'steps' in tonnage/length/draft of ships handled to ensure adequate experience is gained; often, part of this is under the supervision of a senior, more experienced pilot. Some State pilot associations further require simulator training.

State pilotage laws, including licensing, are administered by a State pilot commission or board. Typically, this body will include one or two serving pilots, thus ensuring that the applicants, examinations and continuing qualifications of State-licensed pilots benefit from the 'real world' experience of State pilots who really know what skills the job requires.

## CG licensing procedures

While the CG is the present government agency charged with the authority to examine for and issue Federal pilotage licences/endorsements, their execution is a mixed bag. Qualification is simpler than for State licences—a specified number of qualifying round-trips (r/t) on certain-size vessels gains entrance to the examination. No actual shiphandling experience need be demonstrated, the CG apparently 'assuming'

that observation of same is adequate. The dichotomy here is that 'pilotage' is composed of 'local knowledge' and 'shiphandling,' yet the CG requirements seemingly confuse the two—local knowledge is generally gained independently of vessel size: shiphandling *is* a function of ship size, but ability cannot be determined solely in the examination room.

The trip requirements vary with the licence held and position on board. In some CG Districts (CGD), holding an unlimited master's licence gains qualification in six r/t—in other CGDs, one must hold the same licence *and* be serving as master to qualify in 12 r/t! No prior licence must be held for an original pilot (only) licence, but three years on deck is required and, usually, the initial number of r/t required are much greater (up to 20 or more). Once the original endorsement or original pilot licence is obtained, the r/t requirements for 'extension of route' (additional pilotage) are lessened.

The initial exam is comprehensive (piloting, chart navigation, weather, shiphandling, pollution, etc.)—subsequent exams for extension of route usually only cover local knowledge, chart sketch, aids to navigation and a rules of the road section. The thoroughness and expediency by which r/t are evaluated, the exam graded and the content of the exam, itself, also vary widely, depending on the CG personnel in the Regional Examination Center (REC). As the CG is first a military organisation, the 'generalist' idea prevails, and the service rotates personnel through a variety of billets to diversify their experience.

Applicants for pilotage and other licences are seldom comforted by the thought that their livelihood is merely a step on the promotion ladder for CG personnel, rather than being judged by a professional mariner. Theoretically, one benefit to this scheme is preventing too much familiarity with the maritime community which might lead to less than scrupulous practices in issuance of licences and seamen's papers—it hasn't always prevented abuses, however.

Except as noted above (non-compulsory pilotage), there are few exemptions to pilotage in the USA. Generally, only US ships under 1,600 grt (self-certified) and foreign ships under 300 grt are exempt from pilotage. Recent regulations have added an additional exemption for vessels towing tank barges totalling not more than 10,000 grt. In these vessels, as well as vessels up to 1,600 grt, the master (or mate) is a 'self-certified' pilot. 'Self-certified' pilots must have four r/t (up to 1,600 grt) or 12 r/t (tank barges to 10,000 grt), with a quarter of the required trips made at night. No exam is required.

There are some troubling aspects to the 'self-certified' pilotage. Small vessels *do* get into collisions with much larger vessels and a 10,000 grt barge loaded with toxic chemicals is not something to be 'exempted'! Without a 'recency of service' requirement, the requisite four/12 r/t could have been made at any time in the past. No vessel size is stipulated—it could legally be an outboard-equipped skiff! With the CG trying to justify authority over State pilots, it is interesting to note that these exemptions are granted, apparently without similar concern.

Increasingly, in recent years, a conflict has developed between the CG and State pilots. Basically, the CG desires to exert direct control over the actions of State pilots (no attempt will be made here to address how CG control of State pilots might contravene the 'sense of Congress' that States should control their own pilots!). The CG may also, rightfully, be concerned about the lack of any pilot aboard a foreign vessel in 'non-compulsory' areas. Although not unlikely, most masters would think twice about the consequences of this act, especially on a first call! In any case, the CG already has authority to require a Federal pilot in any area where a State does not—i.e., non-compulsory areas [46 USC 8503(a)].

The scenario concerning the CG, which is not rare, would see a State pilot, acting on that licence, involved in a casualty. The State could suspend the pilot's licence, but he would still be free to pilot on the authority of his *Federal* licence. The reverse is also true, although in States where a State licence is predicated upon possession of a Federal licence, revocation and/or suspension (R&S) of the latter would automatically result in R&S of the former. The CG has taken action against State pilots by indirect means—i.e., violations of the Federal Boat Safety Act of 1971 (negligence), Ports and Waterways Safety-Act of 1972 (pollution), etc.

Other than the 'normal' bureaucratic urge to expand jurisdiction, the CG seems to feel that State boards and associations may be lax in policing their own ranks. Perhaps, on occasion, this is so—but is CG control the best way to remedy this problem? Like other professional associations (physicians, lawyers, etc.), State pilots may be reluctant in policing their own due to the unspoken fear of being in the same position themselves at a later time (there, but for the grace of God, go I!). It is also very true that State pilots, are fully aware of the difficulties of the job, more so than the CG, and are thus reluctant to respond to well-intentioned, but uninformed pressure.

Some States/associations have apparently been lax in responding to some deficiencies. Certainly, when one pilot has had four or five casualties some action is warranted. This, of course, is where the CG would wish to impose their heavy-handed punishment of R&S, which is somewhat misleadingly referred to as 'remedial.' Is this the proper course? The CG apparently feels that putting a pilot (or other mariner) on the beach is going to improve his or her skills. This is wrong-headed thinking! The State pilots are in a much better position to impose (truly) 'remedial' measures—and many *have* done so—such as simulator courses, renewed supervision or other additional training.

If State pilot boards/associations are reluctant to impose discipline or require additional training, how can the problem be resolved? One proposal is that a separate pilot certification board, perhaps affiliated with the American Pilots Association (APA), could be empowered to review all accidents involving State pilots. This board would have the authority to impose appropriate remedial measures, where necessary, revoking or suspending State licences, when required. Much the same as with medical board certification, such a board could also certify pilots to minimum standards and would go a long way toward removing the only criticism by the CG of the State pilot system.□

Report of the Alaska Oil Spill Commission
Executive Summary

# SPILL

## The Wreck of the Exxon Valdez
### Implications for Safe Marine Transportation

January 1990

**Recommendation 20**
*Marine pilot qualifications*

***Training and experience standards for marine pilots in Alaska should be upgraded to require actual experience in Alaska operations of vessels at thresholds of 60,000 and 150,000 deadweight tons.***

Training and experience requirements have been reduced for pilots of large tankers in Prince William Sound and Cook Inlet since the late 1970s, allowing pilots to qualify for very large ship operations on insufficient experience. While no accidents have been caused by this circumstance, a system with multiple thresholds is inherently safer.

**Recommendation 21**
*State as co-insured*

***Insurance policies should identify the State of Alaska as an additional insured or named beneficiary.***

The shipping industry is responsive to economic incentives. Insurance premiums and premium requirements create incentives. The insurance industry is responsive to the needs of co-insureds. Such practices were required during construction of the trans-Alaska pipeline. There is every reason to revive them.

**Recommendation 22**
*Remote spill response*

***The state should set rigorous requirements for private oil spill prevention and response capability in remote locations. The state also should develop response plans for major spills and articulate a prevention program from the Aleutian Islands to the Arctic.***

Despite the state's obligation to respond to major spills, only if private resources are committed to prevention systems and response can an acceptable reduction in risk be achieved.

Marine traffic in arctic Alaska already poses unacknowledged risk. Fuel provisions delivered by sea and vessels fueled by oil create risks of damage in these hazardous and environmentally fragile waters. Spills are usually impossible or much more difficult to contain and collect in arctic waters. Immediacy of response is the key to cleanup if a spill occurs.

Measures should be undertaken to reduce spill risk in the arctic, including better vessel tracking and contingency plan requirements for all large vessels transiting the arctic, and for smaller vessels carrying oil or major fuel supplies.

COMMITTEE TESTIMONY IN SUPPORT OF S.B. 218
BY CAPT. W.E. MURPHY, SOUTHWEST ALASKA PILOTS

Mr. Chairman and members of the committee, thank you for this opportunity to testify in support of Senate Bill 218. My name is Edward Murphy. I reside in Homer and I've been a marine pilot in Alaska since 1974. I pilot ships throughout Southwest Alaska including very large crude carriers and other tankers, cruise ships, container ships, bulk carriers and fisheries related vessels. I served on the Alaska Board of Marine Pilots for four years, three of them as chairman.

In January of last year I wrote Governor Cowper a letter concerning grave safety problems I saw emerging in Alaska's state pilotage system. Among them:

- The lowest entry standards for licensing in the country.

- No state mandated standards or requirements for pilot training.

- Control and manipulation of state pilots by Outside steamship companies and agents.

- Pilot Board difficulties in maintaining and upgrading pilot standards.

-Inordinate delays in pilot discipline cases.

- Legal problems for pilot associations in training pilots and maintaining high standards in the absence of state requirements.

Governor Cowper responded to the concerns expressed in my letter by ordering his Office of Management and Budget to conduct an independent study of Alaska's state pilotage system and to make recommendations for improvement based on the study findings. The result of the staff study is a booklet entitled Improving Alaska's Marine Pilotage System. This document is a remarkably thorough and thoughtful look at pilotage in Alaska written by researchers who have no ax to grind except the public interest. If you have not already done so, I urge you to read the study. It will tell you far better than I can the problems with our state's pilotage system and the need for legislative change to the marine pilot statutes.

Senate Bill 218 is legislation which the pilots who live and work in Alaska believe in. It is legislation you can all proudly support because it is, ultimately, a safety bill. Consider the following:

1. The "FINDINGS" section makes clear for the first time the public service nature of a pilot's work in terms of protecting lives and property and protecting the marine environment. It recognizes that to properly fulfill that public service function marine pilots must operate independently of the shipping industry. That is, be free from the shipowner's interest and control. This is a crucial element of safety long recognized by state pilots and identified by the study staff. The federal government recognized this essential element of piloting in the Oil Pollution Act of 1990 by requiring state licensed pilots who are not a member of the ships crew to pilot tankers in certain sections of Prince William Sound.

2. The bill clearly establishes the powers and duties of the Board of Marine Pilots. The ambiguity of the existing law in this regard has long been the cause of conflicting interpretation by staff attorneys from the A.G.'s office. The result has often been Board confusion, frustration, failure to act in the public interest, and law suits.

3. The Bill raises the entry standards for pilot license applicants. The staff study, pages 15 through 17, clearly illustrates how remarkably low Alaska's standards are. The American Pilot Association says they are the lowest in the country.

4. The Bill declares that the pilot board may establish standards for training programs. Incredibly, pilot training is not addressed at all under current statute.

5. The staff study pointed out the essential element of local knowledge in all piloting and recommended that Alaska's vast coastline be divided into pilot regions where pilots would be restricted to piloting in one region only.

In addition to the features of the Bill previously listed, there is one additional area of concern which is equally crucial to a workable and professional piloting system. That is limiting pilot liability. The Bill limits a pilot's liability and that of pilot organizations. Every time a pilot steps on a ship he faces the possibility of financial ruin. This is in addition to possible criminal penalties he may suffer in the event the vessel he is piloting suffers an accident. Criminal penalties are called for in House Bill 315 passed by the legislature in 1990. Piloting is a high risk profession and few, if any, pilots can stand the sort of twin liabilities now emerging in this state. Some sort of liability limitation is reasonable as the legislatures of other maritime states have found.

Washington is an example: its pilot act also sets a liability limit of $5,000. Note that S.B. 218 does not limit liability if the pilot's error or negligence was gross or wilful.

Liability is also a major problem for pilot organizations because they are caught in a "Catch-22" situation. The state doesn't require any pilot training. Yet all mariners, and probably laymen too , know that pilots have to be well trained. Yet when we train new pilots, as we must, we can be sued if that pilot has an accident. But if we failed to train a new pilot who then had an accident we would be sued for negligence. It's an impossible situation and another compelling reason why the state must both require pilot training and limit the liability of pilot organizations in their training function.

The Bill gives pilots the explicit authority to organize themselves, which of course they do now. It is important to recognize that the state cannot realistically maintain its own pilot training and dispatch service. Pilots form themselves into organizational structures called associations for this purpose. The associations provide pilots, central dispatching, employees, boats, equipment, pilot stations, radio and communications equipment, transportation, training and administration of the whole as a system. We do this with Alaska resident pilots 24 hours a day, 365 days a year in every kind of weather. The Bill does not franchise any pilot group or require membership in any pilot group.

While this is an excellent bill, there are a couple of areas I would recommend the committee add. These are:

1. Page 1, line 5 under POLICY, FINDINGS AND INTENT, add:
" The first and paramount duty of marine pilots licensed by the state is to provide for the public safety and the protection of the marine environment." This is an important declaration of legislative intent and obligation of state pilots.

2. Page 2, line 23 under POWERS AND DUTIES: substitute the word "shall" for "may". This wording change is important because of continuous past difficulties for the pilot board in doing its job with vague language now in statute. It is very important to make the pilot board's duties and obligations specific and required.

3. Page 5, line 11 insert a new section entitled "DEPUTY PILOTS AND DEPUTY PILOT TRAINING". It is extremely important to spell out in statute a progressive training program where an applicant gains training and obtains a deputy pilot license, them serves under that limited license for a period of time before progressing to higher tonnage and, eventually, an unlimited license. I have some suggested language if you would like to consider adding this suggested new section.

Alaska's original state pilotage act of 1970 has changed little since it was enacted. Yet shipping in the state has increased many fold with larger and faster ships carrying more dangerous cargoes and an ever increasing number of passengers. Often these ships ply the waters of Alaska with only one United States citizen aboard; that person is the ship's pilot who is licensed by this state. The consequences of the pilot's failure to adequately meet the demands placed upon him can have profound consequences for the marine environment and the citizens of Alaska. The pilot's role is a public service one. Alaska's citizens have a right to expect that state pilots have met high entry standards, have undergone rigorous training and possess extensive local knowledge. As the study group recognized, safety demands that pilots be independent and free of the shipowner or his agent's interest and control. Senate Bill 218 is long overdue. I urge you to consider it favorably.

Thank you

# FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 218

Revision Date: _____ Department Affected: Commerce & Economic Dev.

Title: Relating to the Board of Marine Pilots, marine pilots, and .... BRU: Occupational Licensing

Component: Administration

Sponsor: Senate Labor & Commerce

Requestor: Senate Transportation COMPONENT SERIAL NO. 0 3 5 6

Expenditures/Revenues: (Thousands of Dollars)

| OPERATING | FY 92 | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | 72.3 | 72.3 | 72.3 | 72.3 | 72.3 | 72.3 |
| TRAVEL | 20.0 | 20.0 | 20.0 | 20.0 | 20.0 | 20.0 |
| CONTRACTUAL | 5.0 | 5.0 | 5.0 | 5.0 | 5.0 | 5.0 |
| SUPPLIES | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| EQUIPMENT | 10.0 | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 108.3 | 98.3 | 98.3 | 98.3 | 98.3 | 98.3 |
| CAPITAL | | | | | | |
| REVENUE | 0 | 240.1 | 0 | 240.1 | 0 | 240.1 |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | 108.3 | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER GF/PR | | 98.3 | 98.3 | 98.3 | 98.3 | 98.3 |
| TOTAL | 108.3 | 98.3 | 98.3 | 98.3 | 98.3 | 98.3 |

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

(SEE ATTACHED)

Prepared By: Jennifer Strickler, Admin. Officer Phone: 465-2144

Division: Occupational Licensing Date: April 25, 1991

Approved by Commissioner: Glenn A. Olds Asst. Comm.

Agency: Commerce and Economic Development Date: 4-25-91

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

FISCAL NOTE ANALYSIS

SB 218

The bill makes a number of amendments to the Marine Pilotage Act. The expenses identified in this fiscal note result from increasing the mandatory number of meetings to at least three as required by Section 4 of the bill, and the employment of a Marine Pilot Coordinator established by Section 7. The Marine Pilot Coordinator is placed in the partially exempt service of State government and is charged with the responsibility to administer and enforce the provisions of the chapter. The costs identified are based on a similar Executive Director position, Range 22.

Personal Services:

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

Travel: 20.0

Section 4 of the bill increases the number of meetings to at least three each year. Currently the board is required to meet once a year and it is often difficult to fund an additional meeting. Funding of $10.0 will provide for two additional meetings in addition to the one already included in the FY 92 budget request.

Funding of $10.0 will cover travel and per diem expenses for the marine pilot coordinator to travel to each marine pilotage region to audit regional marine pilot organizations, review training programs, and to enforce compliance with the marine pilotage act.

Contractual Services: 5.0

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

Supplies: 1.0

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

Equipment: 10.0

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

**TOTAL COSTS: $108.3**

Revenues:

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

Licensing fees must be raised to cover an additional $240.0 ($206.6 new costs identified in this fiscal note for the first two years and the current deficit of $33.4). A biennial licensing fee of $1,952 ($976 per year) will be necessary to cover program costs. Marine Pilot licensees currently pay a biennial fee of $180 ($90 per year). If licensing fees are not increased to cover program costs, the program must then be supported by the general fund.

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

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

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" The first and paramount duty of marine pilots licensed by the state is to provide for the public safety and the protection of the marine environment." This is an important declaration of legislative intent and obligation of state pilots.

2. Page 2, line 23 under POWERS AND DUTIES: substitute the word "shall" for "may". This wording change is important because of continuous past difficulties for the pilot board in doing its job with vague language now in statute. It is very important to make the pilot board's duties and obligations specific and required.

3. Page 5, line 11 insert a new section entitled "DEPUTY PILOTS AND DEPUTY PILOT TRAINING". It is extremely important to spell out in statute a progressive training program where an applicant gains training and obtains a deputy pilot license, them serves under that limited license for a period of time before progressing to higher tonnage and, eventually, an unlimited license. I have some suggested language if you would like to consider adding this suggested new section.

Alaska's original state pilotage act of 1970 has changed little since it was enacted. Yet shipping in the state has increased many fold with larger and faster ships carrying more dangerous cargoes and an ever increasing number of passengers. Often these ships ply the waters of Alaska with only one United States citizen aboard; that person is the ship's pilot who is licensed by this state. The consequences of the pilot's failure to adequately meet the demands placed upon him can have profound consequences for the marine environment and the citizens of Alaska. The pilot's role is a public service one. Alaska's citizens have a right to expect that state pilots have met high entry standards, have undergone rigorous training and possess extensive local knowledge. As the study group recognized, safety demands that pilots be independent and free of the shipowner or his agent's interest and control. Senate Bill 218 is long overdue. I urge you to consider it favorably.

Thank you

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU 99811

September 5, 1975

H. Phillip Hubbard
Deputy Commissioner
Department of Commerce
Pouch D
Juneau, Alaska 99811

Re: Tariffs for licensed pilots on enrolled ships (AS 08.62.040, AS 08.62.180, 12 AAC 56.160(j))

Dear Deputy Commissioner Hubbard:

You have requested an opinion from the Attorney General whether or not the Board of Marine Pilots has statutory authority to regulate tariffs charged by licensed pilots employed on enrolled ships. It is the opinion of this department that the board does have such authority. The rationale for this conclusion is set out below.

The powers and duties of the board are set out in AS 08.62.040(a), which reads in part as follows:

> (1) provide for the maintenance of efficient and competent pilot service on all waters covered by this chapter to assure protection of shipping and the safety of human life and property;
>
> * * * * * *
>
> (4) regulate pilotage fees; . . . .

This statute then gives the board authority to regulate services by licensed pilots on specified waterways to assure protection of shipping, the safety of human life and property, and to regulate tariffs charged by licensed pilots for their services.

Under As 08.62.180(1), "vessels under enrollment" are explicitly excepted from the requirements of AS 08.62. However, the board has promulgated regulation 12 AAC 56.160(j) which reads as follows:

> When a pilot licensed under AS 08.62 is employed on an enrolled ship, the same regulations [as for ships not excepted from the requirements of AS 08.62] apply.

It is generally held that an express exception in a statute "comprises the only limitation on the operation of the statute and no other exception will be implied." 1/ In the matter at hand, the fact that AS 08.62.180(1) provides an express exception for enrolled vessels does not require an implied exception from the board's tariff regulations for licensed pilots employed on those vessels.

The enrolled ship exception in AS 08.62.180(1) does not expressly extend to licensed pilots employed on such vessels. That is, the board is authorized and has the duty to establish qualifications of licensed pilots to provide for examination of pilots and their licensing, and to provide for efficient and competent pilot service, as well as, to regulate pilotage fees for licensed pilots regardless of whether the vessel in question is enrolled. One might at first view this result as indirect regulation of the enrolled vessels themselves, in violation of AS 08.62.180(1). However, owners of enrolled vessels are not required to take on licensed pilots while in Alaskan waters. These owners are free to go elsewhere for pilotage advice.

Therefore, it is the opinion of this department that the board is authorized under AS 08.62.040 to regulate tariffs charged by licensed pilots employed on enrolled ships. And so, 12 AAC 56.160(j) is a valid regulation pursuant to this authority.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Wilson Condon
Deputy Attorney General

WC:chp

1/ 2 A Sutherland Statutory Construction §47.11 (4th ed.)

COMMITTEE TESTIMONY SUPPORTING S.B. 218
CAPTAIN MICHAEL J. O'HARA

Mr. Chairman and members of the committee, thank you for the opportunity to testify in support of S.B. 218.

I am Michael J O'Hara. I reside near Palmer, have been a marine pilot since 1979, and have lived in Alaska since 1974. I have extensive experience piloting ships ranging from VLCCs to cruise ships, bulkers, and fishing related freezer ships. I am also a member of the Alaska Board of Marine Pilots.

The staff study, comissioned in response to Captain WE Murphy's letter regarding the shortcomings of the present pilotage act, stressed local knowledge, increased entry standards, adequate training, continuing education, pilot board authority, pilot discipline, and liability.

Training and local knowledge ensure safety. Regionalization of piloting ensures local knowledge.

Training should be progressive. When I was eighteen years old I decided that I wanted to pilot ships. Fourteen years later I worked my first pilot job. Five years afterwards, after schools and tutelege, study and examinations, I piloted the largest ship in Alaska.
I am not an unusual case.

Regionalization reduces the scope and increases the focus of knowledge.

Local knowledge is a continuous process. One cannot reside nine months a year in Washington and waltz into Prince William Sound as pilot and expect no changes or be proficient. Local knowledge is gleaned from a wide variety of sources, professional and personal. The Exxon Valdez had traversed Prince William Sound frequently, yet with some glacial ice, darkness, and who knows what else, a disaster occured.Add other problems too numerous to mention, and an unfamiliar mariner could precipitate another grounding or collision, even though that mariner has a pilots license but is familiar only with the routine.

Alaska has the lowest standards for entry into the piloting field. Alaska has some of the most arduous piloting jobs as well as an extremely sensitive and unspoiled environment. Alaska should have the highest standard to protect what is as yet pristine.

The pilot board needs clout. Marine accidents must be rigously investigated and the board should not be hesitant to take action for fear of being sued. At present each individual on the board is being sued for not issuing a license waiver to an unqualified pilot. Hence an ambiguous word like "may" should be replaced with "shall", as in pg. 2,line 23 under Powers and Duties.

COMMITTEE TESTIMONY ON SB 218
Captain Michael J.. O'Hara

One particular industry would like company pilots who pilot from Ketchikan throughout Alaska. This desire is understandable from their stand point. It's cheaper. No pilot boats or travel fees would be involved, and rates would be secret and negotiable. This industry also hires whoever is cheapest on the world market. Frequently the only American wage earner on the ship is the pilot. However this arrangement would not be in the best interest of Alaska, because the pilot's first interest is company policy, which leads to comprimising safety in the name of expediency.

The state should not depend on a shipping company to hire and train pilots, nor provide the services an association of pilots provide.

As we saw two years ago, shipping companies don't always hire the most competent mariners. A navigational mistake at sea may go unnoticed but a navigational error near Bligh Reef (or any land) won't.

Thank You

# Alaska State Legislature



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## SENATE LABOR AND COMMERCE COMMITTEE

TO: Senator Curt Menard, Chair
Senate Transportation Committee

FROM: Rod Mourant, Legislative Aide
Senate Labor & Commerce Committee

Rod

Senator, thank you for scheduling SB 218 Marine Pilots legislation for a hearing. It has been over a decade since the legislature has updated the statutes dealing with marine pilotage in Alaska.

To assist the committee in its deliberations Senator Pearce has requested that I provide copies of Improving Alaska's Marine Pilotage System, copies of Senate Bill 218, copies of an article on marine pilotage from Seaways magazine, copies of proposed legislation approved by the Board of Marine Pilots, and a copy of a memorandum from the Office of the Governor on the topic. A fiscal note and position paper has been requested from the Department of Commerce & Economic Development.

Thank you again for considering this legislation.

Attachments

# Alaska State Legislature

Senator Drue Pearce, Chair
Senator Virginia Collins, Vice Chair
Senator Dick Eliason
Senator Rick Halford
Senator Jay Kerttula

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## SENATE LABOR AND COMMERCE COMMITTEE

TO: Senator Curt Menard, Chairman
Senate Transportation Committee

FROM: Senator Drue Pearce

DATE: April 3, 1991

RE: Senate Bill 218

I respectfully request that Senate Bill 218 be scheduled for a hearing before the Senate Transportation Committee at the committee's earliest convenience after April 11th.

Senate Bill 218 makes the first major changes to the Marine Pilotage statutes in nearly twenty years. This legislation is the result of an intensive study of the state's Marine Pilotage System by the Office of the Governor. It also addresses the concerns that the Alaska Oil Spill Commission had with the trend to relax the qualification standards for pilots in the state.

Senate Bill 218 is important to the safety and health of the people of the State of Alaska and to the protection of their environment. This legislation has received an affirmative vote by the Board of Marine Pilots and addresses all of their major concerns. As a result, some aspects of the Marine Pilotage System study were not included in this bill.

Thank you in advance for the early opportunity to present this important legislation.

DP:rrm

# STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION**

WALTER J. HICKEL, GOVERNOR

May 3, 1991

**BILL NUMBER:** SB 218

**TITLE:** An act relating to the Board of Marine Pilots, marine pilots, and marine pilots organizations.

**DEPARTMENT POSITION:** Support

**ANALYSIS:** This bill is intended to clarify and strengthen the authority of the Board of Marine Pilots through an expansion of the Board's duties. This expansion includes establishing qualifications and approval of training programs, and establishing pilot regions to name a few.

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

**PROPOSED AMENDMENTS:** The Department would propose that the legislation be amended to include the parameters for the training programs. For marine pilots in the crude oil tanker trade, the Board should be required to consult with DEC in establishing the training standards.

In addition, the Department recommends that the word "may" on page 2, line 23 and page 5, line 31 be changed to "shall".

John A. Sandor, Commissioner
Alaska Department of Fnvironmental Conservation

Captain Michael C. Spence
P.O. Box 20251
Juneau, Alaska 99801

Honorable Curt Menard
Chairman
Senate Transportation Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

May 1, 1991

Dear Chairman Menard:

The following comments and testimony are submitted in the event that they may be useful in your consideration of SB 218, a bill related to Marine Pilotage.

I am a licensed marine pilot who has practiced in Alaska waters since 1976, and have held an unlimited State of Alaska pilot's license since 1981. I have been a member of the Southeastern Alaska Pilots' Association since 1980, and served four terms as a Director and two terms as an elected officer of that organization. I am a 1975 graduate of the U.S. Merchant Marine Academy at King Point, New York.

I believe that my situation can offer your committee a valuable perspective on certain aspects of SB 218, particularly the proposed immunity from the antitrust laws for pilot organizations.

Despite more than ten years of excellent and incident-free service, in 1989 I was the subject of the most intensive internal disciplinary procedure conducted in the history of the Southeastern

Alaska Pilots' Association. Were it not for the intervention of the U.S. District Court in granting a restraining order, I would have received the severest penalty ever given to any member pilot in the Association.

The offense alleged was not the grounding of a vessel or the damage to a wharf or the pollution of waters, nor was it related in any remote way to professional competence. The alleged offense was that I "brought discredit" to the Southeastern Alaska Pilots' Association.

In the summer of 1988, I was asked by the Master of a cruise ship to relieve a colleague who was piloting under the influence of alcohol (or other drugs). As required by law, I reported this incident to the State of Alaska, Board of Marine Pilots. The following year, when this individual was serving as president of the Association, he was told by State officials that he was under investigation due to my report of his intoxication on the bridge. Three days later, he filed charges against me of having "brought discredit" to the Association.

An elaborate effort was then made by officers and counsel of the Association to present a case against me which would not be easily challenged in any other tribunal. The charges that were brought against me included allegations that I had "solicited"

pilotage work outside the auspices of the Association. It is clear to me that these proceedings were intended to make an example of me and deter others from "bucking the system," from competing with the Association, from reporting instances of professional misconduct to the State, and from otherwise acting to undermine the absolute monopoly enjoyed and perpetuated by the Association.

These and other questions of the anticompetitive policies of the Association have arisen in the lawsuit I filed and will continue to be addressed by the federal court. The State of Alaska must not, through this proposed legislation, deny access to legal remedies available under the antitrust laws to those who are wronged by the anticompetitive actions of pilot associations in Alaska.

Furthermore, before empowering pilot organizations with statutory authority to "police" themselves, the committee must examine the record and determine if indeed these marine pilots are or can be fair and effective jurists. Have the priorities of these associations in disciplinary actions been directed at enhancing professional competence and promoting the public safety?

The record of pilot association actions in cases of ship groundings and wharf damage would suggest that they have not. In virtually all cases of which I have knowledge, including the 1979

grounding of the "Brewster" at Klawock, the 1980 grounding of the "Mannheim" at Ketchikan, the 1986 grounding of the cruise ship the "North Star" near Klawock, and damage to wharves at Hobart Bay in 1987 and Skagway in 1989, most of which, it is my understanding, were wholly or in part due to pilot error, the Southeastern Alaska Pilots' Association has never disciplined the pilots.

In considering this bill, your committee must consider another aspect of the pilotage monopoly: the monopoly on information. A statistical analysis would reveal that for every incident such as a ship grounding, there have likely been at least 100 near misses. For every infraction of the pilotage statutes reported to authorities, there have been many that are unreported. The "monopoly of information" plays a significant part in the standard practice of not reporting incidents of errors in judgment or acts of incompetence that do not result in major casualties.

Over those less visible, but serious incidents is thrown a cloak of internal secrecy, and a capricious system of internally negotiable accountability prevails. Because of the absolute control by the associations over entry and continued access to the profession, witnesses are discouraged from reporting acts of incompetence or intoxication to authorities. A witness who, like myself, testifies against his peers, risks financial ruin from internal retaliatory actions. In this case, the monopoly is a

deterrent to accountability, and thus has a negative effect on the maintenance of high professional standards.

The concept that competition in marine pilotage is synonymous with erosion of standards is unsupported and in fact contrary to principles accepted in other industries. Lively competition exists in the marine pilotage profession in many other states and has served, as in other industries, to raise performance standards of pilots and efficiencies to industry.

Thank you for your attention to these important matters for the marine pilotage profession in Alaska.

Respectfully,

Michael C. Spence

BNA Regulation Report®

Vol. 60, No. 1500 HIGHLIGHTS January 24, 1991

**_Parker_ Shields Title Insurers From FTC Attack On Collective Rate Setting:** Invoking recent Supreme Court teachings in *Town of Hallie* and *Southern Motor Carriers Rate Conference* on the scope and applicability of the state action doctrine, the U.S. Court of Appeals for the Third Circuit decides that the collective setting of rates charged by five major national title insurance companies for title search and examination services in six states is immune from antitrust attack under FTC Act §5 by virtue of the *Parker* doctrine. ... pages 97, 119

**Cooperation Is Theme Of Federal And State Antitrust, Deception Enforcement:** As officials from both federal agencies and state attorneys general's offices continue to harmonize on the theme of cooperation to enforce competition and deceptive trade practice laws, they indicate that occasional differences of perspective or case selection with a novel approach should not cause any discordant note in the cooperative enforcement chorus. ... pages 103, 133

**EC Remains On Steady Course Toward Integration By 1992:** Sir Leon Brittan, Vice President of the Commission of the European Communities and the commissioner responsible for competition policy and financial services, assures U.S. audiences that the EC Member States remain committed to integration by 1992, free trade, and keeping the Common Market "accessible to the rest of the world" and that the Commission is pursuing the prospect of a treaty or accord with the U.S. on antitrust cooperation and enforcement. ... page 115

**Counsel's Assessment Of Antitrust Claim Isn't Admissible In Malpractice Case:** An attorney's statements about the merits of a claim under state antitrust law should not have been admitted in a subsequent malpractice action to prove the validity of the antitrust claim, the Idaho Supreme Court rules. ... page 109

**Marine Pilots Association Can't Invoke _Parker_, Labor Exemption:** An association of marine pilots licensed by Alaska can find no safe harbor in the *Parker* doctrine or its status as a labor organization to avoid the reefs of antitrust litigation instigated by a member challenging his discipline by the association, the U.S. District Court for the District of Alaska determines. ... page 98

**Auto Maker's Field Vehicle Is Covered By State Lemon Law:** Chrysler Motors Corp. must repurchase a defective vehicle sold to a consumer after one of its employees already had driven it more than 20,000 miles, the Washington Supreme Court rules, because an automobile driven extensively as a manufacturer's field vehicle is "new" for purposes of the state's lemon law. ... page 110


0003-6021/91/$00.50

Other provisions require a mechanism for judicial review of arbitrary or capricious regulatory actions.

The FCC would have to develop minimum customer service and picture and sound quality standards. States and franchising authorities would be authorized to impose higher standards for customer service and picture/sound quality.

Cable TV systems would have to carry all local programming by incorporating "must carry" provisions as a condition of cable's compulsory license of broadcast television signals. "Cable draws a substantial benefit from the compulsory license, which allows it to obtain CBS, NBC, and ABC for a nominal charge," Lieberman declared. "It should be required to carry small, local independent and public stations as a condition of receiving this benefit."

## MARINE PILOT ASSOCIATION ISN'T IMMUNE UNDER STATE ACTION DOCTRINE, LABOR LAW

An association of marine pilots licensed by Alaska may not invoke the state action doctrine or its status as a labor organization to sink an antitrust claim floated by a member disciplined by the group, the U.S. District Court for the District of Alaska decides. (*Spence v. Southeastern Alaska Pilots' Ass'n*, DC Alaska, No. J90-004 Civil, 12/11/90)

The defendant, the court explains, is not the state and failed to show "how the immunity of the state might extend to a private association of pilots organized for the purpose of dispatch and pooling resources." The association also fails to qualify as a "labor organization" because its members are independent contractors, not employees, and the group does not "deal with" employers on the pilots' behalf.

### Background

Southeastern Alaska Pilots' Association (SEAP) is a voluntary, unincorporated association of persons licensed by the State of Alaska to perform marine pilotage in the waters of southeast Alaska.

The membership of SEAP is limited to 21 marine pilots. When a vacancy occurs, a new member is admitted by vote of the membership. Members are classified into categories based on experience and availability for dispatch. The income and expenses of members are pooled and the net income is distributed to members in proportion to each pilot's classification. Members must use the association as their means of access to employment in southeastern Alaska and are limited for a period of 10 years from competing in southeastern Alaska following retirement or expulsion from SEAP.

This dispute results from disciplinary action taken by SEAP against one member, Michael C. Spence. According to the complaint, Spence was required to relieve another pilot from duty because the other pilot was intoxicated. When SEAP failed to respond to Spence's efforts to launch a disciplinary action against the other pilot, Spence reported the incident to the state, which has scheduled a disciplinary hearing. The other pilot then filed a complaint with SEAP charing Spence with defamation. After a hearing and submission of vote to





the other members, Spence was suspended from SEAP dispatch for 30 days to run from June 1, 1990 through June 30, 1990.

Spence's complaint alleged that SEAP is a combination in restraint of trade and that its members agree to written and oral agreements in restraint of trade.

The disciplinary action has been stayed pending final judgment in this action.

The court currently is considering SEAP's motion for partial summary judgment based on the state action doctrine and its alleged status as a labor organization.

### State Action

Judge James A. Von Der Heydt rejects SEAP's assertion that it is shielded from antitrust attack because states have authority to regulate pilots.

Spence does not dispute the authority of the state to regulate or demand compulsory pilotage, the court notes, but he "has not brought suit against the state," and the defendants have not shown "how the immunity of the state might extend to a private association of pilots organized for the purpose of dispatch and pooling resources."

Therefore, the court holds that summary judgment cannot be granted based on an affirmative defense of state action immunity.

### Labor Organization

Turning to SEAP's claim that it is exempt from antitrust attack as a "labor organization," the court notes precedent suggesting that pilot associations, such as SEAP, are not "easily legally defined."

In this case, however, neither the language of the statute, 29 USC 152(5), nor case law relied on by the association supports the contention that SEAP qualifies as a "labor organization," the court explains.

The statute, the court observes, spells out that the organization must deal with *employers* (emphasis added). In the circumstances present here, SEAP members are not employees but independent contractors. While the court acknowledges that the term "deals with" in the statute has been interpreted not to be limited to "bargain with," it finds that SEAP does not "deal with" employers on the pilots' behalf. The complaint alleged "that the pilots are responsible for *all* dealings with the vessel."

The cases cited by SEAP, the court continues, "involved situations of employee committees or unions specifically organized to deal with employer-employee relationships." See *General v. Pilots Ass'n for Bay and River Delaware*, 254 FSupp 447 (DC Del 1966); *O'Hare v. U.S.*, 150 AMC 182 (DC WWash 1949); and *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 FSupp 841 (DC NCalif 1979), *aff'd* 658 F2d 1256 (CA 9 1981).

Since the court finds that SEAP is not a labor organization and that its members cannot fit within the employee classification, it declines to reach the question whether there is a labor dispute in this case.

Testimony
to the
House Committee on Transportation
from
Captain Mark Nichols
of Lewis & Clark Pilotage, Inc.

February 7, 1991

Mr. Chairman, Members of the Committee, my name is Mark Nichols and I am secretary of Lewis & Clark Pilotage.

Our company was founded in October, 1989. My partner, Captain Gordon Howe, and I have spent our entire working lives in the maritime industry. Captain Howe, the president of Lewis & Clark, is the sixth most senior pilot on the Columbia River. He is a former two-time president of the Columbia River Pilots Association and served as a board member of the Oregon Board of Maritime Pilots from 1986 through 1990.

I obtained my federal license as first class pilot for the Columbia and Willamette River pilotage grounds in 1962. In 1974 I became licensed as a Columbia River pilot by the Oregon Board of Maritime Pilots. I, too, am a former president of the Columbia River Pilots Association.

Both Captain Howe and myself are members of the Masters, Mates and Pilots Union.

Since the formation of Lewis & Clark Pilotage, we have primarily provided pilotage services to vessels calling at the Peavey Grain facility in Kalama, Washington.

We have no objection to House Bill 2074 from the Oregon Board of Maritime Pilots and would be pleased to provide any background information to this Committee which would be helpful in your consideration of the bill. Thank you for this opportunity to testify.

DRAFT

TESTIMONY BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION
FROM CAPTAIN MARK NICHOLS
OF
LEWIS & CLARK PILOTAGE, INC.

March 12, 1991

Mr. Chair, members of the Committee, my name is Mark Nichols. With me today is my partner, Captain Gordon Howe. Together, we make up the state-licensed Columbia River pilots employed by Lewis & Clark Pilotage, Inc.

My purpose today is to testify in favor of the -3 amendments to House Bill 2074 and the additional amendments which the chairman has authorized to be considered today.

The purpose of our testimony is to make two basic points. First, if the benefits of competition on the pilotage grounds of Oregon are to be preserved, the Legislature should adopt either the federal pilotage option in the -3 amendments or the separate amendment prohibiting the Oregon Board of Maritime Pilots from adopting a rule which reinstates the monopoly of the Columbia River Pilots Association on the Columbia River.

Second, if there is ever to be serious change to what has been a closed "old boys club" on every Oregon pilotage ground, there must be change in the status quo: modification of how the Oregon Board of Maritime Pilots operates; the development of a more fair and open apprenticeship program for pilots; and an affirmative action plan for the recruitment and licensing of minority and women pilots.

Before discussing each of these points in more detail, let me tell you a little bit about the background of Lewis &

Clark Pilotage. Prior to October, 1989, both Capt. Howe and I were members of the Columbia River Pilots Association. Both of us were voted into the CRPA in 1974 after having spent more than a decade apiece in the commercial towboat industry on the Columbia River.

In October, 1989, Peavey Grain Company's terminal in Kalama, Washington, became involved in a labor dispute. Following a threat of physical violence to the one of the CRPA's pilot members, the CRPA met at its Portland headquarters and, in an unprecedented move, decided to refuse to serve neutral foreign flag vessels calling at Peavey's Kalama dock. Gordie Howe and I were worried about the consequences to the CRPA, and to state pilotage in Oregon generally, if the pilotage service at the Peavey dock was delayed indefinitely. Early one morning, we called a special meeting of the CRPA. However, following a heated four-hour meeting, we were the only two pilots who disagreed with the decision to refuse service to vessels calling at the Peavey dock.

Following that meeting, between October 16 and October 26, 1989, six foreign flag vessels stacked up the river waiting to call at Peavey's grain elevator. In addition, two more vessels were in route and scheduled to arrive in the Columbia River just two days later, on October 29, 1989.

During the course of the dispute, Peavey Grain Company advertised for available pilots to move the ships. Gordie Howe, who was then a member of the Oregon Board of Maritime Pilots,

myself and other CRPA members knew that Peavey was looking throughout the world for any pilot with a federal license for the Columbia River who could be found to move those ships. We also know that they found a pilot, Mr. Joe Angel, with the license for the Columbia River bar and he was in the process of taking the necessary tests to obtain the endorsement for the Columbia River. We were very worried that the grain company was close to obtaining the necessary federal pilots and that unless those vessels were moved, we would see federal pilotage on the Columbia River.

Following a whirlwind series of negotiations, on October 27, 1989, my partner Gordon Howe and I resigned from the CRPA and entered into a long-term contract with Peavey Grain Company to be the exclusive provider of pilotage services to vessels calling at their grain terminal. For my part, I made the difficult decision to resign from the CRPA for two reasons. First, I vehemently disagreed with the organization's decision to capitulate to the threats and intimidation and I was not going to allow anyone -- certainly not either side of a labor dispute to which I was not a party -- to prevent me from pursuing my livelihood as a Columbia River Pilot. Second, with the escalating crisis of vessels stacking up in the river, both Gordie Howe and I feared that either Peavey Grain or the U.S. Coast Guard would find a way to set up a system of federal pilotage and destroy more than a century of state control over pilotage in Oregon waters.

We are now in the ironic position of supporting the provision in the -3 amendments which would allow a federal pilotage option to vessels calling in the Columbia River. Our support for that change is a function of our experience over the last 16 months since we formed Lewis & Clark Pilotage. We have been subjected to a series of anti-competitive activities by our former partners which are designed to accomplish one of two things: either destroy our small company's ability to survive or force us back into the CRPA.

Our competitor's anti-competitive tactics, which include threats of economic coercion directed to the providers of service to our company and to the steamship agents who order the pilots for vessels calling in the Columbia River, caused us to file a major anti-trust case under both federal and Oregon law in January of this year. A trial before a jury in federal court in Portland is scheduled for mid-June.

Unfortunately, the courtroom is not the only battlefield on which we face the Columbia River Pilots Association. Just last week, the officers of the CRPA filed complaints against Capt. Howe and myself before the Oregon Board of Maritime Pilots alleging that our contract with Peavey Grain is illegal. But most incredibly, the CRPA has petitioned the Oregon Board of Maritime Pilots to make a policy determination and adopt a rule requiring that "each pilotage ground shall have one and only one pilotage group." There can be nc doubt that the objective of this Petition for Policy Determination and

Rulemaking is to re-establish the CRPA's monopoly, which was fractured for the first time in approximately 30 years when we formed Lewis & Clark Pilotage some 16 months ago.

The Columbia River Pilots Association will claim that reinstatement of their monopoly is vital to safe and efficient pilotage on the Columbia River. But there is nothing about the mere existence of competition which in and of itself undermines safety. Professional pilots should be able to do their job regardless whether there are one, two or three pilotage companies on a particular waterway. We have had no accidents in the 16 months since our formation. Further, competition has existed for decades at the mouth of America's busiest waterway, the Mississippi River. In addition, competition between different state pilotage organizations or between organized groups of federal pilots and state pilot organizations exists on Chesapeake Bay, Delaware Bay, New York Harbor and in Hawaii and Alaska.

Just like other segments of the transportation industry, free and open competition promotes quality and service. On the Columbia River, for example, we have competition between different towboat companies, barge companies, steamship agents, ship's handlers and a host of other elements of the maritime industry. The CRPA claims that we don't really have competition for pilotage on the Columbia River because state law prohibits pilots from charging vessels any different rate than that set out in a designated tariff. But to argue that the lack of price competition means there is no competition is to suggest that

restaurants or taxi cab companies, which may have the same rates for particular products, do not compete for customers on the basis of service and quality is ridiculous.

Our attorney has advised us that the Oregon Board of Maritime Pilots has no authority to adopt rules or regulations which would have the effect of creating a pilotage cartel or monopoly on the Columbia River where one does not exist today. In our counsel's opinion, a rule establishing such a monopoly would violate Oregon's antitrust statute, which was passed in 1953 with the express purpose "to encourage free and open competition in the interest of the general welfare and economy of the state, by preventing monopolistic and unfair practices." ORS 646.715. Oregon's pilotage statute, which is set out in ORS Chapter 776, may give the board the power to adopt rules which "provide for efficient and competent pilotage service on all pilotage grounds," but the Board's authority to adopt rules for the effective administration and enforcement of Chapter 776 is subject to the limitation that such rules cannot be "inconsistent with law." Lewis & Clark will vigorously assert its position in any proceeding before the Oregon Board of Maritime Pilots that adoption of the rule requested by the CRPA will be flatly inconsistent with another Oregon law -- Oregon's antitrust statute, which embodies Oregon's longstanding policy against monopolies in all segments of trade and commerce.

We will fight our battle before the Pilot Board against the CRPA's proposed monopoly rule, but this potentially expensive

and protracted dispute will not be necessary if the Oregon Legislature will adopt one of the two amendments before this Committee today. If you were to adopt the amendment at line 15 and 16 on page four of the -3 amendments, Gordie Howe and I will survive because we would have the right to pilot under our federal licenses for the Columbia River.

Alternatively, if that amendment is not adopted, we will survive if the Legislature enacts a very simple amendment to ORS Chapter 776 prohibiting the Oregon Board of Maritime Pilots from adopting any rule which hinders free and open competition between pilot organizations. Adopting such an amendment will make it crystal clear that the Pilot Board has no authority to even consider a rule creating or reinstating a monopoly on any pilotage ground.

In addition, if Lewis & Clark is to survive and add new pilots over time to replace Gordie Howe and myself (Gordie is 58 and I am 53), we need a provision allowing pilot trainees to ride aboard ocean-going vessels on Oregon pilotage grounds in order to gain the necessary trip experience to obtain a pilot's license. Right now, the CRPA is promoting Senate Bill ___ which would enact as legislation their own training rules. Because the CRPA also takes the position that Lewis & Clark's trainees are not allowed to ride aboard vessels being piloted by the CRPA, our trainees are prevented from gaining the trips necessary over the whole length of the Columbia River to obtain a license. We are perfectly willing to allow the CRPA's trainees to ride with us

aboard the deep draft vessel we pilot to and from Kalama, Washington. We don't ask for our competitor to train our personnel, but only for the opportunity to be aboard these vessels to train our trainees ourselves.

In support of our position on the importance of free and open competition, it is worth pointing out the recent experience in Alaska and Hawaii. In both states, the largest pilot associations sought legislation creating statutory monopolies. In each case, the states have refused to grant statutory monopolies to particular pilot organizations. In Alaska, Governor Walter Hickel decided not to introduce monopoly legislation in the face of opposition from the Alaska's small independent pilotage organizations and from a broad coalition within the maritime industry.

In Hawaii, a bill to grant an exclusive franchise to the Hawaii Pilots Association has been defeated. The Hawaiian experience is worth examining. In 1985, the state auditor, following an extensive investigation, recommended that the Hawaii Board of Pilot Commissioners be abolished because of abuses in rate setting, possible antitrust violations, multiple conflicts of interest and the failure to protect the interests of the public in cases of discipline and enforcement. The Hawaii Legislature followed the auditor's recommendations and in 1985 abolished the Hawaii Board of Maritime Pilots, which like Oregon's Board contained pilot, shipping industry and public members. Instead, regulatory responsibility for pilots was

placed in the Department of Commerce and Consumer Affairs. The Hawaiian Legislature has since rejected efforts to re-establish the pilot board and to grant a monopoly to the Hawaii Pilots Association. That state has concluded that its waters are better served by two competitive pilot organizations: the Hawaii Pilots Association and the Port Pilots of Hawaii. Those two organizations compete on the open market for pilotage business in the Hawaiian Islands.

A partial copy of the Hawaii State Auditor's 1985 report is being submitted with this testimony. We will secure a full copy of that report for filing with this committee as soon as possible.

The Hawaiian Auditor's report serves as a good transition to our second major point: the Oregon Legislature should take affirmative steps to open up the closed and "old boy" character of the pilotage system in Oregon. We support the -3 amendment which place the Oregon Board of Maritime Pilots under the jurisdiction of the Oregon Transportation Commission, provide for nomination of all board members by that Commission and require apprenticeship and affirmative action programs developed by the Bureau of Labor, these are all important first steps toward opening up a very challenging and lucrative occupation to the broadest possible range of capable applicants. Gordie Howe and I were first licensed as Columbia River Pilots in 1974. During our 15 years within the CRPA, we both served as president and Gordie was a member of the Oregon Board of Maritime Pilots from

1986 through 1990. During our tenure with the CRPA, it was a monopoly. The last of the independent pilots on the Columbia River retired sometime in the 1950's. And it is clear that Oregon pilots generally have benefitted from the existence of monopoly power on their particular pilotage ground. Each member of the CRPA works a very favorable schedule: 22 days on, followed by 17 days off. Studies over the years have shown that the average number of hours of work per day "on the board" for dispatch to vessels is seven hours per day. And then, there is the ~~three~~ two and a half weeks off, salaries during the last several years have averaged between $120,000 and $140,000.

We are no longer members of the CRPA. Instead, we compete with our ex-partners through Lewis & Clark Pilotage, Inc. We are working harder now than we did when we were with the CRPA, but that is a function of the battles we are fighting with the CRPA and the intense effort that must be devoted to ensure the survival of any start-up company. We believe ~~the~~ that competition is best for the waterway. Unlike the CRPA's efforts to obtain legislation that will favor that organization and assist it in its efforts to eliminate our company from the Columbia River, the amendments we support here are neutral: they will only ensure that free and open competition can continue and that much needed sunlight comes to a very unique niche in maritime commerce. The citizens of Oregon will be well served by the amendments we support today.

Thank you for this opportunity to testify. Captain Howe and I as well as our admiralty lawyer, Mike Haglund, are available now for questions.

MEHr7125

# M E M O R A N D U M

TO: Representative Cedric Hayden (District 38)
House-393
State Capitol Building
Salem, Oregon 97310

FROM: Lewis & Clark Pilotage, Inc.
Capt. Mark Nichols
Capt. Gordon Howe
Michael E. Haglund, Counsel

DATE: March 7, 1991

RE: Recent Developments and Proposed Amendments to H.B. 2074

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## I. INTRODUCTION.

On March 6, 1991, the Columbia River Pilots Association, until October, 1989, the monopoly provider of pilotage services on the Columbia River pilotage ground, filed a Petition for Rulemaking before the Oregon Board of Maritime Pilots which seeks a policy determination by the Board and a proposed rule requiring that there be only one pilotage organization on each Oregon pilotage ground. The effect of this proposed policy and rule would be to eliminate the CRPA's only competitor, Lewis & Clark Pilotage, Inc. The CRPA also filed the separate complaints against the two state licensed pilots employed by Lewis & Clark: Captain Mark Nichols and Captain Gordon Howe. The complaints were filed without any supporting documentation and seek to invalidate the contract which Lewis & Clark holds with Peavey Grain Company and to discipline Captains Nichols and Howe for alleged violations of Oregon law.

There is nothing in current Oregon law which requires there to be more than one pilotage organization on the Columbia River or any of Oregon's four pilotage grounds. Indeed, the Oregon Legislature long ago passed its own antitrust statute with the express purpose "to encourage free and open competition in the interest of the general welfare and economy of the state, by preventing monopolistic and unfair practices." ORS 646.715. The amendments suggested below are designed to affirm the Legislature's position that there is no legal requirement that there be only one pilot organization on a pilotage ground and to ensure that there can be free and open competition in this segment of the transportation industry.

## II. PROPOSED AMENDMENTS TO H.B. 2074-3.

### A. Regarding the Powers of the Oregon Board of Maritime Pilots.

ORS 776.115 is amended to add an additional section:

"(10) Where multiple pilot organizations exist on a pilotage ground, the Oregon Board of Maritime Pilots shall make no rule which hinders fair and open competition between pilot organizations."

### B. Eliminating Outdated Training Requirements.

Amend ORS 776.325(2) as follows:

"An applicant for a license over any river pilotage ground must have at least six

months' [continuous] experience piloting ocean-going vessels [in the domestic trade] over the pilotage ground for which application is made, prior to making an application for a license, [and must have had the necessary experience in handling ocean-going vessels through the bridges, under varying conditions with and without towboats].

C. Pilotage Trainee's Right to Train.

Adopt new provision ORS 776.310:

"Any pilot or pilot trainee is entitled to ride aboard ocean-going vessels on Oregon pilotage grounds to obtain recency trips or the trip experience necessary to obtain a pilot license. The pilot or pilot trainee must have means available for boarding and leaving vessels on which the pilot or pilot trainee wishes to ride.

D. Repeals Prohibition Against Price Competition.

ORS 776.415 is repealed:

"[No pilot shall demand or receive any greater, lesser or different compensation for piloting the vessel upon any of the pilotage grounds than is allowed by law.]

r7107

Version now promoted by Democrats.

SB 907-AMRS
(LC 3037)
4/1/91 (SH/lc)

# PROPOSED MINORITY AMENDMENTS TO A-ENGROSSED SENATE BILL 907

On page 2 of the printed A-engrossed bill, after line 27, insert:

"SECTION 8. (1) The Oregon Board of Maritime Pilots shall:

"(a) Conduct a study of the need for a limitation, as required under ORS 776.115, on the number of pilots licensed under ORS chapter 776 and of the degree to which free and open competition among pilot organizations should be the future policy of the State of Oregon. In conducting this study, the board shall seek comments from port districts, shipping interests and all pilot associations in this state.

"(b) Prepare an affirmative action plan for the recruitment, training, licensing and employment of minority and women pilots on all pilotage grounds under the jurisdiction of the board.

"(c) Complete the requirements of paragraphs (a) and (b) of this subsection by September 30, 1992, and make proposals for any statutory changes it deems necessary to ORS chapter 776.

"(d) Report to the Speaker of the House of Representatives, the President of the Senate and the Governor on the study and plan prepared under this subsection by September 30, 1992.

"(e) Not adopt any rule, before July 1, 1993, that has the effect of limiting the business of or terminating any pilot organization existing in this state on January 1, 1991, unless the rule is determined by the board to be necessary to preserve the public safety, welfare or commerce or to protect the marine environment.

"(2) As used in this section, 'affirmative action' means a program designed to insure equal opportunity in employment and business for persons other-

Version which passed Transp. Comm. on Thurs 4-3

SB 307-A6
(LC 3037)
3/27/91 (SH/sm)

**PROPOSED AMENDMENTS TO**
**A-ENGROSSED SENATE BILL 307**

and the degree to which free and open competition should be the future policy of the State of Oregon.

On page 2 of the printed A-engrossed bill, after line 27, insert:

"SECTION 3. (1) The Oregon Board of Maritime Pilots shall:

"(a) Conduct a study of the need for a limitation, as required under ORS 776.115, on the number of pilots licensed under ORS chapter 776. In conducting this study, the ~~commission~~ Board shall seek comments from port districts, shipping interests and all pilot associations in this state.

"(b) Prepare an affirmative action plan for the recruitment, training, licensing and employment of minority and women pilots on all pilotage grounds under the jurisdiction of the board.

"(c) Complete the requirements of paragraphs (a) and (b) of this subsection by September 30, 1992, and make proposals for any statutory changes it deems necessary to ORS chapter 776.

"(d) Report to the Speaker of the House of Representatives, the President of the Senate and the Governor on the study and plan prepared under this subsection by September 30, 1992.

"(e) Not adopt any rule, before July 1, 1993, that has the effect of limiting the business of or terminating any pilot organization existing in this state on January 1, 1991.

"(2) As used in this section, 'affirmative action' is a program designed to insure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex or national origin.".

In line 28, delete "3" and insert "4".

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"(8) Adopt any rule or make any order, not inconsistent with law, for the effective administration and enforcement of this chapter.

"(9) Establish rates pursuant to subsection (6) of this section for a period of not less than two years, that continue in effect until a subsequent hearing process. Rates may include automatic adjustment provisions to reflect changing economic conditions. All rates, and adjustments thereto, shall become effective on the same date specified by the board for all pilotage grounds.

"(10) **Where multiple pilot organizations exist on a pilotage ground, make no rule that hinders free and open competition among pilot organizations.**

"SECTION 8. ORS 776.520 is amended to read:

"776.520. Pilots are authorized to limit their liability and the liability of any organization of pilots to which they belong by tariffs approved by the board containing substantially the terms and provisions of the following form:

"_____"

"The provisions of ORS 776.510 and 776.540 hereby are incorporated into and made a part of this tariff. By reason of the option granted by ORS 776.510, the rates and charges named in this tariff do not include the cost of marine insurance insuring the pilot and any organization of pilots to which the pilot belongs, the vessel, its owners, agents or operators from the consequences of negligence or errors in judgment of the pilots or organizations of pilots.

"However, upon reasonable notice to the pilots in writing from the vessel, its master, owners, agents or operators, the pilots parties hereto will procure such insurance on a 'trip' basis in an amount equal to the value of the vessel and its cargo, or such other amount as may be agreed upon between the pilots and the vessel, its master, owners, agents or operators, insuring the pilots and the organization of pilots to which they belong against all claims

# IN RESPONSE TO PROPOSED CHANGES TO HAWAII REVISED STATUTES 462A "PILOTAGE"

January 3, 1991

Recommendations by:

**PORT PILOTS OF HAWAII**
PIER 32
HONOLULU, HAWAII 96817
(808)-531-6248

JANUARY 1991

Memorandum:

TO: Concerned and affected parties

FROM: PORT PILOTS OF HAWAII

SUBJECT: Opposition to proposed legislation by Hawaii Pilots Association regarding port pilotage; (exhibit 1)

## INTRODUCTION

The PORT PILOTS OF HAWAII, is a professional association of State licensed port pilots. We are registered with the State of Hawaii as a trade organization who's purpose is to provide safe, professional, and well trained pilots to meet the needs of commerce as it relates to pilotage. Each pilot in our group has been authorized by the D.C.C.A. to provide our pilotage services independently of the Hawaii Pilots Association. We have documents on file which show that Hawaii Revised Statutes allow us to provide pilotage services independently of any existing pilot association.

The PORT PILOTS OF HAWAII has provided a totally safe and reliable pilotage service and has given the Shipping Agents a viable alternative without compromising Safety. Our Safety record will show that there is nothing to dispute this.

## BACKGROUND OF TWO ASSOCIATIONS

In Mid 1987 Captain LePendu attempted to establish a pension plan, but was warned by the C.P.A. for Hawaii Pilots that the pension plan he wanted to establish may not be qualified under I.R.S. rules. While investigating this it was discovered that there was uncertainty surrounding the precise legal status of the various Hawaii Pilot organizations. It was apparent that restructuring of the Organization was a necessity. Captain Geronimo and LePendu were removed as directors of Hawaii Pilots and not made part of the restructuring process and were ostracized for having discovered these serious business irregularities. We believe that we were made scapegoats for these irregular business practices established by the majority of the Hawaii Pilots.

It became very apparent that Captain Geronimo and Captain LePendu were no longer welcome in the Hawaii Pilots. We eventually left the Hawaii Pilots in hopes of providing our pilotage service to all shipping agents. Our reputations and professionalism have never been questioned by the Hawaii Pilots until it became apparent that we were becoming successful in our endeavors to provide quality pilotage. Our success was measured by the loss of business suffered by the Hawaii Pilot Association.

## OBJECTIVE #1

This report will show cause why legislation to establish a single pilot association is:

1. Not in the best interest of the People of the State of Hawaii;
2. Will promote a Privately Owned Monopoly for the Hawaii Pilot Association;
3. Has no basis in fact that Public Safety will be better served by only one pilot association;
4. The Support System of the Hawaii Pilots Association is not economically efficient;
5. An attempt to circumvent ongoing mediation and pending litigating between former members of Hawaii Pilot Association and the HPA.

## OBJECTIVE #2

This report will also seek to determine that legislation for the reestablishment of the Board of Pilot Commissioners will further the MONOPOLY interests of a single pilot association:

1. 1985 Legislative Auditors Report to the Governor and the Legislature is highly critical of the Pilot Commission; (exhibit 2)
2. 1985 Legislative Auditors Report is highly critical of pilots on the Commission;
3. Commission acted in the interests of the pilots and not the interest of the public;
4. 1990 Legislative Auditors Report to the Governor and the Legislature is supportive of DCCA responsibilities since 1985; (exhibit 3)
5. 1990 Legislative Auditor Report determined that regulations have improved under the Director of DCCA;
6. 1990 Legislative Auditor Report critical of exams for Deputy Port Pilots because test takers and scorers were in the same pilot association;

# TESTIMONY

I. Legislation proposed by the Hawaii Pilot Association: (Exhibit 1)

**MONOPOLY:**

This legislation seeks to create a PRIVATELY OWNED MONOPOLY which is clearly not in the best interest of public safety nor in the best interest of the State. This legislation would, however, be in the best financial interest of the Hawaii Pilots Association, by guaranteeing them total control of the financial market and control of the supply of licensed pilots.

The PORT PILOTS OF HAWAII opposes these proposed legislative changes to Hawaii Revised Statutes 462A-Pilotage.

> "ASSOCIATIONS OF SHIPOWNERS AND OPERATORS ARE NOT PLEASED WITH THE BENEVOLENT MONOPOLY OF STATE PILOT ASSOCIATIONS. SOME HAVE STATED THAT INCREASED COMPETITION WOULD BE GOOD FOR THE MARITIME INDUSTRY." Quote from The Pilotage study Group, 1989, for the U.S. Coast Guard

The 1985 Legislature was correct in Sunsetting the Board of Pilot Commissioners. The 1985 Legislative Auditor's Report was overwhelming in its criticism of the Commission and the Hawaii Pilot Association.(Exhibit 2) The 1990 Legislative Auditor's Report (Exhibit 3) is very favorable of the present direction of the D.C.C.A. Going back to the "old days" of the MONOPOLY and the Pilot Commission would be a 5 year leap backward in the progress toward the improvement of pilotage regulations.

The proposed legislation is misleading and contradictory in that it assumes that there should be a "return" to a single pilotage system. There is already a single pilotage system in effect since all pilots are required by Statute and Regulations to provide the same pilotage service in all Ports. Hawaii Administrative Rules under the direction of the Department of Commerce and Consumer Affairs has created a STATEWIDE PILOTAGE SYSTEM with the adoption in 1990 of Subchapter 12 of the Rules.(exhibit 4) The STATEWIDE PILOTAGE SYSTEM is exactly what the Hawaii Pilots Association is attempting to establish with their proposed legislation. The only differences is that the Hawaii Pilots Association is attempting to establish themselves as the <u>single</u> and <u>only</u> pilot association. The contradiction is that the Single Pilotage System does not mean a single Pilot Association.

Neither the Hawaii Pilot Association nor the Board of Pilot Commissioners acted responsibly on safety matters. "In many cases, board actions furthered the financial interests of licensed pilots and not those of the State." Auditor's Report 1985, (Exhibit 2)

The pilotage act with all its rules and regulations is a State authorized monopoly. At present it is under the control of the DCCA and operating with the best interests of people of the State of Hawaii, and this is where the control must remain for the system to work. **Allowing the Hawaii Pilot Association to control all State Pilots under one association with Legislative sanction would create a privately owned monopoly.** This could have grave implications, possibly violating Anti-trust laws, and certainly not representing the best interest of the State.

The proposed legislation would require all pilots to financially contribute to the pilot support system of the Hawaii Pilots Association without any study or determination that their system is economically efficient or cost effective. We seriously doubt that the Hawaii Pilots Association can come close to matching our Dispatch and Pilot Boat Service.

II. Legislation proposed by the Hawaii Pilot Association:

"Reestablishment of the Board of Pilot Commissioners." Parts A. and Parts B.

The PORT PILOTS OF HAWAII opposes these proposed changes to Hawaii revised Statutes 462A-Pilotage.

> **"IN ALMOST ALL AREAS REVIEW, THERE WAS EVIDENCE OF THE INFLUENCE OF THE PILOT ASSOCIATION ON THE BOARD'S DECISION MAKING PROCESS. IN MANY CASES, BOARD ACTIONS FURTHERED THE FINANCIAL INTERESTS OF LICENSED PILOTS AND NOT THOSE OF THE STATE."** Quote from Legislative Auditor's Report 1985.

Hawaii Administrative Rules Title 16, Chapter 96, Port Pilots, which were approved by the Governor of the State of Hawaii on August 9, 1990, specifically provide for a central scheduling system. This central system will guarantee that "pilotage services will be available at all times". The proposed changes to HRS 462A-Pilotage would conflict with Hawaii Administrative Rules and specifically the new rules in SUBCHAPTER 12 the STATEWIDE PILOTAGE SYSTEM.(Exhibit 4)

**The Sunset Evaluation Update: Pilotage 1990, by the Legislative Auditor, is highly favorable of the Department of Commerce and Consumer Affairs in its regulatory responsibilities since assuming the conn in 1985. The report also states that the regulation of pilotage has improved under the D.C.C.A. The Report's conclusion is that the "public interest is best served by the reenactment of the statute." ... "The State should continue to regulate pilotage."**

The Report does not make recommendations for changes to a single pilot association. The Report does not make recommendations that a Board of Pilot Commissioners be reestablished.

# SUMMARY AND RECOMMENDATIONS

> "The concentration of MONOPOLISTIC power ... heavily influenced by nine licensed pilots, leaves the State in a vulnerable position. Because of these concerns, we strongly believe that pilots should continue to be regulated, not by the board, but by the Department of Commerce and Consumer Affairs."
>
> Legislative Auditor's report 1985

Attempts to create legislation to sanction a single pilot association and to reestablish the board of pilot commissioners would seriously undermine the authority and progress that the D.C.C.A. has accomplished in the past 5 years. The Legislative Auditor's Report of 1985 was highly critical of the Board of Pilot Commissioners and of the Hawaii Pilots. "In almost all areas covered the commission acted in the interest of the pilots and not the Public"

We believe that the Hawaii Pilot Association is deliberately trying to scuttle the progress made by the Director of D.C.C.A. with the pretext that public safety is in jeopardy. The speculation and assumption that the Director of D.C.C.A. or the PORT PILOTS OF HAWAII are less caring about safety is unfounded in fact.

There is doubt that the Hawaii Pilots Association is a nonprofit Association. It has never been confirmed with the D.C.C.A. that this corporation was ever incorporated and registered with the State either as a profit or as a nonprofit corporation. There are serious I.R.S. problems with the pilots' pension plans, and an uncertainty surrounding the precise legal status of Hawaii Pilots, Inc. and its related organizations.

1. We recommend that the proposed legislation not be supported.

2. We recommend that the Director of DCCA continue with his powers and duties as provided for in HRS 462A-3.

3. We recommend that Hawaii Administrative Rules title 16, chapter 96, Subchapter 12, STATEWIDE PILOTAGE SYSTEM, be implemented without delay.

4. We seek your support in opposing the proposed legislation by the Hawaii Pilots Assn., and ask that you write and express your concerns to:

   Hawaii State Legislature
   Consumer Protection and Commerce committees

PROPOSED CHANGES
HAWAII REVISED STATUTES 462A
PILOTAGE
1991

I. Legislation for the return of the State of Hawaii to a single Pilotage System in the interest of public safety by requiring that all Hawaii State Licensed Port Pilots be members of the Hawaii Pilots Association and take part in their Pilot Support System.

II. Reestablishment of the Board of Pilot Commissioners.
   A. Composition of the Board will be seven members.
      1. 2 members licensed pilots.
      2. 2 members shall represent commercial interests.
      3. 2 members shall represent the public.
      4. 1 member shall represent the interests of safety of waterfront workers.
   B. The Board will act as administrators for the Port Pilot Program within the Department of Commerce and Consumer Affairs.
      1. The Board will establish Rules for the regulation of Port Pilots and the Hawaii State Pilotage System.
      2. The Board will set the standards for, will examine, and will issue licenses to Hawaii Port Pilots and Deputy Port Pilots.
      3. The Board will set the number of Hawaii Port Pilots required to maintain the Hawaii State Pilotage System.
      4. The Board will deny, remove, or suspend any Hawaii Port Pilot license it deems necessary in the interest of public safety.
      5. The Board will hold hearings on marine casualties within the pilotage waters of the State of Hawaii where a Hawaii State Licensed Pilot is involved.
      6. The Board will <u>not</u> set Pilotage Rates.
         a. The setting of Pilotage Rates will remain with the Director of the Department of Commerce under rules established within that Department for fair setting of Pilotage Rates.

III. The Position of Hawaii Port Pilot shall be by appointment of the Governor of the State of Hawaii after being examined, licensed, and selected by the Board of Pilot Commissioners.

EXHIBIT 1

1985 AUDITOR'S REPORT

## Chapter 3

## EVALUATION OF THE REGULATION OF PILOTAGE

This chapter contains our evaluation of the regulation of pilotage under Chapter 462A, Hawaii Revised Statutes. It includes our assessment of the need for regulation, the scope of regulation, and the effectiveness and efficiency of operations under the Board of Pilot Commissioners.

### Summary of Findings

1. There is a need for regulation of pilotage. However, regulation by the Board of Pilot Commissioners has not met the purposes intended by the Legislature.

2. Chapter 462A, HRS, creates a monopoly by empowering the board to set pilotage rates and to limit the number of licenses to nine. The board has abused these powers by acting in the interests of the pilots and not in the interests of the people of this State.

3. The board is not an appropriate body for regulating pilotage rates. Its rate setting operations have placed pilot board members in serious conflict of interest situations.

4. The board's licensing program is deficient in several respects. The board's examination largely duplicates that given by the U.S. Coast Guard for federal licensure. Other board requirements are vague, subjective, subject to charges of discrimination, and restrictive.

5. The board has not acted to protect the interests of the public in cases of discipline and enforcement. Thus, there is no assurance that all currently licensed pilots are sufficiently competent.

### The Need for Regulation

The practice of pilotage presents significant potential dangers to life, property, and the economic well being of a community dependent on maritime commerce.



EXHIBIT-2

Serious harm can result from improper pilotage. Some of the consequences of improper pilotage are vessel groundings and collisions with other vessels or objects in or around pilotage waters. A vessel grounded or sunk in the wrong place can block a harbor and prevent the free transit of commerce in and out of a community. Such accidents could result in significant economic impact in Hawaii since some of the islands have only a single port facility for commercial maritime traffic.

An incompetent pilot can place the lives of both crew and passengers in jeopardy. In addition to losses or damages to ships, cargo aboard can be lost or damaged as well. Improper pilotage can also result in damage to major structures such as piers, wharfs, bridges, and navigational aids.

Another significant hazard is the possible spillage of contaminating products such as oil. Such spillage could have grave environmental and economic impact on the State.

Accidents are not uncommon. Table 3.1 presents data on the extent nationally of accidents due to pilotage error. The data show that there is substantial danger even with licensing. In 1980, the majority, or 66 percent, of pilots at fault were state licensed pilots.

Table 3.1

Accidents Due to Personal Fault of Pilot*
United States

| *Year* | *State Licensed Pilots* | *Federal Licensed Pilots* | *Total* |
|---|---|---|---|
| 1978 | 116 (71%) | 48 (29%) | 164 (100%) |
| 1979 | 139 (67%) | 69 (33%) | 208 (100%) |
| 1980 | 78 (66%) | 40 (34%) | 118 (100%) |

*Criteria for recording an accident by the U.S. Coast Guard is (1) death; (2) injury if the individual is incapacitated for 72 hours or longer; and (3) damage that is $25,000 or greater.

Source: U.S. Coast Guard, Merchant Marine Investigations, Statistics Section, Washington, D.C.

In 1980, the U.S. Coast Guard changed its reporting format for accidents. It discontinued the determination of fault and presented data on total number of accidents per year in waters under state jurisdiction or under federal jurisdiction. Table 3.2 presents this data.

Table 3.2

All Accidents with Port Pilots Aboard

| *Year* | *State Licensed Pilots* | *Federal Licensed Pilots* | *Total* |
|---|---|---|---|
| 1981 | 213 (39%) | 332 (61%) | 545 (100%) |
| 1982 | 128 (25%) | 390 (75%) | 518 (100%) |
| 1983 | 65 (12%) | 460 (88%) | 525 (100%) |

Source: U.S. Coast Guard, Merchant Marine Investigations, Statistics Section, Washington, D.C.

If data from Tables 3.1 and 3.2 are extrapolated and compared, it can be seen that vessels with federal pilots were involved in more accidents. This is probably because, in total numbers, there are more federally piloted vessels. However, it seems clear that where blame can be pinpointed, the rate of accidents is higher for state licensed pilots.

U.S. Coast Guard officials report that Hawaii pilots have been found negligent in one accident in the past four years.[1] Sources outside of the U.S. Coast Guard report at least one other major accident. Because of the many dangers posed by the practice of pilotage, it should continue to be regulated. However, the Board of Pilot Commissioners is not the appropriate agency in which to vest responsibility for ensuring public protection against improper pilotage.

As will be shown in this report, regulation by the board has not accomplished the objectives intended by the Legislature of providing for the maximum safety of vessels navigating in state waters, or maintaining a highly efficient state pilotage system, or insuring an adequate supply of qualified pilots. On the contrary, board operations have contravened the attainment of these objectives by inadequate review and follow up of accidents and violations of board rules, by failing to conduct critical and objective analysis of requests for increases in pilotage rates, and by restricting the number of pilots in the State.

1. Interview with Lt. Jonathan Surubbi, Chief of Investigations Section, Marine Safety Division, U.S. Coast Guard, 14th U.S. Coast Guard District, Honolulu, October 18, 1984.

## Scope of Regulation

Although regulation is clearly warranted, there are several serious problems with the current regulation of pilotage. Of particular concern is the extent of the board's power over pilotage and its abuse of this power.

**State authorized monopoly.** Chapter 462A sanctions a state monopoly in pilotage. The Board of Pilot Commissioners is the only state professional and occupational licensing board that is empowered to limit the number of licenses to a specific number, which currently is nine, and to set rates for the occupation. Without Chapter 462A, the board's exclusive control over the practice of pilotage would be in clear violation of both federal and state antitrust laws.

The restriction on the number of licensees has kept the number of pilots in the State at an artificially low level. Rate setting by the board has resulted in government maintained price levels instead of pilotage charges based on market forces. The net effect is to guarantee a higher level of income to pilots in the State while increasing costs to the public. There is little evidence that pilots warrant this special treatment which is granted to no other profession or occupation in Hawaii.

Board members and pilots defend this state authorized monopoly by saying that it is necessary to attract and retain qualified pilots. They say that Hawaii must keep pay levels comparable to that paid to pilots in other states. A second argument extended is that most states have similar provisions in their laws and that opening up licensure would result in chaos in state pilotage.

There is little evidence to support either of these arguments. It does not appear that qualified pilots are in short supply or that regulation by the board has resulted in attracting and retaining qualified pilots. Moreover, this is a misperception of the proper role of a licensing board, which is to license for competency and not to set pay incentives for licensees.

It should be noted that Alaska has no restrictions on the number of pilots it licenses. This has not resulted in the chaos predicted by some, and to date, it does not appear to have had any impact on Alaska's ability to attract qualified pilots.[2]

2. Interview with Gerald Wilkerson, Division of Legislative Audit, Juneau, Alaska, November 16, 1984.

The concentration of monopolistic power in the hands of a board of five commissioners has not made the board more conscious of its responsibilities to the general public. The board is strongly influenced by the two pilot board members and by Hawaii Pilots (HP), the professional association that represents eight of the nine licensed pilots in the State. Most of the board's decisions further the protective and financial interests of the pilots.

***Abuses in rate setting.*** Chapter 462A gives the board the authority to increase, lower, or alter pilotage rates after a public hearing and due notice to specified individuals in the maritime industry. The board is required to set the rate at a "fair charge" for services rendered. In establishing the fair charge, the board is supposed to consider necessary operating expenses, maintenance, depreciation, and return on investment of property used, and comparable charges at other U.S. ports.

In carrying out its rate setting responsibilities, the board may conduct its own investigation or use state auditors or private certified public accountants. The board is further authorized to conduct audits of the financial records of port pilots and the pilot association. Rate increases may be requested by any individual, association, or company.

Since the board was established in 1978, all requests for rate increases have been proposed and supported by HP. Table 3.3 outlines the proposals made by HP and the board's actions. HP first proposed an increase in June 1981. This proposal was modified by the board in July 1981 and approved for public hearing. A compromise proposal was finally adopted in October of that year. HP submitted a second request for a rate increase in April 1984. This proposal was approved by the board and is now awaiting public hearing.

In submitting the 1981 request, HP stated that pilots had not received an adjustment since 1977 and that the rates were inadequate. The adjustment was said to be needed for the following reasons:

- To accommodate increased expenses due to increased workload and inflation as the pilots could no longer support their operating expenses and to achieve an adequate return on investment.
- To bring each pilot's gross income closer to the accepted industry standard. Pilots in comparable mainland ports were said to be earning $20,000 to $30,000 more than Hawaii licensed pilots. HP said that each pilot earned $63,000 after expenses in 1979 and $78,000 in 1980.

Table 3.3

Requests for Rate Increase for Pilotage
1981–1984

| *Length of Vessel* | *A* *Base Rate 1977* | *B* *Pilots Original Proposal 06/26/81* | *C* *Percent Increase Over 1977 Base* | *D* *Board Revised Proposal 07/06/81* | *E* *Percent Increase Over 1977 Base* | *F* *Compromise Approved 10/30/81* | *G* *Percent Increase Over 1977 Proposal* | *H* *HP Current Proposal Approved 04/19/84* | *I* *Percent Increase Over 1981 Base* |
|---|---|---|---|---|---|---|---|---|---|
| 0–200 | 80 | 120 | 50 | 110 | 38 | 102 | 28 | 120 | 18 |
| 200–350 | 100 | 150 | 50 | 140 | 40 | 127 | 27 | 133 | 5 |
| 350–400 | 125 | 190 | 52 | 180 | 44 | 161 | 29 | 169 | 5 |
| 400–450 | 155 | 235 | 52 | 225 | 45 | 200 | 29 | 210 | 5 |
| 450–500 | 205 | 310 | 51 | 300 | 46 | 263 | 28 | 276 | 5 |
| 500–550 | 255 | 385 | 51 | 375 | 47 | 327 | 28 | 343 | 5 |
| 550–600 | 315 | 475 | 51 | 465 | 48 | 404 | 28 | 424 | 5 |
| 600–650 | 385 | 580 | 51 | 570 | 48 | 493 | 28 | 518 | 5 |
| 650–700 | 450 | 675 | 50 | 665 | 48 | 574 | 28 | 603 | 5 |
| 700–750 | 490 | 735 | 50 | 725 | 48 | 625 | 28 | 656 | 5 |
| 750–800 | 520 | 780 | 50 | 770 | 48 | 663 | 28 | 696 | 5 |
| 800–850 | 555 | 835 | 50 | 825 | 49 | 710 | 28 | 745 | 5 |
| 850–900 | 585 | 880 | 50 | 870 | 49 | 748 | 28 | 785 | 5 |
| 900–over | 620 | 930 | 50 | 920 | 48 | 790 | 27 | 830 | 5 |
| Separate Charges | | | | | | | | | |
| Anchorage | | | | | | | | | |
| Under 500' | 90 | 100 | 11 | 100 | 11 | 100 | 11 | 200 | 100 |
| Over 500' | 90 | 200 | 122 | 200 | 122 | 200 | 122 | 400 | 100 |
| Travel Fee | — | variable | | | | — | | variable | |
| Boat Fee | — | — | | — | | — | | 5 | 100 |

The two pilot board members had been instrumental in developing the rate proposal. They were part of a three member Rate Adjustment Committee established by HP to devise the proposal. The HP committee was assisted in this task by a mainland consultant who had succeeded in getting a rate increase for the Alaska pilots.

The proposed increases in pilotage charges are shown in column B of Table 3.3. HP stated that although the request represented a 50 to 60 percent increase in rates, it still fell short of rates assessed at comparable ports.

Although the executive secretary of the Department of Commerce and Consumer Affairs (DCCA) informed the board that it could retain any state auditors or private accountants to assist it in reviewing the rate adjustment request, it chose not to do so. Instead, the board decided to rely on HP. The board said that HP had provided sufficient factual and relevant data for the board to conduct a fair and thorough investigation.

The board allowed HP to be its sole source of information on what constitutes a fair charge and its relation to operating expenses, maintenance, depreciation, and return on investment. HP's own minutes made note of the fact that the board would "not be soliciting information from other associations or commissions regarding rates. They will instead await the presentation from us (the pilots) and do any investigation based on that information."[3]

Consequently, no independent assessment was made of the accuracy and adequacy of the information presented by HP, and no audit was performed of the financial records of HP or of any of the pilots. As a result, even as some of the board members approved the rate proposal as a "fair charge," they had no idea of how much the pilots were actually earning. This information should have played a basic part in determining what was a fair charge.

In July 1981, the board met and discussed the rate proposal introduced in June (See Table 3.3, Columns B and C). The board made a few adjustments to the original proposal but these were deletions that represented only 1.3 percent of the total proposed revenue requirements submitted by the HP or a $10 reduction in each rate

3. Minutes of the Hawaii Pilots Association, May 14, 1981, p. 2.

category (See Table 3.3, Columns D and E). After some discussion, the board decided to approve the rate proposal and schedule it for public hearing.

The State Consumer Advocate testified in a public hearing that the methodology used by HP in justifying the increase was deficient in several ways. It did not project growth or include any projected revenues from delays and cancellations. He stated that although HP's proposal said the increase would allow each pilot to earn $90,000 annually in 1981, he determined that the actual amount each pilot would earn would be $135,700 per year.

The Consumer Advocate recommended that: (1) the proposed rates be suspended until a full analysis is completed; (2) the board engage the services of an *independent* certified public accounting firm to conduct a financial and managerial audit of Hawaii Pilot Boat Service Inc., HP, and each port pilot's corporation; and (3) the pilots initiate a cost-of-service study to determine the proper basis for formulating each component of its costs so that the commission can develop cost-based rates.

In closing his testimony, the Consumer Advocate told the board, ". . . your decision whether to approve, suspend, dismiss or revise the proposed rates must be made on the basis that the pilots and their association have persuasively presented their justifications, and that they have carried their burden of proving their rates to be just and reasonable. Consumer Advocate is of the opinion they have not done so."[4]

In retrospect, the findings of the Consumer Advocate are confirmed in the following respects:

- HP's proposal did not consider any growth in operations. Actual data for 1981 indicates that workload increased by 3.1 percent over 1980.
- HP's proposal did not take into consideration revenues from delays and cancellations thereby underestimating income to the pilots.
- Actual support operations costs have been approximately $380,000 to $390,000 annually since 1980, substantiating the estimate of $380,000 by the Consumer Advocate. HP had estimated support operations costs at $520,520 annually, an overestimation by 33.5 percent.

4. Testimony of the Consumer Advocate before the State of Hawaii Board of Pilot Commissioners, September 4, 1981, p. 8.

- HP stated that pilots needed a 50 percent increase to bring up their annual incomes to a "reasonable" level of $90,000. However, the rate increase of 28 percent which was eventually approved by the board gave each pilot an annual gross income of $88,500. An increase of 50 percent would have resulted in an annual income close to the Consumer Advocate's estimate of $135,000.

Although the Consumer Advocate raised these issues, the board failed to address them at subsequent meetings. The board's rate setting process has not improved since 1981. It still relies on HP for information. On April 19, 1984, the board approved and scheduled for public hearing a request for rate increase from HP. The proposal was approved even though HP submitted no documentation to support the rate increase proposal. A maritime industry board member noted his concern on the absence of supporting information.

The pilot board members indicated that the increase was minimal. However, this is not quite correct. The proposed increase is shown in columns H and I of Table 3.3. It would mean a 5 percent increase in most of the categories. However, there would be a 17.5 percent increase for vessels under 200 feet and a significant increase in separate charges. Anchorage fees would increase 100 percent for vessels under 500 feet in length as well as a 100 percent increase for vessels over 500 feet. New charges for pilot travel expenses and a separate boat fee would be instituted.

Based on actual expenditures for 1983, the separate charges would conservatively increase anchorage revenues by $11,400 and free approximately $41,000 formerly earmarked to cover the annual expenses of travel and boat costs.

Since support operations costs have been relatively stable, the estimated $53,000 annual savings could be distributed as additional income to the individual pilots.

It is clear that the proposal to increase rate is intended to benefit the pilots and not the general public. The primary purpose of the rate proposal from HP is to bring the pilots' income to what they consider to be an adequate level. This purpose is clearly revealed in HP's minutes of September 20, 1982, which said:

"A discussion followed of the best strategy to follow when approaching the Board for an increase in pilotage compensation. . . . The consensus was that pilot income must be the first consideration in setting the rate tariff. Support services expense must be covered, but those expenses should not be allowed to dictate the pilot's incomes."[5]

*Possible antitrust violations.* In reviewing pilotage rates, it came to our attention that the pilots may be in violation of federal antitrust laws relating to price fixing. The pilots' logs show that they charge the same rate for exempt vessels or vessels requiring a federal license as they do for those vessels requiring a state license.

The pilots, who are independent contractors, agreed to charge the same rate to all vessels of the same length regardless of whether they are under state or federal jurisdiction. In doing so, they may be in violation of Title 15, U.S. Code, Section 1, relating to restraint of trade and resale price maintenance.

Unlike vessels subject to Chapter 462A, a pilot operating under a federal license is not required to charge according to a specified rate. The only apparent restriction the federal government has on pilotage charges is that the charge cannot be more than the customary or legally established rate charged in the state that the pilotage is performed. While state pilotage rate setting is immune from antitrust activities, there is a question that this immunity extends to vessels under federally licensed pilotage.

The staff of the Federal Trade Commission has indicated that there is an appearance of an antitrust violation and that additional study may be warranted.

## Inappropriate Assignment of Regulatory Responsibilities

It is apparent that the board is not the proper body for reviewing and setting rates. The board's composition prevents it from analyzing such rates objectively. With two pilot board members, two industry representatives, and one public member, the board is a partisan battlefield. In the matter of rate increases and

5. Minutes of the Hawaii Pilots, September 20, 1982.

other items affecting the interests of pilots, the two pilot board members vote together. The issue is often deadlocked as the two industry members usually vote together, and the public member is sometimes absent.

During deliberations on proposed increases in 1981, the two port pilot members submitted written comments to the board supporting the position of HP and criticizing the comments made by the Consumer Advocate. They questioned the need for involvement by the Consumer Advocate. The industry member also submitted written comments to the board on his reasons for voting against the rate increases. He noted, "I believe the crux of the matter is this. In direct testimony before this commission the attorney for the Pilots Association stated that originally the Pilots wanted to increase the pilotage rates so as to render each Pilot an annual income of $100,000. This amount was apparently felt to be excessive so their proposal was scaled down so as to render only $90,000 per year for each Pilot. I feel that this approach to rate settling (sic) is improper."[6]

The rate that was finally approved was based on a compromise proposed by the remaining industry member and approved by the two port pilots. The public member was absent.

The balance of power is on the side of the pilots. Pilot board members are usually joined at meetings by the business agent for HP and sometimes the attorney for HP. Other port pilots usually attend the meetings as well. At one meeting on rate increases, all nine of the licensed pilots were in attendance. During the period when a pilot board member was chairman of the board, these observers would be given the opportunity to participate in board discussions on rate increases.

The position statement submitted by the pilot board members; their participation and interest in HP, the organization submitting rate requests; and their advocacy of the pilots' position raise questions as to their objectivity in reviewing rates.

The marine industry members may have the knowledge and background necessary for reviewing the rates, but their commitment to the public might also be questioned. Additional costs due to pilotage rate increases would merely be passed

6. Written testimony by K.H. Bowman, Commissioner to the Board of Pilot Commissioners, October 30, 1981.

on to the public. The public member has little or no experience in reviewing rate proposals, and there is no requirement that he be knowledgeable in this area.

In addition, the time needed for a proper review of rates would conflict and be burdensome for board members with other full-time occupations. Staff for such a task is also inadequate. The board's executive secretary is its only staff. The executive secretary also serves as staff to other boards in DCCA. Moreover, the executive secretary has neither the time nor the expertise needed for a thorough review of rate proposals.

There is doubt whether rates should be set at all. There is no issue here of consumers who are not able to protect themselves or who are at a disadvantage in dealing with providers of the service. In this case, the direct consumers are the shipping lines and their agents. They would be quite able to negotiate with pilots on rates without state intervention.

**Conflicts of interest.** The State Code of Ethics for public officers and employees prohibits employees or members of boards and commissions from taking official actions affecting directly any business or undertaking in which the employee or board member has a substantial financial interest or to secure any unwarranted privileges for themselves.

Because of the small number of pilots in the State, the requirement that two of the five board members be licensed port pilots and the extent of the board's powers, conflicts of interest have been inevitable.

The two pilot board members are members of HP as well as shareholders and directors of HPBS, a corporation consisting of eight of the nine licensed pilots in the State. One pilot board member was also an officer of HPBS while on the board. The majority of operating costs incurred by pilots go to HPBS which owns and maintains pilot vessels and other items needed for pilotage. After HPBS expenses are covered, the pilots' agent distributes funds to pilots according to a schedule.

Corporate documents show that each pilot owns 2,000 shares in HPBS. The buy-in cost for a new pilot is estimated to be $30,000.

Clearly, any two pilot board members selected from HP would be voting on issues with direct impact on their financial interests. However, to achieve a quorum of four required by the board, the pilot board members must participate in discussions and vote on issues that have a direct financial impact on HPBS. In the past, the two pilot board members have participated in the following activities:

- In 1984, the pilots on the board voted on rule changes that would create new fees for travel and pilot boat operations as well as increasing pilotage and anchorage fees. The additional fees would have a direct impact on HPBS operating costs.

- In 1981 and 1982, pilots on the board participated in discussions and decisions on rate adjustments submitted by HP. At the same time, the two pilot board members were assigned by the president of HP to a Rate Adjustment Committee. This committee met with the business agent of the Alaska pilots for assistance in developing and presenting the association's proposed rates to the Board of Pilot Commissioners.

- The pilot board members who were actively involved in developing the written examination also conducted oral interviews of applicants in 1980 and 1984 and selected applicants to fill deputy pilot vacancies. The newly licensed pilots then become members of both HP and HPBS.

## The Licensing Program

The board's licensing practices are seriously deficient. The board lacks objective and valid licensing standards; its written examination is of questionable value; its selection practices are subjective, based on irrelevant criteria, and without any documentation.

These problems are compounded by allowing the board to set a limit of nine licensees. Since the statute was enacted in 1978, only three applicants have been licensed as a result of vacancies in the number of available slots. Although the board has the power to increase the number of licensees, it has chosen not to do so. This means that the board is denying licenses to applicants who may be just as competent or more competent than those who are already licensed.

Because there are a number of applicants, all equally qualified, the board makes its decisions on the basis of irrelevant or arbitrary factors. The board's selection decisions have no bearing on an applicant's ability to pilot a vessel, and they are not in the interests of the general public.

**The written examination.** All applicants must first pass a state written examination. The examination consists of two parts, one part on rules of the road and the second on seamanship and shiphandling. The written examination adds little to the protection already provided by the U.S. Coast Guard's federal licensure program for pilots.

As a prerequisite for state licensure, applicants must possess a current U.S. Coast Guard master's license for a steam or motor vessel or any gross tonnage. The applicant must also have U.S. Coast Guard endorsements as a first class pilot for all deep draft harbors in which the State provides pilotage services. To acquire a U.S. Coast Guard master's license, applicants must pass a federal examination.

An applicant for state licensure, therefore, must pass two sets of examinations: first, to obtain a master's license and federal pilot's endorsement; and secondly, the state pilots examination.

The U.S. Coast Guard reviewed the written state pilots examination, comparing it against the U.S. Coast Guard examinations. The U.S. Coast Guard found that the examinations were substantially the same in many areas. The section on the rules of the road in the federal examination is somewhat more difficult than the state examination. The state examination does cover state pilotage laws which are not included in the federal examination, and it contains some practical or situational local knowledge questions. However, some of the questions are out of date.

The U.S. Coast Guard recommended that redundant portions of the state examination be eliminated since the U.S. Coast Guard pilot's license is a prerequisite for state licensure and that the local knowledge portion of the examination be expanded.[7]

7. Letter from the U.S. Department of Transportation, U.S. Coast Guard, Marine Safety Office, Honolulu, to the Office of the Legislative Auditor, dated September 12, 1984.

**Arbitrary selection practices.** Applicants who pass the written examination are placed on an eligibility list until there is a vacancy. They remain eligible for two years from the date of the examination. After that, they must reapply and start all over again.

Should there be a vacancy, applicants must undergo an interview by board members. Although the interviews play a large part in the decision, the board has no criteria or standardized questions or procedures for the oral interview. As a result, the final selection is based largely on subjective factors that have little to do with the applicant's ability as a port pilot.

In June 1984, the board conducted oral interviews to select a deputy pilot to fill a vacancy. The board was supposed to use an evaluation form to reduce some of the subjectivity in the oral interviews. However, the forms served only as a guide, and board members asked questions which were not on the form. The questions asked by the board have no basis in either the statutes or the rules, and they have no relevance to competence as a pilot. Among these were questions about the applicant's willingness to work at reduced wages, the applicant's commitment to staying in the islands, and the applicant's age. Interviews with board members and tapes of the board's oral interviews of applicants reveal the following:

- Board members reported that they were concerned about an applicant's willingness to work at reduced wages. The applicant was questioned and informed that he would be receiving reduced wages for most of three years. The required time as a deputy before promotion to full pilot is six months, although the board is considering changing this to two and one-half years. Payment of reduced wages to deputy pilots is a policy of HP, not of the board.

- An applicant was questioned on whether he lived in Hawaii and his length of residence here. Some board members reported that they were concerned about the applicant's commitment to staying in the islands. The applicant was finally eliminated from consideration because the board felt that he did not have the "commitment" to piloting if things did not go well for pilots in Hawaii.

- The age of another applicant appeared to play a significant role in his rejection by the board. The board was aware that the use of age as a basis for rejection is discriminatory and invalid. One board member asked the executive secretary about the role of age in the selection process and was informed that it had no role at all. The applicant's physical condition was then considered as a basis for denial. However, there was no suggestion that the applicant's physical condition be assessed to determine the applicant's capability for piloting. There is no evidence of incapacity as the applicant is currently a pilot in the San Francisco Bay area. During the discussion, one of the board members admitted that if selection was to be based on experience, then it was clear that this particular pilot was the most qualified. He added, however, that if the concern is how the association operates and how long the pilot will pilot in Hawaii then another selection may be necessary.

- Finally, the board solicited from HP its choice on who should receive licensure. The candidate finally selected was one of two recommended by HP.

J. L. LEPENDU

In June 1984, the board selected one of four applicants to fill the deputy port pilot position. Although the pilot evaluation forms were supposedly used in making this decision, these were not retained.

Rules inadequate for ensuring competency. Although the rules are restrictive, they do not restrict on the basis of competency. This is readily apparent from reviewing the board's rules on deputy port pilots.

The rules require all applicants to serve as deputy port pilots for six months prior to promotion to full pilot. Other than time spent as a deputy port pilot, there is no difference between the requirements for deputy port pilots and port pilots. There are no standards of performance as a deputy port pilot before promotion to full pilot.

There is no recognition of the skills necessary for the pilotage of longer, deeper draft, and heavier vessels. And, there are no requirements for deputy port pilots to report on the different types of vessels piloted or conditions that may have been encountered. Thus, the board does not have the information necessary for evaluating a pilot's training and progression in the occupation, and it has no indicators for determining if promotion to full pilot is warranted. Consequently, there is no assurance that all licensed pilots are fully qualified.

To make matters worse, the board has deferred to HP in its promotion decisions. It has allowed HP to determine qualifications for promotions. The board accepted unstandardized and unverified evaluations of deputy pilots submitted in the past by the pilot organization. No documents verifying performance were submitted to the board except for the pilot's logs. In June 1981, the board considered the promotion of two deputy pilots to full pilot status. Although the board had stated that there would be an examination evaluating their performance, the board had no criteria and the examination was actually an oral interview of the two deputy pilots.

HP presented an oral statement attesting to satisfactory performance, but no documentation was submitted. Three months later, one of the two pilots promoted ran a vessel aground at a port in Kauai.

In June, the board adopted proposed changes to the regulations. One major change proposed is to restructure the deputy pilot classification by establishing three deputy pilot categories. This would limit the length, draft, and type of vessel each deputy category is allowed to pilot and extend the total time required as a deputy pilot from six months to two and one-half years. Table 3.4 provides a breakdown of the restrictions and minimum time proposed for each of the three categories.

Table 3.4

Proposed Deputy Port Pilot Classification
(As Adopted by the Board of Pilot Commissioners on June 12, 1984)

| | | *Proposed* | | |
|---|---|---|---|---|
| *Deputy Port Pilot* | *Current* | *I* | *II* | *III* |
| Allowed to Pilot: | | | | |
| Vessels authorized length | Under 500' | Under 500' | Under 600' | Any length |
| Vessels authorized draft | Under 30' | Under 30'–6" | Under 30'–6" | Any draft |
| Vessels exempted | | Tanker and passenger | Tanker and passenger | Tanker and passenger |
| Minimum Time in Each Category | 6 months | 6 months | 12 months | 12 months |
| Total Time Required | 6 months | | | 2 1/2 years |

The proposed rule is significantly more restrictive as it extends the total time as a deputy port pilot from six months to two and one-half years. However, it provides no greater assurance of competency since there are still no performance standards or requirements for experience on different types of vessels under varying conditions at different ports.

The pilots defend the proposed rule saying that a prolonged orientation period of two and one-half years is needed to insure that an individual is thoroughly familiar with Hawaii pilotage. However, without more specific performance criteria or identification of specific skills needed, the almost two years of additional time as a deputy at reduced pay serves primarily as a restrictive device and as a disincentive.

The proposed rule would place Hawaii in a distinctively disadvantageous position in attracting qualified pilots as there are no provisions for reciprocity, or waivers, or for credit due to experience. All applicants must begin as deputy port pilots with restrictions for two and one-half years. There is no provision for individuals who are already knowledgeable or who have demonstrated an ability to pilot in Hawaii waters. Even experienced pilots must begin as apprentices.

This presents an obstacle to any experienced pilot coming to Hawaii since it requires that the pilot begin again as an apprentice for an extended period of time. This is contrary to the intent of the original legislation, which was to insure an adequate supply of qualified pilots in Hawaii. Instead, it stifles the movement of experienced pilots to Hawaii and attracts primarily those newly entering the pilot profession. Some board members have stated that if they find an individual who is particularly skilled or experienced, the board may make an exception to the rule. However, the current and proposed regulations are explicit on the minimum time required as a deputy port pilot, and there are no provisions for the board to make an exception.

The absurdity and restrictiveness of the current and proposed rule is demonstrated by the following example. A retired pilot who piloted in Hawaii for 20 years and also served as a chief pilot of the State for a number of years would still have to reapply, wait for a vacancy, and if selected, would have to serve as a deputy for six months before becoming a full pilot again. Under the proposed rule, he would have to serve a two and one-half year apprenticeship.

I GOT SCREWED OUT OF $130,000.00

The extension of time to two and one-half years would benefit primarily those pilots already licensed. Since pilotage rates are set regardless of whether the vessel is piloted by a deputy or full pilot, an extended time at reduced wages would mean more income to the full pilots since all income is shared.

### Deficiencies in Discipline and Enforcement

The major purpose of state licensure is to "provide maximum safety for vessels navigating in state waters."[8] This purpose is largely contravened by the board's failure to take timely and appropriate disciplinary actions against pilots who are incompetent, its selective enforcement of the law and the rules, and its failure to develop adequate rules for disciplinary actions.

The following case illustrates the problems in discipline and enforcement.

In September 1981, a pilot licensed both by the U.S. Coast Guard and the State ran a coastwise vessel aground at Kauai. Since the pilot was piloting the vessel under his federal license, the U.S. Coast Guard immediately opened an investigation into the accident. In November 1981, the U.S. Coast Guard determined that the pilot was negligent and suspended his federal license for two months.

No complaint was filed by the injured party or any of the board members. A complaint was initiated by staff of DCCA. One of the pilot board members was highly critical of the independent action taken by the staff.

A representative of the shipowner of the grounded vessel approached the board voicing concern about the pilot continuing to work on his ships. The pilot board members did not respond as impartial board members but as pilots by saying that the shipowner did not have a choice in pilots because "the pilots work on a pool or rotation system so that their income can be shared equally. Therefore, *the pilots* may not be able to grant Mr. _____ the privilege of selecting a pilot under their rules.[9] [Emphasis added.]"

The board decided to allow HP to work out the issue. It said that if the shipowner was not satisfied, he could make a formal request for "review and determination."

8. Conference Committee Report 15-78 on S.B. No. 893, Senate Journal, 1978, p. 754.

9. Minutes of the Board of Pilot Commissioners, October 30, 1981, p. 3.

In January 1982, the representative informed the board that the company would no longer accept the pilot in question for pilotage aboard its vessels. Instead of taking action, the board again decided to close the matter.

In discussing this problem, an industry board member expressed concern that the pilot could continue to pilot under his state license even though his federal license had been suspended.

In March 1982, the board again discussed the complaint filed against the pilot. The industry board members again expressed concern about the "loophole" enabling a pilot to continue to operate when his federal license was suspended. They suggested that legislation should be introduced to prevent this from occurring. The pilot board members opposed such legislation and supported the concept of maintaining the separation between the federal and state licensure. The board then decided to dismiss the complaint, subject to a written opinion from the State Attorney General on whether the board had jurisdiction in the complaint.

A year later, in March 1983, the board was notified that the Attorney General's office had determined that they had jurisdiction to revoke or suspend the license of the pilot involved in the grounding of the vessel at Kauai in 1981, even though he was piloting under his federal license. The board decided to defer action until the board could review the case.

At its meeting on November 22, 1983, the board decided to dismiss the case against the pilot. The board was informed that the pilot in question had resigned from HP on October 20, 1983. On this basis, the board assumed that the pilot would no longer be actively piloting and the board gave the individual until January 20, 1984, to decide what he was going to do. The individual decided to continue to pilot as an independent contractor.

On March 15, 1984, HP filed a complaint with DCCA questioning the competency of the independent pilot. The organization enclosed two letters from shipowners pointing to the pilot's substandard performance. Both letters were dated prior to the pilot's resignation from HP in October 1983. The board finally initiated an investigation in April 1984.

The board's failure to conduct an unbiased, comprehensive, and timely review of a serious incident is irresponsible.

*First,* although board members knew about the accident (some on the same day it had occurred) no action was initiated by the board.

*Second,* the board ignored its own rule requiring accidents of significance to be reported in writing to the board within seven working days.

*Third,* the pilot board members acted in the interests of the profession rather than the public by failing to take positive action when they were notified of the accident, by opposing the initiation of the complaint by DCCA staff, by advocating HP's position when the cruise company expressed concern about the pilot's competence, and by opposing the closing of the "loophole" in the dual licensure program.

*Fourth,* even after the cruise company expressed concern about the competency of the pilot, the board failed to take action, deciding instead to refer the company to HP to "work things out." As before, the board relinquished its authority to HP.

*Fifth,* the one year delay for a legal opinion is unconscionable. All parties share equal blame for the delay. It took over three weeks for the letter requesting a written opinion to be forwarded to the Attorney General's office. The Attorney General's office took eight months to reply. Finally, it took another three months for the Attorney General's reply to be submitted to the board. This placed the board in an awkward position since they had already sent the pilot a letter almost a year earlier informing him that the case had been tentatively dismissed.

*Sixth,* some board members based their decision to dismiss the complaint on the pilot's resignation from HP, thinking that the pilot would no longer continue piloting once he resigned from the professional association. While this reveals their view of the importance of HP, it has little to do with assessing the pilot's responsibility for the accident.

It is important to note that interest and concern by the board and HP developed only after the pilot in question began to operate and succeed on his own. HP questioned the pilot's competency only after the pilot resigned from the organization even though letters of complaint from shipowners were submitted to the organization before the pilot's resignation. It should also be noted that the board dismissed the concerns of the cruise company when it was presented to them in January 1982 but accepted it when HP presented it in March 1984.

Meanwhile, the case continues. At its meeting in October 1984, the board initiated a complaint requesting DCCA to investigate whether the pilot in question is actively piloting as required by Chapter 462A. If the pilot is not in active service, it would be grounds for revocation of the pilot's state license.

Ironically, the board has never defined what constitutes active service as a pilot. When an applicant for a deputy pilot position once asked the board what constituted active service as a pilot, the board told him that it was pretty loose and that there was nothing in writing. The chairman of the board stated that it was basically left to the discretion of the board. The board has never established any standards to define active service and it appears to be selective and subjective in applying it to the pilot in question.

While the board and HP continue to pursue the independent pilot, it has ignored violations by two HP pilots who have damaged piers and also failed to report these accidents. This is in violation of Section 16-96-46 which requires the pilot to "file a written report to the board within seven working days if the incident or collision involved injury, death, extensive damage or running aground."

The board has not investigated or noted either of the following incidents:

- An HP pilot and a board member collided with a pier twice at Nawiliwili Harbor on Kauai. Repair to the dock was $175,000 not including consultant fees. This accident was never reported to the board nor the U.S. Coast Guard which has a $1,000 fine for failure to report major accidents. The damage, according to harbor officials, was quite extensive and readily apparent.

- On July 25, 1984, an HP pilot collided with a dock at Honolulu Harbor. The U.S. Coast Guard estimated $15,000 damage to the ship and about $500,000 to the dock. This accident was never reported to the board by either the pilot or the deputy pilot who was accompanying him.

The board has paid little attention to monitoring accidents, even those that are extremely serious and of substantial magnitude. It is unlikely that the pilot board members and HP could be unaware of these accidents as there are only nine pilots in the State. Since these accidents are costly to the State, they should be investigated to determine if the pilots were at fault and whether disciplinary action should be taken.

As it is, the State and shipowners have no recourse against damages incurred by pilots. In 1980, the law was amended to delete the requirement for the pilot association to maintain liability insurance to protect the State. Thus, even should the pilot be determined to be negligent, it could be difficult for the injured party to collect as pilots do not have to carry liability insurance to cover the cost of damages incurred.

This was the case in at least two accidents involving pilots. Accidents in 1981 and in 1983 resulted in costly damage. However, the complainants were not able to or decided not to pursue recovery from pilots because of their insufficient resources.

**Problems of dual licensure.** The case of the pilot operating with a suspended federal license points to a loophole in the law that should be closed to ensure the safety of vessels. Although the board has discussed this on occasion, it has taken no positive action. As noted earlier, licensure of pilots is shared by both the federal and state governments. The federal government licenses pilots for pilotage on vessels involved in interstate and intrastate trade. The states have jurisdiction for the licensure of pilots piloting foreign vessels or American vessels involved in foreign trade.

As a result of this distinction, the U.S. Coast Guard cannot act on an individual's federal license if the violation occurred while the pilot was operating under the pilot's state license. However, the U.S. Coast Guard may investigate accidents involving pilots operating under their state license but may only seek civil penalties.

Conversely, it is not clear if the State can take action against a pilot operating under the pilot's federal license, although as we noted earlier, the Attorney General believed that the State does have such authority. The lack of clarity is because Chapter 462A has no provision for the board to revoke or suspend a state license based on action taken by the U.S. Coast Guard against a federal license. The statutes should be changed to require a current federal license in good standing as a condition for continued state licensure.

**Inadequate rules.** The board has failed to develop adequate rules for taking effective disciplinary action. The current regulatory basis for disciplinary actions can only be described as weak, considering the potential for loss of life and property.

Chapter 462A-11, HRS, states that the board may deny, suspend, or revoke a license upon *satisfactory proof* that the pilot or applicant:

"(1) Has *wilfully* disobeyed the chapter or any rules of the board;

"(2) Has negligently lost or damaged any vessel which *he was piloting*;

"(3) Is *habitually intoxicated* rendering him unfit to be entrusted with a vessel;

"(4) Is physically or mentally incapable of performing as a pilot; or

"(5) Is no longer actively serving as a pilot. [Emphasis added.]"

As mentioned previously, the board has not defined in its rules what constitutes active service as a pilot. The board has also failed to define *any* of the statutory provisions for disciplinary actions. For example, the board has never defined what constitutes "satisfactory proof" that a violation has occurred or what constitutes "wilful" disobedience or "unfit to be entrusted with the charge of a vessel." As in the case of the question of active pilotage, the failure to define these provisions can lead to subjective and selective enforcement of the law.

Some of the statutory provisions need to be strengthened. For example, the statutes require "wilful" disobedience of the chapter or regulations before a license can be denied, revoked or suspended. This would require a determination of intent which might be difficult.

In another example, the statutes provide for denial, suspension, or revocation of a license if the pilot caused the negligent loss or damage of a vessel that he was piloting. The statutes are silent on death, or injury, or any damage that the pilot may cause to other vessels or structures. Theoretically, if a pilot in control of a large container vessel rams and sinks a pleasure boat, the pilot would be subject to no disciplinary action if there is no damage to the container vessel.

It should be noted that the pilots had considerable input into the development of the statutes and regulation. Yet, the rules are vague and do not reflect professional knowledge of the dangers of pilotage and fail to adequately address disciplinary provisions for unsafe or incompetent practices.

## Summary

We recognize the considerable skill of the state licensed pilots and the dedication and the sense of responsibility they bring to their chosen profession. We also recognize the hazards of pilotage and the potential loss of life, property, and economic well-being that require the need to insure that pilots are competent at all times.

It is evident, however, that the board is not the appropriate body for ensuring the competency of pilots or for assuring the public that charges for pilotage services are fair.

In almost all areas reviewed, there was evidence of the influence of the pilot association on the board's decisionmaking processes. In many cases, board actions furthered the financial interests of licensed pilots and not those of the State.

Many of the problems are also due to the excessive power delegated to the board. The concentration of monopolistic power in the hands of a five-member board, which in turn is heavily influenced by nine licensed pilots, leaves the State in a vulnerable position.

Because of these concerns, we strongly believe that pilots should continue to be regulated, not by the board, but by the Department of Commerce and Consumer Affairs. In regulating pilots, the department should establish clear standards which are related specifically to minimum performance skills. All those who meet these standards should be permitted to become licensed. The restriction on the number of licenses serves no purpose and should be lifted.

Since the purchasers of pilotage services are generally shipping companies or agents who are knowledgeable about the business, they should be allowed to negotiate pilotage rates with the pilots without state intervention. However, should the Legislature decide that the State should continue to set a pilotage rate, this authority should be assigned to DCCA with assistance from the Public Utilities Division.

*Recommendations*

*We recommend as follows:*

*1. Chapter 462A, Hawaii Revised Statutes, be reenacted but amended in the following ways:*

- *to delete the board and assign regulatory responsibility to the Department of Commerce and Consumer Affairs;*
- *rescind the limit on the members of licensees;*
- *rescind provisions relating to establishing rates of pilotage;*
- *establish clear, valid, and reasonable standards for licensure as deputy port pilots and full pilots;*
- *require a current federal license in good standing for continued state licensure.*

*2. The Department of Commerce and Consumer Affairs adopt methods to improve the disciplinary and enforcement program against violations of Chapter 462A.*

# OVERVIEW

THE AUDITOR
STATE OF HAWAII
1990

## Sunset Evaluation Update: Pilotage

### Summary

We evaluated the regulation of pilotage under Chapter 462A, *Hawaii Revised Statutes*, and conclude that the public interest is best served by reenactment of the statute.

The State should continue to regulate pilotage. The practice has significant potential to harm life and property and compromise the economic well-being of the state. It involves directing a vessel through channels, harbors, and other areas where navigation is difficult. Improper pilotage can result in oil spills, vessel groundings and collisions, and damage to ships, piers, and cargo.

Since assuming regulatory responsibility in 1985, the Department of Commerce and Consumer Affairs has improved the regulation of pilotage. Our review, however, found weaknesses in the examination program and in the regulations. The examination for deputy port pilots does not meet some of the standards of a good testing program, particularly in the way the exam was documented and scored. Scorers and test takers belonged to the same professional association, and in one case, examination security may have been breached.

The regulations do not include specific physical standards for pilots. They also leave to pilot discretion those accidents serious enough to warrant reporting. Because the regulations are not specific, the department could not be certain that all serious incidents came to its attention.

### Recommendations and Response

The department should document the development of the port pilot examination and take steps to ensure its validity and security. To be fair, representatives from both pilot associations should score the exam. The department should develop physical standards for the licensure of port pilots, specify these standards on the certificate of medical examination, and consider following guidelines from other jurisdictions on drug or alcohol testing programs.

Finally, the department should toughen the regulations by requiring pilots to report *all* incidents and accidents to the director within seven days. To verify serious accidents, the department should arrange to receive ship captain's reports from the Department of Transportation and investigative reports from the U.S. Coast Guard.

EXHIBIT - 3

The department agrees that the statute should be reenacted and concurs with most of our recommendations. It notes, however, that all pilots licensed in Hawaii are already required to participate in a federal drug testing program.

## Background

Twenty-four states regulate pilotage. In Hawaii, virtually every vessel involved in trade or commerce that enters or departs pilotage waters must employ a state-licensed pilot. From 1986 through 1989, an average of 4,164 vessel "movements" per year required port pilots. Over 90 percent of these movements occurred in Honolulu Harbor.

In 1985 the Legislature followed the recommendations of our sunset evaluation, abolishing the Board of Pilot Commissioners and vesting responsibility for the program in the director of the Department of Commerce and Consumer Affairs. The department now regulates the nine state-licensed pilots.

The State licenses pilot applicants first as deputy port pilots then as port pilots. All applicants must hold a U.S. Coast Guard license as master of steam and motor vessels and also be endorsed as first-class pilots for deep-draft harbors in the state. In addition, applicants must meet experience requirements, submit a certificate of physical examination, and pass a written examination.

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# Chapter 1
## Introduction

The Sunset Law, or the Hawaii Regulatory Licensing Reform Act, repeals occupational licensing statutes according to a specified timetable. The law directs the auditor to evaluate each occupational licensing statute prior to its repeal to determine if the public interest is best served by reenactment, modification, or repeal of the statute.

This report evaluates the regulation of pilotage under Chapter 462A, *Hawaii Revised Statutes*, to determine compliance with policies for occupational regulation in the Sunset Law.

## Background on Pilotage

Pilotage is the work of directing a vessel's movement in channels, harbors, restricted waters, or other areas where navigation is deemed difficult or dangerous.[1] Although only a small portion of a ship's voyage is spent in these areas, most ship casualties occur there. Ships are likely to encounter increased traffic and pass closer to natural hazards in shallow waters.

A pilot is either a member of a ship's crew or an individual brought aboard the ship specifically to direct it through pilotage waters. A pilot normally takes navigational control and direction of a ship outside designated pilotage waters. The pilot then directs the vessel to a safe berth, avoiding potential hazards and adapting to such changing conditions as currents, depths, and weather. The pilot provides shiphandling skills combined with up-to-date knowledge of the local geography and weather and the port's navigational requirements and regulations. The time needed to pilot a vessel to and from a berth varies from port to port.[2]

### *Federal and state regulation*

The federal government has jurisdiction over vessels engaged in domestic trade between ports in the United States or its possessions. These "coastwise" vessels require a federally licensed pilot who is endorsed for the pilotage waters that the ship plans to enter. The U.S. Coast Guard enforces the federal laws and issues federal licenses to pilots who meet its requirements. The Coast Guard is also empowered to suspend, revoke, or deny licensure if a pilot is negligent,

unskillful, inattentive to pilotage duties, or willfully violates any maritime law or regulation. It investigates incidents involving pilots operating under federal licenses.

The 24 states that regulate pilotage have jurisdiction over vessels granted permission by the United States Customs Service to engage in foreign trade. These "registered" vessels must take on a state-licensed pilot when entering that state's designated pilotage waters.[3] Vessels that sail under the flag of a foreign country must also be piloted by a state-licensed pilot.

Public vessels, such as fireboats, police boats, and warships owned by municipalities, state, or federal governments are exempt from state and federal pilotage laws. They may, at their option, use the services of a federal or state pilot. Pleasure boats or other miscellaneous motor powered vessels do not require a port pilot.

## Pilotage in Hawaii

With certain exceptions,[4] every vessel involved in trade or commerce that enters or departs any port designated as pilotage waters must employ a state-licensed pilot. Pilotage waters include those around Port Allen, Nawiliwili, Honolulu, Kahului, Hilo, Kawaihae, and Barbers Point.[5]

From 1986 through 1989, an average of 4,164 vessel movements per year required port pilots.[6] Over 90 percent of these movements occurred in Honolulu Harbor and ranged from movements of foreign fishing boats of less than 200 feet, to automobile container vessels of 900 feet or more.

### *1985 sunset evaluation*

Our 1985 sunset evaluation report found a need to regulate pilotage. However, the Board of Pilot Commissioners had not met the purposes intended by the Legislature, nor had the board acted in the interests of the State. The report recommended that Chapter 462A be amended to delete the board and assign regulatory responsibility to the Department of Commerce and Consumer Affairs (DCCA).[7]

In 1985, the Legislature abolished the Board of Pilot Commissioners and vested in the director of the DCCA all the responsibilities once held by the board. The director now has full responsibility for the program.