

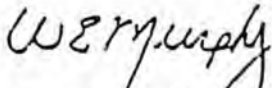
ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7946 HOUSE LABOR & COMMERCE

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

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

Sincerely yours,

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

Capt. W.E. Murphy

Governor Steve Cowper
January 1, 1990
page seven of seven pages

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 21, 1990

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

Dear Captain Murphy:

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

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

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

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

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

Captain W. E. Murphy

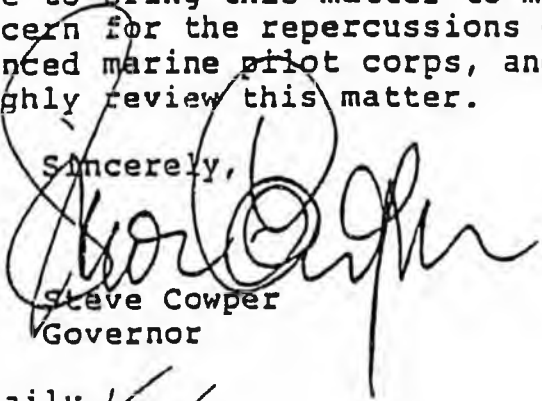
-2-

March 21, 1990

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

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

Sincerely,



Steve Cowper
Governor

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

Appendix C

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

Huzzus & Kirchner
A Professional Corporation
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 342-0204

OFFICE OF
MANAGEMENT & BUDGET

MAY 28 1990

STRATEGIC PLANNING
CABLE ADDRESS USLAW
FAX (202) 337-0034
TLX-TWX 3106088 (USLAW WASH)

RICHARD W. HURRUS *
PAUL G. KIRCHNER †
PETER N. KYROS †
JOHN R. MCKAY * †

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

May 25, 1990

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

Dear Ms. Madden:

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

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

1. Entry Level Requirements.

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

Hurvus & Hirschner

Ms. Mary Lou Madden
May 25, 1990
Page Two

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

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

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

Hurnus & Hirschner

Ms. Mary Lou Madden
May 25, 1990
Page Three

2. Pre-License Training.

A) Need.

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

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

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

Harris & Hirschner

Ms. Mary Lou Madden
May 25, 1990
Page Four

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

B) Legal Authority and Policy Considerations.

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

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

Hurnus & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Five

Bar Pilots for the Port of New Orleans, 230 F.Supp. 18 (E.D. La. 1964).

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

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

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

Hurkus & Hirschner

Ms. Mary Lou Madden
May 25, 1990
Page Six

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

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

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

Hunnus & Hirschner

Ms. Mary Lou Madden
May 25, 1990
Page Six

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

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

Huxus & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Seven

C) Legal Status.

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

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

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

license. That understanding is relevant to your question regarding possible liability concerns of pilot associations.

D) Types of Programs.

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

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

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

Harris & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Nine

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

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

Harris & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Ten

3. Continuing Education.

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

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

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

Hickman & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Eleven

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

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

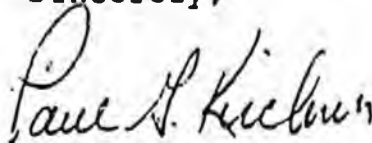
Hurris & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Thirteen

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

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

Sincerely,


Paul G. Kirchner

PGK/wmm

cc: Captain Pat J. Neely, Jr.

Hunnus & Kirchner

Ms. Mary Lou Madden
May 25, 1990
Page Twelve

the pilotage rate base.

4. Pilot Discipline.

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

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

Appendix D

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

LAW OFFICES OF
ZIEGLER, CLOUDY, KING & PETERSON

307 SAUNDEN STREET
KETCHIKAN, ALASKA 99901

C. L. CLOUDY
EDWARD G. KING
J. W. PETERSON
WILL WOODKELL
TREVOR N. STEPHENS

(907) 225-9401
FACSIMILE
(907) 225-2813

(1915-1972 (DECEASED))
A. M. ZIEGLER
RETIRED
ROBERT M. ZIEGLER, SR.

June 25, 1990

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

OFFICE OF
MANAGEMENT & BUDGET

JUN 26 1990

STRATEGIC PLANNING

Re: Sunset Pilotage Act
Our File 29.039.48

Dear Brad:

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

Limitation on Licenses

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

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

ZIEGLER, CLOUDY, KING & PETERSON

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 2

by Paul Kirchner in his letter on behalf of APA, the power and authority of the State to so regulate has never, ever been successfully questioned in the courts of the United States.

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

Training Up

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

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

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

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

ZIEGLER, CLOUDY, KING & PETERSON

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 3

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

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

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

Tariffs

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

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 4

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

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

Penalties

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

Entry Level Licensing

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

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

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

ZIEGLER. CLOUDY. KING & PETEKSON

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 5

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

Pilot Liability

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

Pilot Performance

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

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 6

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

Associations

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

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

Legal Environment

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

ZIEGLER, CLOUDY, KING & PETERSON

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 7

encompasses most of these claims:

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

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

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

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

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

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

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

Admiralty Attorney

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

ZIEGLER, CLOUDY, KING & PETERSON

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 8

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

What the State Can Do

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

Miscellaneous

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

ZIEGLER, CLOUDY, KING & PETERSON

Mr. Brad Pierce, Senior Policy Analyst
Division of Policy
Office of Management and Budget
Office of the Governor
June 25, 1990
Page 9

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

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

Sincerely,

ZIEGLER, CLOUDY, KING & PETERSON

By 
C. L. Cloudy

CLC:ce

cc: Paul G. Kirchner, Esq.
Kurrus & Kirchner, P. C.
1055 Thomas Jefferson Street, N. W.
Washington, D. C. 20007

James D. Gilmore, Esq.
Gilmore & Feldman
310 K Street, Suite 308
Anchorage, Alaska 99501

Appendix E

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

Kurrus & Kirchner
A Professional Corporation
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 342-0204

RICHARD W. KURRUS *
PAUL G. KIRCHNER †
JOHN R. MCKAY *

* ALSO ADMITTED IN MASSACHUSETTS
† ALSO ADMITTED IN VIRGINIA
* ALSO ADMITTED IN NEW YORK

CABLE ADDRESS USLAW
TELECOPIER (202) 337-0034
TLX-TWX 510001116 (USLAW WASH)

DONALD L. MOGERS
WILLIAM H. QUEALY
PETER C. WILLIAMS
OF COUNSEL

July 27, 1990

Mr. C.L. Cloudy
Ziegler, Cloudy, King &
Peterson
301 Bawden Street
Ketchikan, Alaska 99901

Dear Mr. Cloudy:

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

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

PILOT LIABILITY LIMITATION GENERALLY

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

Harris & Kirchner

Mr. C.L. Cloudy
July 27, 1990
Page Two

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

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

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

Mr. C.L. Cloudy
July 27, 1990
Page Three

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

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

Hurris & Kirchner

Mr. C.L. Cloudy
July 27, 1990
Page Four

DIFFERENT FORMS OF LIABILITY LIMITATION

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

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

Mr. C.L. Cloudy
July 27, 1990
Page Five

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

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

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

Hunnus & Kirchner

Mr. C.L. Cloudy
July 27, 1990
Page Six

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

ANALYSIS OF THE DIFFERENT FORMS OF LIABILITY LIMITATION

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

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

Harris & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Seven

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

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

Harris & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Eight

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

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

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

Hurrus & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Nine

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

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

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

Hurris & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Ten

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

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

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

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

Harris & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Eleven

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

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

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

Hurxus & Kirchner

Mr. C.L. Cloudy
July 27, 1990
Page Twelve

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

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

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

Mr. C.L. Cloudy
July 27, 1990
Page Thirteen

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

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

Master/Servant Relationship and Liability Limitation

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

Hunnus & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Fourteen

1990 Cum. Pocket part).

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

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

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

Mr. C.L. Cloudy
July 27, 1990
Page Fifteen

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

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

Harris & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Sixteen

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

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

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

Huxius & Hirschner

Mr. C.L. Cloudy
July 27, 1990
Page Seventeen

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

Federal Legislation Affecting Vessel Owner/Operator
Liability for Pilot Negligence

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

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

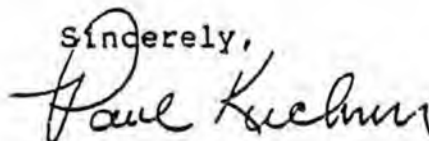
Hurvus & Kirchner

Mr. C.L. Cloudy
July 27, 1990
Page Eighteen

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

I hope that this information and these views are helpful.

Sincerely,



Paul G. Kirchner

Enclosures
PGK/aes

HB

237

File 2

PA Pacific Associates

116 Gold Street

Juneau, Alaska 99801

(907) 586-3107

FAX 586-1001

MEMORANDUM

January 28, 1994

Sent via fax
1 page total

To: Lynda Giguere
From: Joe Kyle
Subj: Tariff Write Up for Marine Pilot Act

Lynda, attached language is "legal" version of what industry and the following pilot associations (pending, but SWAPA is a tentative yes, and we do not expect any problems with AMP, WAPA, KPA, or ACP — SEAPA is a potential problem)) can live with, assuming we need tariff language in the Marine Pilot Act to replace the sunset provision.

This information is provided so you and Rep Hudson have a general idea of how most of the pilots and industry believe the tariff should be handled in the Act.

We're working hard for problem resolution between industry and SEAPA in southeast Alaska . . . trying to get everyone on the same timetable is our problem at present. I'm optimistic . . . to repeat, Rep Hudson's letter to all concerned is very appropriate (and should help the process).

NEW SECTIONS IN MARINE PILOTAGE ACT

Sec. 08.62.055. Rates and Rate Determinations. (a) A pilot organization recognized by the board, acting on behalf of its members, shall, from time to time but not more than once during any 12-month period, prepare and file with the board a set of rates applicable to the providing of pilotage services by its members. The filed set of rates shall include a complete listing of all charges imposed by, and amounts due, its members in consideration for providing pilotage services. The initial set of rates shall be filed within thirty (30) days after the effective date of this section. For purposes of this section, a set of rates filed with the board shall become effective thirty (30) days after the receipt thereof by the board and shall remain in effect until the date which is thirty (30) days after the receipt by the board of a replacement set of rates, except that the initial set of rates shall be deemed to be in effect as of the later of July 1, 1994 or the effective date of this section, even if filed subsequent thereto.

(b) A pilot organization recognized by the board, acting on behalf of its members, may enter into agreements with owners, operators, managers or agents of vessels specifying the rates that will be charged for pilotage services provided by its members to such owners, operators, managers or agents. Rates provided for in such agreements need not be uniform as to all vessels to which the members provide pilotage services nor are they required to be the same as the rates then in effect under (a) of this section. Any rate determination by the board under this section or by an arbitrator under AS 08.62.060 shall have no impact on the enforceability of such agreements.

(c) If a pilot organization is unable to enter into an agreement of the type referred to in (b) of this section with an owner, operator, manager or agent:

(1) the fact that no agreement has been entered into shall not relieve the vessel of such owner, operator, manager or agent of its obligations under AS 08.62.160 nor shall it relieve the members of their obligation to provide pilotage services to such vessel;

(2) the rates charged by the members, and payable by the owner, operator, manager or agent, for pilotage services actually performed, shall be the rates in effect under (a) of this section at the time the pilotage services were actually performed or such lesser rates as may be determined by the marine pilot organization, subject to refund as provided in (d) of this section, except that a marine pilot organization may not file a set of rates under (a) of this section for the purpose of placing unreasonable economic pressure on an owner, manager, operator or agent to enter into an agreement under (b) of this section in lieu of seeking a rate

determination by the board under this section;

(3) the owner, operator, manager or agent may, no later than thirty (30) days after the pilotage services have been provided, petition the board for a rate determination under this section by filing a rate determination petition with the board and serving a copy of the petition on the appropriate marine pilot organization. Once a petition is filed, it is not necessary for the owner, operator, manager or agent to file additional petitions as to subsequent pilotage services performed utilizing the same rates that are the subject of the filed petition. The rate determination made under this section or by arbitration under AS 08.62.060 in response to the filed petition shall also apply to such subsequent pilotage services; and

(4) the board shall have authority to consolidate rate determination petitions filed by different owners, operators, managers or agents if the petitions present common issues. Furthermore, two or more owners, operators, managers or agents may file a joint rate determination petition so long as the vessel of at least one petitioner has received pilotage services within the preceding thirty (30) days. Once a joint petition is filed, it is not necessary for any of the petitioners to file additional petitions as to subsequent pilotage services performed utilizing the same rates that are the subject of the filed petition. The rate determination made under this section or by arbitration under AS 08.62.060 in response to the filed petition shall also apply to such subsequent pilotage services.

(d) If an owner, operator, manager or agent timely petitions the board under (c) of this section, the board, or if the parties agree to submit the dispute to arbitration under AS 08.62.060, then the arbitrator, shall determine whether the rates charged were just and reasonable. The board or arbitrator, as the case may be, shall make a final determination in response to a rate determination petition within 180 days after the receipt thereof by the board, except that if the dispute has been submitted to mediation under AS 08.62.060, the 180-day period shall not begin to run, nor shall the board be required to make a rate determination in response to the petition, until one or both parties notify the board that it is unwilling to proceed with the mediation. If the board or arbitrator determines that the rates charged were in excess of what the board or arbitrator determines to be just and reasonable, the pilot organization shall promptly and, in any event within thirty (30) days after a determination by the board or arbitrator, as the case may be, refund to the owner, operator, manager or agent the difference between what was paid and what was determined by the board or arbitrator to be just and reasonable. The pilot organization shall be responsible for effecting such refund regardless of whether the monies paid have previously been distributed to its members.

(e) In making a rate determination under this section or under AS 08.62.600, the board or arbitrator shall take into account the following factors together with such additional factors as the board may, by regulation, determine to be appropriate:

(1) historical rates charged for comparable pilotage services in the state;

(2) current rates charged for comparable pilotage services in the state to other owners, operators, managers and agents by members of all recognized marine pilot organizations;

(3) rates charged for comparable pilotage services other than in the state;

(4) the actual time aboard the vessel, time engaged in preparing to provide the pilotage services, seasonal and weather conditions, and risks;

(5) the reasonable expenses incurred in providing the pilotage services such as dispatch, transportation, overhead and other associated expenses; and

(6) the financial impact of pilotage expenses on the owner, operator or manager of the vessel, except that this factor shall only be considered if the owner, operator, manager or agent provides to the board or arbitrator, as the case may be, all such financial information as the board or arbitrator shall reasonably determine is necessary for determining such impact.

After taking into account such factors, the board or arbitrator, as the case may be, shall determine just and reasonable rates. For these purposes, just and reasonable rates shall be the rates which provide reasonable compensation to the pilot giving due consideration to such factors.

(f) In making a rate determination under this section, the board may, but shall not be obligated to, facilitate the determination by requesting the commissioner or the commissioner's designee, or one or both public members of the board, or an independent third party, to review the petition and make a report to the board with recommendations.

(g) During the period while the board is considering a rate determination petition, the marine pilot coordinator shall be authorized to use such means as he or she shall deem appropriate in order to assist the parties in resolving their differences for the purpose of reaching an agreement under (b) of this section, so as to result in the withdrawal of the rate determination petition.

Sec. 08.62.060. Arbitration and Mediation. (a) The board shall prepare and maintain a list of rate arbitrators and a list of rate mediators. Each list:

(1) shall include only individuals residing in the state who: (i) are experienced in maritime matters, are licensed to practice law in the state, or who have experience as arbitrators or mediators, (ii) have advised the board of their willingness to serve as rate arbitrators and/or rate mediators, as the case may be, and (iii) have provided the board with detailed biographical information;

(2) shall not include any person holding a license under this chapter or any person registered as an agent under AS 08.62.187;

(3) may include individuals that are on the other list; and

(4) shall only include individuals who have agreed to provide arbitration or mediation services, as the case may be, at rates not in excess of the maximum arbitration or mediation rates established by the board.

(b) Whenever a rate determination petition is filed under AS 08.62.55(c), the marine pilot coordinator shall promptly inquire both of the petitioner and the appropriate marine pilot organization as to whether they desire to have the dispute submitted to mediation or arbitration. If both parties are willing to submit the dispute to arbitration, the dispute shall be arbitrated in the manner provided in (c) of this section. If both parties are willing to submit the dispute to mediation but not arbitration, the dispute shall be submitted to mediation in the manner provided in (d) of this section.

(c) If a dispute is to be submitted to arbitration:

(1) the marine pilot coordinator shall send to both parties a list of three individuals from the list of arbitrators, chosen at random, together with biographical information on each individual. The marine pilot coordinator shall, before including an individual on the list sent to the parties, confirm that they are willing to serve as arbitrator and do not have any conflict of interest. The marine pilot coordinator shall then ask each party to strike one name from the list. The arbitrator shall be the individual whose name was not struck by either party or if both parties struck the same name, then one of the two remaining individuals, as selected by the marine pilot coordinator;

(2) the fees and expenses of the arbitrator shall be paid one-half by the petitioner(s) and one-half by the marine pilot organization, with each party bearing its own

costs incurred in connection with the arbitration;

(3) the provisions of AS 08.62.055(e) shall apply for purposes of the standard to be applied, and the factors to be considered, by the arbitrator; and

(4) the provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180 apply to arbitrations under this section if they do not conflict with the provisions of this section.

(d) If a dispute is to be submitted to mediation:

(1) the marine pilot coordinator shall send to both parties a list of three individuals from the list of mediators, chosen at random, together with biographical information on each individual. The marine pilot coordinator shall, before including an individual on the list sent to the parties, confirm that they are willing to serve as mediator and do not have any conflict of interest. The marine pilot coordinator shall then ask each party to strike one name from the list. The mediator shall be the individual whose name was not struck by either party or if both parties struck the same name, then one of the two remaining individuals, as selected by the marine pilot coordinator;

(2) the fees and expenses of the mediator shall be paid one-half by the petitioner(s) and one-half by the marine pilot organization, with each party bearing its own costs incurred in connection with the mediation;

(3) the mediator, in conjunction with the parties, shall establish a schedule and procedure for conducting the mediation;

(4) if either party should, at any time, determine that it is unwilling to proceed with the mediation, that party shall notify the board whereupon the mediation shall cease; and

(5) if, as a result of the mediation, the parties are able to reach an agreement of the type referred to in AS 08.62.055(b) and resolve their disputes regarding amounts paid for pilotage services that were the subject of the rate determination petition, the parties shall promptly notify the board whereupon no further action will be required by the board under AS 08.62.055 with respect to the rate determination petition.

DRAFT: December 14, 1993

AMENDING EXISTING SECTIONS OF MARINE PILOTAGE ACT

A. AS 08.62.010: Amended as follows (additions underlined):

Sec. 08.62.010. Creation and membership of board. There is created the Board of Marine Pilots. It consists of two pilots licensed under this chapter who have been actively engaged in piloting on vessels subject to this chapter, two agents or managers of vessels who are and remain actively engaged in ordering pilots for vessels subject to this chapter, two public members in accordance with AS 08.01.025, and the commissioner or the commissioner's designee. Not more than one pilot and one agent or manager shall be from any one judicial district. All members of the board shall be residents of the state.

B. AS 08.62.040(a)(1): Amended as follows (additions underlined):

(1) provide for the maintenance of efficient and competent pilotage service on the inland and coastal water of and adjacent to the state to assure the protection of shipping, the safety of human life and property, and the protection of the marine environment, and to promote maritime commerce in the state;

C. AS 08.62.175(c)(3): Amended to read in its entirety as follows:

(3) adopt and revise rates for filing pursuant to AS 08.62.055(a);

Post-It™ brand fax transmittal memo 76 # of pages: *	
To Lynda	From Bob Lohr
Co. P. Hudson	Co. APUK
Dept. House LtC	Phone# 263-2174
Fax# 465-6790	Fax# 276-0160 FINAL

Position Paper on HB 237

Alaska Public Utilities Commission / POSITION PAPER

The Alaska Public Utilities Commission (Commission) believes that the assignment of new responsibilities to an agency is a legislative decision, subject to the Governor's approval. If this responsibility is assigned to the Commission, it will adopt the marine pilot tariff in accordance with the factors defined by the statute. The Commission recognizes the critical importance of marine pilots to marine safety.

HB 237 (the Bill) would require the Commission to adopt a tariff for marine pilot services required under AS 08.62. The Commission has considerable experience in approving tariffs for public utilities and pipeline carriers. During FY 92 the Commission handled 303 tariff revisions from a total of 104 regulated utilities and 15 pipeline carriers. The principle of just and reasonable rates is well-established in utility regulation. Typically these tariff decisions are based on tariff actions proposed by the utility or carrier and approved, modified, or rejected by the Commission.

The Commission understands that the present law requires the Board of Marine Pilots to adopt a maximum tariff for marine pilot services and requires pilot associations to adopt tariffs within that maximum. This arrangement has led to price competition between certain pilot associations.

HB 237 would eliminate the price competition by requiring the Commission to establish a fixed tariff and by requiring pilots to charge and associations to collect only that fixed amount. No price variation from the established tariff is permitted.

Position Paper on HB 237
April 9, 1993
Page 2 of 4

Page 3, line 19-20 of the bill would require the tariff adopted to be "just and reasonable and in accordance with accepted maritime industry practices and standards." The Commission is advised that marine standards and practices are not widely accepted and are the subject of considerable debate. The Commission believes that the legal standard of "just and reasonable", in combination with the list of required considerations is adequate direction to the Commission. Therefore, the Commission recommends deletion of the bold-faced as shown above.

Allowed pilot expenses is amended to exclude the cost of political contributions, public relations and lobbyist expenses (page 3, line 31). The Commission recommends substitution of "lobbying" for lobbyist. One of the new standards proposed in this legislation is the consideration of "the economic effect of the proposed tariff on the industry, the area, and the state". The Commission recommends clarification or deletion of this standard because it would be difficult to apply and would likely lead to debate in the future. If the intent is to ensure that pilotage services are available to all ports at reasonable rates, the Commission suggests the concept of universal service from federal Communications Act may be appropriate.

The Commission recommends that two factors be added to the list of required considerations (page 4, line 8 of the Bill)

(1) the supply and demand for pilotage services; and (2) the public interest in maintaining efficient, economical and reliable pilotage service.

Position Paper on HB 237
April 9, 1993
Page 3 of 4

HB 237 would require the marine pilot tariff to be adopted as a regulation. The Commission recommends that the tariff be developed through its normal adjudicatory process because established procedures are well-settled for accomplishing this. Language to carry out this recommendation is attached to this position paper. Other states, such as Maryland and Oregon, treat pilot tariffs this way. The regulatory process is generally more lengthy and expensive than adjudicatory decision-making, in part because it requires the approval of the attorney general's office and filing by the Lieutenant Governor. Due process is assured in the adjudicatory process. The Commission makes these decisions after providing all interested parties the opportunity to be heard.

However, the Commission has no experience whatsoever in marine pilot tariffs, so expertise in this area would have to be developed. The Commission believes that expertise in the maritime area of practice must be developed to do a proper job. A fiscal note has been prepared for this bill and is attached.

Section 6 of the bill adds subsections to AS 08.62.045. Subsection (f) requires the Commission to adopt regulations to apply a regulatory cost charge to vessel movements sufficient to cover the costs of regulating marine pilot tariffs. The Dept. of Revenue would collect this charge. The Commission recommends that this section be amended to clarify responsibility for payment of these fees.

Position Paper on HB 237
April 9, 1993
Page 4 of 4

The Commission understands that the House Labor & Commerce Committee is considering one amendment that would make the Commission, rather than the Marine Pilots Board, responsible for limiting by regulation the number of pilots and for establishing criteria for selecting pilots to be awarded licenses. This Commission believes that this function should not be assigned to the Commission and that it should stay with the Board. Furthermore, it is beyond the Commission's expertise.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 237

Revision Date: _____

Dept. Affected: Commerce & Economic Development

Title: Marine Pilot Licensing & Tariffs

GRU: Alaska Public Utilities Comm.

Component: _____

Sponsor: _____

Requestor: _____

COMPONENT SERIAL NO. 364

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES	78,077	78,077	78,077	78,077	78,077	78,077
TRAVEL	5,000	3,500	3,500	5,000	3,500	3,500
CONTRACTUAL	130,000	25,000	25,000	130,000	25,000	25,000
SUPPLIES	1,500	1,200	1,200	1,500	1,200	1,200
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	214,577	107,777	107,777	214,577	107,777	107,777
CAPITAL	0	0	0	0	0	0

REVENUE FUND SOURCE:	GF/PR	1005	GF/PR	1005	GF/PR	1005

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	214,577	107,777	107,777	214,577	107,777	107,777
1008 GF/MHTIA						
Other						
TOTAL	214,577	107,777	107,777	214,577	107,777	107,777

POSITIONS:

FULL-TIME	1.5			2.0		
PART-TIME		2.0	2.0		2.0	2.0
TEMPORARY						

Estimate of current year (FY93) impact: 7,500

ANALYSIS: (Attach a separate page if necessary)

Commission expenses would be heaviest during the year when the tariff was being developed. Pursuant to proposed AS 08.62.045(f) the source is General Fund/Program Receipts through the regulatory cost charge on vessel movements.

Prepared by: Don Schroer, Chairman
Division: Alaska Public Utilities Commission

Phone: 276-6222
Date: April 5, 1993

Approved by Commissioner: _____

Date: _____

Worksheet to Support Fiscal Note to HB 237
 Marine Pilot Tariffs
 FY 94 Cost

DRAFT

PERSONAL SERVICES

	39,076	Marine Pilot Financial Analyst, Range 21A (9 months)
	13,763	Fringe Benefits
	<u>52,839</u>	Subtotal Financial Analyst
	17,199	Clerk Typist III Range 8, (9 months)
	8,039	Fringe Benefits
	<u>25,238</u>	Subtotal Clerk
\$78,077		Subtotal Personal Services

CONTRACTUAL

	80,000	Expert Witness
	25,000	Hearing Officer
	5,000	Transcript Cost
	20,000	Asst. AG Time (Dept. of Law RSA)
\$130,000	<u>130,000</u>	Subtotal Contractual

TRAVEL

\$5,000	6,000	Subtotal Travel
---------	-------	-----------------

SUPPLIES

\$1,500	1,500	Subtotal Supplies
<u>\$214,577</u>		TOTAL

Worksheet to Support Fiscal Note to HB 237
 Marine Pilot Tariffs
 FY 95, FY 96 Cost

J E A P T

PERSONAL SERVICES

	39,076	Marine Pilot Financial Analyst, Range 21A (9 months)
	13,763	Fringe Benefits
	<u>52,839</u>	Subtotal Financial Analyst
	17,199	Clerk Typist III Range B, (9 months)
	8,039	Fringe Benefits
	<u>25,238</u>	Subtotal Clerk
\$78,077		Subtotal Personal Services

CONTRACTUAL

	20,000	Consultant
	0	Hearing Officer
	0	Transcript Cost
	5,000	Asst. AG Time (Dept. of Law RSA)
\$25,000	<u>25,000</u>	Subtotal Contractual

TRAVEL

\$3,500	3,500	Subtotal Travel
---------	-------	-----------------

SUPPLIES

\$1,200	1,200	Subtotal Supplies
<u>\$107,777</u>		TOTAL

The focus on Commission activities during the two fiscal years following adoption of the Marine Pilot tariff would shift to coordination with the Marine Pilots Board. In addition, if the amendment to HB 237 shifting the responsibility for limiting the number of pilots is adopted, it will require an annual economic analysis.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 5, 1994

SUBJECT: Federal Antitrust Exemption for Tariff Setting Activities of Marine Pilot Organizations (Work Order No. 8-LS1615(E))

TO: Representative Bill Hudson
ATTN: Lynda Giguere

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your request for my comments regarding a letter to Stuart Mork from Mark Ashburn, dated March 2, 1994.

The essence of the letter is that the pending repeal of the authority of the Board of Marine Pilots to set maximum tariffs that may be charged by marine pilot organizations is not "particularly meaningful," because it probably would not change the antitrust liability of marine pilot organizations.

Under federal antitrust law, a group of individuals such as marine pilots cannot agree among themselves to set the tariffs that they may charge for their services. Such actions are anticompetitive and may constitute horizontal price fixing. Persons who engage in activities violative of the federal antitrust laws are potentially subject to criminal and civil sanctions, including the payment of treble damages to those injured by their illegal conduct.

Under the "state action" exemption, a state is allowed to immunize private anticompetitive conduct from federal antitrust liability by (1) clearly and affirmatively articulating a policy to allow anticompetitive conduct and (2) actively supervising the anticompetitive conduct of the private party. Under AS 08.62.045 the Board of Marine Pilots is authorized to supervise the setting of tariffs by marine pilot organizations. Once AS 08.62.045 is repealed, as scheduled on June 30 of this year, the board will no longer have the authority to supervise the setting of marine pilot tariffs by marine pilot organizations and there will be little likelihood that the state will be able to satisfy the "active supervision" requirement of the "state action" exemption. If the state is not able to immunize the tariff setting practices of marine

Representative Bill Hudson
March 5, 1994
Page 2

pilot organizations through the "state action" exemption, then marine pilot organizations and their members are at risk of violating the federal antitrust laws.

Mr. Ashburn suggests that the repeal of AS 08.62.045 will probably not have a meaningful impact on the antitrust liability of the marine pilot organizations, because AS 08.54.045 does not actually provide for active supervision and thus the current statutory scheme would not immunize the tariff setting activities of the marine pilot organizations, in any case. This risk conceivably exists. The United States Supreme Court has repeatedly increased the level and rigor of state supervision of private anticompetitive activities that is necessary to satisfy the "active supervision" requirement. The level of supervision authorized by AS 08.62.045 may conceivably fall below the standard set by the Supreme Court. However, without the authority to at least set the maximum tariffs that may be charged by marine pilot organizations, the state will not be able to make a reasonable argument to the federal courts that the state does indeed actively supervise the setting of marine pilot tariffs.

The alternative argument, that AS 08.62.045 may not be necessary because marine pilot organizations are like private companies that competitively set tariffs and thus are not anticompetitive, disregards the fact that marine pilot organizations are merely voluntary associations of independent contractors that provide marine pilot services. Marine pilots are not employees of the marine pilot organization, so a marine pilot organization cannot be considered to be a distinct business entity engaged in open and unfettered competition with other marine pilot organizations.

If I may be of further assistance, please advise.

GU:gc
94-172 glc

ASHBURN AND MASON

LAWYERS

A PROFESSIONAL CORPORATION

1130 WEST SIXTH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501

MARK E. ASHBURN
DOUGLAS B. BAILY
LEWIS F. GORDON
JULIAN L. MASON III
JOHN C. McCARRON
DONALD W. McCLINTOCK III
A. WILLIAM SAUPE
SHARON A. STURGES
KIRSTEN TINGLUM

TELEPHONE
(907) 276-4331

TELECOPIER
(907) 277-8235

March 2, 1994

VIA FAX NO. 586-1204

Mr. Stuart Mork
Alaska Marine Pilots
P. O. Box 730
Dutch Harbor, Alaska 99692

Re: Maximum Tariff
Our File No. 7936.002

Dear Stuart:

I am writing this letter pursuant to our recent discussions pertaining to the maximum tariff set by the Board of Marine Pilots pursuant to AS 08.62.045(a). Your specific question to me was whether the repeal of AS 08.62.045 would deprive a marine pilot organization of a significant benefit in connection with the "state action" exemption from federal antitrust statutes. You have asked me to set forth in a brief letter the conclusions which I earlier discussed with you.

The "state action" exemption provides generally that the antitrust laws do not apply to action by a state operating in its sovereign capacity or to private conduct directed or compelled by the state. There is a two-pronged standard for applying the state action doctrine to private parties. (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the state must actively supervise any private anticompetitive conduct.

For the reasons which I described to you in some detail in our recent discussions, I do not believe that the repeal of AS 08.62.045 would be particularly meaningful in its impact on the potential antitrust liability of marine pilot organizations. There are two basic reasons for this conclusion.

First, an argument can be made that AS 08.62.045 does not satisfy the test for a state action exemption as it is presently written. AS 08.62.045 does not displace competition with regulation; rather, it authorizes the Board of Marine Pilots to set a

Mr. Stuart Mork
Page 2
March 2, 1994

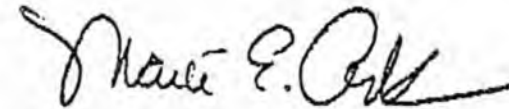
maximum tariff, authorizes a pilot organization to notify the Board of Marine Pilots of a revised tariff for the organization, and sets up a scheme where pilot organizations may compete with one another on price matters. While AS 08.62.045 does offer some antitrust protection to marine pilot organizations (because of the Board's "review" of group tariffs), it is certainly not clear that the Board's action under the statute would satisfy the second prong of the standard for the state action exemptions. The standard would, by way of contrast, clearly be met if the statute authorized the Board to set a fixed tariff and required all pilots to charge the tariff set by the Board.

Second, an argument can certainly be made that in a statutory scheme where marine pilot organizations compete with one another on the issue of tariffs, then there is no anticompetitive impact from allowing pilots to form regional groups that set tariffs, train pilots, provide dispatching services, etc. Such groups are business entities, competing on the basis of price and service with rival groups in the same region.

For these two reasons, the protection afforded by AS 08.62.045 to marine pilot organizations, while measurable, is not particularly significant. I have kept this letter short for your convenience. Please let me know if you have any questions.

Very truly yours,

ASHBURN & MASON



Mark E. Ashburn

MEA:dt

N:\DAT\7938\MORK.L01

From :

PHONE No. :

Feb. 04 1994 8:11AM PG1

FEB- 3-94 THU 11:45

SEN DRUE PEARCE

FAX NO. 1

P. 01

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465 3867 nr 465-2450
FAX (907) 465-2030
Mail Stop 3101

130 Seward Street, Suite 400
Juneau, Alaska 99801-2105

MEMORANDUM

February 3, 1994

SUBJECT: Tariffs for marine pilotage services (Work Order No. 8-LS1615)

TO: Senator Drue Pearce

FROM: George Utermohle *GU*
Legislative Counsel *GU*

This memorandum is in response to your queries regarding the consequences of the repeal of AS 08.62.045, relating to tariffs for marine pilotage services.

AS 08.62.045 requires the Board of Marine Pilots to adopt regulations establishing the maximum tariffs that marine pilots may charge for pilotage services; authorizes regional marine pilot organizations to adopt tariffs for pilotage services; establishes the procedure for adoption of tariffs by pilot organizations; and prohibits pilot organizations and marine pilots themselves from charging excessive or improperly adopted tariffs. ^U AS 18.62.045 will be repealed June 30, 1994. Section 35, ch. 89,

U AS 08.62.045 states:

PILOTAGE TARIFFS. (a) The board shall adopt by regulation maximum tariffs that may be charged by pilots for the provision of specific pilotage services. The board shall identify those expenses that are included in the tariff. In adopting maximum tariffs under this subsection, the board shall take into consideration

- (1) reasonable compensation for actual time aboard a vessel as a pilot and for time engaged in preparing to provide pilotage services;
- (2) differential compensation for seasonal and weather conditions, risks involved in providing pilotage service, and overtime;
- (3) dispatch expenses, transportation expenses, and other associated costs directly related to the provision of pilotage services;
- (4) reasonable overhead expenses that are necessary to provide year round pilotage services for the region; and
- (5) other expenses identified by the board.

(b) A pilot organization recognized by the board, acting on behalf of its members, may adopt a new or revised tariff for provision of pilot services if the pilot organization follows the procedures set out in (c) of this section. The tariff adopted under this subsection must include those expenses identified by the board under (a) of this section, but may not exceed the maximum tariff set by the board. The tariff adopted under this subsection may be revised annually.

(continued...)

From :

PHONE No. :

Feb. 04 1994 8:12AM P02

FEB- 3-94 THU 11:46

SEN DRUE PEARCE

FAX NO. 1

P. 02

Senator Drue Pearce
February 3, 1994
Page 2

SLA 1991.

AFTER THE REPEAL OF AS 08.62.045, MAY THE BOARD REGULATE PILOTAGE TARIFFS?

The only explicit authority of the Board of Marine Pilots to regulate marine pilotage tariffs is AS 08.62.045. Once AS 08.62.045 is repealed, the board will lose its explicit authority over tariffs.

It is possible that the board retains some residual authority to regulate marine pilotage tariffs under its general powers and duties (AS 08.62.040). In revising the marine pilot laws in 1991, the legislature found that "it is necessary to give the Board of Marine Pilots broad statutory authority, including the authority to establish pilotage regions and maximum tariffs and the authority to establish criteria for the training and licensing of marine pilots." Section 1(b)(2), ch. 89, SLA 1991; emphasis added. The fact that the legislature made this finding of a need to set maximum tariffs while at the same time providing for the eventual repeal of the board's express authority to set maximum tariffs under AS 08.62.045, suggests that the legislature did not intend to wholly eliminate the authority of the board to set maximum tariffs after AS 08.62.045 is repealed. Also, the board itself does not consider AS 08.62.045 as the sole source of its authority regarding pilotage tariffs. The board cites both AS 08.62.045 and 08.62.040 as authority for its current and past regulations regarding pilotage tariffs.^{2/}

^{2/}(...continued)

(c) A pilot organization shall send a notice of intent to adopt a tariff for provision of pilot services to the board and publish the notice on at least three days during a period of 14 consecutive days in a newspaper of general circulation in the state. The notice of intent to adopt a tariff shall include a copy of the proposed tariff, the name and mailing address of the pilot organization that intends to adopt the tariff, and a statement of the time and place of adoption of the tariff. A pilot organization may not adopt a tariff until 30 days have elapsed from the later of the mailing of the notice of intent to adopt a tariff to the board or the last date of publication of the notice of intent to adopt a tariff. A tariff may not take effect until 30 days after the tariff is adopted by the pilot organization.

(d) A pilot organization recognized by the board or a member of the pilot organization may not charge a tariff for the provision of pilotage services that exceeds the maximum tariff set by the board, that is different from the tariff adopted by the pilot organization, or that has not taken effect under (c) of this section.

^{2/} The most likely sources of authority, outside of AS 08.62.040, for the Board of Marine Pilots to regulate pilotage tariffs are:

AS 08.62.040(a)(1)--The board shall . . . provide for the maintenance of efficient and
(continued...)

FEB 3 94 THU 11:47

SEN DRUE PEARCE

FAX NO. 1

P. 03

Senator Drue Pearce
February 3, 1994
Page 3

On the other hand, a reasonable argument can be made that when the legislature repeals the board's explicit authority to set maximum tariffs, it intends to deny that authority to the board. If the legislature repeals the explicit authority of the board to set maximum tariffs under AS 08.62.045, yet the board still had the authority under a general statute to achieve the same purpose, then the act of the legislature in repealing AS 08.62.045 was a nullity and without effect. As a matter of statutory construction, it is presumed that the legislature does not engage in fruitless acts and that an amendment of a statute is intended to be a substantive change in the law. Torkko/Korman/Engineers v. Penland Ventures, 673 P.2d 769 (Alaska 1983); Isakson v. Rickev, 550 P.2d 359 (Alaska 1976).

In conclusion, it is not clear whether the Board of Marine Pilots may continue to set maximum pilotage tariffs or otherwise regulate pilotage tariffs after AS 08.62.045 is repealed.

WILL MARINE PILOTS BE ABLE TO CHARGE TARIFFS AFTER THE REPEAL OF AS 08.62.045?

The answer is yes. Pilot organizations are authorized under AS 08.62.175(c)(3) to adopt and revise tariffs for services provided by their members. This authority is not affected by the repeal of AS 08.62.045.

WHAT PROCEDURES WILL GOVERN THE ADOPTION OF TARIFFS BY PILOT ORGANIZATIONS?

After the repeal of AS 08.62.045(b) and (c), there will no longer be any statutory procedures for the adoption and revision of pilotage tariffs by the pilot organizations. At the present time there are no regulations governing the procedures for adoption of tariffs.

2/ (...continued)

competent pilotage service on the inland and coastal water of and adjacent to the state to assure the protection of shipping, the safety of human life and property, and the protection of the marine environment;

AS 08.62.040(a)(4)(C)--The board shall . . . adopt regulations establishing . . . the criteria for recognizing pilot organizations under AS 08.62.175;

AS 08.62.040(a)(6)--The board shall . . . review and approve the articles, bylaws, and rules of pilot organizations;

AS 08.62.040(b)--The board may, by regulation, make any other provision for proper and safe pilotage upon the inland and coastal water of and adjacent to the state and for the efficient administration of this chapter . . .

From

PHONE No. :

Feb. 04 1994 8:13AM PG.1

FEB- 3-94 THU 11:47

SEN DRUE PEARCE

FAX NO. 1

P. 04

Senator Drue Pearce
February 3, 1994
Page 4

In the absence of statutory or regulatory standards governing the procedures for the adoption of tariffs by pilot organizations, the organizations will be relatively free to adopt their own procedures. Given that the authority granted to the pilot organizations to set tariffs for services provided by their members is a legislative grant of authority, it is possible that the organizations are subject to a minimal obligation to adopt reasonable procedures for the adoption and revision of tariffs. It is not clear whether the pilot organizations would be held to constitutional due process standards which would require reasonable notice of the proposed adoption of the tariffs and the opportunity for affected individuals to comment on the proposed tariffs.

To the extent that the board has statutory authority, arising under provisions other than AS 08.62.045, to prescribe procedures for the adoption of tariffs by pilot organizations, it may be useful for the board to do so.

ARE THERE ANY OTHER CONSEQUENCES THAT MAY RESULT FROM THE REPEAL OF AS 08.62.045?

A significant consequence of the repeal of AS 08.62.045 is the possibility that pilot organizations may lose the benefit of the "state action" exemption from federal antitrust laws. AS 08.64 authorizes pilot organizations to set tariffs for services provided by its members. Such activity could constitute price fixing or a combination or conspiracy in violation of state and federal antitrust laws. Marine pilot organizations are exempt from state antitrust laws under AS 45.50.572(a). But there does not appear to be a similar explicit exemption for pilot organizations under federal antitrust laws.

Pilot organizations are presently protected from federal antitrust laws by virtue of the "state action" exemption, through which the anticompetitive actions of the state or anticompetitive conduct fostered by the state are exempt from the application of the federal antitrust laws. Parker v. Brown, 317 U.S. 341, 87 L.Ed 315 (1943). Under the "state action" exemption, private parties, such as the pilot organizations, may legitimately engage in otherwise anticompetitive activities if the state (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of the anticompetitive conduct taken by the private party. California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L.Ed.2d 233, 243 (1980). AS 08.62 contains ample evidence of a state policy to allow anticompetitive conduct so as to satisfy the first requirement of the "state action" exemption.

However, if the only clear authority of the Board of Marine Pilots to supervise tariffs established by pilot organizations is repealed, the state may not be able to satisfy the second requirement of the "state action" exemption: active supervision. "The requirement is designed to ensure that the state action [exemption] will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the

From :

PHONE No. :

Feb. 04 1994 8:14AM PGS

FEB- 3-94 THU 11:48

SEN DRUE PEARCE

FAX NO. 1

P. 05

Senator Drue Pearce
February 3, 1994
Page 5

active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct." Patrick v. Burgel, 486 U.S. 94, 100-101, 100 L.Ed.2d 83, 92 (1988); citation omitted. The active supervision requirement is satisfied when the state has exercised sufficient independent judgment and control so that the details of the rate have been established as the product of deliberate state intervention, not simply by agreement among private parties. It is not enough that the state has established, staffed, and funded a regulatory program; there must be a minimum level of active supervision. Federal Trade Commission v. Ticor Title Insurance Company, 504 U.S. ___, 119 L.Ed.2d 410 (1992).

By repealing the authority of the Board of Marine Pilots to set maximum rates, the legislature may be eliminating the only authority of the board to actively supervise the tariffs set by the pilot organizations and may, as a consequence, deny the protection of the "state action" exemption from the federal antitrust laws to the pilot organizations.

The advice of the antitrust experts in the Department of Law would assist the legislature in deciding whether AS 08.62.045 must be retained in order to maintain the "state action" exemption from federal antitrust laws for the tariff setting activities of the pilot organizations.

If I may be of further assistance, please advise.

GU:pl
94-094.plm

ASHBURN AND MASON

LAWYERS

A PROFESSIONAL CORPORATION

1130 WEST SIXTH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501

MARK E. ASHBURN
DOUGLAS B. BAILY
LEWIS F. GORDON
JULIAN L. MASON III
JOHN C. McCARRON
DONALD W. McCLINTOCK III
A. WILLIAM SAUPE
SHARON A. STURGES
KIRSTEN TINGLUM

TELEPHONE
(907) 276-4331
TELECOPIER
(907) 277-8235

*LYNDA -
Keep w/ Pilot Files.*

March 30, 1994

Mr. Thomas Dundas
Alaska Marine Pilots
P. O. Box 730
Dutch Harbor, AK 99692

Re: Maximum Tariff for Marine Pilots
Our File No. 7936.002

Dear Tom:

I am writing this letter as a follow-up to my earlier letter of March 2, 1994 pertaining to the maximum tariff set by the Board of Marine Pilots pursuant to AS 08.62.045(a). You have asked that I comment particularly on the recent memorandum authored by George Utermohle which addresses my March 2 letter.

In my March 2 letter (a copy of which is attached hereto), I concluded that the repeal of AS 08.62.045 would not be particularly meaningful in its impact on the potential antitrust liability of a marine pilot organization like the Alaska Marine Pilots. My conclusion on this matter has not changed.

First, as I stated in my March 2 letter, a compelling argument can be made that a pilot organization, like the Alaska Marine Pilots, is a business entity that competes on the basis of price and service with rival entities, or potential rival entities, in its region. If in fact a pilot group is a business entity, then no viable claim can be made that the setting of prices by such a group is price-fixing. It is a basic tenet of antitrust law that a violation of Section 1 of the Sherman Act requires "concerted action" by multiple actors not the unilateral behavior of a single actor.

Mr. Utermohle opines in his memorandum that "a group of individuals such as marine pilots cannot agree among themselves to set the tariffs that they may charge for their services." Such an agreement, states Mr. Utermohle, would be anticompetitive and would constitute horizontal price-fixing. Mr. Utermohle's conclusion is overbroad. An agreement among marine pilots as to prices would constitute price-fixing only if the pilots were competitors and not part of a single business entity. Section 1 of the Sherman Act prohibits only certain contracts, combinations or conspiracies in restraint of trade. It does not reach the unilateral action of a single business entity acting alone.

Mr. Thomas Dundas
Page 2
March 30, 1994

For example, a group of lawyers can form a single business entity, set prices for their services and market their services. Such action would not be price-fixing. However, if those same lawyers were not part of a single business but were instead separate business entities competing with one another in the marketplace, then any agreement among them as to the prices they charged may well constitute horizontal price-fixing.

Mr. Utermohle asserts in his memorandum that a marine pilot organization is merely a voluntary association of independent contractors that provide marine pilot services. He states that pilots are not "employees" of the marine pilot organization so the organization cannot be considered a distinct business entity. These assertions are, I believe, conclusory and inaccurate. A marine pilot organization like the Alaska Marine Pilots is not simply a voluntary association of independent contractors. Marine pilots are independent contractors with regard to their relationship to the vessels that they pilot. See AS 08.62.163. This does not mean that marine pilots are necessarily independent contractors with regard to the pilot organization that trains them, dispatches them, and sets fees for their services. There is no reason that a pilot organization like the Alaska Marine Pilots cannot be a distinct business entity that competes with other such entities and that sets prices and service standards for its member pilots.

Second, even if one concludes that pilot organizations are subject to potential liability under the federal antitrust statutes, AS 08.62.045 offers marginal protection to the pilot organizations as it is currently written. As I discussed earlier, the "state action" exemption provides that the antitrust laws do not apply to private conduct directed or compelled by the state. The exemption requires an affirmatively expressed state policy and active supervision by the state of any anticompetitive conduct.

AS 08.62.045, as currently written, does not set a fixed tariff for marine pilots. The Marine Pilot Board sets a maximum tariff that marine pilots and marine pilot organizations may not exceed. It does not, however, set a fixed tariff which all pilots are required to charge. A pilot organization may adopt any tariff it proposes so long as the tariff does not exceed the Board's maximum tariff. The review and oversight by the Board of the proposed tariffs of pilot organizations is minimal. See AS 08.62.045(c).

Mr. Utermohle states in his memorandum that the Board supervises the setting of tariffs by pilot organizations under AS 08.62.045 and that if the Board does not supervise the tariff settings then the state would not be able to satisfy the active supervision requirement of the state action exception. This declaration overstates, I believe, the protection which AS 08.62.045 as currently written provides to pilot

Mr. Thomas Dundas
Page 3
March 30, 1994

organizations. While the statute does certainly offer some protection to pilot organizations because of the maximum tariff and the filing of group tariffs with the Board, it is by no means certain that the limited involvement of the Board would satisfy the "active state supervision" requirement of the exemption.

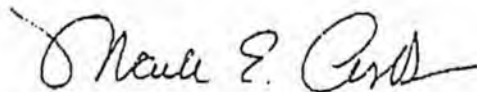
By way of contrast, if the Board set a fixed tariff for marine pilots and if all pilots were required to charge that tariff or to petition the Board for any change in tariff, then such a scheme would satisfy the state action exemption. The current provisions of AS 08.62.045 do not provide for such a fixed tariff, however, and thus any protection afforded by the current scheme is more suspect.

In conclusion, I believe that it is overly simplistic to conclude that pilot organizations cannot be distinct business entities lawfully able to set prices for their members and to compete with other pilot organizations on the basis of price and service. Furthermore, I believe that to conclude the present statutory scheme of a maximum tariff by itself insulates pilot organizations from federal antitrust liability is unwise.

Please contact me if you have any questions.

Very truly yours,

ASHBURN & MASON



Mark E. Ashburn

MEA:dt

cc: Senator Drew Pearce
Senator George Jacko
Representative Bill Hudson
Representative Carl Moses

N:\DAT\7836\DUNDAS.L01

ASHBURN AND MASON

LAWYERS

A PROFESSIONAL CORPORATION

1130 WEST SIXTH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501MARK E. ASHBURN
DOUGLAS B. BAILY
LEWIS F. GORDON
JULIAN L. MASON III
JOHN C. McCARRON
DONALD W. McCLINTOCK III
A. WILLIAM SAUPE
SHARON A. STURGES
KIRSTEN TINGLUMTELEPHONE
(907) 276-1231TELECOPIER
(907) 277-8235

March 2, 1994

VIA FAX NO. 586-1204Mr. Stuart Mork
Alaska Marine Pilots
P. O. Box 730
Dutch Harbor, Alaska 99692Re: Maximum Tariff
Our File No. 7936.002

Dear Stuart:

I am writing this letter pursuant to our recent discussions pertaining to the maximum tariff set by the Board of Marine Pilots pursuant to AS 08.62.045(a). Your specific question to me was whether the repeal of AS 08.62.045 would deprive a marine pilot organization of a significant benefit in connection with the "state action" exemption from federal antitrust statutes. You have asked me to set forth in a brief letter the conclusions which I earlier discussed with you.

The "state action" exemption provides generally that the antitrust laws do not apply to action by a state operating in its sovereign capacity or to private conduct directed or compelled by the state. There is a two-pronged standard for applying the state action doctrine to private parties: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the state must actively supervise any private anticompetitive conduct.

For the reasons which I described to you in some detail in our recent discussions, I do not believe that the repeal of AS 08.62.045 would be particularly meaningful in its impact on the potential antitrust liability of marine pilot organizations. There are two basic reasons for this conclusion.

First, an argument can be made that AS 08.62.045 does not satisfy the test for a state action exemption as it is presently written. AS 08.62.045 does not displace competition with regulation; rather, it authorizes the Board of Marine Pilots to set a

Mr. Stuart Mork
Page 2
March 2, 1994

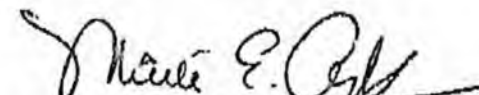
maximum tariff, authorizes a pilot organization to notify the Board of Marine Pilots of a revised tariff for the organization, and sets up a scheme where pilot organizations may compete with one another on price matters. While AS 08.62.045 does offer some antitrust protection to marine pilot organizations (because of the Board's "review" of group tariffs), it is certainly not clear that the Board's action under the statute would satisfy the second prong of the standard for the state action exemptions. The standard would, by way of contrast, clearly be met if the statute authorized the Board to set a fixed tariff and required all pilots to charge the tariff set by the Board.

Second, an argument can certainly be made that in a statutory scheme where marine pilot organizations compete with one another on the issue of tariffs, then there is no anticompetitive impact from allowing pilots to form regional groups that set tariffs, train pilots, provide dispatching services, etc. Such groups are business entities, competing on the basis of price and service with rival groups in the same region.

For these two reasons, the protection afforded by AS 08.62.045 to marine pilot organizations, while measurable, is not particularly significant. I have kept this letter short for your convenience. Please let me know if you have any questions.

Very truly yours,

ASHBURN & MASON



Mark E. Ashburn

MEA:dt

N:\DAT\7830\MORK.L01

**ALASKA MARINE PILOTS
& DISPATCHING SERVICE**

P. O. BOX 730 • DUTCH HARBOR, ALASKA 99832 • 907/581-1240
AMP FAX 907/581-1372

March 29, 1994

Rep. Bill Hudson
Room #108 State Capitol
Juneau, AK 99801-1182

RE: Extension of the Maximum Tariff

Dear Rep. Hudson,

In 1991, the Alaska Legislature overhauled the statutory scheme for pilotage in the state to promote competition. A significant change was removing the fixed tariff and introducing a maximum tariff which serves an upper limit on charges.


Should the maximum tariff be allowed to sunset?

The answer is clearly yes. Most pilots in the state, and nationwide for that matter, believe that the state is best served by the regulated monopoly system in piloting. AMP has argued for implementation of this system for a long time. The system would operate much like a public utility where service is guaranteed, the number of licensed pilots controlled and fixed rates publicly set.

If competition is to exist in piloting, it must be based on service and price as it is in the rest of the free market. However, the State of Alaska has clearly taken the service option out of the equation. Recent interpretations of statutes have deemed that withholding service has the appearance of being a boycott that violates applicable antitrust laws. AS 8.62.175(d)(3)(B) specifically obligates pilot associations to provide service to all parts of the region at all times of the year to the best of that group's ability.

Since by statute AMP must provide service, the only other aspect of competition we can address is price. AMP should be unincumbered by a maximum tariff when negotiating contracts. The maximum tariff should be allowed to sunset and allow AMP and the other pilot associations to more freely operate in the competitive environment created by the Legislature.

Sincerely,


Capt. Thomas Dundas

PA Pacific Associates

116 Gold Street

Juneau, Alaska 99801

(907) 586-3107

FAX 586-1001

March 23, 1994

Representative Bill Hudson
State Capitol Building
Room 108
Juneau, Alaska 99811-0800

*Alaska Steamship Association -
Commissioner and
will decide.*

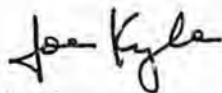
Dear Representative Hudson:

The attached letter to Commissioner Paul Fuhs regarding the tariff provision of the Marine Pilot Act is self - explanatory.

Please accept it and this letter as the Alaska Steamship Association's statement of support for the action taken by the Marine Pilot Board during its February 1994 meeting regarding extending the tariff.

Additionally, permit me to underscore the fact that both pilot association representatives and both industry representatives on the board voted in favor of extending the tariff to June 30, 1998.

Best regards,



Joe Kyle

cc: Commissioner Paul Fuhs, DCED
Alaska Steamship Association

PA Pacific Associates

116 Gold Street

Juneau, Alaska 99801

(907) 586-3107

FAX 586-1001

March 23, 1994

Commissioner Paul Fuhs
Department of Commerce & Economic Development
State Office Building
P. O. Box 110800
Juneau, Alaska 99811-0800

Dear Commissioner Fuhs:

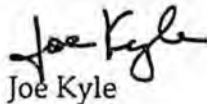
At its February 1994 meeting, the Alaska Board of Marine Pilots voted 5 - 2 to recommend that the current tariff provision in the Marine Pilot Act be extended to June 30, 1998. The two opposing votes were cast by Deputy Commissioner Reed and Chairman Klepper. Deputy Commissioner Reed stated he voted against the motion to extend the tariff, not because he was opposed to extending it, but because he felt the oversight responsibility for the tariff should be exercised by an entity other than the Board of Marine Pilots. Mr. Klepper did not announce his rationale, but presumably it was the same as Deputy Commissioner Reed's. Both pilot representatives on the board voted in favor of extending the tariff.

Over the last week the Alaska Steamship Association (ASA) learned that the Southeast Alaska Pilots (SEAPA), Alaska Marine Pilots (AMP), and Western Alaska Pilots (WAPA) have been opposing a tariff extension in conversations and letters to key legislators. From my recent conversations with the Alaska Coastal Pilots (ACP) and the Southwest Alaska Pilots (SWAPA), I understand they support the pilot board action to extend the tariff.

While ASA is attempting to work constructively with all the pilot associations to find a more mutually agreeable, long term solution to setting pilot tariffs, we believe a continuation of the status quo will best serve as a bridge to that solution. If the tariff sunsets; state officials, the pilot board, the industry, and the pilots will sail off into uncharted waters, just as we are all learning to work with the tariff provision — written into law just over two years ago.

The ASA urges you to support the pilot board action on the tariff by favorably endorsing its February action to the Alaska legislature.

Sincerely,



Joe Kyle

cc: Senator Drue Pearce
Representative Bill Hudson

8-LS0808J
Cramer
3/11/93

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE HUDSON

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to marine pilot tariffs."

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** AS 08.62.040(a) is amended to read:

4 (a) The board shall

5 (1) provide for the maintenance of efficient and competent pilotage
6 service on the inland and coastal water of and adjacent to the state to assure the
7 protection of shipping, the safety of human life and property, and the protection of the
8 marine environment;

9 (2) consistent with the law, adopt regulations, subject to the
10 Administrative Procedure Act (AS 44.62), establishing the qualifications of and
11 required training for pilots and providing for the examination of pilots and the issuance
12 of original or renewal pilot licenses to qualified persons;

13 (3) keep a register of licensed pilots, licensed deputy pilots, and agents;

14

- 1 (4) adopt regulations establishing
2 (A) pilotage regions in the state;
3 (B) the criteria for concurring in the amount of license,
4 application, training, investigation, and audit fees proposed by the department
5 under AS 08.01.065;
6 (C) the criteria for recognizing pilot organizations under
7 AS 08.62.175;
- 8 (5) make available, upon request, copies of this chapter and the
9 regulations adopted under this chapter;
- 10 (6) review and approve the articles, bylaws, and rules of pilot
11 organizations;
- 12 (7) audit a pilot organization or an individual pilot as necessary to
13 implement and enforce this chapter;
- 14 (8) review and approve training programs conducted by pilot
15 organizations; the board shall cooperate with the Department of Environmental
16 Conservation in the review and approval of training programs for pilots of tank
17 vessels; [AND]
- 18 (9) establish and publish the dates of future license examinations;and
19 (10) establish by regulation
20 (A) the maximum number of pilots to be licensed in a region
21 based on the number needed to assure the safety of human life and
22 property, and the protection of the marine environment of the state; and
23 (B) if there are more qualified applicants for licensing than
24 there are licenses available, the criteria for choosing which pilots should
25 be awarded licenses.

26 * Sec. 2. AS 08.62.040(b) is amended to read:

27 (b) The board may, by regulation, make any other provision for proper and
28 safe pilotage upon the inland and coastal water of and adjacent to the state and for the
29 efficient administration of this chapter, including establishing

30 (1) different licensing criteria for a pilotage region if justified by
31 regional differences in piloting;

1 (2) a mandatory random drug and alcohol testing program for pilots
2 licensed under this chapter;

3 (3) criteria for trainee selection and for training programs conducted by
4 pilot organizations; and

5 (4) standards under which, during a transition period when the board
6 is changing the boundaries of a pilotage region, a pilot may receive [A LICENSE
7 OR] an endorsement to a license to pilot vessels in more than one pilotage region.

8 * Sec. 3. AS 08.62.040(d) is amended to read:

9 (d) Notwithstanding the exemption from AS 45.50.562 - 45.50.596 granted to
10 pilot organizations under AS 45.50.572(a), the board may not adopt a regulation or
11 take other action resulting in anti-competitive activities that, if the board were subject
12 to AS 45.50.562 - 45.50.596, would violate AS 45.50.562 - 45.50.596. However, the
13 board shall adopt regulations and take other actions to restrict the number of
14 licenses issued in a region as required by (a) of this section.

15 * Sec. 4. AS 08.62.045(a) is amended to read:

16 (a) The Alaska Public Utilities Commission [BOARD] shall adopt by
17 regulation fixed [MAXIMUM] tariffs that may be charged by pilots for the provision
18 of specific pilotage services in a pilotage region in the state. The commission
19 [BOARD] shall identify those expenses that are included in the tariff. Expenses
20 included in the tariff must be just and reasonable and in accordance with
21 accepted maritime industry practices and standards. In adopting [MAXIMUM]
22 tariffs under this subsection, the commission [BOARD] shall take into consideration

23 (1) reasonable compensation for actual time aboard a vessel as a pilot,
24 including overtime, and for time engaged in preparing to provide pilotage services;
25 comparisons are limited to the maritime market in the United States;

26 (2) differential compensation for seasonal and weather conditions and
27 [,] risks involved in providing pilotage service in the state compared to the other
28 maritime states [, AND OVERTIME];

29 (3) pilot expenses allowed for dispatch services [EXPENSES],
30 transportation expenses, and other associated costs directly related to the provision of
31 pilotage services; allowed pilot expenses may not include an allowance for the cost

1 of political contributions, public relations, or lobbyist expenses;

2 (4) reasonable overhead expenses that are necessary to provide year
3 round pilotage services for the region; [AND]

4 (5) the economic effect of the proposed tariff on the industry, the
5 area, and the state;

6 (6) the reasonable cost of equipment associated with the tariff;
7 equipment considered in setting the tariff must be used and useful toward marine
8 pilotage; and

9 (7) other expenses identified by the commission [BOARD].

10 * Sec. 5. AS 08.62.045(d) is amended to read:

11 (d) A pilot organization recognized by the board or a member of the pilot
12 organization may not charge a tariff for the provision of pilotage services that differs
13 from [EXCEEDS] the [MAXIMUM] tariff set by the commission [BOARD, THAT
14 IS DIFFERENT FROM THE TARIFF ADOPTED BY THE PILOT ORGANIZATION,
15 OR THAT HAS NOT TAKEN EFFECT UNDER (c) OF THIS SECTION].

16 * Sec. 6. AS 08.62.045 is amended by adding new subsections to read:

17 (e) A tariff adopted under this section is valid for three years and may not be
18 amended except as provided in this subsection or in (g) of this section. The
19 commission may reopen a tariff if the commission finds that the tariff is substantially
20 unfair. Once each year, the commission shall by regulation adjust the tariffs for
21 inflation, based on the consumer price index for the region. If a regional consumer
22 price index is not available, the commission shall adjust the tariff using the state
23 consumer price index and adjusting the state index by using an established differential
24 study for the region.

25 (f) The commission shall by regulation impose and establish a method to
26 determine annually the amount of a regulatory cost charge to cover the commission's
27 costs of regulating tariffs under this section. The charge shall be in the form of a tariff
28 fee assessed by region on each movement of a vessel subject to this chapter. The
29 commission shall administer and the Department of Revenue shall collect and enforce
30 the charge imposed under this subsection.

31 (g) If a pilot organization recognized by the board and a shipping company or

1 the agent of a shipping company to whom pilotage services are provided agree on (a) ^{the}
2 tariff for a particular region, they shall present the agreement to the commission for
3 review. The commission shall hold a public hearing concerning the agreement and
4 may approve it if it finds that approval of the agreement is in the public interest.

5 (h) The commission shall adopt regulations under AS 44.62 (Administrative
6 Procedure Act) to carry out its powers and duties under this section.

7 (i) In this section, "commission" means the Alaska Public Utilities
8 Commission.

9 * Sec. 7. AS 08.62.080 is amended to read:

10 Sec. 08.62.080. LICENSE REQUIRED; RESTRICTIONS AND
11 CONDITIONS. (a) A person may not pilot a vessel subject to this chapter unless the
12 person has a valid license issued [IS LICENSED] under this chapter and is a member
13 of a pilot organization recognized by the board.

14 (b) A pilot may not be licensed in more than one pilotage region at one time.
15 However, a pilot may hold endorsements issued by the board permitting the pilot
16 to operate in more than one pilotage region at a time if, under (d) of this section,
17 the board has declared an emergency or if, under AS 08.62.040(b), the board is
18 changing the boundaries of a region [, UNLESS THE BOARD DETERMINES
19 THAT IT IS IN THE BEST INTERESTS OF THE STATE TO LICENSE PILOTS
20 FOR PARTS OF MORE THAN ONE PILOTAGE REGION].

21 (c) A license issued under this chapter must identify the specific waterways
22 and ports [IN EACH PILOTAGE REGION] in which a licensee is authorized by the
23 board to pilot vessels. The board shall authorize a licensee to pilot vessels in specific
24 waterways or ports [A SPECIFIC WATERWAY OR PORT] in a pilotage region
25 upon the licensee satisfying the training and other qualifying requirements required by
26 the board to pilot vessels in that region [WATERWAY OR PORT].

27 * Sec. 8. AS 08.62.080 is amended by adding a new subsection to read:

28 (d) The board may adopt regulations designating that an emergency exists that
29 requires the board to issue emergency endorsements to pilots not licensed in a
30 particular region. After adopting regulations, the board may issue an emergency
31 endorsement to a licensed pilot to permit the pilot to operate in a region in which the